

Punishing the Poor Again? Irregularity, the 'criminalisation of migration' and precarious labour markets in the UK and Germany

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Abstract

The increasingly punitive nature of immigration control across the Western world and the overrepresentation of foreign nationals in European prisons has revitalised criminological interest in issues of migration. Alessandro De Giorgi (2010: 153) and others contend that restrictive, ‘illegalising’ immigration admission policies and ‘hyper-criminalising’ immigration controls create a population of migrant workers on European territory, whose legal precarity makes them ideal fodder for employment in post-Fordist neoliberal labour markets.

This thesis refines the neoliberal-materialist analysis of immigration policy, as described most succinctly by De Giorgi (2010), through a comparative case study of the UK and Germany. To this end, it explores the various economic, political and cultural factors that have driven the development of a punitive regulation of immigration in the two countries and compares immigration control practices. It also examines the ways in which immigration status siphons immigrants into precarious work and how this process occurs differently in the UK and Germany.

An underlying concern is to examine the extent to which differences in the underlying labour markets of the two countries, as described in Hall and Soskice’s (2001) Varieties of Capitalism (VoC) typology, structure differences in the processes outlined in the neoliberal-materialist analysis. While the development of immigration controls is motivated by a wide variety of factors outside of the labour market, the fact that

motivating factors are largely shared among countries of the same VoC type suggests some relationship with the underlying economic structure. In addition, the thesis argues that foreigners are vulnerable to specific forms of workplace exploitation and social marginalisation in ‘coordinated’ Germany because of factors associated with the VoC – a finding that also has important connotations for understanding the more intense overrepresentation of foreign nationals in German prisons. At the same time, it highlights the importance of other cultural and social factors, unique to each country, in the politics of immigration.

The final section reverses the previous line of the enquiry by examining whether immigration ‘neoliberalises’ industrial relations in Germany. It finds that immigration’s effects depend, to a significant extent, on the degree to which foreigners are constructed as precarious workers through state policy. In turn, immigration policy’s wider effects on the labour market suggest native workers might also have an interest in preventing the precarisation of their immigrant counterparts. Finally, immigration status may become less and less important in understanding the exploitation of workers in Europe, as citizenship is associated with fewer rights.

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Table of Abbreviations

BDA: Bundesvereinigung der Deutschen Arbeitgeberverbände - Federal association of employers' associations
CEE: Central and East European
CME: Coordinated Market Economy
DDR: Deutsche Demokratische Republik - former East Germany
DGB: Deutsche Gewerkschaftsbund – German umbrella trade unions' association
DWP: Department of Work and Pensions
DM: Deutsche Mark
EU: European Union
EEA: European Economic Area
FDGB: Freier Deutscher Gewerkschaftsbund: Free German trade unions' association
FKS: Finanzkontrolle Schwarzarbeit - Financial control of the black economy, a unit within the customs authorities
HDB: Hauptverband der Deutschen Bauindustrie - Main association for the German construction industry
HMRC: Her Majesty's Revenue and Customs
IG-BAU: IG-Bau-Agrar-Umwelt -Trade union for construction, agriculture and the environment
IG-BSE: IG-Bau-Stein-Erde - Trade union for construction, stone and earth (precursor of IG-BAU)
IND: Immigration and Nationality Directorate
LME: Liberal Market Economy
SAWS: Seasonal Agricultural Workers Scheme
SBS: Sector-Based Schemes
ULAK: Urlaubs- and Lohnausgleichskasse - Holiday and wage compensation fund
USSR: Union of Soviet Socialist Republics
VoC: Varieties of Capitalism, typology created by Hall and Soskice (2001)
ZDB: Zentralverband des Deutschen Baugewerbes - Central association for the German construction trades.
ZVK: Zusatzversorgungskasse - Supplementary insurance fund.
ZVOB: Zweckverband Ostdeutscher Bauverbände - Association of East German Construction associations

Glossary (German: English)

Allgemeinverbindlicherklärung: Process by which a collective agreement is declared universally applicable
Arbeitsamt: Labour offices
Ausländerämtern: Foreigners' authorities
Ausländerdeutsche: Germans living abroad, term used under Weimar Republic
Ausländerzentralregister: Central Register of Foreigners
Aussiedler: People of German extraction who move back to Germany from East Europe
Betrieblichen Vertretungslücke: Representation deficiency (refers to lack of work councils in an industry)
Bundesagentur für Arbeit: Federal Agency for Labour
Bundesamt für Migration und Flüchtlinge: Federal Office for Migration and Refugees
Bundesanstalt für Arbeit: Federal Labour Office
Bundesländer: Federal states
Bundespolizei: Federal Police Agency
Bündnisse gegen Schwarzarbeit und illegale Beschäftigung: Alliances against Illicit Work and Illegal Employment'
Deutsche Arbeitzentrale: German Work Centre
Deutsche Feldarbeiterzentrale: German Field Worker Centre
Deutsche Rentenversicherung: German Pension Insurance
Duldung: Toleration, a stay of deportation for failed asylum seekers in Germany who cannot be removed for humanitarian or practical reasons
Facharbeiter: Qualified workers
Finanzkontrolle Schwarzarbeit: Financial control of the Black Economy
Gastarbeiter: Guestworkers
Gewerkschaft Gartenbau-Landwirtschaft-Forsten: Trade union for landscape architecture, agriculture and forestry
Handwerksverordnung: Handicrafts' Code
Kontospiegel: Procedure for checking employment data with work permit data
Krankenkassen: Statutory health insurance programmes
Ländespolizei: Regional police forces
Lebensraum: Technically translated as 'living space', Lebensraum in the German context refers to Hitler's plan for territorial expansion
Lohnsteuerkarte: Tax card
Lohnsteuerrückvergütung: Tax reimbursements
Menschenhandel: Trafficking
Meister: Master craftsman
Optionsmodell: So-called 'Option model', whereby young people who gained German citizenship in this way had to choose between their German and foreign citizenship by their 23rd birthday
Polizeiliche Kriminalstatistik: Police Criminal Statistics
Polizeiliche Meldewesen: Police Registration Body
Saisonarbeitnehmer/Saisonarbeiter: Seasonal worker
Scheinasylantan: Bogus asylum seekers

Schleierfahndung: Identity controls that can be conducted in Germany- even in the absence of any specific event or reasonable cause for suspicion - within 30km of the border or else in major traffic areas such as motorways, airports or train stations

Schwarzarbeit: Working 'off the books'

Strafgesetzbuch: Criminal Code.

Schlechtwettergeld: Bad weather allowance

Solidaritätsorganisationen: Solidarity organisations

Sozialversicherungsausweis: Social security card

Tarifautonomie: The constitutionally protected autonomy of the social partners in collective bargaining

Tarifflucht: Flight from coordination in industrial relations

Tarifvertrag/Tarifverträge: Collective bargaining agreement(s)

Taschengeld: Pocket money

Vollmacht: Power of attorney

Werkvertragsarbeitnehmer: Contract workers

Zentral Auslands- und Fachvermittlung: Central foreigners' placement service

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Introduction

The modern, globalised age is defined by the increased mobility of people across borders. Low-cost travel has meant that there are more tourists, visitors and international migrants than ever before, and their numbers are certain to increase for the foreseeable future (Engel, Rutkowski et al., 2014: 125). The settlement of foreign nationals from all over the world has transformed the economic, social and political landscape of European nation states. Diversity is no longer a choice: it is an undeniable – and irreversible – fact.

However, as international travel becomes ever easier for the cosmopolitan elite, the global unwanted face ever more barriers to entering the West (Aas, 2013). Increasingly restrictive admissions policies towards Third World immigrants in ‘Fortress Europe’ are buttressed by an intensive border-control regime. People who enter or reside in European territory without permission risk arrest and prosecution for one of a widening array of ‘immigration crimes’ (Aliverti, 2013), detention in special ‘removal centres’ or in prisons (Bosworth, 2007) and ultimately, deportation. The marginalisation of foreign nationals (and their descendants, who may or may not have citizenship) is also manifest in their heavy overrepresentation in all of West Europe’s prisons, although the precise extent to which they are overrepresented varies between each country. In turn, the selective hyper-incarceration of foreign nationals in Europe indicates that the institutional factors that have protected Europe from the hyper-incarceration suffered in the USA, have a limited impact for those outside of the bounds of citizenship (Wacquant, 1999;

Lacey, 2008). The compelling question for the scholar is: how – and why – is this happening (Barker, 2012: 113)?

Working ‘hard and scared’: Immigration policy and the Neoliberal-Materialist Analysis

The thesis is an interrogation of what it calls a ‘neoliberal-materialist’ analysis of contemporary immigration policy, as most succinctly expressed in Alessandro De Giorgi’s (2010) article ‘Immigration control, post-Fordism, and less eligibility: A materialist critique of the criminalization of immigration across Europe’. This work is a constant reference throughout the thesis. However, the relationship between the criminalisation of immigrants and the neoliberal or post-Fordist economy¹ is an oft-repeated theme across a fragmented – but substantively consistent - body of literature (see Calavita, 1992; Calavita, 1998; Wacquant, 1999; De Genova, 2002; Calavita, 2003; De Genova, 2004; Palidda, 2005; Bauder, 2006; De Giorgi, 2006; De Giorgi, 2009; Palidda, 2009; Escobar, 2010; Nagels and Rea, 2010). The thesis uses the phrase ‘neoliberal-

¹ Some authors within the literature discussed in this section favour the term ‘neoliberal’ (Calavita 2003; 2005; Melossi 2003), some favour ‘post-Fordism’ (Palidda 2009; Escobar 2010; Nagels and Rea 2010) and others use both interchangeably (De Giorgi 2010; Palidda: 2005). Both terms are heavily contested, but the key difference between the two is that post-Fordism is generally understood as a descriptive concept, denoting the fragmented nature of today’s production regime, while neoliberalism implies a resurgence of an ideological commitment towards ‘free market’ capitalism: ‘a loosely demarcated set of political beliefs which most prominently and prototypically include the conviction that the only legitimate purpose of the state is to safeguard individual, especially commercial, liberty, as well as strong private property rights’ (Thorsen and Lie, 2006: 14). However, when applied by the authors above as a description of contemporary labour markets, neoliberalism implies a similar set of processes to those associated with post-Fordism: most notably, a growing need for a flexible and precarious workforce.

materialist'² to denote the range of authors who relate changes in immigration policy to the needs of contemporary, Western labour markets.

At the heart of the neoliberal-materialist approach to immigration policy is the understanding that it is naïve to take the stated aims of the law - such as the deterrence of undocumented migration or protection of the nation-state from security threats - at face value (De Genova 2002: 432). Instead, immigration controls should be viewed in terms of the functions they play in the globalised neo-liberal economy. Foremost among these is the creation of a host country population of migrant workers whose legal precarity make them ideal fodder for employment in post-Fordist or neoliberal economies (Calavita, 2003; Calavita, 2005: 418; Palidda, 2009: 314; De Giorgi, 2010: 153). In particular – and borrowing the concept from Rusche and Kirchheimer's materialist analysis of punishment (1932) - De Giorgi argues that foreign nationals are subject to a process of less eligibility whereby their insertion into the lowest rungs of legal and illegal labour markets is encouraged by 'an emerging European model of punitive regulation' (2010: 158). This process involves a series of marginalising processes – from restrictive admissions policies to the criminalisation of immigration offences, detention and deportation and exclusion from employment and social rights.

Immigrants are siphoned³ into precarious employment by way of a two-step process. Firstly, increasingly restrictive admissions policies limit opportunities for certain forms of

² The thesis uses the term 'neoliberal-materialism' both to highlight the similarities in the analysis made in this body of work and what has been called the 'neoliberal-penalty' thesis (Wacquant 2009:xviii) and to emphasise the ideological aspects driving current immigration and labour policy.

legal immigration. Much as the criminal justice system under neoliberalism directs its authoritarian gaze to those at the bottom of the socio-economic ladder (leaving corporations and the upper class largely free from intervention (Wacquant 2009: 312)), borders are also selective in their effects. While few restrictions to travel and immigration confront the cosmopolitan elite, borders retain all their ‘symbolic and material violence’ against the ‘under-privileged, non-western, ‘Third-World’ migrants’ (De Giorgi 2010: 151) at the bottom of the ‘global hierarchy of mobility’ (Bauman, 1998: 69). However, such laws do not preclude immigration. Instead, given that people will continue to immigrate whether there are legal possibilities or not, the primary impact of restrictive admissions policies is to increase the likelihood that a person will migrate illegally (De Giorgi 2007: 120). Restrictive admissions policies therefore represent the ‘illegalisation’ of certain forms of immigration (De Giorgi 2010: 148, 153).

Secondly, once on the national territory, migrants face a constant threat of punitive sanctions including arrest, criminalisation, imprisonment, detention and, ultimately, deportation. Such pressures undermine their ability to negotiate on an equal footing with their employers (Morales, 1983; De Genova, 2002). Immigrants’ exploitability is further intensified by the fact that they are excluded from the citizenship rights that give native workers a platform to resist employer domination.

³ The use of the term “siphon” in this context is not meant to imply that immigration controls necessarily place foreign nationals into precarious employment. Instead, it refers to the way in which immigration controls and status conditions create the institutional preconditions for immigrants’ vulnerability to exploitation. In this way, immigration policies encourage foreign nationals into precarious employment.

These issues are, naturally, most acute for irregular migrants, who suffer from fears that employers – and indeed anyone aware of their legal situation – may denounce them to the immigration authorities. However, the threat of detention and deportation also affects regular migrants' labour-market behaviour, since their legal status is often tied to specific employment obligations (De Giorgi, 2006). Illegality represents a constant threat infringing upon the biographies of legal immigrants, whose lives become an 'eternal probation' (Kanstroom 2000: 1907; Sharma 2001). As such, avoiding expulsion requires migrants to accept whatever labour market opportunities and conditions they are offered (De Giorgi 2007).

By amplifying immigrants' marginal position in their host country, the prohibitionist immigration regime also makes it more likely that migrants will become involved in 'crimes of survival' (De Giorgi 2010: 157). In this context, prisons function both so as to deter immigrants and other members of the 'lowest socially significant' class (Rusche and Kirchheimer, 2003: 4) from exiting the labour market and to warehouse the social effects of socio-economic exclusion, including involvement in street-level crime (Palidda, 2009: 315). In turn, the non-Western descendants of immigrants – who may or may not have the citizenship of their host country, and are similarly concentrated at the lowest rungs of the socio-economic ladder – are also the objects of intensive policing and hyper-incarceration (Wacquant, 1999; Weber and Bowling, 2013).

Finally, the criminalisation of immigration has important ideological value in contemporary European societies. Neoliberal globalisation has undermined the nation-

state's jurisdiction over production, trade and the labour market and has implied the spread of both social and economic insecurity throughout the working classes (Melossi, 2003: 375; Palidda, 2005: 315). European states have sought to compensate for their eroding economic authority by focusing on the 'all-too-tangible enemy of the stranger next door' (Bauman, 1998: 7). The performative act of punitiveness gives the appearance that 'something is being done' (Wacquant 1999; Palidda 2009). In turn, the more borders are presided over and defended, the greater the possibility of representing anyone who violates them as an invader. The construction of the immigrant as a potentially dangerous intruder justifies their criminalisation and marginalisation.

The Contribution of the Thesis

This thesis refines neoliberal-materialist analyses of immigration policy, as expressed most succinctly in De Giorgi (2010). The first issue is the lack of historical perspective. Although De Giorgi (2010) pays homage to earlier materialist analyses of mobility control (found, for instance, in Chambliss, 1964; Ignatieff, 1978; Melossi, Pavarini et al., 1981), he focuses on the exceptional nature of 'the criminalisation of immigrants' in the modern era. However, punitive measures of managing immigrant communities precede the advent of neoliberalism (Palidda, 2005: 63). Further work is needed to understand the various ways in which mobility has been policed over time, the functions that immigration controls have played in disciplining immigrant labour, and continuities in contemporary patterns of punishment and control.

In addition, much as Wacquant criticises the ‘narrowly materialist vision of the political economy of punishment’ (2009: xviii), this thesis also seeks to analyse the limits of neoliberal-materialist analyses in understanding developments in the management of immigrant populations over time. Neoliberalism (or post-Fordism) is hardly a sufficient explanation for the rich variety of state measures that impact on foreign nationals and their descendants. To this end, this thesis offers an empirical study of the different economic, cultural and political factors that have motivated ‘punitive’ state responses towards immigrants over time. Here, the thesis focuses on the hyper-policing and hyper-incarceration of immigrant communities, restrictive admissions policies, deportation and criminal immigration offences.

Further, although De Giorgi (2007) discusses the relationship between immigration controls and the institutionally precarious nature of immigrants in the workplace, the precise way in which this process occurs is left unspeak (2007). A more empirically grounded analysis can be found in Kitty Calavita’s analysis of immigration policy in Italy and Spain in the 1990s (1998; 2005).⁴ The thesis augments the grand theoretical argument made in the work of De Giorgi (2006; 2010), De Genova (2002; 2004) and Wacquant (1999), with an empirical examination of how immigrants are actually constructed as precarious workers through an interaction of immigration and labour law in two European countries: Germany and the UK.

⁴ See also Anderson, B. (2010) ‘Migration, immigration controls and the fashioning of precarious workers’, *Work Employment & Society* 24 (2): 300-317 for an overview of the relationship between immigration status and precarious employment.

Most of all, the thesis builds on the existing neoliberal-materialist literature through an examination of the ways in which the processes outlined above occurred differently in different contexts. Just as Wacquant's (2009) work on penal severity overstates the similarities between criminal justice systems across the Western world (see Pratt, 2000; Sutton, 2004; Cavadino and Dignan, 2007; Lacey, 2008; Lappi-Seppälä, 2008; Campbell, 2010), so too do neoliberal-materialist perspectives largely overlook national variation.⁵ To this end, the thesis employs a 'diverse' comparative case study of the UK and Germany (Seawright and Gerring, 2008). In particular, given the focus on the relationship between immigration policy and employment relationships in neoliberal-materialist analysis, these two countries have been chosen because they represent different types of labour market, as delineated in the Varieties of Capitalism typology (Hall and Soskice, 2001).⁶ At the same time, they are standardised in terms of many key variables that might otherwise explain differences in immigration policy, including size, EU membership, level of industrialisation, urbanisation and socio- economic development.

The underlying aim of the thesis is to explore whether and how differences in the labour market influence the structure of immigration controls and the intensity of immigrants' criminalisation and mediate immigration policy's impact on migrants' employment relationships. However, much as economic factors may not be able to

⁵ Kitty Calavita's (2005) book looked at immigration policy and economic exclusion in Italy and Spain. However, her analysis focused largely on the similarity of processes affecting immigrant workers in Southern Europe.

⁶ Liberal market economies (LMEs) – of which the UK is an example – are characterised by deregulated labour markets, decentralised industrial bargaining, weak trade unions, a shareholder value culture and liberalised inter-firm relations. A lack of institutions for the representation of workers' rights – and firms that are more competitively market oriented – mean that LMEs are associated with lower levels of employment and social protection and higher levels of inequality. Coordinated market economies (CMEs), by contrast, are associated with co-operative industrial bargaining, strong trade unions and a greater voice for employees' in corporate governance matters (Rueda 2000; Hall and Soskice 2001) – institutions that are traditionally associated with greater market regulation and higher levels of job security and social protection.

explain the intensification of border control and the development of punitive immigration regimes, it is likely that differences in the institutional structure of the labour market, as described in the Varieties of Capitalism literature, will only explain some of the differences between the two countries. On the one hand, the two countries may manifest similar processes despite having different labour markets. On the other hand, observed variations might be better explained by other, non-materialist drivers and factors (Brubaker, 1992; Green, 2007). Thus, even as the thesis mobilises the Varieties of Capitalism, the typology's analytical applicability to the topic at hand is interrogated.

Finally, having examined the impact of institutional variation as described in the Varieties of Capitalism on immigration control, the criminalisation of immigrant communities and foreign nationals' construction as precarious workers, the final chapter of this dissertation reverses the previous line of enquiry, exploring immigration's effect on the 'institutions of coordination' (collective bargaining, employer associations, trade unions and work councils) that differentiate the German construction industry from its counterparts in liberal market economies.⁷ The thesis therefore contributes to a burgeoning body of work interrogating the salience of the distinct coordinated market economy type and more widely, the question of institutional change within the Varieties of Capitalism framework (Goodin, 2003; Howell, 2003; Watson, 2003). I employ a

⁷ The industry was chosen as a suitable case study both for the high proportion of migrants in its workforce (Passel, 2006; Krenn and Haidinger, 2008); and the fact it was, historically, an idea example of a 'coordinated' industry. In particular, the German construction industry was highly regulated and featured significant qualification barriers, strong collective bargaining agreements, an active labour inspectorate and restrictions on labour agencies (Bosch and Zühlke-Robinet, 2003). By contrast, by the 1990s, the UK construction industry was distinguished by 'bogus' self-employment, extensive subcontracting, weak unions and employer representation, and a failing apprenticeship system (Harvey, 2003).

triangulated methodology, including doctrinal legal analysis, descriptive statistics, literature reviews and archival research, consultation with experts and interviews.

Chapter Structure

The thesis is structured in the following manner. Chapter one begins with an overview of criminological accounts of immigration. From an early focus on immigrants' criminal propensity (see, for example, Park, Burgess et al., 1925; Sellin, 1938; Bottoms, 1967), a nascent body of literature explores the impact of the criminalisation of immigration offences on foreign nationals' representation in the criminal justice system (Weber, 2004; Weber, 2005; Pickering and Weber, 2006; Stumpf, 2006; Cachon, 2007; Bosworth and Guild, 2008; Cachon, 2009; Aas, 2011; Aliverti, 2012; Aliverti, 2012; Aas, 2013; Aliverti, 2013; Stumpf, 2013). At the same time, as the second section of the chapter outlines, immigration enforcement is also characterised by the proliferation of administrative measures, troubling precisely because they do not attract the same procedural safeguards as criminal processes (see, for instance, Legomsky, 2007; Aliverti, 2012; Aliverti, 2012; Stumpf, 2013). The third section of the chapter gives an overview of materialist/Marxian literature on immigration policy and punishment. The final section uses existing literature to illuminate some of the ways neoliberal-materialist perspectives could be refined – and what the thesis contributes towards this end.

Having introduced the key theoretical framework, chapter two presents a comparative–historical case study of the punitive regulation of immigrants in the UK and

Germany, focusing on the criminalisation of immigration offences, the representation of immigrants and their descendants in the criminal justice system and the use of deportation. While neoliberal-materialist analyses tends to focus on the exceptional nature of punitive trends in the modern era,⁸ the chapter explores the ways in which immigration controls and the criminal justice system have played a role in disciplining foreign work over time. Further, it explores the applicability – and limits – of the neoliberal-materialist analysis, arguing that punitive developments are motivated not only by economic factors, but also cultural and social impulses. Finally, although convergence is apparent, the final section of the thesis offers some exploratory remarks regarding differences in the criminalisation of immigrant communities in the two countries under study, tying findings in to a wider analysis of punishment in coordinated and liberal market economies.

Chapter three asks whether differences in the structure and intensity of internal immigration policing in the UK and Germany are attributable to Hall and Soskice's (2001) Varieties of Capitalism framework. It focuses on controls governing access to the labour market, the welfare state, the private housing market, as well as public identity checks. The chapter finds significant differences remain in the UK and Germany's internal control systems, many of which are complementary to the underlying labour market structure. In particular, the general trend is that Germany's internal control system is far tighter than the UK's – and that this is facilitated by the institutional arrangements

⁸ For instance, De Giorgi (2010: 147) argues that the 're-bordering [of nation-states] is part of a broader punitive turn in the regulation of migration which has emerged, particularly in the European context, since the mid-1970s...punitive strategies [that] should be analyzed against the background of an increasingly flexible and de-regulated neoliberal economy'.

that typify a coordinated market economy. Further, differences that appear to be totally independent from the VoC are, in fact, shared by other countries of the same type - suggesting a relationship with the underlying economic structure. However, the thesis also cautions against reducing all differences to the Varieties of Capitalism. The politics of immigration control are, to some extent, unique in each country, and speak to a complex mixture of economic, political, cultural and geographical considerations. At the same time, signs that the UK is intensifying its internal control regime – and that this is occurring under a neoliberal government – indicate that the factors that have meant that the UK has historically operated a far laxer control regime have rapidly lost their significance.

The next two chapters move the analysis from a focus on the immigration control system, to the intersection between immigration policy and the labour market. Chapter four examines how immigration status leaves foreigners vulnerable to precarious employment in the UK and Germany. While successive governments in both countries have introduced a number of policies criminalising the direct perpetrators (employers, gang masters) of immigrants' workplace abuse, the state is a central actor rendering immigrant workers uniquely vulnerable to exploitation. The chapter demonstrates the ways in which foreign workers are made precarious through immigration status through an examination of the conditions and rights associated with six immigration routes: asylum seekers, domestic workers, seasonal workers, Romanian and Bulgarian workers immigrating under the European freedom of establishment, European posted workers and, finally, irregular immigrant workers. Further, it discusses the way in which immigrants are fashioned into precarious workers in different ways in the UK and Germany – and the

extent to which this is attributable to institutional differences as predicted in the Varieties of Capitalism typology.

Chapter five then reverses this line of enquiry by asking what immigration's effect has been on the industrial relations system in the German construction industry. While immigration has been associated with the disorganisation of coordinated industrial relations and the institutionalisation of neoliberal labour markets within the German construction sector, the chapter argues that the effect of immigration on industrial relations depends to a great extent upon the lengths to which incoming workers are 'fashioned' into particular types of illegalised or precarious, low-wage workers. The chapter demonstrates this by examining the impact of four successive epochs of immigration on the construction industry: post-war Gastarbeiter; contract workers between 1989 and 1992; posted workers from the 1990s onwards; and finally, post-accession European 'self-employed' workers.

Chapter six summarises the main findings of the thesis and relates them to wider debates within the sociology of punishment. The chapter begins by discussing the various ways in which immigrants have been disciplined through immigration controls throughout time. It emphasises the importance of understanding the interaction between material and cultural impulses in immigration policy-making. It comments upon the salience of the Varieties of Capitalism framework in understanding variation in internal immigration control practices, the criminalisation of immigrant communities and the construction of foreign nationals as precarious workers, before discussing the extent to

which immigration erodes the institutional basis that differentiates coordinated market economies from liberal market economies. Finally, it argues that transformations in immigration control might be understood as part of a wider process of transforming the state.

The Appendix discusses the small-n comparative case study research design, the choice of comparators (the UK and Germany), the choice of the construction industry as an object of analysis in chapter five and the triangulated methodology used in this thesis. It also described the research process. In particular, it discusses some of challenges faced in undertaking comparative research, as well as the ethical dimensions associated with research into irregular immigration/exploitation. A list of the interviewees is included at the end.

In sum, the thesis has a threefold aim. The first is to explore the limits of the neoliberal-materialist approach, as expressed most succinctly in De Giorgi (2010), in explaining developments in immigration control. The second is to understand how immigration status – in interaction with labour law – renders migrant workers especially vulnerable to precarious employment. The third aim intersects with the first two by investigating the relevance of the Varieties of Capitalism typology for understanding differences in migration control practices, in criminalisation and in the nexus between immigration status and precarity – before an investigation of immigration policy's impact on the Varieties of Capitalism framework itself. In these endeavours, the thesis hopes to

achieve a better understanding of the relationship between neoliberalism and the punitive regulation of immigrant communities.

Ch. 1: Neoliberalism and the Criminalisation of Immigrants: a literature review

Introduction

According to ‘neoliberal-materialist’ perspectives on immigration policy, the ‘criminalization of immigration’ and ‘punitive turn in the regulation of migration’ (De Giorgi 2010:147) in Europe over the past 30 years should be analysed against the backdrop of the increasingly neoliberal or post-Fordist character of the economy. In this view, the illegalisation and criminalisation of immigrations helps to create a population of precarious, foreign workers on European territory, whose legal precarity makes them the ideal, docile workers for the lowest echelons of contemporary labour markets. The punishment of non-Western immigrants is also understood as a symbolic spectacle, which absorbs social and economic anxieties under late capitalism and legitimates a drift towards a penal management of poverty (Wacquant 1999:219).

The chapter places neoliberal-materialist analyses of the criminalisation of immigration in their broader academic context. While contemporary scholars like De Giorgi (2006; 2010), Calavita (1998; 2005; 2005), Wacquant (1999) and De Genova (2002; 2004) focus on the state’s complicity in criminalising and marginalising immigrant populations, historically, criminologists were more concerned with the criminal propensity of migrant populations (see, for example, Park, Burgess et al., 1925; Sellin, 1938; Bottoms, 1967). The advent of perspectives highlighting the criminalisation of immigrant communities was part of a wider radicalisation of criminology, which

became increasingly concerned with questions of state power. As outlined below, a burgeoning literature highlights the role of discrimination and ‘crimes only immigrants can commit’ (de Saussure and Schulz, 2005: 224) in the criminalisation of immigrant populations.

At the same time, a focus on the criminalisation of immigrants obfuscates a number of highly troubling developments outside the criminal justice system. Modes of punitive regulation are diversifying and can no longer be contained within the discrete boundaries of the criminal justice agencies that have tended to shape the thinking of criminologists over the years (Pickering and Weber, 2006; Weber and Bowling, 2013). To this end, the second section of the chapter explores the way in which immigrants are also subject to administrative measures such as detention and deportation ‘in which the rights and guarantees usually embodied in the “rule of law” are dismissed’ (De Giorgi 2007:127). In turn, De Giorgi (2010) and De Genova (2002) argue that it is not only the threat of criminalisation, but also the deportability of immigrants which encourages their exploitation in the workplace.

The third section of the chapter places the neoliberal-materialist perspective in its theoretical context. In particular, it discusses the influence of ‘neo-Marxist criminological perspective known as the ‘political economy of punishment’’ (De Giorgi 2010:148) and Marxian analyses of immigration on the development of the key concepts and ideas within the neoliberal-materialist analysis. It highlights the continuities between the neoliberal-materialist approach and previous Marxian analyses of immigration, as well as

the ways in which the two bodies of literature differ in terms of the particular weight they attribute to state processes.

The final section of the chapter then uses existing literature to illuminate some of the ways the neoliberal-materialist framework could be refined – and what the thesis contributes towards this end. I propose that De Giorgi and others writing from a similar perspective (Calavita, 1992; Calavita, 1998; Wacquant, 1999; De Genova, 2002; Calavita, 2003; De Genova, 2004; Calavita, 2005; Calavita, 2005; Palidda, 2005; Bauder, 2006; De Giorgi, 2006; De Giorgi, 2006; Palidda, 2009; De Giorgi, 2010; Nagels and Rea, 2010; Escobar, 2010) have overstated the importance of recent shifts in the labour market. First, immigrants have been criminalised for many years preceding neoliberalism – and controls may have had a similar effect in terms of policing immigrants’ labour market behaviour. Second, economic factors are not the only ‘driving force’ (Barker 2012:117) that may have contributed to the emergence of today’s punitive system of immigration control. Further, while the relationship between the immigration policy regime and immigrants’ workplace precarity is central to the neoliberal-materialist analysis, little work has been done to flesh out exactly how the former affects the latter. The thesis provides the missing link between immigration policy and employment patterns.

Most importantly, neoliberal-materialist analyses of immigration policy tend to skate over the possibility of variation in the processes outlined above. To this end, the final section of the chapter draws on previous critiques of Wacquant (2009) to highlight the ways in which countries belonging to different Varieties of Capitalism might also vary in

the aspects discussed in De Giorgi (2010) and others. At the same time, the section also discusses the argument that immigration threatens the distinct institutional structure of the coordinated market economy – and how the wider effects of ‘precaritizing’¹ immigration policy illuminate the interdependence of foreign and native working classes.

Migrants and criminology: from criminality to criminalisation

Early criminologists compared immigrants’ criminal propensity to the native born (see, for example: Park, Burgess et al., 1925; Sellin, 1938; Bottoms, 1967). This was particularly the case in the USA, where the ascent of the discipline occurred in tandem with mass immigration. Research into immigrants’ criminality continues today (Parvani; Killias, 1989; Reyneri, 1996; Albrecht, 1997; Martens, 1997; Tonry, 1997; Yeager, 1997; Hagan, 1998; Wacquant, 1999; Engberson, 2001; Mears, 2001; Angel-Ajani, 2003; Holmberg and Kyvsgaard, 2003; Melossi, 2003; Palidda, 2009). Many reasons have been put forward explaining the criminality of immigrants, from the specific challenges of the migratory process (Eldering and Knorth, 1998), cultural conflict (Sellin, 1938), the socio-economic exclusion that often accompanies integration (Killias, 1989; Gans, 1992) and immigrants’ concentration in the disadvantaged and disorganised environments likely to produce cryogenic effects (Thomas and Znaniecki, 1918; Shaw and McKay, 1942). More recently, Dario Melossi’s work has highlighted the fact that irregular immigration status ‘imposes a set of conditions and constrictions...which significantly increase the risk factor for criminal behaviour’ (2012: 21).

¹ To use a word used in Ross (2013: 820) to describe reforms that make workers more precarious.

Despite the continuing popularity of the idea that immigrants are more likely to commit crime, the American literature has largely settled on a consensus that immigrants exhibit lower levels of crime, arrest and violence than non-immigrants, particularly when differences in age and gender are controlled for (Butcher and Piehl, 1997; Yeager, 1997; Butcher and Piehl, 1998; Hagan, 1998; Hagan and Palloni, 1999; Sampson, Morenoff et al., 2005; Morenoff and Astor, 2006; Rumbaut, 2006; Butcher and Piehl, 2007; Rumbaut, Ewing et al., 2007). Indeed, one study found that young immigrant men are less likely to be incarcerated than any ethnic group in the USA (Rumbaut, Ewing et al., 2007). By contrast, in Europe, foreigners are highly overrepresented in criminal justice statistics (Palidda, 2009), although this varies by country. For instance, a recent calculation found that Italy imprisons foreigners at a rate 14 times the rate at which it imprisons nationals, while the ‘hyper-incarceration factor’ in Ireland is only 1.9 (De Giorgi, 2010: 155).

However, even in the European context, the idea that immigrants are more likely to commit crime is subject to some serious qualification. In addition to the general point that incarceration statistics are in no way adequate proxies for crime rates, statistics on foreign nationals rarely control for differences between immigrants and citizens in age, gender and rural/urban distribution. Many immigrant populations have similar or even lower levels of involvement in the criminal justice system than the majority ethnic group (Tonry, 1997: 1). Further, discussions of a particular nationality might mask variations in socio-economic status and criminal offending within that group (Martinez Jr and Lee, 2000: 487), as well as significant differences in the crime rates of male and female immigrants.

In addition, in some countries, the category of foreign nationals includes a number of so-called second-generation immigrants. This is particularly the case in countries such as Germany and Austria where citizenship has traditionally been governed by a principle of *jus sanguinis* or ‘common descent’. In this context, many second- and even third-generation ‘immigrants’ remain foreign nationals and are recorded as such in criminal justice statistics. This issue makes it difficult to compare the rate at which foreign nationals are imprisoned in different countries. In turn, there is a remarkable degree of consistency in the literature that it is the children of immigrants, rather than the immigrants themselves, whose crime rates are higher than those of their parents (Sellin, 1938; Killias, 1989; Bankston III, 1998; Hagan, 1998; Rumbaut, 2006; Greene, 2009). Thus, Sutherland argued (1924) that it is not immigration but acculturation to the mainstream that leads the children of immigrants to commit crime. The criminality of second-generation immigrants arises because they are alienated from both their parents’ and their peers’ culture (Stepick and Swartz, 1998).

The overrepresentation of foreign nationals and their descendants in criminal justice systems across Europe and the USA might also be wholly or partially due to discrimination within the criminal justice system (Demuth, 1978; Tonry, 1995; Marlow and Loveday, 2000; De Schutter and Ringelheim, 2008; De Giorgi, 2010). From a focus on ‘rule-breaking’ to ‘rule-making... [and] enforcing’ (Sparks, 1980: 170), analyses that highlighted the issue of discrimination paved the way for more radical analyses, such as is expressed in the neoliberal-materialist analysis of contemporary immigration policy. Discrimination can take many forms, from the ‘direct’ racism of the police officer on the street to more insidious forms of institutional racism and exclusion (Gordon, 1983). Thus, for instance, foreign nationals are disadvantaged by the requirement that to avoid pre-trial

detention, they need ‘exactly what foreigners are often not able or not willing to show, [namely] a stable and legal residence, work and income’ (Melossi, 2003: 374). Discrimination is also apparent in the ‘strategic’ use of criminal law in the prosecution of specific migrant populations (Cachon, 2009; Guild, 2009). A recent example of this in the UK is the repeated targeting of Romanian and Bulgarian migrants at Marble Arch in London for begging.²

The criminalisation of immigration: from street crimes to immigration crimes

Over the last decade, a burgeoning body of literature has highlighted the importance of criminal immigration offences in understanding immigrants’ involvement with the criminal justice system (Weber, 2004; Weber, 2005; Pickering and Weber, 2006; Stumpf, 2006; Cachon, 2007; Bosworth, 2008; Bosworth and Guild, 2008; Cachon, 2009; Aas, 2011; Bosworth, 2011; Bosworth, 2011; Aliverti, 2012; Aliverti, 2012; Barker, 2012; Aas, 2013; Aliverti, 2013; Stumpf, 2013; Zedner, 2013). This body of research has moved the criminological focus from its prior focus on immigrants’ involvement in street crimes to an analysis of the criminalising nature of immigration control. Much of the work on the ‘criminalisation of immigration’ has focused on the USA, where criminal law provides a key mechanism for the control of migration. By contrast, there is a small but growing literature on the use of criminal immigration offences in Europe (see, for

² As reported in: ‘Beggars at Marble Arch targeted by Metropolitan Police’, 18/05/2012, BBC News, , accessible here: <http://www.bbc.co.uk/news/uk-england-london-18115370> (last accessed 20/04/2014); “I’m from Romania, I came to Britain for the hospital”: Beggars sleeping rough around Marble Arch are arrested by UK Border police just a day after immigration laws are relaxed’, 02/01/2014, Daily Mail, accessible here: <http://www.dailymail.co.uk/news/article-2532613/Beggars-sleeping-rough-Marble-Arch-arrested-UK-Border-police-just-day-British-immigration-laws-relaxed.html> (last accessed 20/04/2014).

instance, Aliverti 2012, 2012; 2013 and Banks 2007; 2011 on the UK; and Vogel 2000; 2009 on Germany).

‘Crimes of immigration’ take a number of forms. First, there are crimes specifically targeting immigrants’ actions, including illegal entry, illegal residence, overstaying, deception during the immigration or asylum application process, failure to produce a document and failure to register with the police. Second, immigrants can be criminalised under document fraud offences where, for instance, they use a false passport in transit (Webber, 1995; Motomura, 2008: 2088). Third, people who facilitate irregular migrants’ stay on national territory – family members, employers, doctors – can also leave themselves liable to criminal sanction (Medina, 1997: 522; Castañeda, 2011; Aliverti, 2012). Finally, the current state of law in many countries guarantees that unauthorized migrants need to commit other crimes in order to survive (Hagan, 1994.; Coutin, 2000). For example, the advent of laws in the USA preventing irregular migrants from obtaining a driver’s license mean that these non-citizens must either drive without a license or rely on false documents (Johnson, 2004; Lopez, 2004) – both acts that leave them liable for criminal prosecution.

The increasing number of people prosecuted for criminal immigration offences across the USA and Europe is not only an indication of the introduction of new criminal immigration offences, however. Instead, it also responds to the presence of irregular immigrant populations on Western soil. While popular discourse places the blame for illegal immigration squarely at the feet of those who have chosen to immigrate, it should also be noted that ‘the construction of [irregular immigration] is...an inevitable function

of any form of immigration control' (Anderson, 2010: 31, see also Samers 2004; De Giorgi 2007; 2009; Jordan 2002). As both Alessandro De Giorgi (2009; 2010) and Salvatore Palidda (2009: 314) discuss, the 'narrowing of legal access' for low-skilled and humanitarian migrants in Europe and the USA is a fundamental factor contributing to a criminalisation of certain types of migration flows and the institutionalisation of a 'global hierarchy of mobility' (Bauman, 1998: 69). The more restrictive or complex the immigration admissions system, the more likely someone is to fall into irregularity.³

Finally, the criminalisation of irregular immigration also arises from the intensification of border enforcement practices (Sheptycki, 2002; Walters, 2002; Lutterbeck, 2006; Pickering, 2006; Weber, 2006; Andreas, 2009). Immigration enforcement authorities can increase their capacities to control illegal immigration, either through funding increases or through being awarded new police powers (Weber, 2004; Stumpf, 2006; Fekete, 2010). The immigration control regime can also intensify as a result of improved coordination between different actors co-opted into immigration enforcement. Much as the responsibility for policing provision in most liberal democracies is largely shared nowadays by a widening range of governmental and non-governmental providers (Loader, 2000; Jones and Newburn, 2006; Stenning, 2009), there is also far more to migration control than what the immigration authorities do. The

³ People will immigrate regardless of the possibility of obtaining legal status, 'pushed' by political persecution, war or unemployment in their home countries and 'pulled' by economic (Kline, 2003) or educational opportunities (Yang, 2007), the desire to reunite with a partner or with family members long gone (González-Ferrer, 2007) or (conversely) to be free of parental supervision (Kalra and Bhugra, 2010). In addition, the heavily restrictive border controls that characterise today's European immigration systems can prevent even foreign nationals who might have the right to enter or stay in a country from making themselves known to the authorities. Thus, the number of illegal entrants in the UK swelled during the 1990s not only due to the virtual impossibility of legal immigration from outside the EU but also because many genuine refugees feared that making an asylum claim would result in detention and removal and hence did not claim asylum (Webber, 1995).

fragmented institutional landscape means coordination capacities are ever more important in maintaining an effective immigration control regime.

The pluralisation of the enforcement regime is closely connected with the way in which immigration control is increasingly divorced from the borders of the nation-state. Shifting migration controls ‘outwards’ requires the transnational coordination of agencies – a process epitomised by the establishment of the ‘European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union’ (otherwise known as FRONTEX) (Sheptycki, 2002: 216). European Union countries are increasingly working with border states such as the former Soviet Republics, Morocco and Turkey, who have been co-opted into interdiction efforts under the EU’s ‘Global Agreement to Migration and Mobility’ (Vogel, 2000). National immigration authorities coordinate their actions with airline officers posted at overseas airports across the world, who perform pre-boarding checks at a considerable distance from the physical border of a nation-state. These efforts are controversial. Much as the ‘externalisation’ of immigration controls might deter unwanted immigration, the process of externalising borders has come under criticism from those who argue it encourages states to deny their international obligations towards asylum seekers and refugees (Wolff, 2008; den Heijer, Ryan et al., 2010: 362).

Immigration controls can also be pushed ‘inwards’, targeting foreigners who have already entered the national space. Internal controls work in two ways: firstly, by preventing migrants from gaining access to a job, service or home to which they are not entitled; and secondly, by ensuring that irregular migrants (or those who are facilitating

their stay) come to the attention of the authorities (Vogel, 2000). In turn, internal controls require the assistance of employers, hotel registrars, doctors, teachers, police forces, labour court judges, labour inspectorates and landlord, who are compelled to carry out immigration control tasks on behalf of the state.

However, the allegiance of third parties to immigration enforcement cannot be assumed. Employers come to mind as a group for whom non-compliance reaps commercial reward. Third parties can also resist immigration control duties for humanitarian reasons – or because they simply do not have the resources to focus on what is seen as an issue of secondary importance. Thus, coordination between the different parties responsible for immigration control can often only be achieved through punitive measures (Sitkin, 2014). As a result, although the general principle is for migration control to target irregular migrants themselves, at times is it the non-compliant third party who becomes the objects of punishment (Broeders, 2009).

The diffusion of policing to control points both inside and outside the nation state undermines traditional conceptions of borders and lends credence to the argument that the militarisation of physical borders is more an expensive symbolic spectacle than an effective means of immigration management (Andreas 2009). In turn, the pluralisation of immigration means that migration control – like crime control – increasingly emphasises information-sharing above and beyond any ‘on-the-ground delivery of visible police functions’ (Loader, 2002: 142). In the EU, this is evidenced by the creation of a series of

databases (the Schengen Information System, EURODAC⁴ and the Visa Information System) containing information about immigrants and asylum seekers for use in immigration and law enforcement. Modern technological advances – including the advent of biometric ID cards - make it ever easier to integrate the surveillance of the ‘other’ into a number of automated bureaucratic systems, such as welfare and medical aid (Lyon, 2006). The emphasis on automatic information flows means border control problems are increasingly framed in terms of their technical operability, rather than their normative connotations (Barry, 2002). Much as the criminal justice system as a whole increasingly focuses on risk management rather than the reformation or punishment of offenders, so is immigration control increasingly discussed in actuarial terms (De Giorgi 2006).

New forms of control

At the same time, a singular focus on the criminalisation of immigrants obfuscates other significant transformations in immigration enforcement. Modes of punitive regulation are diversifying and can no longer be contained within the discrete boundaries of the criminal justice agencies that have tended to shape the thinking of criminologists over the years (Pickering and Weber, 2006; Weber and Bowling, 2013). The ‘governing through crime’ framework does not account for the way in which ‘the migrant is in a substantially different, and far more vulnerable, position from the...criminal’ (Bosworth and Guild, 2008: 711). Instead, migration control as a whole has witnessed the ‘asymmetrical

⁴ EURODAC (short for the ‘European Dactyloscopy’) is the fingerprint database for identifying illegal entrants and asylum seekers in Europe.

incorporation of criminal justice norms', featuring an increased use of crime control methods and techniques but without the same procedural safeguards (Legomsky, 2007).

A key issue is that immigration control is performed through administrative or civil law, rather than criminal law, which attracts a wider range of protections for the offender. In the UK, for instance, the introduction and strengthening of criminal provisions against irregular immigrants has been largely symbolic. Immigration control is normally enforced through administrative powers to detain and deport that are considerably more flexible than any corresponding criminal powers (Cope and Luqmani, 1995; Aliverti, 2012).⁵ The exclusion of deportation⁶ from the protections offered in a criminal case is justified by the fact that it is considered a bureaucratic tool of migration management, rather than a punishment. However, the argument that 'deportation is not a punishment because we do not view it as a punishment' ignores the fact that deportation is certainly experienced as punitive by individuals subjected to it (Kanstroom, 2000: 1895). Further, administrative deportation may follow criminal conviction, including a conviction for an immigration-related offence. The increasingly intense interaction of migration and criminal law processes makes it difficult to justify deportation's exclusion from the protections of criminal law (Markowitz, 2010; Stumpf, 2013: 60).

⁵ A slightly different situation ensues in the USA where criminal law provides a key mechanism for the control of migration. However, many of these offenders have been prosecuted under dubious circumstances that do not fulfil the normal procedural requirements of criminal prosecution. In particular, Operation Streamline requires the criminal prosecution of all border crossers. The program's voluminous prosecutions have forced many courts to cut procedural safeguards, most notably through the use of en masse hearings. Following conviction, immigration offenders are then deported under civil deportation, which attracts no right of counsel (Chacon 2009).

⁶ This chapter uses 'deportation' as a term denoting all state removals of foreign nationals. The following chapter delineates between different forms of state-enforced deportations.

Similar arguments might be applied to detention practices. Immigration detention capacity has expanded rapidly across the Western world in recent years (Gibney, 2003; Weber, 2004; Ellermann, 2005; Jesuit Refugee Service, 2005; Welch, 2005; De Giorgi, 2006; Inda, 2006; Van Kalmthout, 2007; De Giorgi, 2010). For instance, the United Kingdom has expanded the capacity of its facilities from 250 in 1993 to 3,500 in 2011 (Sampson and Mitchell, 2013: 101). Immigration detention is widely defined by governments as a non-punitive, bureaucratic measure that is intended to enable border control (Noll 1999: 26). Because of this, detention tends to attract procedural safeguards that are far less robust than those guaranteed in criminal trials (Legomsky, 2007).⁷ However, as Lucia Zedner has argued, ‘where proceedings and measures result in burdens of a severity comparable to punishment - immigration detention springs to mind as an obvious example - the process protections and standard of proof should surely be akin to those applied in criminal proceedings’ (2013: 53).⁸

Through these mechanisms, different standards of punishment and governmental control apply to citizens and (unwanted) non-citizens, even though this difference is currently hidden and implicit (Bosworth and Guild 2008). Juliet Stumpf (2006) argues that the regulation of migrants has often taken less benign forms than the treatment of citizen-offenders in the criminal justice system because criminal law starts from a

⁷ This depends, to some degree, on the context. While judicial oversight of the decision to detain is a central feature of many countries’ immigration detention regimes (e.g. Germany, Austria, Belgium, Italy, Greece) in the UK, for example, not only is there no automatic judicial oversight of immigration detention, but there are no clear restrictions on how much time an asylum seeker may be detained (Welch and Schuster 2005; Bosworth and Guild 2007).

⁸ A similar logic underlies the insistence of the European Court of Human Rights in Strasbourg that the question of whether a person is charged with a criminal offence is for the court to determine by looking at the substance of the situation. This ‘anti-subversion device’ is intended to prevent governments from manipulating the criminal/civil boundary and thereby avoiding awarding extra procedural rights, see: *Engel v. Netherlands* [1976] 1 ECHR 647, and *Bentham v United Kingdom* [1996] 22 ECHR 293

presumption of membership whereas immigration law starts from an assumption of non-membership. Liz Fekete (2010) contends that recent years have seen the gradual re-emergence of an ‘enemy penology’ (Krasmann, 2007) aimed at non-citizens in Europe. Under this perspective - developed in the works of Günther Jakobs - certain people have forfeited their right to the guarantees usually granted to everybody else. While his conception of the ‘enemy penology’ referred to people whose behaviour was so fundamentally threatening that they had to be excluded from society, Fekete (2010) argues that enemy penology characterises the treatment of immigrants in Europe today, who are subject to a number of disproportionate, authoritarian and pre-emptive measures. These include harsher sentencing,⁹ indeterminate administrative detention in the UK, and above all, increased use in the EU of the ‘double punishment’ of deporting foreign nationals after the completion of their prison sentence. Neoliberal-materialist analyses incorporate both ‘penal and extra penal regulations of immigration’ (De Giorgi, 2010:153) as developments that encourage immigrants’ exploitability.

Theoretical framework: migration control and the neoliberal materialist perspective

Much as criminal justice has become increasingly punitive in the last 30 years, so have border controls and the criminalisation of immigrant communities intensified across Europe (Barker, 2012: 113). The compelling question for criminologists is how - and why - has this happened? To this end, the thesis builds on ‘neoliberal-materialist’ perspectives expressed in De Giorgi (2006; 2010) and others (Calavita, 1992; Calavita, 1998;

⁹ A Council of Europe paper reported that “Italian law was changed in 2008 to make the irregular status of aliens who commit a criminal offence an aggravating circumstance for the purposes of punishment on conviction” (Guild 2009).

Wacquant, 1999; De Genova, 2002; Calavita, 2003; Melossi, 2003; De Genova, 2004; Palidda, 2005; Bauder, 2006; De Giorgi, 2006; De Giorgi, 2006; Palidda, 2009; De Giorgi, 2010; Escobar, 2010; Nagels and Rea, 2010), which tie recent developments in immigration control to the underlying needs of the neoliberal production regime. As the following section outlines, the neoliberal-materialist analysis borrows heavily from ‘concepts and ideas forged within the neo-Marxist criminological perspective known as the “political economy of punishment”’ (De Giorgi 2010:148), as well as Marxian insights on immigration.

The Marxian analysis of crime and punishment

Marx himself wrote little about crime. Instead, it was the task of subsequent authors to develop a criminology that highlighted the relationship between the criminal justice system and the underlying political economy. As a result, Marxian criminology displays a variety of starting points (Garland, 1993: 84), from analyses that emphasise the material functions of punishment in regulating the labour market, to those that pay greater attention to the ideological functions of punishment for maintaining ruling class dominance.

Nonetheless, what unites the different authors working under the rubric of Marxian criminology is the understanding that the criminal justice system represents and constitutes the economic relations that shape society (Quinney, 1970; Hay, 1975; Thompson, 1975; Pashukanis, 1978). The criminal justice system cannot be understood

from its stated end - the control of crime - but instead, must be conceptualised as an instrument by which the capitalist social order is maintained. As such, there is as much of an emphasis in Marxian criminology on processes of criminalisation than on the reasons for why people commit crime.

Others have highlighted the way in which the criminalisation of others distracts the working classes from the social ills of capitalism. Stuart Hall's *Policing the Crisis* (1978) argued that the criminalisation of black immigrant muggers in Britain in the late 1970s was a moral panic, which absorbed wider insecurities among the working classes and allowed the state to maintain a sense of legitimacy in a time of economic crisis. The idea that the punishment of immigrants has ideological benefits in terms of maintaining the power of the state is a theme that features prominently in neoliberal-materialist analyses (see, for example, Wacquant 1999:219; Palidda 2009). In an earlier chapter on immigration controls, for instance, De Giorgi (2006) argues that the increased interdependence of nation states under globalisation has undermined the nation-state's jurisdiction over production, trade and fiscal controls and has been implicated in the post-Keynesian retrenchment of welfare provisions. In response, European states have sought to compensate for eroding economic authority - and a more general crisis of European identity (De Giorgi 2006:119) - by focusing on the 'all-too-tangible enemy of the stranger next door' (Bauman, 1998: 7).

By contrast, De Giorgi's later article (2010) focused explicitly on the materialist functions of immigration controls for disciplining the labour market behaviour of foreign nationals. In this endeavour, he borrowed heavily from 'Punishment and Social Structure'

by Georg Rusche and Otto Kirchheimer (1932/2003). The main argument of this book is that 'every system of production tends to discover punishments which correspond to its productive relationships' (p.5). In particular, they argued that the criminal justice system is shaped by the principle of less eligibility. Conditions have to be worse than the worst conditions experienced by free men to be an effective deterrent to criminal activity. When unemployment is low, convicts tend to be treated better than in times of high unemployment and are more likely to be involved in prison labour during their sentence. In periods of high unemployment, when wages are scarce and living conditions are worse for the free man, conditions in prison worsen (although the presence of welfare policies can keep living conditions for both the convict and the free man artificially high).

This argument spawned a large body of literature, which interrogated the relationship between unemployment and prison rates (for an overview, see Chiricos and Delone, 1992). De Giorgi - who has criticised this body of work elsewhere (2006: 23) - does not directly focus on the relationship between unemployment and punitive methods of immigration control. Instead, the main idea he borrows from Rusche and Kirchheimer is the idea that criminal justice systems are shaped by the 'less eligibility' principle (2010:161), according to which the conditions for those who break the rules should be worse than conditions at large. Thus, De Giorgi argues that '[consistent] with the principle of less eligibility, the hyper-criminalization of migrations contributes to shape immigrants' acceptance of...over-exploitative conditions' (2010:163). As below, however, he gives little detail as to how this process works in practice.

Finally, the main arguments made in the neoliberal-materialist analysis of European immigration policy are consistent with the theoretical arguments of a number of authors within the sociology of punishment, who highlight the relationship between neoliberalism and the increasingly punitive nature of contemporary criminal justice (Wacquant, 2001; Weiss, 2001; Wacquant, 2003; Sutton, 2004; Cavadino and Dignan, 2007; Reiner, 2007; Wacquant, 2009; Harcourt, 2010; Wacquant, 2010; Bell, 2011). In particular, De Giorgi (2010) draws explicitly on Loïc Wacquant's book 'Punishing the Poor' (2009).¹⁰ Although Wacquant, in this book, explicitly rejects the 'political economy of punishment approach' (2009: xvii), the focus on neoliberalism within Wacquant's work nonetheless indicates the continuity of Marxian-inspired notions of the relationship between the criminal justice system and the underlying production regime. Wacquant argues that the growing recourse to imprisonment in the United States comprises a constituent element of a 'neoliberal centaur state' characterised by laissez-faire attitudes towards the business class and brutally paternalistic and punitive policies directed towards the lower classes (p.312). Under the neoliberal state, the widespread use of imprisonment and the ascent of 'workfare',¹¹ constitute the two sides of a material and symbolic apparatus whose purpose is to curb and warehouse the urban disorders unleashed by economic deregulation while imposing precarious employment on the post-industrial proletariat. By ensuring that anything other than work is an undesirable option, such policies encourage the post-industrial proletariat into jobs as precarious as the ones towards which migrants congregate.

¹⁰ De Giorgi's earlier chapter on immigration controls – 'The Criminalisation of International Migrations: Towards an Actuarial Model of Control' (2006) – also borrows from an earlier chapter of Wacquant's ('Deadly symbiosis. When Ghetto and prison meet and mesh') (2001).

¹¹ Wacquant (2009) uses the term workfare to describe the retrenchment of social welfare benefits and the introduction of work requirements, as opposed to the narrow definition of 'community work for benefits'.

The extent to which Wacquant's analysis is generalizable to the European example is contentious. While the prologue to *Punishing the Poor* provocatively calls America the 'living laboratory of neoliberal future,' Wacquant qualifies his assertion that Western European states are 'more or less slavishly' following the American example with the caveat that certain differences - 'the deep roots of the social state...the weaker hold of individualist ideologies... and the absence of a sharp ethnoracial divide' (2009:23) - mean that it is unlikely that European criminal justice systems will ever look anything like that of the USA's. However, in an earlier article - 'Suitable Enemies: Foreigner and Immigrants in the Prisons of Europe' (1999) - Wacquant argues that the criminalisation of immigrants represents a 'veritable litmus test' for the extent to which European states resist or conform to the American policy of criminalising poverty (1999: 220). In a similar fashion, De Giorgio's review of Nicola Lacey's 'The Prisoners' Dilemma' (2008) emphasises that while 'it could be the case that although the total extension of the penal arm of the State remains comparatively limited, pointing to a general climate of penal moderation across Europe, when it comes to the criminalization of immigrants what emerges is an unusual intensity of penal practices' (2010:154).

The Marxian analysis of immigration

Much like Marxian literature on crime and punishment, Marxian analyses of immigration take a variety of different forms, while retaining a belief in the functions of immigration for the reproduction of ruling class power (Castles, 1970; Gorz, 1970; Marshall, 1973; Castells, 1975; Burawoy, 1976; Marx, 1976; Petras, 1981; Portes, 1981; Castles and Kosack, 1985; Miles, 1986; Miles, 1987; Bovenkerk, 1990; Bovenkerk, 1991). Some

Marxian analyses concentrate on the role of immigration in disorganising the working class struggle. For instance, one perspective holds that class conflict abates as immigrant labour ‘substitutes’ for native workers at the lowest tier of the socio-economic ladder, raising the latter to a higher tier (Gorz, 1970; Castles and Kosack, 1985). By contrast, Kitty Calavita (1981) has written about the negative effect of immigration on the early American labour movement – and in particular, the use of foreign workers as strike breakers and wage reducers. Adriana Marshall (1973) has argued that class conflict is moderated by the way that immigration divides the working classes as native workers respond to perceived economic competition with racism. Along these lines, Gary Freeman (1986) contends that the mass migration of foreign workers is what eroded the political consensus on which the post-war welfare state in Western Europe was founded and led to the Americanisation of social policies in Europe.

Marxian analyses of immigration also highlight the inferior position of the foreign worker in the labour market. For instance, Castles and Kovack (1973) have argued that a clear benefit of immigration from the ruling classes’ perspective is that immigrants have less power to extract concessions from employers than domestic workers. Migrant workers are actively sought for the ‘secondary labour market’ because they can restore the flexibility that has been lost due to labour market regulation and fill jobs that the native workforce has abandoned (Piore, 1979). As persons ready to work as when labour is needed (and ready to go when not needed), migrants can be relied upon to expand the process of capital accumulation; to regulate business cycles; and for seasonal work. Immigrants also help to burnish the reserve army of labour, which helps to counteract inflationary pressures on wages in times of labour scarcity (Miles, 1987; Bovenkerk, 1991; Meyers, 2000).

The subjugation and exploitation of immigrants is at the heart of neoliberal-materialist perspectives on immigration. However, while the Marxian literature above skims over the reasons for why immigrants are vulnerable on the bargaining table, neoliberal-materialist perspectives emphasise the fact that migrants' lack of power relative to domestic labour – the condition that makes them so attractive to employers (Castles and Kosack, 1972; Freeman, 1979) - is a direct consequence of their ongoing potential for falling into illegality, rather than an intrinsic property of immigration per se. It is the threat of criminalisation, detention and deportation – along with migrants' exclusion from the welfare state - that renders immigrants a pool of docile, desperate workers (Morales, 1983; Calavita, 1998: 531; De Genova, 2002; Maira, 2007).

In these arguments, they draw on another body of Marxian literature on the political conflicts around the control of immigration. As De Giorgi (2007:150) describes it, 'the history of class struggle is inscribed in an ongoing conflict between capital and labour over the control of mobility'. From vagrancy laws in Elizabethan England (Chambliss 1964) to the colonial expulsion of indigenous populations from their land (Burawoy 1976; Weber and Bowling 2008), up to today's restrictive immigration policies, every stage of economic development has seen the mobility of the proletariat controlled in some way or another (Moulier-Boutang, 1998). Mobility controls reflect 'the importance of "vested interest" groups in the emergence and/or alteration of laws' (Chambliss 1964:77). These interpretations of immigration policy open up the possibility that it is not immigration that reflects ruling class interests, but rather immigration that has been

‘harnessed, disciplined, governed, controlled, detained, stopped’ (Melossi 2003:372). State policy moves to the centre of analysis.

Critiques of the neoliberal-materialist analysis and the contribution of the thesis

Certain assumptions within the neoliberal-materialist analysis - for instance, the concentration of irregular immigrants in precarious work (Heyman, 1998; Ngai, 2004: 2) and the overrepresentation of people from (certain) immigrant backgrounds in the criminal justice systems of Europe (Tonry, 1997) - are well established. However, there are several ways that the neoliberal-materialist analysis of ‘illegalising’ and ‘criminalising’ immigration policy might be refined.

Neoliberalism?

Neoliberal-materialist analyses focus on the exceptional nature of ‘the criminalisation of immigrants’ since the 1970s and tie this to the development of neoliberal or post-Fordist economies in Europe. However, ‘the phenomenon of criminalization has always been present...When there are political or economic crises, the immigrant is always the first easy target’ (Palidda 2012:314). As the literature on vagrancy laws from the 19th century highlights (Chambliss, 1964; Beier, 1985; Torpey, 2000), the state has attempted to control the movement of the proletariat for far longer than is highlighted in neoliberal-materialist analyses (see, for example, Wacquant 1999; De Giorgi 2010). Further work is

needed to understand the various ways in which mobility has been policed over time and the functions that criminalisation have played for disciplining immigrant labour. To apply Lucia Zedner's (2006) critique of interpretations which see contemporary transformations in policing as a radical break with the past, it is possible that recent developments in immigration control are better understood as an echo of previous phases of marginalisation and criminalisation. The key question to ask is 'what is really new and what is not'? (Zedner, 2006: 83).

More fundamentally, there is a need to analyse the limits of materialism in understanding developments in migration control over time. Much as Wacquant critiques the 'narrowly materialist vision of the political economy of punishment' (2009: xviii), there are many reasons for why immigration control may become more punitive, beyond – and even, in spite of – the considerations of the labour market. In their article on the historical use of immigration controls, Leanne Weber and Ben Bowling (2008:359) argue that 'the strategies adopted at any point in time to produce order in the face of suspect mobility have been contingent on specific material and political conditions, and their form and social meaning can only be fully understood in the context of a particular historical milieu.' As Vanessa Barker (2012) comments, the implicit emphasis on economic factors within much literature on recent trends in European penal sanctioning means that issues of 'national sovereignty and conflicts over group members and national belonging' are set to one side. However, 'increased penal severity...is more likely the result of a crisis in governance and conflicts over national belonging rather than labor market demands' (Barker 2012:118, see also Melossi 2003:375-376).

A number of authors argue that increasingly punitive immigration controls speak to the threat that immigration poses to ‘societal security’ (1993: 25) - a term denoting social cohesion and a secure sense of national identity (Buzan, 1998; Ceyhan, 2002; Ibrahim, 2005; Diez, 2008).¹² In this analysis, the criminalisation of immigrants and ethnic minorities is a reflection of popular anxieties regarding global integration and multiculturalism. A pertinent example of these dynamics in Britain is evident in recent campaigning by UKIP, whose election posters highlight both the loss of national sovereignty through membership in the European Union and the social threat of unfettered immigration to Britain.¹³ In turn, national identity theorists such as Meissner (1992), Zolberg (1981), Stalker (2002) and Bhagwati (1984) highlight the influence of racial and national ideologies, colonial histories and definitions of citizenship over economic factors in immigration admissions policies.

Other analyses have emphasised the role of foreign policy considerations in immigration policy. For instance, Claudia Aradau (2001) argues that the ‘unauthorized immigrant’ has been securitised since the end of the Cold War to replace communist states as the ‘enemy’ against which the bureaucratic fragmented state can fulfil its essential role as the protector of civil society (2001: 1-2). Others have highlighted the way in which foreign Muslims have increasingly been portrayed as a threat to national

¹² Securitisation is a term that describes a process under which a particular issue (in this case, migration) is labelled a security problem that threatens the survival of a referent object (Waever, 1993; Buzan, 1998). Under this view, by invoking the exceptional nature of the threat, securitisation justifies the transport of a particular issue from the sphere of normal politics into the realm of emergency politics where it can be dealt with swiftly and without the normal rules and regulations associated with democratic policy-making (Taurek, 2006).

¹³ For instance, Nigel Farage has critiqued the way in which parts of Britain have become ‘unrecognizable’. In his words ‘you don’t hear English spoken any more. This is not the kind of community we want to leave to our children and grandchildren.’ He also expressed his discomfort at hearing foreign languages spoken on the train. See ‘Nigel Farage: parts of Britain are “like a foreign land”’, *The Guardian*, 28/04/2014, accessible here: <http://www.theguardian.com/politics/2014/feb/28/nigel-farage-ukip-immigration-speech> (last accessed 17/05/2014)

security in Europe and the USA through a discursive amalgamation of organised crime, terrorism and migration (Zucconi, 2004; Story, 2005; Bosworth and Flavin, 2007; Bigo and Tsoukala, 2008). In turn, they argue that securitising discourses have directly justified a host of restrictive asylum and immigration control measures (Zard, 2002). It is also possible that the relative impact of different considerations varies by type of immigration stream. For instance, Meyers (2000) argues that refugee policy is best understood by mobilising foreign policy considerations, whereas materialist analyses offer clearer insights into labour market and irregular migrant policies.

Neoliberal-materialist accounts of immigration policy do not ignore other influences completely (2007:128). For instance, De Giorgi's earlier article (2006) mentions both the crisis of European identity and the securitisation of 'Islamist' immigrants. However, ultimately these factors are reduced to their functions for the underlying economy. The critique that immigration enforcement is influenced by factors outside the economic structure mirrors debates within the field of cultural Marxism. Theorists such as Stuart Hall and Gabriel and Ben-Tovim emphasised the relative autonomy of cultural factors - race, nationalism - from class relations, and the importance of studying cultural, political and legal factors separately from economic structure. However, more traditional Marxian analyses argue that cultural, legal, political, and additional forms of life are superstructures that reflect and reproduce the economic base (Kellner, 2004). The thesis explores these tensions in its analysis of the different factors that have motivated the development of punitive immigration controls over time.

Fashioning precarious workers

De Giorgi uses the concept of 'less eligibility' to explain the impact of illegalisation/criminalisation on immigrants' labour market precarity (2010). While providing an interesting starting point for theoretical analysis, there is no empirical information on the specific mechanisms that link developments in immigration policy to foreign nationals' exploitation. Indeed, the lack of empirical information is often a critique of Marxian analysis, which tends to forefront 'polemical or programmatic' analysis over the collection of data (Sparks, 1980: 177).

At the same time, a growing body of literature outside of the Marxian corpus examines the relationship between immigration status and precarious employment, ranging from micro-level studies of the working lives of irregular migrants (Alt 1999, 2003; Black et al 2005; Engberson et al 2007; Erdemir and Vasta 2007; Vasta and Kandilig 2007; Duvell 2006; Krenn and Haidiger 2008) to 'top-down' analyses of the impact of legislative developments (Calavita, 1998; De Genova, 2004; Calavita, 2005; Anthias, 2006; McKay, 2007; McKay, 2008; Jureidini, 2009; Anderson and Ruhs, 2010; Bücker and Warneck, 2010; Dewhurst, 2011). For instance, Bridget Anderson (2010) argues that UK immigration law fashions precarious workers 'not only [by] illegalis[ing] some groups, but legalis[ing] others in very particular ways' (2010: 312). One example of this process is restrictions on free choice of occupation, including the inability to change employers. Where visas deny the possibility of changing employers, immigrants are dependent on their employers' goodwill, not only for their livelihood, but also for their right to stay in the country. For Anderson (2010), immigration controls function 'not only as a tap but a mould' used to construct particular types of employment relations.

A recognisably materialist perspective is found in Kitty Calavita's in-depth analysis of Spanish and Italian immigration policy in the 1980s and 90s (1998; 2005). Her work focused on the inconsistency between public discourses that emphasised the need to integrate foreigners, and the fact that 'immigration law actively and regularly "irregulariz[ed]" people, by making it all but impossible to retain legal status over time' (Calavita, 1998: 531). Much like De Giorgi, she argues that this 'economics of alterite' has to be understood in terms of its benefits for the post-Fordist economies of Southern Europe.

De Giorgi's (2010) analysis uses Calavita's work as a starting point for his theoretical analysis. However, by moving to a level of abstraction, he loses sight of the empirical details, identified in Calavita, that tie immigration policies to workplace precarity. There is no information on how the regime of 'less eligibility' actually works in practice. Speaking to this deficiency, the thesis offers an analysis of the specific ways in which the state constructs immigrants as precarious workers. In particular, it focuses on the interaction of immigration and labour/social law – bodies of law historically considered in isolation from one another - arguing that limited access to social and economic rights is a key reason for why foreign nationals might be more vulnerable to exploitation.¹⁴ Further, it explores the way in which the deportability of foreign nationals

¹⁴ Economic rights are a countervailing force 'counteracting the inequality of bargaining power which is inherent in the employment relationship' (Edwards, 2009: 129). Without economic rights, foreigners are in a weaker position vis-à-vis their employers. In addition, foreigners' inferior access to social or welfare rights also leaves them vulnerable to exploitation. As argued by Esping-Andersen (1990), social rights have a decommodifying effect, meaning that they enable people to survive even when they are not working. With inferior access to these benefits, foreign nationals are wholly dependent on their employer for the means to avoid destitution.

makes them hyper-dependent on their employers, who control not only their employees' means of survival, but might also influence their right to stay in the country.

The thesis argues that the precise way in which this process occurs varies in different institutional contexts, depending on differences in the particular conditions attached to immigration status and the way these interaction with existing labour and social welfare law. It is to the issue of variation that the thesis now turns.

Variation

The foremost critique that this thesis offers of neoliberal-materialist accounts of immigration is that they do not speak to the possibility of national variation in methods of immigration control or in the relationship between punishment and work within Europe. Wacquant (1999) and De Giorgi (2010) are particularly guilty of this. Despite the converging effect of transnational organisations such as the EU and the common pressures faced by all advanced industrial states, institutional stickiness, different national self-conceptions, differential incentive structures and policy 'feedbacks' (established patterns of political support) act as bulwarks against uniform policy development (Pierson, 2001). It is the task of the scholar of comparative criminology to explore and explain such differences (Nelken, 2000).

The field of migration studies already offers a number of typologies for describing differences in nation-state's response to immigration. For instance, national identity theorists Stephen Castles and Mark Miller (2003) have argued that three divergent models of immigration incorporation exist. The differential exclusionary model present in Germany and Austria is characterised by limited labour market mobility, discriminatory housing and education policies and stringent citizenship laws. The assimilation model variant found in France is characterised by efforts to incorporate migrants but only where they are willing to adopt the linguistic and cultural traits of the host nation. Finally, the multicultural model most often found in settler nations materialises where the state affirms group/community identities. These models are attributed to the 'histories, ideologies and structures of the societies concerned' (Castles and Miller 2003:243).

Another corpus has focused on differences in social rights accorded to migrants. An example here is Sainsbury (2006), which uses Esping Anderson's tripartite welfare system typology (1990) to argue that while social rights for migrants are better developed in Germany and Sweden than in the USA, the difference between citizens and non-citizens is less acute in the latter, a liberal market economy, due to the residual nature of social protection in this regime type.

However, given the fact that the neoliberal materialist analysis is based on the premise that immigration policy speaks to underlying production structures, it follows that the most significant source of variation should be variation in underlying labour market institution. In other words, if punitive immigration regimes reflect the needs of the neoliberal labour market, they should also reflect national differences in the structure of

the labour market and the extent to which different nation-states have adopted neoliberalism.

This understanding motivated the use of the Varieties of Capitalism (VoC) typology in the thesis. The VoC typology is the most cited example of a model addressing labour market differences between developed states (Hall and Soskice 2001, cited in (Rueda, 2000; A. P Brinegar, Jolly et al., 2004; Estévez-Abe, 2005; Borang, 2007; Paul, 2011). The crucial differentiation at the heart of the typology is between so-called liberal and co-ordinated market economies. The former (liberal market economies or LMEs) are characterised by deregulated labour markets, lower levels of employment and social protection, decentralised industrial bargaining, weak trade unions, a shareholder value culture and liberalised inter-firm relations. Co-ordinated market economies (CMEs) are associated with greater market regulation, higher levels of job security and social protection, co-operative industrial bargaining, strong trade unions and employees' greater voice in corporate governance matters (Rueda 2000; Hall and Soskice 2001). The thesis conducts a comparative case study of the UK and Germany on the basis that they are the paradigmatic examples of liberal and coordinated market economies in Europe.¹⁵

The universalising (and dystopian) nature of the neoliberal materialist analysis mirrors other work in the sociology of punishment, such Wacquant's *Punishing the Poor* (2009). A burgeoning body of literature has already established the fact that coordinated market economies have less punitive criminal justice systems than liberal market

¹⁵ A more detailed account of the case study selection process is included in the Appendix.

economies, as exemplified by radically and consistently lower prison rates (Lacey 2008; Cavadino and Dignan 2007). In a similar vein, the present thesis explores whether and how differences as described in the Varieties of Capitalism structure differences in the management of immigrant communities in the UK and Germany. In particular, it examines the impact of the VoC on differences in the overrepresentation of immigrants in prisons, the structure of internal immigration control and the process by which immigrants are constructed as precarious workers in the two countries under study.

At the same time, the differences as described in the Varieties of Capitalism typology are not immutable. A substantial literature has focused on issues of institutional change in the VoC and in particular, the salience of the coordinated market economy type. While much of this literature focuses on the impact of globalisation on the distinction between the two types of economies (Streeck, 1998; Hassel, 1999; Drezner, 2001; Goodin, 2003; Howell, 2003; Hassel, 2012; Heeg, 2012), authors such as Lillie and Greer (2007), Krings (2009) and Streeck (1998) have highlighted the ways in which immigration might potentially threaten the institutional structure of the coordinated market economy. In this view, employers' incentive structures are changed when they gain access to workers whose expectations are oriented to conditions in their country of origin rather than the host country where the work is performed. This encourages employers to opt out of the high-skill, high-cost production sustained by the coordinated market economy.

Thus, while the rest of the thesis concentrates on the effect of the VoC on immigrants, the final substantive chapter asks how the supply of migrant workers –

‘fashioned’ into precarious workers by the spectre of detention and deportation – has affected the salience of the ‘coordinated’ labour market and in particular, coordinated industrial relations in the German construction industry. In highlighting the impact of illegalising immigration policies on the wider labour market, it emphasises the interdependence of foreign and native workers. Further, as becomes clear in the following chapter, while foreign nationals are subject to a particular set of marginalising and criminalising policies, processes of exclusion creep very easily over the citizenship boundary. Punitive immigration policies are only one part of a wider structure of control, which affect immigrants and citizens alike. As such, the thesis’ findings do not stand alone, but should represent one part of a wider project in understanding the nature of contemporary nation-states.

Ch. 2: Punishing Immigrants: a Comparative-Historical Analysis

Introduction

As discussed in the previous chapter, Marxian literature on immigration and punishment highlights the functions that mobility controls and criminalisation have played in constituting the working classes as exploitable wage labour (Ignatieff, 1978; Melossi, Pavarini et al., 1981; Chambliss, 1989; Melossi, 2003). In a similar vein, De Giorgi (2007; 2010), argues that the emergence of prohibitionist immigration policies in Europe and the overrepresentation of foreign nationals in European prisons should be analyzed against the backdrop of global and local transformations of work under post-Fordism:

‘the transition of late capitalist societies from a Fordist/industrial model of production based on stable labour markets, potentially inclusive welfare systems, and extensive regulatory practices (i.e. Keynesianism), toward a post-industrial and post-Fordist paradigm of capitalist accumulation characterized by rigidly segmented labour markets, pervasive work insecurity, the downsizing of welfare, and the extensive deregulation of the economy in the name of labour flexibility’ (De Giorgi 2010: 152-153)

In particular, he suggests, the hyper-criminalisation and marginalisation of immigrants - through ‘increasingly restrictive immigration laws, militarized borders...administrative detention, systematic deportations...hyper-incarceration’ (p.

153) and 'limited access to civil, social, and political rights' (p. 160) - institutes a regime of 'less eligibility', under which immigrants have no other alternative but to work under terrible conditions in the lower echelons of the post-Fordist or neoliberal economy (De Giorgi 2010: 163). Prisons also warehouse immigrants who commit crime to survive as a result of their marginalized position in society (De Giorgi 2006:125). Finally, the criminalisation of immigration fulfills an ideological function by designating immigrants as scapegoats for the wider social and economic anxieties typifying late capitalism.

This chapter builds upon and refines the neoliberal-materialist analysis of immigration policy, starting with an examination of the continuity of exclusionary and criminalising measures directed at immigrant communities. To this end, the chapter offers an overview of state responses to immigration over time - and the ways in which such measures have aimed at disciplining the labour of foreign nationals. Through this, the chapter identifies what is new in the regulation of immigration in the post-Fordist era.

The chapter also interrogates the extent to which punitive developments in the control of immigrant populations have, in fact, been functional to the economy. Here, the chapter addresses the fact that the materialist analysis glosses over other potential drivers of state policy. As Barker (2012:118-119) comments, 'a focus on the economic realm as the driving force behind the increased incarceration and the criminalization of migration...means that the literature cannot quite handle all sources of variation and complexity that do not conform neatly to predicted outcomes.' Similarly, Weber and Bowling (2008: 359) argue that they are unable to make 'general claims of a recurring

pattern or golden thread running through the history of border of control.’ While more traditional Marxist analyses reduce ‘all the rest of ideology’ to the material basis of the economy (Marx and Engels, 1970: 47), it is also possible that developments in immigration control produce effects that run counter to what might be functional for the economic context. It is important to understand what other factors may shape immigration policies.

Finally, the chapter confronts a central issue with the neoliberal-materialist analysis of immigration policy: that it does not take national differences into account. As I discussed in the previous chapter, the UK and Germany vary in many ways that are meaningful for understanding the criminalisation, illegalisation and marginalisation of immigrant populations. Given the centrality of the underlying production regime to the neoliberal-materialist analysis, it is surprising that so little attention is paid to differences in the underlying economic structures and how this might affect immigration policy. Much as comparative analysis of the overall criminal justice system finds that coordinated market economies have less severe penal systems than liberal market economies (Sutton, 2004; Cavadino and Dignan, 2007; Lacey, 2008; Lappi-Seppälä, 2008), it might also be anticipated that countries with different labour market characteristics vary in the extent to which they criminalise and marginalise foreign nationals. However, the criminalisation of immigrants may not mimic the patterns found in the criminal justice system as a whole. Immigrants might be excluded from the

institutions that promote solidarity and (relative) tolerance in the criminal justice systems of coordinated market economies (Lacey, 2008).¹

The chapter is divided into three parts. The first and second parts offer a historical overview of state responses to immigration in Germany and the UK. The third section of the chapter explores the reasons why and how the UK and Germany differ in the use of ‘punitive’ policies directed towards foreign nationals and their descendants and relates findings to a wider analysis of punishment in coordinated and liberal market economies.

Germany

Early Immigration Controls

The German Reich was only established in 1871. Early mobility controls on what are today considered German territory were initially focused on vagrants or ‘masterless men’ (Herrenlose) from other municipalities and kingdoms (Torpey, 2000). Travellers - labelled Gypsies, irrespective of their nationality or ethnicity were treated with extreme suspicion, including special surveillance measures by the police (Lucassen, 1997). By contrast, the re-focusing of mobility controls on the foreign national from the late 19th

¹ For instance, Barker (2013) outlines how the idea of folk-belonging acts as a structural barrier to incorporation for foreign nationals in Sweden. In turn, and applying a Wacquantian analysis of neoliberal state policy (see 2009), foreigners’ exclusion from the protections of the welfare state can be seen as the flipside of their overrepresentation in Swedish prisons.

century onwards spoke to the solidification of a German identity after the unification of the country. Removing bureaucratic impediments to the mobility of German nationals also benefitted employers who were struggling to ensure a workforce for the factories during Germany's rapid industrialisation.²

Immigration controls during the late 19th century were also used to prevent foreigners becoming a burden on the welfare state. The majority of the 500 annual Federal expulsions (Reichsverweisung) based on the Empire's criminal code³ were for vagrancy and begging, with the remaining number made up of foreigners expelled for 'crimes of desperation', including theft, fraud, prostitution or false papers (Schrover, 2008: 63). Expulsions from the individual Bundesländer - carried out under administrative powers and subject to almost total discretion⁴ - were also largely directed at denying foreigners access to the welfare state, as well as ensuring that foreign workers were not able to settle on German land. The expulsion of destitute aliens carried on the tradition of the poor relief system, under which the police would expel paupers from neighbouring states and kingdoms. Mobility controls responded to economic conditions, ensuring that workers were both mobile enough to be responsive to economic needs, but not so mobile that they existed outside of the employment society.

² A similar logic motivated the reform of the 'Prussian Poor Law' 1842 (Preußische Armenfürsorge), which made the community of residence (rather than that of origin) responsible for funding the vast majority of poor relief, particularly in the case of sickness. Further, in areas which attracted a considerable number of new immigrants, compulsory insurance funds financed by the workers themselves and their employers were also to pay for the cost of maintaining the sick poor. This system was rolled out across the German empire during the 1870s and subsequently evolved into the German social insurance state (Hennock, 2007: 33).

³ See S. 38-39, S. 284, S. 361-62 'Empire Criminal Code' (Reichsstrafgesetzbuch). Notably, the grounds for expulsion under the Strafgesetzbuch are very similar to those laid out today in the 'Residence Act' 2005 (Aufenthaltsgesetz) S. 53-55.

⁴ As a result, state expulsions far exceeded the Empire expulsions in number, see Schrover (2008: 68).

By the end of the 19th century, strong economic growth saw Germany shift from a country of net emigration to the world's second largest destination for immigrants (Reinecke, 2010). There were around 778,000 immigrants on the Reich territory in 1900 (Schrover, 2008: 62). By far the biggest wave of incoming migration involved 'Ruhr Poles' moving to newly industrialized Prussia (Herbert, 1986). Yet despite the economic need for workers, political interest in preventing ethnic diversity led to regular expulsions of ethnically dissimilar persons in the 19th century, culminating in the bloody deportation of around 30,000 Poles and Jews of Russian, Polish and Austrian heritage from Prussia between 1885 and 1890 (Bade, 2009). The ethno-national construction of the German state - based on the notion of a German people bound by common descent and language (Brubaker, 1990) - meant there was no allowance for the assimilation of ethnic 'Others'. Foreigners were conceptualized as 'foes of the Empire' (Reichsfeinde) by Bismarck, who privately supported the extermination of Catholic Poles (Prizel, 1998: 113).

In this episode, nationalist impulses undermined what would be desirable from the standpoint of the economy. A compromise had to be reached. Subsequently, Prussia institutionalised a 'rotation' system, whereby workers had to leave every winter and had to carry identity card at all times (Bade, 1993: 374). Foreigners who took part in strikes or who otherwise complained about working conditions were deported (Kulczycki, 1994: 62). The creation of this system spoke to the desire to constitute foreigners as a 'reserve army of labour', as well as the wish to control the security risk posed by immigrants (Fahrmeir, Faron et al., 2003: 121; Lucassen and Lucassen, 2005).

A final aspect of Germany's early mobility control regime involved the expulsion of local populations as part of a process of territorial expansion – actions justified by the idea of uniting the greater German Empire. In 1908, the Prussian parliament passed the Expropriation Act (Enteignungsgesetz). This made it legal to confiscate land whenever buying it proved difficult and provided the legal framework for the expulsion of Polish populations in the First World War, including several hundred thousand Polish civilians who were subsequently moved to labour camps in Germany. As Peter O'Brien comments, 'Hitler changed the name of the campaign, but his quest for Lebensraum in the 'general plan of the East' had the same aim, though pursued with grotesquely heightened brutality' (O'Brien, 1988: 112).

The World Wars

World War One (1914-1919) and the Weimar Republic (1919-1933)

World War One provided the context for the tightening of passport controls on the border (Caplan and Torpey 2001:259). The government also evicted many of the 1.2 million foreigners working in the country due to a surge in unemployment at the beginning of the conflict (Bade, 1984: 530). However, workers holding Russian citizenship were prevented from leaving Germany because the authorities feared that they could be drafted into the Russian armed forces (Spoerer, 2006). By contrast, later in the war, women, juveniles and foreign workers from conquered territories increasingly took the jobs of those who had been killed in action or were still serving (Hardach, 1981). While foreign

workers from Poland and Belgium were officially working ‘voluntarily’, the German state used coercive tactics to encourage them to take employment, from forced deportation to the deliberate starvation of the local population. This truly was a regime of ‘less eligibility’. Once on the job, workers faced ‘drastic punishments for minor transgressions, disobedience, violation of the contract or flight’ (Bade, Emmer et al., 2011: 600). The labour of foreign nationals was, in fact, an extremely important part of the wartime economy. In the end, it was not enough: the chronic shortage of manpower was a key reason explaining why Germany lost the War (Harrison, 1988)

Immigration patterns changed dramatically after the end of the First World War. Germany, and especially Berlin, emerged as a safe haven for small groups of refugees, particularly anti-Bolshevik Russians. By contrast, ethnic Germans from Poland and Alsace-Lorraine were not allowed to return to their homeland because large-scale migration from ceded territories would weaken the German case for reclaiming those areas (Klusmeyer and Papademetriou, 2009: 63-64). Overall, the worsening economic situation in Germany meant that the number of foreigners decreased rapidly during the inter-war period.

The German Foreign Ministry argued that protecting ethnic minorities within the German borders would enhance its credibility in defending German minority rights abroad. Policies directed at immigrant communities were a diplomatic card to play in pursuing foreign policy objectives (Klusmeyer and Papademetriou, 2009: 63), rather than an adjunct of the underlying economic structure or a reflection of popular attitudes. The

liberal attitude towards immigrant populations was demonstrated by the ‘Prussian Foreigners Police Regulation’ in 1932, (Prüßische Ausländer-Polizeiverordnung), which introduced restrictions on the use of expulsions for refugees and other categories of persons such as long-term residents and children. In addition, foreigners could henceforth only be expelled if they had taken part in a specified list of criminal activities (Oltmer, 2005: 64).⁵

However, the government’s position was at odds with growing public animosity towards immigration during the Weimar Republic (1919-1933). Having elevated the issue of protecting the Germans living abroad (the *Ausländerdeutsche*), the Foreign Ministry’s failure to achieve any notable success in this arena was seen as a failure of the regime (Klusmeyer and Papademetriou, 2009: 63). Further, having experienced hyperinflation during the early 1920s, the economy was devastated by the Wall Street Crash, after which unemployment rose to over 6 million (Sklar, 1995; Baranowski, 1996). Foreigners became the scapegoats for the economic and social devastation that Germans suffered under the Weimar Republic. The conviction that the democratic republic could not control its ‘impossible’ Eastern borders fostered the ideologies of those on the radical right who sought to resolve the issue by force and for all time.

The Third Reich (1933-1945)

⁵ While the ‘Prussian Foreigners Police Regulation’ 1932 was, in many respects, ahead of its time in terms of formally protecting foreigners against the arbitrary actions of the state, it is worth noting that foreigners were still conceptualized as a security risks: ‘suspicion’ of involvement in politically subversive activities remained a sufficient ground for expulsion (Schwarz, 2010: 253).

The subjugation of ‘foreigners’ achieved new heights under the Third Reich (1933-1945), who were only to be allowed in the country if they were ‘worthy of hospitality’ - a provision that accorded total discretion to the government. The Nazi mindset was reflected in S. 5 (1) of the ‘Foreigners Police Ordinance’ 1938 (Ausländerpolizeiverordnung), which stated that giving incorrect information about race was grounds for expulsion. Nonetheless, what is particularly striking is the similarity between most of the other specific grounds given for expulsion - poverty, begging, criminality, vagrancy, political threat - and S. 54 of the Residence Act 2005 that is operative today.⁶

Notably, the category of ‘foreigners’ included German Jews, who were stripped of their citizenship during the ‘Reich Citizenship Law’ (Verordnung zum Reichsbürgergesetz) of 1935. The subsequent construction of Jews, Gypsies and other ‘asocials’ (homosexuals, East Europeans, the disabled, political dissidents) as criminals and enemies of the state played a central role in justifying their increasing marginalisation in Germany (Berkowitz, 2007).⁷ Nazi views on the criminality of certain groups of foreigners were based on the idea that their genes meant they were more likely to commit crime. The idea that genetic makeup made a person more or less susceptible to criminality (the understanding of “‘crime as destiny’”) provided the ideological framework

⁶ Indeed, the widespread use of expulsion on grounds of undesirable actions remains a central aspect of the German migration control regime and finds its British corollary in the deportation of foreigners, where it is ‘conducive to public good’ or recommended by the courts following conviction of an offence punishable with imprisonment (Immigration Act 1971, S. 5, S.6)

⁷ Despite an enduring myth that the state penal institutions had ‘nothing to do with the concentration camps’, criminals and delinquents were also exterminated in the concentration camps (Wachsmann, 1999).

for the notion that ‘Judentum ist verbrechertum’ (‘Judaism is criminality’), as was printed on public billboards across the country (Galliker, Herman et al., 1997: 41). Later, Auschwitz and other concentration camps were portrayed as penal institutions for criminals - a label that shrouded the true, genocidal nature of the Holocaust (Berkowitz, 2007).

From 1941 onwards, the Nazi leadership began to deport Jews, Gypsies, East Europeans, political dissidents, homosexuals and others to ‘labour camps’ in Germany and in the occupied territories (Browning, 1992). Notably, ‘foreigners’ were not the only group subject to the Nazi’s genocidal plans. Gypsies - some of whom were German citizens - were labelled officially ‘unworthy of life’ (lebensunwertig) in 1934, and subject to enforced sterilisation, deportation, hard labour in the camps and extermination (Huttenbach, 1991). The Third Reich was also characterised by an increasingly punitive approach to vagrancy and begging. Although during the Weimar Republic, the Nazis initially were compassionate towards ‘fellow-Germans who had got into difficulties through no fault of their own’ (Ayass, 1988: 2), after 1934, the provisions of the Criminal Code that dealt with vagrants and beggars were made much tougher. In particular, a new measure was added to the Criminal Code (S. 42d) providing the possibility of indefinite internment for those who were repeatedly sentenced to the workhouse. From 1938 onwards, beggars and vagrants were systematically sent to concentration camps (ibid).

The modern-day German criminal immigration regime can be directly traced back to the ‘Foreigners Police Ordinance’ 1938. This statute introduced the main offences that

are still the most prosecuted criminal immigrant offences today (Aurnhammer, 1996), including a penalty of one year in prison or a criminal fine for illegal entry and residence (S. 13 (1)); for residence in part of the German Reich for which they were not authorised (S. 13 (2)); and residence in contravention of a residence ban (S. 13 (2)).

Criminal penalties were also used by the Nazi government to control foreign workers. In particular, as the Second World War broke out, Germany experienced severe manpower shortages as many young men went to war. In response, the number of foreign workers - forced labourers and prisoners of war - rose from 301,000 in 1939 to a staggering 7,126,000 in 1944 (Herbert, 2000). Workers risked criminal penalties when they did not fulfill their contractual obligations.⁸ The 'Polish Criminal Ordinance' (Polenstrafverordnung)⁹ recommended 'death or, in less serious cases, imprisonment' where Poles and Jews damaged the establishments in which they worked. In May-August 1942, 80 per cent of the 21,500 people arrested for industrial action were foreigners (Herbert, 1997: 127).

Thus, criminal law and administrative controls reflected the desire to constitute foreigners as precarious workers during the Third Reich. However, a straightforward application of a materialist analysis denies the 'absolute uniqueness of the catastrophe'

⁸ 'Files of the provincial government in Augsburg' (Akten des Regierungspräsidenten in Augsburg), accessible here: www.zum.de/Faecher/Materialien/lehmann/dps/lebensumstaende/verhaltensvorschriften/ss_an_vw.htm (last accessed 13/05/2014)

⁹ 'Regulation on the Criminal Justice System against Poles and Jews in the Incorporated Eastern Territories' 1941 (Verordnung über die Strafrechtspflege gegen Polen und Juden in den eingegliederten Ostgebieten)

(Deutscher and Deutscher, 1968: 163). The Holocaust was defined by senseless and irrational violence, which aimed at the eradication of a specific, racially defined population – even, at times, at the expense of economic or military gain. The institutionalisation of a racial hierarchy epitomises the importance of eugenics in Nazi ideology (Ehrenreich, 2007). Understanding the Holocaust in terms of its materialist functions alone is both illogical and reductive. In turn, the contradiction between the economic interest in exploiting as many foreigners as possible and the ideological principles of National Socialism - which sought to protect the German Volk from mixing with ‘foreign blood’ - played out in a system where ‘foreign’ workers were worked until death.

Post-War Germany and the Guestworker Period (1945-1972)

Germany was split into four zones of occupation following the end of the Second World War. As soon as West Germany regained its territorial sovereignty, it enacted the ‘Passport Law’ 1952 (Paßgesetz), which introduced a duty - backed by criminal sanctions - for foreigners and Germans to possess and show a passport or replacement passport upon request where they entered, resided or left German territory (S. 11). In addition, S. 25 of the ‘Asylum Regulation’ 1953 (Asylverordnung) added criminal penalties where asylum seekers intentionally or negligently contravened the requirement to register if they had entered the national territory without permission.

These penalties spoke to a schism in German society. In penance for the crimes of the Nazi era, the architects of the German Constitution (1949) had included a clause allowing every victim of political persecution the right to claim asylum in Germany (Art 16 (2)). However, apart from the small number of refugees allowed into the country after the First World War, Germany had no historical tradition of granting asylum (Höfling-Semnar, 1995: 96). Germans remained uncomfortable with the idea of large-scale permanent immigration - despite the fact that labour was in short supply following the cessation of the Second World War (Diefendorf, 1993). Thus, the introduction of criminal immigration offences expressed the still-present xenophobic currents within German society. The post-war period was also distinguished by continuing anti-Gypsy sentiment, which motivated the introduction of requirements for vagrants to carry special passes in Bavaria in 1953 and attempts by the interior ministry of Nordrhein-Westphalen to strip Gypsies of their German nationality in the mid-1950s (Margalit, 2002).

Until the beginning of the 1960s, ethnic Germans from former Reich territories and refugees from East Germany helped to fill the gap in the workforce (Guild and Minderhoud, 2006). However, the intra-regional movement of Germans was halted as the German Democratic Republic closed its borders in 1961 and constructed the Berlin Wall. Instead, from the mid-1950s onwards, West Germany institutionalized guestworker programmes in the form of bilateral agreements with Italy (1955), Spain and Greece (1960), Turkey (1961), Portugal (1964), Tunisia and Morocco (1965) and Yugoslavia

(1968).¹⁰ After 1958, workers from other members of the European Community had the right to immigrate to Germany.

To De Giorgi (2007: 115), liberal admissions policies, full employment and the extension of some citizenship rights (under the aegis of a more general trend towards universalizing the welfare state) ensured the relative inclusion of foreigners and their families during this period. The reality was, however, more mixed. On the one hand, the economic needs of the German economy provided an incentive for an expansive admissions immigration policy throughout the 1960s. Indeed, in 1964, celebrations marked the arrival of the millionth guestworker - Armando Sa. Rodrigues from Portugal - who was given a scooter by the German state as a sign of welcome (Del Fabbro, 1995: 133). Programmes existed for the (relatively) easy legalization of status in the case of illegal residence (Martin and Miller, 2001) or entry.¹¹ The vast majority of guestworkers were employed and the trade unions had negotiated an 'equal pay and equal conditions' clause into the bilateral agreements (Hunger, 2001). This was usually respected by employers (although migrants were often paid at lower "minimum" levels of collectively bargained agreements, Power, Garling et al., 1979: 89). Finally, guestworkers had access to social insurance benefits, as long as they made a sufficient number of contributions first.

¹⁰ East Germany also invited a smaller number of foreign workers, mostly from Vietnam, Mozambique and Cuba. The history of migrants into East Germany is both fascinating and in need of further exploration. However, the following sections present evidence from West Germany, given that the current legal framework around immigration and criminal justice in Germany derives from West Germany.

¹¹ Even in cases of illegal entry, 'if there [was] no sign of criminal wrongdoing, the local official and administrative courts...usually decide[d] in favour of the guestworkers' [right to stay], especially if they [were] married'. See 'With us, everything's how is always was: Guestworkers' (Bei uns so üblich GASTARBEITER), 11/09/1963, *Der Spiegel*, accessible here: <http://www.spiegel.de/spiegel/print/d-46171915.html> (last accessed 13/03/2014)

On the other hand, guestworkers in Germany were conceptualized as temporary workers, rather than permanent immigrants, whose right to stay was wholly dependent on doing the dirty and dangerous jobs Germans did not want to do. Throughout the early guestworker period, the Foreigners Police Ordinance 1938 by and large persisted as the basis for the regulation of immigration to Germany. This allowed the authorities' total discretion over a foreigner's right to stay. Following international condemnation, the Foreigners Police Ordinance 1938, Passport Law 1952 and Asylum Regulation 1953 were repealed and substituted by the first 'Foreigners' Law' 1965 (*Ausländergesetz*) (Schueler, 1974; Aurnhammer, 1996: 10). The West German Ministry of the Interior was praised for taking a liberal and cosmopolitan step away from Nazi-era regulation (Joppke, 1999).

However, the new law was also formulated in a way that left foreign nationals in a highly precarious position - and showed some historical continuity with the earlier period of German history. Much like the Polish workers in the late 1890s, guestworkers were conceptualized as 'labour, not people' (Castles 2006:742). The 1965 Act added a number of both criminal and administrative immigration offences (S. 47, S.48) and gave the foreigners' authorities of the different *Bundesländer* almost total discretion over who was to enter, reside or be expelled (S. 2).¹² This discretion was used to great effect during the

¹² This provision also ensured the highly uneven development of immigration policy across Germany. Immigration law – particularly in the mid-twentieth century – was a bewildering mix of statute, federal and state administrative guidance and court decisions, with different federal states pursuing, at times, radically different visions of an appropriate foreigner policy. Generally, the conservative states to the South – Hessen, Baden Württemberg and Bavaria – have adopted more recognizably anti-immigration policies. To some extent, regional differences have been eroded through 'deterrence competition': the gentler northern

recession of 1967-68, when authorities used a variety of tricks to ‘encourage’ 300,000 guestworkers to leave (Dohse 1981: 331-334). Guestworkers were liable to be deported if they changed their employment.¹³ Administrative guidelines accompanying the *Ausländergesetz* 1965 denied foreign nationals ‘the civil rights of freedom of assembly, freedom of association, freedom of movement and freedom of choice of occupation, place of work and place of education, and protection from extradition abroad’ (Castles 1985:522). The Federal Republic, like its predecessors, developed an effective system of police surveillance (including blacklisting contract breakers and Communists) and earned a reputation for frequently harassing and deporting subversive foreigners, particularly those who were involved in trade union activities (Eisner, 1970:179-195).

Further, vagrancy, begging, unemployment or claiming social assistance benefits were grounds for expulsion under the *Foreigners Law* 1965 (Brady, Crawford et al., 1999: 364). Employers were responsible for ensuring ‘reasonable’ accommodation,¹⁴ but there were repeated scandals surrounding guestworkers living conditions – including, in one example, the use of a converted WWII forced labour camp as barracks for the new guestworkers.¹⁵

local municipalities, fearful of attracting the bulk of immigration in Germany and wanting avoid shouldering the burden of integration costs, have had to adopt the more restrictive policies of the south (Münch, 1992: 140). Nonetheless, considerable differences in immigration practices continue to this day.

¹³ Supra note 11

¹⁴ ‘The German-Italian bilateral agreement’ 1955 (Vereinbarung über die Anwerbung und Vermittlung von italienischen Arbeitskräften nach der Bundesrepublik Deutschland), S.3

¹⁵ ‘Where do your guestworkers live?’ (‘Wo wohnen Ihre Gastarbeiter?’), accessible here: http://www.angekommen.com/italiener/Bundesrepublik_WoWohnenIhreGastarbeiter.html (last accessed 05/02/2014)

This evidence undermines the claims made by De Giorgi and others (Wacquant, 1999; Ajzenstadt and Shapira, 2012) that the guestworker period was characterized by the ‘relative social inclusion’ of foreigners (De Giorgi 2007:115). Instead, the legal framework was quite explicitly aimed at constituting such people as low-wage, precarious workers – precisely the claims made by De Giorgi regarding immigrants in Europe today. What does, however, differ from later periods in history is that the subjugation of foreigners occurred under the banner of legal immigration. Further, foreigners were under-represented in criminal justice ‘suspect’ statistics¹⁶ in the 1950s and early 1960s (Wehner, 1966; Zimmermann, 1966), particularly when differences in the age and gender composition were taken into account.¹⁷ Until the early 1970s, the proportion of foreigners in prison was lower than the proportion of Germans in prison (Kury, Ferdinand et al., 2008: 128). Finally, while Yugoslavian, Turkish and Italian nationals constituted the biggest number of foreign suspects, Dutch, Moroccan and American foreigners were considerably more likely, per capita, to be counted as suspects (Polizeiliche Kriminalstatistik, 1971: 42). While guestworkers were subjected to ‘subordinated inclusion’ in the labour market, this did not primarily occur through the instruments and tools of the criminal justice system, or through a process of ‘illegalisation’.

¹⁶ A ‘suspect’ is an individual suspected by police of having committed a crime when enough evidence is available to pass the case to the public prosecutor's office for further decision making. Since 1984, police statistics count suspects only once. Earlier, a suspect was counted separately each time there were grounds to pass the case to the public prosecutor (Albrecht, 1997: 50).

¹⁷ While the proportion of foreign nationals among police suspects rose quickly (from 1.7 per cent of all suspects in 1953 to 10.7 per cent in 1971, see the Polizeiliche Kriminalstatistik), this spoke more to a steep increase in the foreign population throughout the guest worker-period than the intensive criminalisation of foreign nationals. Foreign nationals were slightly overrepresented in the police statistics in 1970, comprising 5.2 per cent of the general population and 8.3 per cent of the suspect population. However, it should be noted that the general population data used in German police statistics does not take tourists and illegal residents into account. Nor does it standardise for the overrepresentation of young men (the group most likely to commit crime) in the foreigner population. These issues beset all the following calculations on foreign nationals. Taking these factors into account, the overrepresentation of foreign nationals would have been negligible during the early 1970s.

The Anwerbstopp (1972-1989)

The oil crisis, ensuing recession and fear of disorder from an increasingly politicized resident foreign population (Mehrlaender, 1979: 151) provided the context for a moratorium on the recruitment of all foreign workers from non-EC countries (Castles, 1985; Martin and Miller, 2001). The following year, the Federal Ministry of Labour was ordered to deny work permits to all non-EC citizens who already resided in Germany but who applied for a permit for the first time. Bavaria tried to eliminate any possibility of extending the residence permit beyond five years (Dohse, 1985: 304).

Criminal law also reflected the desire to re-border Germany. Employer sanctions were introduced for the illegal employment of foreigners in 1972 and penalties repeatedly increased throughout the next 20 years (Martin and Miller, 2001). This was done with the full support of the unions and employer associations, who wanted to protect existing businesses from low-wage competition.¹⁸ While many offences (vagrancy, begging, homelessness) were decriminalized in 1975 (Darby, 1976), immigration offences were upgraded to ‘criminal misdemeanors’ (Vergehen).

These developments fit with neoliberal-materialist analyses of immigration policy, which argue that economic insecurity provided the context for an increasingly restrictive attitude towards non-Western foreigners across Europe from the 1970s onwards (De

¹⁸ As explained further in the following chapter, this was a policy preference that is concomitant with coordinated market economies.

Giorgi, 2006; De Giorgi, 2010). However, again, the situation was more complex than first appears. The desire to reduce the foreign population was balanced by the moral consideration of the duty that the German government owed to the workers it had recruited. A 1973 paper produced by the Federal Ministry of Labour argued that: ‘on the basis of social and humanitarian considerations, the federal government refuses to terminate forcibly, with bureaucratic intervention, the residence of foreign workers at the culmination of a given period. Rather, the legal status should be improved with longer residence.’¹⁹ To this end, a 1978 federal administrative guideline (a Verfestigungsregel or ‘Stabilization Statute’) made it easier to obtain an unlimited residence permit - which meant foreigners could only be expelled on the basis of serious criminal involvement, rather than unemployment or social assistance receipt - for former guestworkers with at least eight years’ of residence (Dohse, 1985: 351). In turn, an ever-expanding number of foreigners gained the security of the unlimited residence permit simply because they had been in Germany so many years. Later, political attempts to introduce hardline immigration legislation – for instance, the proposal of a new *Ausländergesetz* in 1983, which attempted to ban the immigration of children who were over six years – were controversial enough to threaten the unity of the then Conservative-Liberal coalition government (O'Brien, 1988: 120).

The power of successive governments to restrict immigration was also limited by the Constitution. Two landmark cases before the Constitutional Court restricted the state’s

¹⁹ ‘Investigation into the Employment of foreign workers on the national territory, their families and their living situation’ (‘Repräsentativuntersuchung über die Beschäftigung ausländischer Arbeitnehmer im Bundesgebiet und ihre Familien und Wohnverhältnisse’), Bundesanstalt für Arbeit, (1973), Nuremberg, reported in O’Brien 1988:122-133

ability to deport foreigners, or refuse to renew their residence permits (Joppke 1999: 72-73).²⁰ Legislation regarding the deportation of family members was a little more complex because it did not involve the rights of established residents but the initial grant of new residence rights. However, here, too, the Constitutional Court determined that Article 6 of the Basic Law, which mandates that the state give ‘special protection’ to marriage and the family, protected family members from deportation to some degree.²¹

Constitutional safeguards played an even greater role in the management of asylum seekers. Until the mid-1970s, asylum seeking was not a particularly controversial aspect of German immigration policy. Partially, this was due to the small number of applicants, averaging only around 5,000 a year in the 1960s (Ellermann, 2005). Integration into German society was facilitated by quick absorption into the post-war economy. Further, the political imperatives of the Cold War ensured a lenient approach to asylum seekers from the East Bloc, who made up 90 per cent of all asylum applicants during this period.²²

²⁰ In the ‘Arab case’ (1973) (Bundesverfassungsgericht (Constitutional Court) Decision of 18 July 1973, 1 155/73), the Federal Constitutional Court ruled that the deportation of two Palestinian student on the basis of their affiliation with a group that was suspected of having contact with the terrorists contravened the ‘principle of proportionality,’ which requires that the interests of the public should be carefully weighed against restrictions on the liberty of the individuals concerned – including foreigners. In the ‘Indian case’ (1977) (Bundesverfassungsgericht (Constitutional Court) Decision of the 26 September 1 1978/525/77) the Federal Constitutional Court held that prior renewals of residence permit had created a constitutionally protected ‘reliance interest,’ resulting in the integration of the claimant into German society and his alienation from his home state. The Courts decided that right of the guest-worker to stay in the country could not be ‘overridden by the slogan that the Federal Republic of Germany was not a country of immigration’ (Neuman 1990:49).

²¹ Bundesverfassungsgericht (Constitutional Court) Decision of 12 May 1987, 1226/83, 101, 313/84

²² For instance, in 1966, the Federal Conference of Interior ministers decided that refugees from the Eastern Bloc (with the exception of Yugoslavia) were not to be deported regardless of the outcome of their asylum hearings (Höfling-Semnar, 1995).

However, asylum seeking became increasingly controversial in the 1970s for a number of reasons. The number of asylum seeker applications increased rapidly, from 5,600 applications in 1973 to 108,000 in 1980 (BAMF, 2013: 11). The arrival of new asylum seekers coincided with ever-rising unemployment figures. The other aspect was the changing national composition of asylum seekers. Fewer and fewer were East Europeans, whose arrival in Germany was welcome on the basis of the Cold War. Instead, new asylum seekers came from all over the world (König 2000), including many from Turkey. As workers could no longer migrate along labour immigration routes, they found other avenues for entering and remaining in Germany (Alienkoff 1983:197). Germans were increasingly disdainful of what was seen as 'bogus' asylum seeking.

While the government faced pressure to reform the asylum law, it was limited in what it could do. Unlike other countries, where the right to grant asylum was conceptualized as the right of the state, the right of asylum in Germany was defined in the Constitution as the right of the persecuted individual to be held against the receiving state (Art. 16). This meant that every non-national claiming to be persecuted enjoyed the right of entry to Germany (Joppke, 1997: 273-274). As constitutional law, any amendment would require cross-party consensus. Further, the authors of the Constitution, many of whom lived in exile during the Nazi regime, had intentionally formulated the law in this manner - both as an act of redemption and as a way of limiting the power of the executive following the totalitarian experience of the Nazi State (Bosswick, 2000). Consequently, it was taboo to consider reforming Article 16.

Instead, the right-wing, CDU/CSU Government introduced a social deterrence regime, characterized by herding asylum seekers into camps, providing in-kind benefits only and imposing work bans. Following asylum seekers' arrival, the period of time for which they were not allowed to work increased from two to five years in 1987. Facilitation was increasingly conceptualized as an issue of organised crime (Guild and Minderhoud 2006)²³ and criminal offences were introduced for asylum seekers and 'tolerated'²⁴ migrants who repeatedly infringed residence, accommodation or general restrictions (S. 85 Asylverfahrensgesetz 1982). Like early forms of Poor Law administration, these new restrictions were designed to ensure that no single local municipality was responsible for a disproportionate share of a largely destitute population. However, unlike the situation that had confronted vagrants a century before, asylum seekers were not generally allowed to work (Joppke, 1999). Work bans and the criminalisation of illegal foreign work spoke to the desire to reserve German jobs for German nationals during a period of high unemployment, as well as the desire to prevent 'bogus asylum seekers' (Scheinasylantan) arriving for economic, rather than political, reasons.

²³ Today there are offences for giving or using false information to obtain a permit for oneself or another which will be used for the purposes of illegal entry or residence (S. 95. 2 Residence Act); smuggling (S. 96); smuggling of foreigners resulting in death, for gain and as organized bands (S. 97); encouragement of fraudulent application for asylum (S. 84 Asylum Procedure Law) and commercial and organized encouragement to fraudulent application for asylum (S. 84a). Furthermore, from the early 1990s onwards, the offence of assisting illegal entry or residence has developed by combining immigration penalties with the provisions listed in S. 26 and S.27 of the Criminal Code, under which any person who intentionally 'induces' or 'assists' an unlawful act becomes liable for the same penalty as the one assigned to the perpetrator.

²⁴ In Germany, asylum seekers whose application is rejected are granted the toleration status – a so-called 'Duldung' - if they cannot be deported for humanitarian or other reasons.

Finally, the Asylum Procedure Law 1982 introduced a number of amendments that would make it harder to achieve refugee status. First, it introduced the notion of a ‘manifestly unfounded’ asylum claim (S. 30), which attracted fewer rights of appeal. Second, refugee status would only be awarded if the asylum seeker could prove a narrow concept of objective persecution, as opposed to the international and subjective standard of ‘well-founded fear’ (Joppke, 1999: 89). Asylum seekers now had to prove clear ‘intention’ of persecution on the part of the prosecutor and that the act of persecution was targeted at one of their ‘inalienable attributes’ (opinion, religion, race, nationality or membership of a particular group).²⁵ Consequently, the vast majority (c. 95 per cent) of asylum seekers did not gain refugee status (Joppke 1990: 90).

Nonetheless, once an asylum applicant arrived on national territory, the protective review procedures mandated by Art. 19 of the Constitution - the ‘legal remedies’ clause - essentially guaranteed that s/he could stay. Indeed, 60-70 per cent of failed refugees were granted de facto refugee status (Kurthen, 1995) and only 1-2 per cent of denied asylum seekers were eventually deported (Joppke: 1990: 90). Thus, despite the rapidly rising number of failed asylum seekers, the number of deportations stayed constant from 1977 until 1988, oscillating around 10,000 per year.²⁶ Commenting on the failure of seven asylum reforms since 1978, Burkhardt Hirsh (FDP) said, ‘in the end, nothing is achieved if after a final legal decision, no consequent deportation follows’ (Der

²⁵ The Asylum Procedure Law 1982 also gave the border police the right to deny entry if the asylum seeker had already found more than temporary protection in another country; and gave them the right to refuse to forward a claim to the Federal Office for consideration – a decision that immediately implied that foreigners were under the duty to leave the country (Durieux, 1984).

²⁶ Further, the vast majority of deportees were for immigration violations and criminal offences, rather than asylum cases (although this increased from around 5 per cent -24 per cent in 1989) (see Ellerman 2005:21).

Spiegel 1990 in Joppke 1999:90).²⁷ Ultimately, constitutional safeguards prevented the government from implementing more restrictive immigration policies.

They did not, however, prevent the increasing representation of foreign nationals in criminal justice suspect statistics (see Fig. 1). By the early 1980s, foreigners were overrepresented in German prison for the first time in recorded history, although differences in the age and gender structure of the foreign and German population would explain much of this difference. Notably, foreign nationals were less overrepresented as a population further along in the criminal justice process. Prosecutors were (and continue to be) more likely to dismiss cases of immigrant offences because of a lack of evidence or because of the minor guilt of the offender. These exemptions provide a partial counterweight against the over-policing of foreign nationals (Albrecht 1997).

Year	Prison overrepresentation	Police overrepresentation
1975	1.0	2.0
1976	0.9	1.8
1977	0.9	1.8
1978	0.9	1.8
1979	0.9	1.9
1980	1.0	2.0
1981	1.2	2.1
1982	1.4	2.1
1983	1.3	n/a
1984	1.3	2.3
1985	1.3	2.5
1986	1.3	2.5

²⁷ In 1978, Berlin officials managed to deny residence extensions to only 3 per cent of those who requested them. Further, foreigners refused extensions of their permits won 100 percent of their appeal cases in the courts (Spies, 1982).

1987	1.5	2.9
1988	1.4	2.9

Fig. 1 Overrepresentation of foreign nationals in German criminal justice system 1975-1989. Prison statistics, source: *Strafvollzugstatistiken*; police statistics, source: *Polizeiliche Kriminalstatistiken*

The desire to re-border Germany - and the criminalisation of immigration offences - was reflected in the increasing numbers of foreign nationals who were suspected of criminal immigration offences. By 1989, 24 per cent of foreigners in the police statistics were suspected of offences against the Foreigners- and Asylum Procedure Law and a further 7.5 per cent for document offences (Polizeiliche Kriminalstatistik, 1989). However, most immigration crimes did not, however, translate into prison sentences (own calculations, Strafverfolgungsstatistik, 1975-2010).

Instead, rising prison rates among the foreign population spoke to their involvement in other forms of crime. For instance, Moroccan, Colombian, Gambian and Senegalese groups were almost exclusively involved in drug crimes throughout the 1980s (Albrecht 1997:61-62). Turkish men exhibited more or less ‘normal’ offence patterns when compared to German nationals, with the exception of their disproportionate representation in violent and drug crimes (Albrecht 1997: 61). The available prison statistics do not allow differentiation by nationality and criminal offence. However, it is likely that the increasing bifurcation of the German criminal justice system during the 1980s - between longer sentences for drugs, theft and violent crimes, and a radically lower custody rate for crimes such as traffic offences that had previously attracted short-term sentences (Snacken and Beyens, 1994) – had a disproportionate effect on prison rates of foreigners of Turkish, Moroccan, Colombian, Gambian and Senegalese nationalities.

In turn, academic attention within Germany turned to the fact that an ever-increasing number of foreign nationals in the prison system were second-generation Turkish immigrants. A Marxian analysis of the overrepresentation of the second-generation in the criminal justice system was offered by Mansel (1988), who argued that second- and third-generation ‘foreigners’ were no longer willing to accept the poor conditions of employment that their parents had experienced because they had been educated in Germany. Instead, the descendants of the guestworker wanted to achieve the consumption success to which their German peers also aspired. However, given their socio-economic marginalisation in society, mainstream methods of achieving success were blocked to

them. Instead, second-generation foreigners resorted to gang activity. In this context, the criminalisation of second-generation foreigners represented an attempt by the German state to discipline them into accepting the low-quality employment their parents had abided. Further, criminalisation played a central role in legitimising this groups' labour market precarity, through constituting them as 'low-value' individuals.

This account applies many of the analyses contained in the neoliberal-materialist analysis. However, the extent to which policies of criminalisation were functional to the economy in the ways described by Mansel - or indeed, De Giorgi's (2010) analysis - is challenged by the high unemployment rates Germany experienced in the 1980s. The introduction of work bans and the criminalisation of illegal foreign work imply that the German government wanted to limit the immigrants' entry into an already swollen labour market, rather than encourage them into work. In turn, this policy preference can be explained by the fact that strong institutional protections - concomitant with Germany's position as a coordinated market economy (Soskice, 1999) - meant that precarious, low-wage employment did not proliferate during the 1980s. Despite the election of a Conservative-Liberal government, who expressly aimed at increasing flexibility within the labour market, there were, in fact, fewer opportunities during this time period for the types of unskilled and semiskilled jobs guestworkers had taken in the 1950s and 1960s. In turn, while employment rates had been higher among guestworkers than among workers,

by the 1980s, unemployment rates were higher among male foreign workers than the indigenous workforce (Jones, 1994).²⁸

The exclusion of immigrants and their descendants from the regular labour market does not necessarily undermine the neoliberal-materialist analysis, which also discusses ‘insertion...in the lowest regions of the illegal economies’ (De Giorgi 2010: 160; see also Melossi 2003; 2012; Palidda 2009). Empirical observations support this analysis: restrictions on the employment of asylum seekers in Germany in early 1980s led to an underground labour market for people awaiting recognition of their refugee status (Aleinkoff, 1983). However, it is also worth noting that resources for labour enforcement mushroomed during this period. By the early 1990s, ‘Germany probably [spent] more to prevent illegal foreign employment than any other country’ (Martin and Miller, 2001: 51). In this context, it would be difficult to argue that enforcement was a diversionary tactic, designed to obfuscate the siphoning of foreign nationals into precarious employment in illegal economies. Instead, there was a concerted effort by the government - under pressure from trade unions and employer associations - to protect the existing coordinated market economy.

Finally, the neoliberal-materialist analysis does not take the particular construction of German nationality into account and the effect this had on the representation of the children of guestworkers as criminals. As above, German nationalism preceded the

²⁸ In addition, an increasing number of the foreign workforce worked in high-skilled occupations in the late 1980s (Schuck and Münz, 1998: 91).

political organisation of Germany as a state and was rooted in the concept of ethno-cultural and linguistic belonging (Brubaker 1992:1-6). Thus, while temporary labour immigration was acceptable - Poles in the late 18th century, guestworkers in the 1960s - the increasing immigration and settlement of people from 'non-Western' cultures was conceptualized as a threat to German nationhood. A discomfort with cultural pluralism was evident in debates on the headscarf, which were understood as a symbol of the failure of Muslims to integrate in German society (Mandel, 1989: 38). The delinquency of the children of Turkish guestworkers was widely discussed in terms of the conflict between Germany and the violent, patriarchal and traditional Islam (Huebner, 1982).²⁹

In sum, the attempt to 're-border'³⁰ (De Giorgi 2010:147) Germany spoke to the increasingly precarious economic situation, under which the labour power foreign nationals was no longer desirable. Contrary to the materialist analysis, the closure of the German economy towards foreign nationals – and the intensification of selectively criminalising pressures towards the settled immigrant population³¹ - spoke not to its transformation into a liberal market economy but to the protectionist impulses of the German coordinated market economy. This tendency to criminalise and exclude foreigners was only augmented by a national self-conception, under which multiculturalism was conceptualized as an intrinsic threat to German cultural security. Thus, despite the fact that re-bordering coincided with high unemployment and the

²⁹ As a form of protest against German police harassment, a group of Turkish stage actors dressed in Nazi (SS) uniforms asked people walking in the streets of Istanbul to show their identity cards (Kadioğlu, 1996: 177).

³⁰ This term implies increasingly restrictive immigration policies.

³¹ The increasing overrepresentation of foreign nationals in Germany in prison happened at the same time as the German prison population decreased by 15 per cent between 1983 and 1990 – a development that spoke to significant declines in the use of remand for young people and an increase in the use of diversionary tactics for juvenile offenders (Graham, 1990).

election of a Conservative Chancellor committed to increasing flexibility in the labour market (Grande, 1987), immigration policy during the 1980s bore the earmarks of an earlier period of economic accumulation, as well as the continuing stranglehold of descent-based citizenship.

Reunification (1990-2000)

Germany was severely taxed by the unification process. The transition from a socialist to a capitalist economy in East Germany was ‘economic bloodletting on such a vast scale’ (Burda and Hunt, 2001: 1): the Gross Domestic Product in the region declined by 30 per cent and unemployment rose from 0 per cent to 15 per cent from 1989 to 1992.³² Reunification also meant ‘emotional catastrophe’ for those who had supported the old socialist government.³³ Initial jubilation quickly gave way to disillusionment and the renewal of the mutual mistrust that had built up between the two sides of the country over the past 45 years (Krauss and Faas, 1994). For many Germans ‘unity [was] experienced as a loss’ (Borneman, 1998: 109).

At the same time, a series of geo-political events - from the breakdown of the USSR to civil wars in Yugoslavia - triggered increased immigration into Western Europe. In

³² In fact, joblessness in the East rose to 33 per cent if hidden unemployment (early retirement, involuntary part-time work, training schemes for the unemployed, and so on) is included (Burda and Hunt 2001:1).

³³ A good depiction of this found in the tragicomedy *Goodbye Lenin*, which shows one young man’s attempt to prevent his ailing mother – an avid supporter of the socialist regime in East Germany – from finding out about the Reunification.

turn, Germany experienced the biggest in-flow of immigration in its history. Because of the aforementioned constitutional safeguards protecting the right of asylum seekers to seek asylum, Germany took in 430,191 asylum applicants in 1992 (Kanstroom, 1993: 163): more than 60 per cent of Western Europe's entire population of asylum seekers (ibid:158). Further, Germany also accepted the immigration of around 1.5 million Aussiedler: people of German heritage who had been trapped behind the Iron Curtain following the Second World War. Taken together, the Federal Republic had to absorb around three million new immigrants between 1989 and 1990 (Joppke, 1999: 91).

Immigration and asylum issues rose to the top of the political agenda. Some of the responses that the government took were 'welcoming' in character, including a number of regularisation programmes (Baldwin-Edwards and Kraler, 2009: 287-288) and a liberalisation of the naturalisation regime (Pierobon, 2010: 7-8). Nonetheless, the mood was decidedly restrictive. In 1992, after much political wrangling, Germany undertook the monumental step of amending Article 16 of the Constitution, which had guaranteed the right to claim asylum on national territory to all claiming to be persecuted. The insertion of proviso clauses enabled the state to reject two types of asylum-seekers at the border. First, Germany could now refuse asylum seekers arriving through 'safe third countries' and from 'safe countries of origin' without their being able to claim the right of asylum (Fullerton, 2001).³⁴ In addition, 'manifestly unfounded' cases³⁵ - first legislated in the Asylverfahrensgesetz 1982 - would henceforth be considered under a specially

³⁴ Subjecting the latter to quick recognition procedures in extra-territorial airport spaces before deportation.

³⁵ The term 'manifestly unfounded' has a broad definition, including safe countries of origin, contradictory applications or applications where individuals are fleeing because of a general state of war (S. 30 2-3, Asylum Procedure Law 1982).

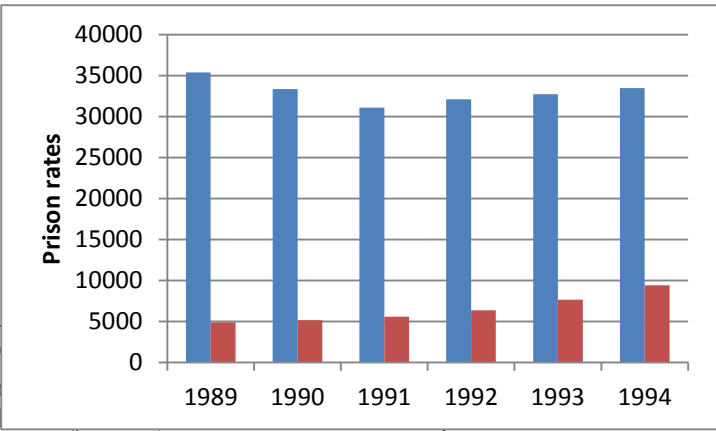
accelerated procedure, in the course of which asylum seekers could be detained for 19 days at a closed facility at the airport (Goodwin-Gill, 2003). Following the conclusion of these proceedings, judicial intervention restraining the execution of expulsion would be permitted only where serious doubts exist as to the measure's legality. In addition, authorities were henceforth allowed to deport asylum seekers while they pursued their limited right to appeal (Fullerton, 2001). Asylum seekers were also downshifted to lower-level benefit schemes under the 'Asylum Seekers Benefits Act' 1993 (Asylbewerberleistungsgesetz).

These amendments were followed by a radical fall in the number of asylum applicants (from over 400,000 in 1994 to 167,000 the following year) and a quick rise in the number of deportations, from around 20,000 in 1992 to over 53,000 in 1994. Importantly, the increase cannot solely be attributed to the rapid increase in the number of asylum applications received, although this did play a substantial role. Instead, it also speaks to the increasing proportion of asylum seekers who were deported – from 5 per cent of all applications to between 15-20 per cent in 1994. Asylum seekers, who comprised 77 per cent of removals in 1994, gradually decreased to around 50 per cent in the late 1990s (Ellerman 2005:210).

Alongside an increasingly restrictive immigration policy, both the number and overrepresentation of foreign nationals in the criminal justice system increased rapidly during the early 1990s (see Fig. 2 and 3). Indeed, the increase in prison inmates in Germany during this period was mainly due to sharp increases in the number of foreign

inmates (Kury, Ferdinand et al., 2008:126).³⁶ This is particularly notable, given the fact that East Germany had very few foreign nationals compared to the West. Reunification would therefore have been expected to depress the number of foreign nationals in the criminal justice system. However, the overrepresentation of foreign nationals in prison was worst in new federal states, where foreigners were overrepresented by a factor of 6.4 (Brandenburg) and 7.3 (Saxony) (Dünkel, undated).

	Prison overrepresentation	Police overrepresentation
1988	1.4	2.9
1989	1.6	3.1
1990	1.9	3.8
1991	2.0	3.6
1992	1.8	3.9
1993	2.1	4.2
1994	2.4	3.7
1995	2.5	3.5
Fig. 2: Foreigners' overrepresentation in prison and police suspect statistics. (Source: Strafvollzugstatistiken; Polizeiliche Kriminal Statistiken)		



Nordrhein-Westfalen, the majority of pre-trial detainees were foreign nationals (Albrecht 1997:72). In turn, those having been sent to pre-trial detention run a greater risk of receiving an unconditional prison sentence than those who stayed outside detention (Dünkel and J. Walter, 2004).

Fig. 3 Prison rates: Germans and foreign nationals (1989-1994), Source: *Strafvollzugstatistiken*

In addition, criminal justice statistics did not differentiate Aussiedler because they usually received German nationality upon arrival. Nonetheless, the available evidence suggests that they too were overrepresented in the criminal justice system (Pfeiffer, Brettfeld et al., 1996; Albrecht, 1997; von Mahs, 2005). In turn, while Aussiedler had been welcome in small numbers throughout the 1980s, Germany was not prepared to accept their mass immigration after the fall of the Iron Curtain. Gradually, the special immigration and settlement rights enjoyed by ethnic Germans were eroded (Dietz, 2006).

Reflecting the increasing number of asylum seekers and ‘illegals’ in the wider population, the number of foreign nationals who were suspected of immigration and document offences increased rapidly. However, foreign nationals were still more likely to be suspected of offences such as theft, fraud, assault and drug crimes than immigration offences (Polizeiliche Kriminalstatistik, 1992), although this depended on nationality. Romanians were twenty times as likely to be suspected of crime as Germans, largely because of immigration and property crimes (Albrecht 1997: 82). This can be seen in the context of continuing tension between the Roma population and the police, who maintained an official file on ‘Combating the Gypsy Nuisance’ (Margalit, 2002: 62).

By contrast, Turkish nationals, who were overrepresented by a factor of approximately eight in police suspect statistics (Polizeiliche Kriminalstatistik, 1993: 107), were more likely to commit violent and drug-related crimes. The early 1990s witnessed a moral panic in Germany about the criminality of foreigners and in particular criminal networks from East Europe, Turkey and Yugoslavia. With the encouragement of the EC, Germany introduced tough penalties for trafficking in the context of organised crime, selling drugs to minors and smuggling significant amounts of drugs (Böllinger, 2004).³⁷

The debate around the criminality of Turkish nationals continued to focus on the failure of the integration project. Influenced by the media panic on this issue, judges passed increasingly harsh sentences for young foreign criminals in the 1990s (Steffen, 1998; Suhling and Schott, 2001). The deportation of young delinquents of Turkish nationality – so called ‘Memhets’ named after the infamous deportation of a 14 year old boy of that name from Munich³⁸ - became a rallying point for right-wing politicians.

More than any other decade prior or since, the 1990s witnessed the emergence of trends described in De Giorgi’s analysis, including the ‘narrowing of channels of legal access’ (2010:158) for asylum seekers, the increased use of deportation and the criminalisation of immigrant populations. However, the extents to which these changes can be attributed to the economic situation are debatable. It is true that the development

³⁷ S. 30a ‘Drugs Law’ (Betäubungsmittelgesetz)

³⁸ ‘Germany deports teenage boy’, 14/11/1998, BBC News, accessible here: <http://news.bbc.co.uk/1/hi/world/europe/214502.stm> (last accessed 06/03/2014)

described above occurred in a period of economic crisis. Further, the fact that the criminalisation of immigrants was more intense in the poorer Eastern Bundesländer fits with the idea that the criminal justice system is subject to the principle of less eligibility, whereby worsening economic conditions mean ever harsher punishments are needed to prevent the lowest socially significant class from exiting the labour market through involvement in criminal activity.

However, again, the neoliberal-materialist analysis does not take into account the significant attempts made by the German government to control illegal foreign employment – an issue discussed in detail in chapter seven. Further, an overriding focus on economic factors ignores the specific nature of the German crisis in the 1990s. Reunification also implied a radical transformation in notions of national belonging (Lyons, 1996: 280-281) and rapid socio-cultural change. Indeed, the most fateful aggravation of societal stress was the allocation of 20 per cent of asylum seekers to the impoverished Eastern Bundesländer (Joppke, 1997: 289), where the local population had little experience with non-Western foreigners. The predictable result was a rapid increase in the membership of far-right parties and a wave of xenophobic violence across East Germany: a highly embarrassing development for a country that had spent much of the past 50 years trying to distance itself from the crimes of the Third Reich (Zick, Wagner et al., 2001: 545). In turn, the increasingly harsh attitude towards foreign nationals represented the state's attempt assert sovereignty in a context where Cold-War considerations no longer took precedence. In this context, foreigners were a 'suitable enemy' (Wacquant 1999) – an easy scapegoat - for absorbing the economic and social tensions unleashed by reunification.

Dual Citizenship and a New Sense of Belonging – Germany is ein Einwanderungsland?
(2000-today)

By the end of the decade, however, things had begun to change. In the summer of 2000, following a decade of high unemployment and lackluster growth (EC, 2002), the Social-Democrat Chancellor Schroeder acknowledged that the recruitment freeze of 1973 was harming Germany's economic competitiveness. In addition, denying citizenship to the descendants of the guestworkers was increasingly framed in terms of the harm this did to integration (Hailbronner, 2010: 3). Out of the old discourse that 'Germany is no immigration land' suddenly rose a new one proclaiming that 'Germany needs immigration' (Deutschland braucht Zuwanderung). An increasingly welcome attitude is indicated in the changing name of the statute governing immigration regulation in Germany, from the Foreigners Act (1990) to the Residence Act 2005 (Davey, 2005).

Since the early 2000s, Germany has launched a series of programmes inviting high-skilled labour immigration. In addition, a number of policies signified the increasingly tolerant attitude of the German population towards the settlement of immigrant populations - including asylum seekers. In 1996, 1999, 2001 and 2005, the Federal Conference of the Interior passed special administrative ordinances that allowed certain categories of rejected asylum seekers to stay. Since 2007, tolerated migrants³⁹ who have lived in Germany have been able to apply for a temporary work permit and, if they work

³⁹ A special immigration category in Germany for failed asylum seekers who cannot be deported.

for a year, a more permanent residence permit. In addition, Bavaria and Saxony are the only states that still require asylum seekers to remain within a small administrative region. Given the high numbers of people previously criminalised for contravening residence restrictions, these amendments are likely to have a big effect on the involvement of foreign nationals in criminal immigration offences.

Despite the fact that the Residence Act 2005 added a number of new criminal and administrative immigration provisions (S.95-98), there has been a steady decrease in the absolute number of criminal immigration offences that the police have detected, which today are lower in number than at any time since the late 1980s.⁴⁰ In addition, the number of deportations has decreased almost every year subsequent to the ‘deportation turn’ of the mid-1990s. This signals a return to the deportation levels of the late 1980s, with around 11,500 deportations carried out in 2011.⁴¹

A major factor playing into these developments is the sharp fall in the number of irregular residents since East Europeans gained the right of residence. This occurred as part of the accession of A8 countries in 2008 and Romania and Bulgaria in 2011 in the EU. The changing boundary of the EU - and especially, the inclusion of many less economically developed nations - is ignored by the neoliberal-materialist analysis. Further, focusing on the declining number of irregular immigrants ignores the fact that

⁴⁰ Similarly, the Finanzkontrolle Schwarzarbeit – the unit responsible for enforcing against illegal work – recorded a mere 15,074 citations for illegal foreign work (Email correspondence, FKS, 10/09/2012), compared to over 80,000 in the mid-1990s (Martin 2001:21).

⁴¹ ‘Deportations and Deportations of people who have illegally entered the country within six months of their entering the federal territory’ (‘Abschiebungen und Zurückschiebungen seit 2000’), accessible here: http://www.auslaender-statistik.de/bund/abschi_2.htm (last accessed 13/05/2014).

Germany maintains a considerable population of deportable irregular immigrants (BAMF, 2012: 102). In fact, deportation continues to decrease despite rapidly rising numbers of asylum seekers since 2007, the majority of which have been refused the right to stay. In this context, the falling number of deportations may represent a shift in attitude by enforcement agencies.

Perhaps the most significant developments in German immigration policy were changes to the naturalisation law. The resentment directed at Aussiedler -most of whom spoke Russian rather than German and 'were imbued with Soviet dispositions' (Mandel, 1989: 5) - undermined the notion of a descent-based community, already discredited by association with National Socialism. At the same time, the claims of a now long-settled foreign population (von Loeffelholz, 2002) were becoming harder to ignore.⁴² From 2000, children born to non-German parents would gain German citizenship at birth if at least one parent had a permanent residence permit (and had this status for at least three years) and the parent was residing in Germany for at least eight years⁴³. Recently the so-called Optionsmodell ('option model')⁴⁴ was abolished. As Chancellor Merkel says, the changes in the naturalisation law are 'a clear signal that we want these young people and they're part of our society.'⁴⁵

⁴² 19 per cent of the German population have a migrant background, see Krobisch and Wiest (2011: 3).

⁴³ This policy applied retrospectively to foreign nationals born on German soil since 1990.

⁴⁴ Whereby young people who gained German citizenship in this way had to choose between their German and foreign citizenship by their 23rd birthday (S. 29 'Citizenship Law', Staatsangehörigkeitsgesetzes).

⁴⁵ 'Germany Opens up to Dual Citizenship. Deal Marks Compromise for Chancellor Angela Merkel', 27/11/2013, The Wall Street Journal: Europe News, accessible here: <http://online.wsj.com/news/articles/SB10001424052702303332904579223591691471628> (last accessed 21/05/2014)

At the same time, German debates continue to focus heavily on issues surrounding the socio-cultural integration of Muslims, over and above economic considerations (Habermas, 2010; Godenau, Vogel et al., 2012). The rallying cry of ‘integration’ has provided the ideological context for the introduction of restrictions on non-European family immigration. Thus, the introduction of pre-entry language tests and income requirements for spouses and adult children has been portrayed as a sort of ‘preventive integration policy’, ensuring that newly arriving migrants are not socio-economically marginalised. Further, the introduction of a minimum age for non-European spouses was ‘meant to avoid the situation where Turks, in particular, who hold traditional values and who are living here, bring very young wives uninfluenced by Western values from their country of origin to Germany’ (Seveker and Walter, 2010: 15). In addition, the required duration of marriage before attaining an independent right of residence was reduced from four years to two - a measure which intended to help potential victims of forced marriage leave their spouses with no fear of deportation. Absolute numbers of applications as well as residence permits granted on grounds of family reunification have dropped by more than half in Germany since the mid-2000s (Schweitzer, 2014: 2).

The criminal justice system continues to show signs of the exclusion of foreigners in German society. On the one hand, the overrepresentation of foreign nationals in the police suspect population for all crimes has decreased to around two-and-a-half times their representation in the wider population: just over the level seen during the later guestworker period and considerably less than was the case in the 1990s. However, this is largely because of the decrease in immigration offences. In fact, foreign nationals represent 22.8 per cent of the prison population (Strafvollzugstatistiken, 2012) – around

two and a half times their representation in the total population and only slightly less than in the late 1990s. Although German prison statistics do not delineate by nationality, suspect statistics suggest that Turkish, Serbian, Romanian, Italian and Polish nationals comprise the majority of foreign criminals (Polizeiliche Kriminalstatistik, 2012: 134), while the most overrepresented populations are the Romanians, Serbians and Iraqis. Further, prison statistics do not include people with a migrant background who have naturalised. Studies indicate that people with Turkish (Diehl and Blohm, 2003), Polish, Yugoslavian, Russian and East European backgrounds are highly overrepresented in prison (Pfeiffer, Kleimann et al., 2005).

In addition, the resident Turkish population has come under greater scrutiny following the emergence of the threat of international jihadist terrorism with the 11 September 2001 attacks in the United States. Subsequently, German police regularly carried out mass identity checks outside mosques, frequently after Friday prayers when the largest numbers of worshippers were present (De Schutter and Ringelheim 2008). Further, in an attempt to identify ‘sleepers’ of terrorist organisations, the German authorities decided to resort to the so-called Rasterfahndung method, under which universities, employers, health and social insurance agencies were required to provide the police with the personal records of all persons presenting suspect features (i.e. male, Muslim, national of or born in one of 26 listed countries with a predominantly Muslim population, a current or former student and legally resident in Germany). A renewed concern with the security risk of foreigners is evident in the addition of new mandatory grounds for deportation (S. 54a Residence Act 2005). There have subsequently been some high-profile cases of expulsion of members of the Milli Görüş Turkish diaspora

organisation. However, deportation on the basis of security risk or involvement in terrorism is a highly residual category in overall deportation.

While immigration policy has become more inclusionary in some respects, this has not prevented the solidifying of a criminalised - and securitised - foreign and ethnic minority underclass. This process has occurred alongside the neoliberalisation of certain sectors of the German labour market - a process that picked up pace with the Hartz IV reforms in 2004 (Seeleib-Kaiser and Fleckenstein, 2007). While 'core' employment is still protected by the rules and regulations that typify a coordinated market economy, for an 'outsider' the labour market is increasingly precarious. The same division is manifest in the welfare state. In turn, while the concentration of first-generation immigrants in poor-quality employment might be explicable by factors related to the migratory process (including a lack of language skills, problems recognising foreign qualifications, and limitations on employment as stated on their visa), the fact that second-generation immigrants from Turkey and Central-Eastern Europe are even more vulnerable to low-wage work than their parents (Aldashev, Gernandt et al., 2008) indicates the emergence of a ethnic minority population for whom the benefits of German citizenship have not translated into their inclusion. Thus, the institutionalisation of the insider/outsider division within German citizenship facilitates the emergence of a national underclass. Much like the African-Americans in the USA discussed in Wacquant's analysis (2009), it is not the threat of deportation but of criminalisation that encourages this groups' insertion into the lowest echelons of the labour market. This issue will be discussed further in the chapters' conclusion.

The UK

Early Immigration Controls

Much like Germany, the early use of criminal law in mobility control in the UK was directed at fellow Brits. Fears of the crime threat and welfare burden posed by rural immigration to the cities motivated the introduction of capital punishment for vagrants who could not be sent back home (Beier, 1985: 158-64). By the 19th century, vagrants were no longer considered criminals for moving from their home towns - a behavior that served the needs of the industrialising economy. Thus, instead of expulsion back to their place of birth, vagrants were increasingly confined to workhouses and 'hospitals', where they were used as free labour (Neocleous, 2000).

Criminal offences directed at the control of foreign nationals have been a key feature of statutory immigration law since the late 1700s (Aliverti, 2013: 12). For instance, the Aliens Act of 1793 – inspired by the 'danger [that] may arise to the public tranquility (sic)' from the entry of substantial numbers of refugees fleeing the French Revolution - contained a number of criminal sanctions regarding foreigners' entry, registration duties, residence and the obligation to carry a passport (Horspool, 2012). Legislation throughout the 18th and 19th century continued the tradition of criminalising immigration offences, although there is little information about the enforcement of these offences throughout this period (Aliverti, 2013: 14).

The 19th century in the UK was, however, generally a time of lax controls over foreigners (Thornberry, 1963; Dummet and Nichol, 1990: 415). From 1825 to 1905 no alien was expelled, or prevented from entering the UK (Dietz, 1973). The open-door policy towards foreign nationals spoke to Britain's self-conception as a liberal state, morally superior to her continental neighbours (Cesarani, 1992: 27) and a haven for those fleeing persecution.

A slightly different situation concerned the Irish, who made up 3.5 per cent of the population of England in 1861 (Swift, 2002: 124). The Irish were, in fact, citizens of what was then called the 'United Kingdom of Great Britain and Ireland'. However, in much of the popular and 'scientific' literature, the Irish were seen to be of inferior stock: 'white chimpanzees', as Charles Kingsley memorably called them (see Bhreathnach-Lynch, 1997: 245). The great majority of Irish men 'entered the lowliest and less healthy of urban occupations' (ibid), while the women concentrated in domestic work (Swift, 2006: 1-2). Local authorities reacted to the Irish pauper population with deportation under Poor Law provisions.⁴⁶ Further, the Irish born were three times more likely to face prosecution than their English neighbours and five times more likely to be committed to prison (ibid, 2006: 15). Thus, they were subject to similar processes of criminalisation and labour market segmentation as De Giorgi (2010) and Wacquant (1999) describe for non-Western foreigners in Europe today.

⁴⁶ 'Removal of Irish Paupers', HC Deb 24 February 1854 vol 130 cc1256-64, accessible at: <http://hansard.millbanksystems.com/commons/1854/feb/24/removal-of-irish-paupers> (last accessed 23/03/2014)

Following the arrival of around 150,000 destitute Russia Jews between 1885 and 1902 (Cohen, 2003; Feldman, 2003) - many of who moved into the already dense slums of East London - the Aliens Act 1905 introduced the UK's first system of border controls since the reign of Elizabeth 1. The Aliens Act 1905 specified criminal penalties for a number of immigration offences including the unauthorised landing of an immigrant (S. 1 (5)); making a false statement or representation to an immigration officer, medical officer, immigration board or to the Secretary of State (S. 7 (4)) and being found in the UK in contravention of an expulsion order (S. 3 (2)). 'Masters of ship' were also liable to criminal penalty where they participated in illegal entry crimes (S.1 (5); S. 3 (2)): an early example of the participatory liability offences that today form an integral part of the UK's criminal immigration system.

While people 'fleeing religious persecution' were to be given the right to land, the inspectors of the newly founded 'Aliens Inspectorate' were given powers to deny entry to those considered 'undesirable' (Barnett, 2002; Arnold, 2010; Clayton, 2010) - defined, in part, as people without the means to support themselves. In practice, the law was easily evaded as permission to land was given verbally and few were denied entry. The Aliens Act 1905 also gave the Secretary of State the right to issue expulsion orders against foreigners where this was recommended by the courts following a criminal conviction, the foreigner was known to have received charity or lacked means or had lived in unsanitary conditions (Cohen 2003). Several hundred German Gypsies were deported between 1904 and 1906 against the background of intense official and public hostility towards 'undesirable' and destitute minorities (Holmes, 1991; Panayi, 1994: 106).

Thus, the very beginning of modern immigration control was motivated by a desire to control the entry of the foreign poor (Schuster, 2005). At the same time, it is unlikely that the new controls were primarily motivated by the desire of the ruling class to subjugate immigrant labour. This was not a legislation popular among the political class (Pellew, 1989: 370), who were largely beholden to the notion of free movement as an integral part of the freedom of trade (Wray, 2006: 310). In particular ‘the fact that it took a quarter of a century for controls to be enacted [shows] that there was a significant ideological battle to be won [among the political elite]’ (Cohen, Humphries et al., 2002: 52). Furthermore, Edwardian Britain was relatively prosperous, with low unemployment rates. In these conditions, a liberal immigration policy was, in fact, desirable. This economic situation contrasts with the increasingly insecure economic conditions to which the neoliberal-materialist analysis relates punitive developments in contemporary immigration policy.

Instead, the Aliens Act 1905 responded to the demands of the increasingly political active working class, represented by the trade unions and xenophobic pressure groups such as the British Brothers League. Their opposition to the immigration of East European Jews was discussed in terms of the argument that destitute immigrants would undercut native workers. Further, the 1890s witnessed a moral panic about ‘problem of Jewish juvenile delinquency’ in East London (Granot-Bein, 2010). Finally, popular anti-Semitism was also a factor in the politics of the Aliens Act 1905 (Hayes, Humphries et al., 2004). In turn, the ambivalence of the political class towards restrictiveness was

expressed in the inclusion of appeal rights and generous provisions for people seeking asylum.

Wartime Immigration Offences (1914-1945)

The next development in immigration policy was motivated by security concerns rather than economic expediency. Immigration controls became much more rigorous due to the First World War. One day after the passage of the Defence of the Realm Act 1914, which provided the government flexible powers for the control and surveillance of British citizens, the Aliens Restriction Act 1914 provided the Secretary of State with wide-ranging powers to make regulations concerning the lives of foreign nationals (Macenczak, 2010). The Act was passed amidst growing fears about foreign spies and rising xenophobia (Saunders, 1985). Then-Secretary of State McKenna quickly passed an Order⁴⁷ that no aliens were permitted to enter or leave Britain at will and all had to register at local police stations. Imprisonment 'with or without hard labour for any term not exceeding three months' was available for anyone making false representations for any of the purposes contained in the Act (S. 23).⁴⁸ Finally, the Home Secretary was

⁴⁷ Aliens Restriction (Consolidation) Order 1914

⁴⁸ It is unclear how much criminal sanctions were used in the management of foreign populations during the First World War. One case was widely reported: a German man, who had lived in England for thirty years, was arrested for refusing to register for fear of the negative stigma it would bring his British wife and children, see 'Enemy Aliens: Aldershot Organist Charged,' 27/10/1914, The Times. In any case, the regime was effective: by September 9, 1914, 50,633 Germans and 16,141 Austro-Hungarians had registered with the police (Panayi, 1991: 49).

granted the power to deport foreigners, without appeal, where this was considered ‘conducive to public good’ (Couper and Santamaria 1984).⁴⁹

Between 1914 and 1919, 28,744 ‘enemy’ aliens were repatriated, of whom 23,571 were Germans (Holmes, 1988). In addition, hundreds of thousands of Germans were ‘interned’ in war camps throughout the British Isles (Panayi 2012:44), although, from 1915, the British government released alien enemies who could work. Much like the German example, internees and foreign workers played a vital role in Britain’s wartime economy.⁵⁰

By contrast, 240,000 Belgian refugees were welcomed by the British government in 1914. Belgians benefited (at least, at first) from overwhelming public sympathy (Panayi, 1994). While trade unions were initially worried about the labour market competition implied by immigration, the war-time economy soon assured that everyone who wanted a job could have one. There was international controversy after a German newspaper declared that Belgian refugees in England were working under slave-like conditions in munitions factories. It was true that Belgian workers were restricted in their ability to change employers. However, as a report by the Belgian Department of Records argued, Belgian workmen’s conditions were generally of a decent standard. In particular, the Board of Trade only allowed employers to hire Belgian workers after the employers were examined to see ‘whether he [was] able to offer satisfactory guarantees

⁴⁹ The Home Secretary was also allowed to order the deportation of an alien following criminal conviction, even if a court did not recommend deportation.

⁵⁰ ‘Aliens Enemies’, HL Deb 10 February 1915 vol 18 cc497-505, accessible here: <http://hansard.millbanksystems.com/lords/1915/feb/10/alien-enemies> (last accessed 23/03/2014)

from the point of view of morality, and [would] bind himself to pay the wages required by the English Standard Time Rates of Wages' (World War I Collection, 1917). Belgians who could not work were offered free housing and food. Thus, foreign policy considerations contributed to the differential treatment of immigrants of different nationalities.

The other major development during the First World War that would have a lasting effect on immigrant communities was the inception of criminal sanctions for the improper distribution use of cocaine and opium in 1916.⁵¹ Controls were launched as a response to the moral panic around an emerging underground drug and prostitution scene in Soho, fanned by the transient soldier population, as well as concern about smuggling of cocaine to India and smoking-opium and morphine to the Far-East and the USA. From the very beginning, immigrant populations - in this case, the Chinese community - were associated with the drugs trade and disproportionately represented in prosecution statistics (Berridge, 1978).

Anti-immigrant sentiment carried on after the First World War. The Aliens Restriction (Amendment) Act 1919 extended the powers of the wartime Act of 1914. The primary aim of the Act was to target enemy aliens, obliging them to register with their police, restricting where they could live and facilitating their deportation. The legislation was motivated primarily as a 'sort of testimony of public indignation to the attitude of

⁵¹ Regulation 40B, under the Defence of the Realm Act 1914

Germany and to her conduct during the war.’⁵² In 1919, 19,000 more Germans had been repatriated along with eighty Russians who were expelled for sympathising with the Bolsheviks (Cohen 1994). Among other restrictions,⁵³ the 1919 Act also made it a criminal offence for immigrants to 'promote industrial unrest in any industry in which he has not been bona fide engaged for at least two years immediately preceding in the United Kingdom'(S. 3 (2)). The offence was justified by the fact that industrial unrest ‘would be an invaluable instrument in the hands of our enemies.’⁵⁴ Foreigners who wanted to take part in strikes were invited to naturalise and thereby prove their allegiance to the British crown. Thus, the provision was framed as a security issue. However, it appears likely that the provision was more generally aimed at limiting the strength of the labour movement during a period of economic turmoil and frequent strikes.

Unemployment rose rapidly after the War. The poor economic conditions provided the context for the Aliens Order (1920), which required all alien immigrants to obtain work permits and forbade anyone without the means of supporting themselves the right to enter the country. It also gave immigration officers far-reaching powers to remove any illegal entrants within two months of arrival (Couper and Santamaria, 1984: 438):⁵⁵ the ‘ancestor’ of the present power enjoyed by the UK Border Force to remove illegal

⁵² ‘Aliens restriction bill’, HL Deb 27 November 1919 vol 37 cc435-82, accessible here: http://hansard.millbanksystems.com/lords/1919/nov/27/aliens-restriction-bill#S5LV0037P0_19191127_HOL_3 (last accessed 24/03/2014)

⁵³ Where any person contravened the provisions of the Act they were liable to a fine of up to £100 or a prison sentence of six months. The same punishment was available to any person aiding or abetting or knowingly harbouring ‘any person whom he knows or has reasonable ground for believing to have acted in contravention of this Act’ (S. 13, 2).

⁵⁴ ‘CLAUSE 3.—(Incitement to Sedition, etc.)’, HC Deb 22 October 1919 vol 120 cc152-66, accessible here: http://hansard.millbanksystems.com/commons/1919/oct/22/clause-3-incitement-to-sedition-etc#S5CV0120P0_19191022_HOC_535 (last accessed 24/03/2014)

⁵⁵ Previously, they had only had the power to give directions for the removal of immigrants to whom they refused leave to enter.

entrants. Anti-alienism was expressed through a moral panic around crimes committed by foreigners. Detective Inspector Fitch attributed 50 per cent of crime to the influence of the foreign prostitute, and claimed that ‘prostitution, in some way or other is the basic cause of most murders, is managed by foreign bullies and largely carried on by foreign bullies’ (cited in Slater, 2007: 55). In turn, the Dangerous Drugs Act 1920 - the foundation of modern drug control - was partially motivated towards tackling the Chinese drug market.

The intensity of xenophobia during the interwar period was, however, directed at an ever-decreasing number of foreign nationals. Besides from a steady stream of Irish immigrants, the poor economic conditions in England meant immigration was minimal during the inter-war period. Thus in 1925, only ‘117 aliens [were in prison]... of a total of 9,455 prisoners in England and Wales.’⁵⁶ In addition, deportation was rarely used in the inter-war period (Bloch and Schuster 2006), with a mere 203 ‘aliens’ deported in 1925.⁵⁷ In this context, restrictive immigration policies and the criminalisation of immigrant communities can be seen as a symbolic reaction of a state weakened by war and beleaguered by economic crisis.

Immigration rose once more from the mid-1930s, as increasing numbers of Jewish refugees arrived from the continent. From the beginning, Britain held a consistent line on

⁵⁶ ‘Imprisonment’, HC Deb 14 February 1924 vol 169 c995, accessible here: http://hansard.millbanksystems.com/commons/1924/feb/14/imprisonment#S5CV0169P0_19240214_HOC_133 (last accessed 24/03/2014)

⁵⁷ ‘Deportation’, see HC Deb 12 July 1926 vol 198 c38, accessible here: <http://hansard.millbanksystems.com/commons/1926/jul/12/deportation> (last accessed 13/05/2014)

limiting Jewish immigration (London, 2003: 2) – a policy motivated both by Anti-Semitism and the desire to prevent economic competition.⁵⁸ In particular, refugees were only allowed to work if they either set up their own firm or worked as domestic workers. Further, foreign Jews were not entitled to state assistance, but had to rely on welfare within the community. These policies left them in a highly precarious and exploitable position.

The Second World War saw the reintroduction of controls based on the security threat of foreign nationals. For instance, the Aliens (Movement Restriction) Order 1940 imposed a curfew on enemy aliens. Unlike Germany, criminal penalties were not used in the control of prisoners of war, although internees were kept in prisons in some instances.⁵⁹ Again, Britain institutionalized a policy of detaining Germans - including Jewish refugees, some of whom had already been in concentration camps - in British camps, pending their deportation (Gillman and Gillman, 1980). However, public support for these measures declined after the bombing and sinking of the *Arandora Star*, a boat carrying Italian and German internees and prisoners of war to Canada in 1940 - an incident which resulted in an estimated 700 deaths. Although both the UK and Germany detained and deported foreigners, the scope and intent of the programme under the two authorities was vastly different.

⁵⁸ The British government also refused to allow Jews admission to Palestine, fearing that this would antagonise Arab nationalists in the region and inflame Muslims in British India (Endelman, 2002: 214).

⁵⁹ 'Defence Regulation 18B', HC Deb 21 July 1942 vol 381 cc1426-519, accessible here: http://hansard.millbanksystems.com/commons/1942/jul/21/defence-regulation-18b#S5CV0381P0_19420721_HOC_326 (last accessed 13/05/2014)

The End of the Empire (1948-1971)

A period of relatively open immigration policy followed the Second World War.⁶⁰ As Tory MP Quintin Hogg said, 'we thought that there would be a free trade in citizens.'⁶¹ The number of immigrants increased dramatically after the Second World War: 'whereas, in 1931, we had 268,000 people of foreign birthplaces, in 1958 we had an estimated 800,000 and this does not take account of the coloured population which has been coming in in recent years...' ⁶² The number of deportations dropped to around 100 deportations yearly in the late 1950s (Dietz, 1973).

A liberal attitude towards immigration can be understood in terms of the economic needs of post-war Britain. Like Germany, the UK suffered significant casualties in the war and required a labour force for the reconstruction of its cities. In the UK, labour demand was initially met through a series of schemes recruiting workers from across Europe, mainly from the Ukraine and Poland. Since many of these workers were displaced persons, the programmes were couched in terms of Britain's post-war humanitarian duties (Kay and Miles, 1992). However, a closer look at the details of the programme indicates the role of economic considerations in the recruitment of this

⁶⁰ An exception to this was the compulsory repatriation of around 1,362 Chinese merchant seamen from Liverpool in 1946. Identified as a troublesome population due to their use of opium, the Liverpool authorities were also anxious to secure the use of the housing that the Chinese occupied, see 'Liverpool, summer of 1946, shows why human rights are needed to underpin policy on family immigration', 17/10/2011, Don Flynn, Migrants' Rights Network blog, accessible here: <http://www.migrantsrights.org.uk/blog/2011/10/liverpool-summer-1946-shows-why-human-rights-are-needed-underpin-policy-family-immigrat> (last accessed 21/05/2014)

⁶¹ Parliamentary debates, House of Commons, 27 Feb 1968 V.759 , c. 1262, 107 in Joppke (1999: 107)

⁶² 'Disturbances, Notting Hill (Sentences)', HC Deb 23 February 1960 vol 618 cc331-40, accessible here: http://hansard.millbanksystems.com/commons/1960/feb/23/disturbances-notting-hill-sentences#S5CV0618P0_19600223_HOC_465 (last accessed 13/05/2014)

population. For instance, workers were initially limited to certain occupations and could be deported when they changed employers. In addition, the vast majority of misdemeanours committed by these people were for work related offences - having an 'unsatisfactory working record or industrious conduct' - or contraventions of the Aliens Order 1920 (Tannahill, 1958: 129).⁶³

The colonies provided another major source of new immigration. In 1948, the British Nationality Act was passed in order to establish a new status of British subject, the Citizen of the United Kingdom and Colonies (CUKC). Under this law, if a person could prove that he or she was born within the British Empire, they could claim full nationality rights in Britain, such as the right to settle and work (without restriction) in Britain, and bring their families with them (Nicol and Trust, 1981). This gave almost a quarter of the world's population the right to legally enter Britain. Organisations such as British Transport and the National Health Services set up active recruitment offices in the colonies, although the vast majority of Commonwealth immigrants arrived spontaneously.

To De Giorgi (2007: 115), Britain's liberal admissions policies are an example of a more inclusionary stance towards foreigners. Again, the reality is more complex. The 1948 Act was not specifically aimed at encouraging mass immigration - or at

⁶³ Indeed, involvement in traditional criminal activity was apparently 'very low' among these workers, despite the fears of the British population. Low crime rates were attributed to their race. As Lord Saltoun argued, 'Serbs...Ukrainians or Russians, I have had some traffic with all these people, and they are much more the slow-blooded northern type, much better stocks for us to amalgamate with than almost any others in Europe', see 'Emigration Policy', HL Deb 17 April 1947 vol 146 cc1054-83, accessible here: <http://hansard.millbanksystems.com/lords/1947/apr/17/emigration-policy> (last accessed 11/05/2014)

transforming Britain into a multicultural society. Rather, the objective was constitutional: to standardise the notion of the British subject (Hansen, 2000: 35-36). At the same time, a substantive commitment to an open-door policy towards Commonwealth citizens existed, although this was largely conceived of as white immigration between the UK and Australia, New Zealand and Canada. In addition, an imperial notion of Britain as the 'motherland' and recognition of the contribution of Empire subjects in the military campaigns of the Second World War also encouraged tolerance for 'coloured' immigration from the colonies. Politicians openly expressed support for open immigration, taking 'pride in the fact that a man can say *civis Britannicus sum* whatever his colour may be.'⁶⁴

Nonetheless, even in the immediate post-war period, black migration and settlement was seen as problematic. Throughout the 1950s, successive British governments tried to pressurise the colonial governments into limiting the issue of passports, attempted to intervene in the transport market in order to raise the price of low fare transatlantic passages, and, in Jamaica, issued propaganda about the harsh weather conditions in Britain (Solomos 2004: 44). The possibility that Commonwealth immigrants - who would, upon entry, have the same social rights as British citizens - would become a strain on public finances, played heavily in proposals to restrict immigration.

⁶⁴ Henry Hopkinson, the Minister of State at the Colonial Office, in a House of Commons Debates (1954), reported in Hansen (2000: 251).

In addition, popular depictions also painted foreigners as a potential criminal threat. At this time, the Irish delinquent was a well-established figment of public discourse (Feheney, 1983). In 1961, eight per cent of receptions into English prisons and borstals were of Irish birth - around five times their representation among the general population (Bottoms, 1967: 363). Again, conviction statistics showed that the Irish were involved in a high proportion of public drunkenness, breach of peace and willful damage. More than 60 per cent of deportations in 1963 were of Irish nationals (Russell, 1964: 143).

Irish nationals were far more heavily represented in the criminal justice system than immigrants from the West Indies.⁶⁵ However, ‘assertions of Commonwealth citizens’ criminality tended to become much more emotional than similar discussions about the Irish [and were] indeed part and parcel of many arguments about whether the flow of immigration from these countries should be stopped...’ (Bottoms, 1967: 113). Police readily used dogs against black people and regularly went ‘nigger-hunting’ (Hunte, 1966). Given the disproportionate and violent policing of black communities in the 1960s, it is perhaps surprising that the number of persons from Commonwealth countries who were convicted of offence was less than two times their representation in the general public (Bottoms, 1967) - a negligible amount, considering differences in the age and gender distribution of the migrant population as compared to the native population.

⁶⁵ ‘Prisons and Borstals (Immigrants)’ HC Deb 08 April 1965 vol 710 c95w , accessible here: http://hansard.millbanksystems.com/written_answers/1965/apr/08/prisons-and-borstals-immigrants#S5CV0710P0_19650408_CWA_47 (last accessed 11/05/2014).

Nonetheless, a series of race riots in the late 1950s and the electoral success of overtly racist Peter Griffiths⁶⁶ demonstrated the importance of immigration controls to the political elite and set the stage for the gradual erosion of Commonwealth citizens' special status. The Commonwealth Immigrants Act 1962 extended immigration controls to Commonwealth immigrants who henceforth needed an 'employment voucher' in order to migrate to Britain (Salt and Kitching, 1990). It also allowed the deportation of Commonwealth citizens who had committed a crime worthy of imprisonment and gave immigration officials the power to remove persons refused admission (although initially, only in the first 24 hours after entry). It was envisioned that deportation orders would be relatively rare, used only for confirmed or dangerous criminals. However, between 1962 and 1966, 999 Commonwealth citizens had been deported, compared with 232 'aliens' (Thornberry, 1962: 654).

Immigration controls increasingly targeted black populations (Small and Solomos, 2006): a tradition which continues to this day. While a liberal element to immigration control was introduced with the Immigration Appeals Act 1969, which introduced a two-tier appeals system within the removal and deportation regime (Hepple 1969), the overall tendency was towards increasing restrictiveness. In 1968, the Commonwealth Immigrants Act took away the right of entry of anyone who did not have a parent born in the UK. This aimed at preventing the entry of a 200,000 Kenyan Asians with UK passports, who had become the victims of intense discrimination under the post-colonial government.

⁶⁶ Peter Griffiths was said to have run with the slogan that 'if you want a nigger for a neighbour, vote Labour', see 'Looking back at Race Relations', 23/10/1999, BBC News, accessible here: <http://news.bbc.co.uk/1/hi/482565.stm> (last accessed 21/05/2014).

The Immigration Act 1971 - which forms the basis of today's immigration regime - represented the end of Commonwealth citizens' special immigration rights. The Act introduced the notion that only patrials - persons with a direct personal or ancestral connection with Britain - had the right of abode. As intended, this disproportionately affected 'coloured' people's right to immigrate to the UK. Immigration crimes specified in previous legislation⁶⁷ were subsumed into the new Act, including: illegal entry and entering in breach of deportation orders (S. 24, S. 24 (a)), failing to comply with conditions (S. 26 (f)) and assisting illegal entry and harbouring a person who illegally entered the UK or overstayed (S. 25). Police and immigration officers were given the power to arrest potential offenders without warrant in the case of suspected violations under the Act.

The Immigration Act 1971 also introduced a number of policies facilitating deportation. These included allowing deportation on the basis of 'common good' for Commonwealth citizens (a power that had previously been reserved for aliens), removing time limits for the removal of illegal entrants and taking away the right to an in-country appeal that had been introduced in the Immigration Appeals Act 1969. The fact that Parliament promised that there would be no 'witch hunt' against illegal entrants following the Immigration Act 1971 spoke to continued residual support for a liberal immigration

⁶⁷ The Aliens Restriction Act 1914; the Commonwealth Immigrants Act 1962; The Commonwealth Immigrants Act 1968 and the Immigration Appeals Act 1969.

policy.⁶⁸ However, the number of illegal entrants removed increased from 117 in 1973 to 910 in 1980 (Nicol and Trust, 1981: 5).

These developments denote gradual restrictiveness within immigration policy. It is, however, questionable whether reforms can be attributed to a neoliberalising agenda, as described in the works of De Giorgi (2007). On the one hand, a focus on ‘wives unable to obtain hospital beds in childbirth...children unable to obtain school places’⁶⁹ and competition for housing, spoke to a concern with the social and economic burdens implied by significant immigration. On the other hand, the British economy was generally buoyant in this time period and boasted full employment (although its slow and steady economic growth rates were less remarkable than Germany’s miraculous post-war recovery (Woodward, 1995)). In this context, it was not economically advantageous to restrict immigration. In addition, restrictiveness in immigration policy was not coterminous with neoliberalising reforms in social and economic policy. Throughout the 1960s, successive governments were still broadly committed to an idea of an expansive welfare state and interventionist economic policy, rather than the neoliberal agenda that later came to characterise British politics.

⁶⁸ As Clinton Davis MP said, ‘We believe that this group of people in the normal event should be permitted to remain here provided that they have established themselves and their families and have shown a good work record as useful members of the community’, see ‘Adjournment (Summer)’, HC Deb 19 July 1973 vol 860 cc753-809, accessible here: http://hansard.millbanksystems.com/commons/1973/jul/19/adjournment-summer#S5CV0860P0_19730719_HOC_360 (last accessed 11/05/2014).

⁶⁹ ‘Enoch Powell’s Rivers of Blood speech’, accessible here: <http://www.telegraph.co.uk/comment/3643823/Enoch-Powells-Rivers-of-Blood-speech.html> (last accessed 24/04/2014).

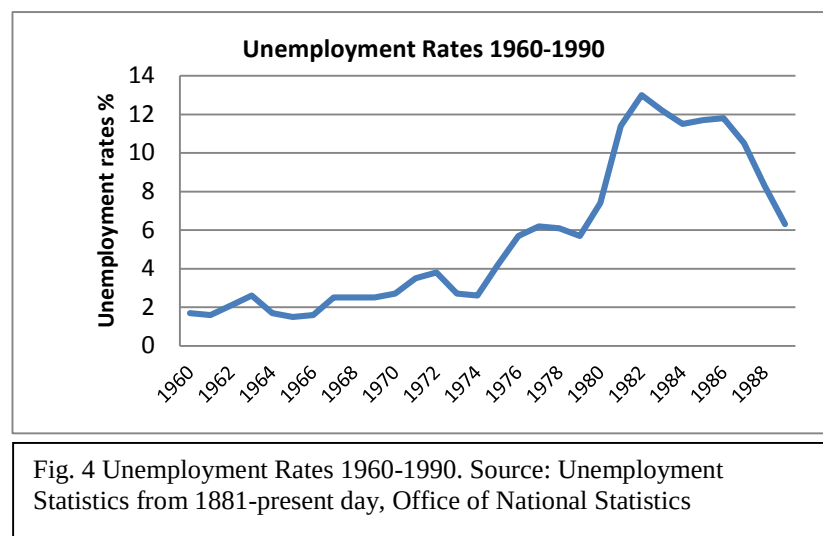
If increasing restrictiveness was not motivated by neoliberalism, what were its causes? On this note, it is important to consider the race element. At the same time that the rights of Commonwealth citizens were being retrenched, the UK made several attempts to join the European Community, finally succeeding in 1973 (Layton-Henry, 1992). From this point on, European workers had the right to enter the UK. Differential policies towards foreigners of different cultures suggest that the retrenchment of Commonwealth citizens' right of entry was at least partially motivated by racial animosity - outside of any specific economic motive. As parliamentary debates surrounding the 1968 reform discuss, restrictions on Commonwealth citizens' right of entry were introduced as a way of tackling the 'racial problems [that] arise quite simply from the arrival in this country of many people of wholly alien cultures'⁷⁰: what Small and Solomos (2006: 247) have called the 'numbers game'. Enoch Powell, too, concentrated less on economic competition and more on the fact that Britons were being made 'strangers in their own country' - recounting, in detail, the story of the old-age pensioner, whose formally 'respectable' street had turned into 'a place of noise and confusion following the settlement of "Negros"'. Thus, it appears that restrictive immigration policy in the British case was motivated more by racial and cultural factors than the desire to constitute foreigners as a precarious workforce, or to obfuscate the retrenchment of social and economic protections.

Finally, Commonwealth citizens' loss of immigration rights also has to be seen against the context of the de-colonialisation process that gathered pace in the 1960s. As

⁷⁰ Reginald Maudling, speaking in the parliamentary debate on the 1968 Commonwealth Immigrants Act (cited in Joppke 1999:21).

well as the fact that migrants from the Commonwealth were an indispensable source of labour for post-war Britain (Dixon 1983), a policy of open immigration was part of an ideological edifice where the UK was portrayed as a ‘motherland’ for its subjects (Winstone, 1996), rather than a project of colonialisation primarily driven by the desire to economically exploit new territories (Bayly, 1990; Armitage, 2000). Once the Empire fell, there was no longer any need to maintain this fiction.

Post-Immigration Act 1971 and the Era of Discontent (1971-1996)



Britain experienced its first major post-war recession in 1973. This marked the end of the post-war, Keynesian ‘full employment’ society (Matthews, 1968). Unemployment rates increased from an average of 2 per cent in the 1960s to 4.3 per cent in the 1970s and 10.4 per cent in the 1980s (see Fig. 4). Crime rates rose steeply from the mid-1960s

onwards:⁷¹ a fact that Machin and Meghir (2004) attributed to rapidly rising wage inequality and the worsening labour market position of less skilled workers.

In turn, relations between the police and the West Indian population worsened throughout the 1970s and 1980s. A key issue was police use of provisions under the Vagrancy Act 1824 (S. 4) to search and arrest black people on suspicion of committing an offence (Demuth, 1978). Indeed, the immediate trigger for the 1981 Brixton riots was ‘Operation Swamp’ - a 10-day operation in which 150 plain clothes officers made 1000 stop and searches and 150 arrests (Jefferson and Grimshaw, 1984). Later, the British ‘War on Drugs’ translated into increasingly harsh penalties for drug traffickers and the intensified enforcement against drug pushers, many of who were unemployed ethnic minorities who relied on dealing for an income (Marwick, 2003: 290, 308). In 1977, the Metropolitan police force critiqued ‘the fallibility of the assertion that crime rates among those of West Indian origin are no higher than those of the population at large’ (House of Commons Select Committee 1977:182). By the 1980s, black people were noticeably overrepresented in the custodial population (Fludger and Britain, 1981; Kettle, 1982) - a pattern that has remained constant ever since.

How should the criminalisation of black communities during this period be analysed? A neo-Marxian analysis was offered in *Policing the Crisis*, where Hall et al. (1978) famously argued that a moral panic about black youth and mugging was a way of

⁷¹ By the mid-1960s, there were around one million recorded offences. This figure jumped to two million in the mid-1970s. This great increase in recorded crime rates is part of a sustained upward trend which started in 1955 and continued until the mid-2000s (Reiner, 2007: 63).

persuading the public that society's problems were caused by 'immigrants' rather than the faults of the capitalist system. This analysis highlighted the symbolic functions of criminalisation in terms of showcasing the authority of the state - a claim that is also used in neoliberal-materialist analyses of contemporary immigration policy (De Giorgi 2006; Wacquant 1999: 219; Palidda 2009).

Sivanandan (1981) argued that the police should be viewed as agents of imperialism and black communities as engaged in an anti-colonialist struggle. This view was criticised as 'profoundly idealist' by Lea and Young (1984: 124), who argued instead that the criminalisation of the black population reflected higher offending rates among the black population. In their analysis, black people in the UK committed crime in order to achieve the consumption success to which they were denied and to act out their frustration at their marginalisation in British society. Second-generation West Indians had, on average, an even lower economic status than their parents (Barber and Britain, 1981). Deteriorating police-black relations were a corollary of the worsening socio-economic and political situation of Black youth under Margaret Thatcher's programme of de-industrialisation.⁷²

By contrast, the experiences of Irish immigrants were quite different. Irish communities suffered from increasing surveillance after the IRA pub bombings of the early 1970s. In particular, the Prevention of Terrorism (Temporary Provisions) Act 1974

⁷² While marginalisation - including very high (youth) unemployment rates - is undoubtedly a key factor in explaining why black communities were increasingly criminalised during the 1970s and 1980s, it does not explain why the similarly deprived Asian communities were under-represented in criminal justice statistics (Webster, 1997). This issue is discussed in further detail on page 185.

introduced detention without charge and controls without suspicion at ports of entry. By one estimate, in 1985, '55,000 people were stopped and examined [on the border]. We've estimated that the numbers have increased since then' (Solicitor Gareth Pierce cited in Usher, 1990: 87). However, Irish nationals were under-represented in the British prison population by the 1980s⁷³ - a development probably related to the increased prosperity of the Irish community from the mid-1960s onwards. Black immigrants and ethnic minorities had replaced the Irish as the 'lowest socially significant' class within Britain.

Notably, the criminalisation of the black population did not arise from their involvement in immigration offences. A very small number of people were initially prosecuted for offences under the Immigration Act 1971 (Aliverti, 2013). Instead, individuals accused of illegal entry or breaching the conditions of a leave were simply removed without being prosecuted. Further, most black people had citizenship, either through long-term residence, their previous colonial ties or through having been born in the UK. This contrasted with that of the *Gastarbeiter*, who were excluded from the descent-based German citizenship. Thus, although both countries witnessed the intensified marginalisation of ethnic 'others' during the 1980s, the particular manifestation of exclusion varied between them as a result of historical differences in citizenship.

⁷³ See 'Prison Statistics', HC Deb 10 March 1989 vol 148 c5W, accessible here: http://hansard.millbanksystems.com/written_answers/1989/mar/10/prison-statistics#S6CV0148P0_19890310_CWA_36 (last accessed 20/03/2014).

Immigration policy was not a particularly frenzied area of legislative activity in the 1970s, not least because the UK's worsening economic situation meant a declining number of immigrants. Nonetheless, Prime Minister Heath's decision to accept 28,000 Ugandan Asians expelled by President Amin in August 1972 was criticised by many sectors of the population.⁷⁴ Although they never won a seat, the electoral success of the National Front - a xenophobic, far right party - in the early 1970s re-alerted mainstream politicians to the potency of immigration policy. Immigration became increasingly politicised from this point onwards (Messina, 1995).

Margaret Thatcher's electoral success depended, in large part, on her ability to woo voters from the National Front. In turn, the Conservative governments (1979-1996) introduced a series of restrictive immigration policies, including the intensification of enforcement against illegal entrants, restrictions on family reunification and on appeals against deportation, visa requirements for asylum seekers and the introduction of new criminal immigration offences. Citizenship policy was also 'ethnicised' (Joppke, 1999: 641) through the British Nationality Act 1981. Henceforth, only British citizens had the right of abode in Britain. The Act also removed the automatic entitlement of persons born in Britain to British citizenship.

Asylum figures continued to grow, constituting the largest category of entrant apart from visitors and persons in transit in the early 1990s (Bloch, 2000: 29). In anticipation

⁷⁴ Refugees were greeted with angry crowds when they arrived at Stanstead and Heathrow airports, see 'Ugandan Asians', 06/12/2012, Backbench Business, Daily Hansard Debate, Column 1042, accessible here: <http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm121206/debtext/121206-0002.htm> (last accessed 21/05/2014).

of a European Court indictment, the Asylum and Immigration Appeals Act 1993 saw the introduction of in-country appeals for asylum seekers (Joppke 1999:133). However, the overall tone of the legislation was restrictive and included removing asylum seekers' access to social housing (Macdonald 1993). Subsequently, the Asylum and Immigration Act 1996 added a new criminal immigration offence of obtaining leave to enter or remain by deception (S. 4), created a separate and inferior system of asylum welfare support and finally, introduced criminal sanctions for the knowing employment of illegal foreign workers (Ryan 2005-2006). Employer sanctions might appear to contravene the materialist analysis by increasing the risks attached to illegally employing a foreigner. However, the resulting legislation was weak and poorly enforced, as manifest in the fact that between 1997 and 2006, only 37 people were convicted under the Act (Aliverti 2013:42).

By 1993, foreign nationals comprised eight per cent of the male and 18 per cent of the female population in prison, compared to 3.6 per cent in the total population (Home Office, 1994). Unfortunately, prisoners sentenced on the basis of immigration offences are not delineated in prison statistics. However, considerably higher fraud and forgery rates among all ethnic minority groups indicated growing recourse to illegal documents following the restrictions on asylum seeking introduced in the 1980s (Goodwin-Gill, 2003; Macdonald and Toal, 2010).

In sum, the marginalisation of the working class through the systematic neoliberalisation of the economy and the retrenchment of the welfare state under British

Conservative Party rule, was a central factor auguring the criminalisation of both first and second-generation black communities. In Britain, much as in America, a racialised class structure was emerging. In turn, deprived communities were less likely to receive welfare assistance and more likely to be over-policed during the 1980s, although it was not until the following decade that prison rates began to rise rapidly.

Thatcher also introduced a number of restrictive immigration policies during this period. In these policies, the argument that neoliberalism was a motivating factor is a little weaker. In particular, Britain was undergoing rapid cultural change, of which the settlement of immigrant communities was just one dimension. As Alfred Sherman, an advisor to Margaret Thatcher, argued ‘the imposition of mass immigration from backward alien cultures is just one symptom of this self-destructive urge reflected in the assault of patriotism, the family [...], the Christian religion in public life and schools, traditional morality, in matters of sex, honesty, public display, and respect for the law, in short all that is English and wholesome’ (Sherman, 1979). Similarly, on the eve of her election, Margaret Thatcher famously said, ‘People are really rather afraid that this country might be rather swamped by people with a different culture.’⁷⁵ This comment was quickly followed by the movement of working class votes from both Labour (Smith, 1994: 4) and the National Front to the Conservative Party (Messina, 1990: 2) - a development that destabilised traditional class-based patterns of voting. The consideration of race and culture in Thatcher’s stance on immigration policy was also evident in her statement that she objected to South Asian Britons being give council houses at the

⁷⁵ ‘Margaret Thatcher complained about immigration to Britain’, 30/12/2009, Jon Swaine, Daily Telegraph, accessible here: <http://www.telegraph.co.uk/news/politics/margaret-thatcher/6906503/Margaret-Thatcher-complained-about-Asian-immigration-to-Britain.html> (last accessed 13/05/2014).

expense of ‘white citizens’, and her comment that she had ‘less objection to refugees such as Rhodesians, Poles and Hungarians, since they could more easily be assimilated into British society.’⁷⁶ Conversely, employers were largely absent from debates on immigration. In immigration policy, Thatcher was motivated more by a populist sentiment and a neo-conservative critique of multiculturalism, than neoliberalism per se.

New Labour and the Coalition Government (1997-today)

By the late 1990s, the ‘immigration issue’ - and particularly the abuse of the asylum system - became a major concern for the newly elected Labour government. Under pressure from the general public and the Opposition, the period under New Labour (1997-2010) saw the fastest and largest expansion in the catalogue of immigration crimes since 1905, with an additional 84 offences being added through six immigration and asylum acts (Aliverti 2012:420). A particularly significant criminal offence, in terms of prosecution rates, has been ‘being unable to produce an immigration document at a leave or asylum interview in respect of [oneself]’.⁷⁷ In 2005, 37 per cent of the 540 proceedings were for this offence alone.⁷⁸ The number of persons prosecuted subsequently declined to 102 in 2011, although it is still one of the most frequently prosecuted immigration violations.⁷⁹

⁷⁶ *ibid*

⁷⁷ S. 2 (1) 9 Asylum and Immigration (Treatment of Claimants, etc.) Act 2004

⁷⁸ Detention dataset, Control of immigration statistics, tab pr.01, Defendants proceeded against for offences under Immigration Acts, 1971 to 2007 in England and Wales

⁷⁹ *ibid*

Older categories of offences have also been reformulated to facilitate prosecution. For instance, the Nationality, Immigration and Asylum Act 2002 expanded the definition of assisting unlawful immigration (S. 25). Currently, it is far and away the largest offence category of all criminal immigration offences, accounting in 2011 for just over half of proceedings in Magistrates and Crown courts.⁸⁰ Thus, unlike Germany, most people who are criminalised under immigration law in the UK are criminalised for participatory offences.

However, the vast majority of the new offences in the field of immigration have rarely - if ever - been used. For instance, the Immigration and Asylum Act 1999, which Cohen (2003: 143) called 'probably the greatest tightening of controls since 1905', enacted 35 different immigration-related offences, most relating to the provision of social security for asylum seekers and the enforcement of discipline inside removal centres. However, new offences under the Act only averaged 68 proceedings per year.⁸¹ The fact that new criminal offences have not been applied in the everyday management of immigration suggests that criminalisation has had functions beyond the practical. As Ana Aliverti (2013:421) argues, 'in immigration - as in other fields - one of the ways to look tough is to create new offences'. Applying David Garland's concept of 'acting out' (1996:459), Aliverti argues that criminalisation is used to obfuscate the fact that little can be done to control a particular social issue. In this context, criminalisation is not a useful tool of immigration enforcement, but is instead a process by which the power of the state is asserted.

⁸⁰ *ibid*

⁸¹ *ibid*

Instead, immigration authorities are far more likely to use administrative means of immigration control. From the late 1990s onwards, a series of policies aimed at facilitating removals were motivated by the highly politicised failure of the Home Office in processing asylum claims and the growing number of failed asylum seekers on the national territory. For instance, the Immigration and Asylum Act 1999 made people who overstayed their permission to remain liable for removal rather than deportation (S. 10). The significance of this development is found in the fact that the latter does not attract an in-country right of appeal (Brennan, 2006).

Three years later, the Immigration and Asylum Act 2002 introduced the concept that people from ‘safe countries’ are usually to be considered under the ‘Detained Non-Suspensive Appeal’ stream, which stipulates that claimants will be detained for between 10 and 14 days while their asylum claim is determined and will have no right of appeal in the UK to an independent court or tribunal.⁸² There was also an increase in the financial and personnel resources made available to the Immigration and Nationality Directorate, which led to a rapid rise in illegal entry actions initiated (Cwerner, 2004).⁸³ As a result of these changes, the UK underwent a ‘deportation turn’ (Gibney, 2008) from just over 7,300 in-land removals in 1997 to around 30,000 in 2006.⁸⁴

⁸² The general ‘Detained Fast-Track’ procedure is also available for other claims, irrespective of nationality. Asylum seekers’ rates of success under fast track systems are far lower than with other kinds of applications, something that partially reflects limited opportunities for asylum seekers to collect case evidence (BID, 2008; HRW, 2010).

⁸³ The number of illegal entry action initiated increased from 4,460 (1992) to 14,560 (1996) to a peak of 69,875 (2001) (Home Office, 2002: 73).

⁸⁴ Excluding people detained and removed at the port of entry (see Bennett, Heath et al., 2007: 83).

The other group targeted for removal were foreign criminals. The expulsion of foreign criminals was framed in terms of their failure to live up to the standards demanded of them as conditional members of British society (Anderson, Gibney et al., 2011: 555) - an issue that had risen to prominence following the riots by disaffected young Muslim men in northern cities in 2001. It became mandatory for foreign national prisoners to be considered for deportation under the Criminal Justice Act 2003. However, poor organisation between the Home Office and the then-Immigration and Nationality Directorate led to the 'foreign prisoners' scandal' in 2006, whereby the government's failure to consider deporting 1,000 foreign nationals on their release from prison led to the resignation of the home secretary Charles Clark. Subsequently, all foreign nationals from outside the EU who are sentenced to a prison sentence of more than a year are subject to automatic deportation.⁸⁵ The number of deportations following a criminal conviction increased five-fold from 2005, from 1,000 in 2005 to 5,400 in 2008 (Fekete, 2010: 6).

Finally, New Labour also introduced a number of restrictions aimed at limiting the immigration of non-European spouses of settled 'third-country nationals' and British citizens. These were justified by a mixture of economic and cultural factors. For instance, increasing the minimum income requirements for being a sponsor was justified on the basis that this would reduce the burden on the taxpayer, while raising the minimum age of spouses was tied to fears about the issue of forced marriages of 'child-brides'. The

⁸⁵ Unless deportation would breach the proposed deportee's human rights, or would be contrary to EU law or the Refugee Convention.

introduction of language and culture tests for citizenship in 2004-2005 and more recently, a pre-entry language test (2010) suggested a trend towards greater compulsion in integration policies (Spencer and McNeil, 2011).

While the developments described above denote an increasingly exclusionary attitude towards immigration, legal immigration actually grew quickly under New Labour. In particular, the government under Tony Blair wanted to ‘ensure that visitors, businessmen, students and others whose activities benefit the UK felt encouraged to come’ (Home Office, 1998: para 5.2) This aim was realised in the creation of a points system, oriented towards facilitating the immigration of high-skilled nationals (Somerville, 2007).

While the bifurcated nature of immigration controls towards the ‘global proletariat’ and the ‘cosmopolitan elite’ mirrors the description made in De Giorgi’s materialist reading of immigration policy, it should be noted that New Labour also introduced low-skill migration routes (Sector-Based Schemes (SBS)) for nationals from outside Europe. These were eventually phased out, but only because it was expected that the need for low-skilled labour would be fulfilled by immigration from the new East European members of the European Union. In addition, a series of ‘backdoor’ amnesties for failed asylum seekers spoke of a managerial attitude on behalf of the government towards immigration.⁸⁶ In this case, the foremost aim was to clear the backlogs of the Home

⁸⁶ ‘160,000 asylum seekers granted amnesty by the backdoor, says MP’, 02/06/2011, Alan Travis, The Guardian, accessible here: <http://www.theguardian.com/uk/2011/jun/02/160000-asylum-seekers-granted-amnesty> (last accessed 21/05/2014).

Office and get the asylum system under control, rather than to restrict immigration per se. To call New Labour restrictive would be to deny the pragmatic nature of immigration control during this period, as well as the fact that migration was increasingly viewed as a positive economic asset during a period of low unemployment and labour shortages in key sectors (Somerville, 2007: 22).

More recently, the Conservative coalition government (2010) has overseen a decline in the number of enforced removals, deportations⁸⁷ and criminal immigration offences prosecuted. As is the case in Germany, these developments can be seen within the context of a radical decline in the number of asylum claimants. The size of the irregular immigrant population has also declined with EU enlargement, which implied the automatic legalization of East Europeans' right of residence. However, an additional factor is the shrinking size of the former UK Border Agency, who lost an estimated 25 per cent of their workforce between 2010 and 2013⁸⁸ as part of a wider policy of retrenching the state. Thus, while the government has openly aimed at reducing the number of immigrants - through closing down the highly skilled labour immigration route, limiting the domestic worker visa and denying EU immigrants access to welfare benefits - the neoliberal project of shrinking the state has, at the same time, been associated with a retrenchment of immigration enforcement capacities.

⁸⁷ There has been a dramatic increase in voluntary departures. However, it is unclear whether this is the function of better record keeping (see 'Deportations, Removals and Voluntary Departures, Migration Observatory', Migration Observatory, accessible here: <http://migrationobservatory.ox.ac.uk/briefings/deportations-removals-and-voluntary-departures-uk> (last accessed 13/05/2014). Data on voluntary departures is therefore excluded from analysis.

⁸⁸ 'UK Border Agency axe jobs', 09/11/2010, The Guardian, accessible here: <http://www.theguardian.com/uk/2010/nov/09/uk-border-agency-axe-jobs> (last accessed 12/05/2014) The UK Border Agency was shut down in April 2013, its tasks subsumed into the Home Office.

Other developments of note include changes to the foreign national prisoner population. The proportion of foreign nationals in prison has nearly doubled from 7.6 per cent of the prison population in 1997 to 13 per cent in 2013 (White and Woodbridge, 1998; Ministry of Justice, 2013) . However, this reflects the growing number of foreign citizens in Britain, rather than a policy of selective criminalisation. In fact, as Fig. 5 shows, the relative overrepresentation of foreign nationals in prison, compared to their overrepresentation in society, has actually decreased since the mid-1990s onwards. Today, foreign nationals are overrepresented by a factor of 1.8 compared to the national population. This difference is negligible when considering differences in the age and gender distribution between the foreign and native population.

At the same time, the UK's prison population has increased dramatically over the same time period, from just under 70,000 to over 95,000.⁸⁹ There are many more foreigners in prison today than there was in the early 1990s, much as there are many more British nationals in prison. Both rapidly rising prison rates and punitive strands in immigration policy can be understood in the context of New Labour's attempt to appeal to more socially conservative elements of the public (Vanstone, 2010), as well as its 'Third Way' ideological stance (McLaughlin, Muncie et al., 2001), which saw the party try and skate a middle path between neoliberalism and socialism. As Tony Blair famously argued, Labour would be 'tough on crime, tough on the causes of crime'- including 'poverty, social exclusion, unemployment, lack of education, the sense of hopelessness

⁸⁹ The prison rate has increased from 108 per 100,000 persons to 151 per 100,000 people, own calculations, 'Prison Population', EUROSTAT.

that is so often the breeding ground for crimes among our young people'.⁹⁰ Whether New Labour were just as successful at being tough on the causes of crime is a matter of considerable debate (Jessop, 2003; Hills and Stewart, 2005).

The vast majority of foreign nationals in prison today are there for drug offences,⁹¹ violence against the person, sexual offences and robbery (Banks, 2011), rather than immigration offences. A growing number of time-served foreign prisoners indicates difficulties in implementing their automatic deportation, as well as the strong parliamentary and public interest in foreign national prisoners and the political damage than could be caused to a government which authorises the release of a foreign national who goes on to (re)offend (Banks 2011: 192-193). Evidence of the increasing emphasis on immigration enforcement during the early 2000s is found in the fact that the proportion of foreign nationals held for fraud and forgery increased from 10 per cent in 1995 to 21 per cent in 2005 (Bhui, 2008: 155). However, this has subsequently declined to 5 per cent at the end of 2013.⁹²

Year	Foreign nat. prisoners (per cent)	General population (per cent)	Overrepresentation
1995	8.1	3.6	2.3
1996	7.8	4.1	1.9
1997	7.6	3.8	2.0
1998	7.8	4	2.0
1999	8.4	3.9	2.2
2000	8.6	4.4	2.0
2001	10.5	4.6	2.3

⁹⁰ 'Blair vows to tackle poverty', The Daily Mail, accessible here: <http://www.dailymail.co.uk/news/article-138861/Blair-vows-tackle-poverty.html> (last accessed 12/05/2014).

⁹¹ A full 58 per cent of foreign national women are serving drug-related sentences (Joseph 2006, Prison Reform Trust 2010).

⁹² Freedom of Information request 88463, Home Office

2002	11	4.8	2.3
2003	12.3	4.9	2.5
2004	12.2	5.3	2.3
2005	12.8	5.8	2.2
2006	14.1	6.3	2.2
2007	14	6.8	2.1
2008	13.7	7.3	1.9
2009	13.6	7.2	1.9
2010	12.9	7.3	1.8
2011	12.9	7.9	1.6
2012	13	7.2	1.8

Fig. 5 Foreign nationals in prison 1995-2012. Sources for prison data: 'The Prison Population' series (Home Office: Great Britain); 'Statistics on Race and the Criminal Justice System' series (Home Office: Great Britain). Source for foreign nationals: 'Share of migrants in the population 1993-2012', 'Migrants in the UK', Migration Observatory, accessible here: <http://migrationobservatory.ox.ac.uk/briefings/migrants-uk-overview>

There has also been a transformation in the ethnic composition of the prison population. While the overrepresentation of black British minority ethnic populations has slightly declined since the early 1990s, there has been an increase in the proportion and overrepresentation of two overlapping populations in prison: South Asians (in particular, Pakistanis, Bangladeshis and 'others') and Muslim men. Under-represented in criminal justice statistics until the 1990s, today, the Asian population is slightly overrepresented, although this is not as acute as remains for Black and Black British groups (see below).

The proportion of Muslim prisoners was 13.4 per cent in 2012⁹³ (compared to 4.8 per cent of the total population).⁹⁴

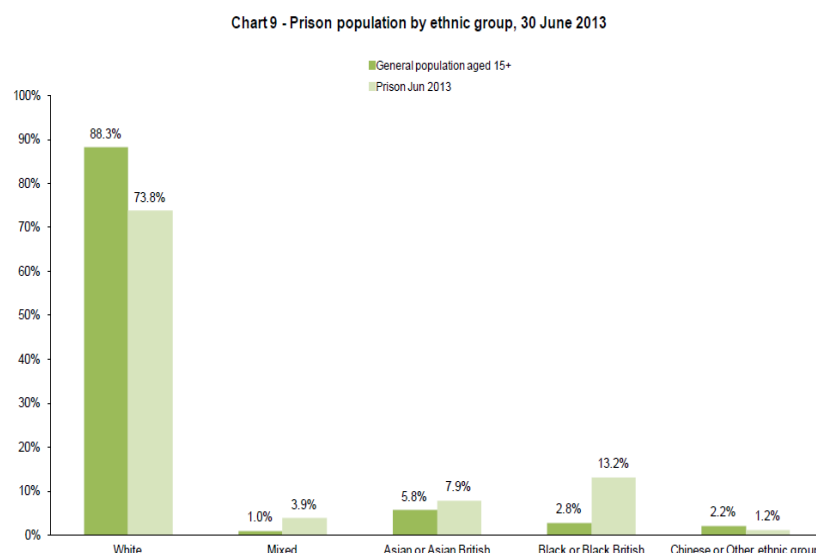


Fig. 6 Prison Population by ethnic group, 2013. Source: 'Prison Population Statistics', Berman, G. and Dar, A., Standard Note: SN/SG/4344, Home Office: Great Britain, p.11

How can the growth of Asian and Muslim populations in prison be explained? The experience of the Asian population with the police has often been contrasted to the more visceral hostility between the black population and the police (Webster, 2004). This is not to say that the relationship of the British police with the Asian population has been harmonious. For instance, the police repressed strikes by Asian workers against racial discrimination in the 1970s (Race Today Collective, 1983). In the 1980s, politically

⁹³ 'Proportion of Muslim prisoners in England and Wales doubles in decade', 14/11/2013, Alan Travis, The Guardian, accessible here: <http://www.theguardian.com/society/2013/nov/14/muslim-prisoners-double-england-wales-ministry-justice> (last accessed 12/05/2014).

⁹⁴ See 'Religion in England and Wales 2011', 11/12/2012, Office of National Statistics, accessible here: <http://www.ons.gov.uk/ons/rel/census/2011-census/key-statistics-for-local-authorities-in-england-and-wales/rpt-religion.html> (last accessed 21/05/2014). It should also be noted that many Islamic prisoners convert during their sentence (Spalek and El-Hassan, 2007).

organized young Asian people were criminalised for defending their areas from far-right hostility. However, the 'under-criminalisation' of Asian populations - despite high levels of deprivation among Pakistanis and Bangladeshis - has been tied to their natural 'quietism' and deference (Webster, 1997), as well as strong informal controls, which depress offending (Mawby and Batta, 1980).

While this representation persists for Asian women - who are still seen as victims of a male dominated culture and are underrepresented in the criminal justice system - Asian and Muslim men are increasingly portrayed as security threats (Webster, 2004). Public debate started to increasingly focus on Muslim involvement in crime from the early 1990s onwards. One example was the BBC Panorama programme on 'Britain's New Muslim Underclass' in April 1993, which used anecdotal evidence from towns in the West Midlands and Yorkshire to support an assertion that there was a rising tide of crime among unemployed young Muslims (Smith, 1997). Following three days of rioting in Bradford in 1995 - blamed on the 'breakdown of discipline and hierarchy among Pakistani families as well as heavy-handed policing'⁹⁵ - criminologist Marian Fitzgerald warned that the young age structure of Bangladeshi and Pakistani communities meant that an upsurge of criminality among these groups was inevitable. Notably, much as the criminalisation of black communities affects the descendants of immigrants, rather than the immigrants themselves, the criminalisation of Asian populations mostly affects the second- and third- generation. In turn, the riots in Bradford and Dewsbury in 2001

⁹⁵ 'Research warns of Asian crime timebomb', 22/07/1995, Jason Bennetto, The Independent, accessible here: <http://www.independent.co.uk/news/research-warns-of-asian-crime-timebomb-1592600.html> (last accessed 12/05/2014).

between Pakistani- and Bangladeshi-British youths and the police solidified the public view of Asian men as a violent and threatening underclass.

The criminalisation of Asian men can also be seen in the context of a global 'securitisation' of Islam. During the 1991 Gulf War, protest by Arab or Muslim Britons was encoded as increasingly anti-British. Demonstrating this encoding of Arabs and Muslims as the 'stranger within' was the imprisonment of 77 Iraqis and Palestinians living in Britain during the conflict, on the grounds of their being a threat to national security (Buchanan, c. 2002). In 2000, the Terrorism Act - the direct successor of the Prevention of Terrorism Acts aimed at the Irish - loosened requirements for 'reasonable suspicion' before a stop and search took place (S. 44). Unlike wider stop and search powers, under which black people were more likely to be controlled, the powers granted under the Terrorism Act 2000 were used on young Asian-British and Muslim men (Home Office, 2011). The links between immigration and terrorism can also be seen in the introduction of policies for the deportation of foreign nationals who are perceived as a security risk, although the numbers involved are still a fraction of overall returns (Gibney 2000). Controversially, following the London bombing in 2005, the then-Labour government introduced a clause into S. 40 (2) of the British Nationality Act 1981 allowing the denationalisation of dual-national British citizens if it considered conducive to the public good: a power that human rights lawyer Gareth Peirce compares to

‘medieval exile’. Of the 24 individuals who have had their citizenship revoked, the majority come from Muslim-majority nations.⁹⁶

It is difficult to fully separate economic and cultural factors in the criminalisation of Asian-British and Muslim communities. Muslims are the most disadvantaged faith group in the British labour market (Emerson, 2009: 111). Given the general association between socio-economic marginality and criminalisation, it is unsurprising that it is Bangladeshis and Pakistanis - rather than the wealthier Indian-British population - that are overrepresented in prison statistics. They remain the poorest ethnic minority groups in Britain (Heath and McMahon 2005). In turn, the radicalisation of British-Muslim populations has been tied to their ghettoised socio-economic position (Maxwell, 2006: 111). However, the intensification of their criminalisation over the previous 15 years also indicates the way in which societal representations are influenced by geo-political security concerns and, in particular, the construction of Islam as an essential threat to the West. What is clear is that certain Asian British communities have joined the Black British population as an over-criminalised and marginalised class. The demarcation of exclusion is no longer between foreigners and natives, but has definitively crossed over the citizenship line.

⁹⁶ ‘Deprivation of British citizenship and withdrawal of passport facilities’, Standard Note: SN/HA/6820, House of Common’s Library (2014), accessible here: www.parliament.uk/briefing-papers/sn06820.pdf (last accessed 21/05/2014).

Revisiting the Neoliberal-Materialist analysis: Varieties of Capitalism and the Criminalisation of Immigrants

Continuities in immigration control

The previous sections explored the applicability of the materialist analysis to developments in immigration policy in UK and Germany. The first aspect it examined was the extent to which criminalising and exclusionary policies directed at immigrant communities are particular to the neoliberal age. As described in De Giorgi (2006; 2010), both countries have overseen the proliferation of criminal sanctions for immigration offences and increased the use of deportation since the early 1970s. Both countries have introduced a 'hierarchy of mobility' (Bauman, 1998: 69), under which the immigration of highly skilled workers is welcome, while family reunification and asylum admissions policies - which disproportionately affect citizens of non-Western, poor countries - are problematised. Finally, as highlighted in Wacquant (1999) non-Western immigrants and their descendants are increasingly represented in the criminal justice systems of both the UK and Germany.

However, the chapter has also found that the movement towards an 'emerging regime of punitive regulation' (De Giorgi 2010:138) is not inexorable. Both countries have witnessed a significant decline in the number of deportations and the number of people suspected of criminal immigration offences over the past decade. This is largely the by-product of the accession of East European countries - a regime changing

development that is wholly absent from the neoliberal-materialist analyses of De Giorgi (2010) and Wacquant (1999).

Further, the process of re-bordering against low-skilled immigration has been stymied by legislative constraints that have affected politicians' ability to implement a restrictive immigration policy. For instance, despite the desire to limit immigration after the 1973 recession, German politicians' ability to restrict the entry and settlement of guestworkers populations and their families in the 1970s and asylum seekers in the 1980s was frustrated by constitutional Law. While Germany's revocation of Art. 16's 'right to claim asylum' in 1993 shows that countries can and do militate against these restrictions, it remains that politicians' power over immigration policy - as with other areas of policy - is limited by the particular institutional environment in which they operate. Today, international law poses an obstacle to both countries' ability to regulate immigration. The deportation of asylum seekers and refugees in the UK and Germany is limited by the principle of non-refoulement, which concerns the protection of refugees from being returned or expelled to places where their lives or freedoms could be threatened.

In addition, both countries have seen the development of liberal elements in immigration admissions politics. Signs of a pragmatic - if not welcoming - attitude towards non-European immigration include a series of 'backdoor' amnesties for failed asylum seekers in both countries. In Germany, steps taken to facilitate the naturalisation of second- and third- generation immigrants were the result of both international and domestic pressures to facilitate the integration of this group. In the context of increasing

ethnic diversity, the fact that German citizenship was based exclusively on ethno-national belonging seemed increasingly antiquated and out of step with its European neighbours.

Conversely, immigration policies have reflected the desire to control the mobility of the 'global proletariat' since long before the early 1970s. Indeed, nascent immigration controls show a marked similarity to today's immigration systems, with regards to the exclusion of people likely to become a burden on the welfare state. Thus, in the UK, the Aliens Act 1905 allowed inspectors to deny entry to people who did not have the means to support themselves and gave the Home Secretary the right to expel people who received charity. In Germany, the federal government's criminal expulsions were largely used for the purposes of deporting vagrants and beggars. The expulsion of foreign nationals who claim social assistance continues to this day.

In addition, immigrants in both countries were subject to immigration policies that explicitly aimed at weakening their labour market positions throughout time. In the UK, legislation passed in 1919 meant that 'aliens' were to be deported when they took part in strikes. Jewish refugees from Germany and Austria in the 1930s and 1940s could only enter as long as they worked as domestic servants. After the Second World War, European Volunteer Workers were subject to criminal sanction for work-related offences and could be deported when they changed employment.

In Germany, the early implementation of a 'rotation system' for foreign workers in Prussia ensured their position as a 'reserve army of labour'. As Weber commented in the

1890s when discussing the Ruhr Pole workforce, ‘a nod to the government official next door suffices to dispatch him (the migrant worker) promptly back over the borders when he does not thoroughly submit to the wishes of the landowner’ (Weber 1893: 71 in Armstrong, 1968). In the 1950s and 1960s, the same desire to import ‘labour, not people’ shaped the guestworker system, under which foreigners were only allowed to stay in the country on the condition that they filled the jobs that the Germans did not want to do.

What these examples indicate is that the use of exclusionary immigration policy in the ‘subordinate inclusion’ (De Giorgi 2010: 157) of foreign nationals is not a new phenomenon. Immigration controls have been implicated in the exploitation of foreigners for as long as they have existed, although the particular method through which exclusion occurs may vary over time. In turn, this highlights the fact that there have always been dirty, dangerous jobs, even at the height of Europe’s “trente glorieuses” - the thirty glorious years of post-war economic expansion’ (Culpepper, 2006: 7). The idea that precarious employment is unique to the contemporary time period - and that immigrants have been ushered into this section of the workforce only since the 1970s - is a significant failing of the neoliberal-materialist analysis, particularly as expressed in De Giorgi (2010).

The Material Basis of Immigration Control

The second issue regards the particular role of economic and cultural factors in immigration policy-making. The two are not necessarily diametrically opposed. Indeed,

dominant discourses on race and belonging might provide the ideological basis for policies that are functional to the underlying economic structure. For instance, the traditional Marxian analysis predicts that ethnic heterogeneity might also be an advantage for employers, insofar as racial tensions might divide working classes. Further, Calavita highlights the ‘advantage...of Otherness’ (2005:11) in constituting non-Western immigrants as suitable fodder for low-quality employment. One example of this is found in the way in which exclusionary, descent-based notions of German citizenship provided the ideological context for attempts to constitute Polish workers and later the Gastarbeiter as temporary workers.

However, the neoliberal-materialist analysis does not provide a full explanation of state responses to the treatment of populations of differing national backgrounds. For instance, the liberal attitude towards ethnic Germans and East European refugees in the 1960s was largely motivated by the nation-state’s desire to demonstrate their anti-Soviet ideological commitment and the superiority of West Germany over East Germany. In the UK, Thatcher was loathe to admit South Asian immigration, while less troubled by (white) immigration from what was then called Rhodesia - because, by her calculations, the latter would be easier to assimilate. In turn, the emergence of Pakistani and Bangladeshi nationals and their descendants as a criminalised sub-population in the UK speaks to the recent resurgence of a global panic regarding Islam and its threat to the West. In both countries, immigration policy at any one time has spoken to a complex mixture of factors. As Pak (1994:6) asserted, ‘the really interesting problem of immigration politics is the interaction between the economic and the cultural’. It is only

by analysing how these different considerations play out in society that a synthesised, holistic explanation is possible.

Further, immigration policies can be restrictive to the point of being dysfunctional for the economy - at least, from a neoliberal perspective. While De Giorgi (2010:151) argues that 'illegalisation' of immigration is functional to the economy, this account ignores the fact that neoliberal business groups spend a lot of money lobbying for open borders (McNevin, 2006). The opposition of successive UK governments to immigration controls at the end of the 19th century spoke to the liberal notion that the free movement of people was a necessary corollary of free trade and laissez-faire governance - concepts that re-emerged as 'neoliberalism' in the 1980s onwards. The introduction of restrictive policies by Thatcher was motivated by her neo-conservative attitude to immigration, rather than neoliberalism.

By contrast, the protectionist attitude of the German government during the 1980s towards foreign labour - as manifest in work bans and the rapid expansion of the labour inspectorate - spoke instead of the desire to maintain the coordinated market economy, rather than to allow the development of neoliberal labour markets, characterised by low-wage, precarious employment. This finding fits in with Borang's (2007) argument that employer demand for immigrant labour is likely to be greater in liberal market economies than in coordinated market economies because of larger low-wage markets in the former.

In addition, the protectionist and exclusionary attitude of the working classes towards foreign nationals might also have a greater effect on immigration policy-making in a coordinated market economy than in a liberal market economy, given the stronger position of trade unions (institutions for representing workers' voices) on the policy-making process in the former. At times, however, governments in both countries have lost the battle to convince the population of the economic benefits of immigration. For instance, restrictions on Commonwealth citizens' right of entry and residence from 1962 onwards were not motivated by a changing economic situation - that was to come later - but rather by the designation of black immigration as culturally suspect, as well as the breakdown of the Empire. More recently, while business groups continue to lobby for more expansive immigration policies,⁹⁷ the European election results show that mainstream political parties are unable to keep up with the anti-immigration sentiments of the working classes.⁹⁸ As such, immigration provides the context for the intensification of a 'crisis of the capitalist state' (O'Connor 1979). In today's precarious labour markets, the political wings are stuck between the desire to gain legitimacy among working class populations - to whom they can longer promise economic security - and the need to promote economic growth.

This is not to say, however, that neoliberalism holds the promise for a more humane attitude towards immigration. Instead, open borders are only supported by employers on

⁹⁷ The UK's main business lobbying organisation, the CBI and the Engineering Employers Federation have registered their support for Labour, on the grounds that the party offers a more business-friendly attitude to immigration. See 'David Cameron urged to tone down anti-immigration rhetoric', 23/04/2014, Financial Times.

⁹⁸ 'Labour MPs fear party has failed to stop UKIP eroding its traditional working class base', 26/05/2014, The Independent, accessible here: <http://www.independent.co.uk/news/uk/politics/eu-and-local-elections-2014-labour-mps-fear-party-has-failed-to-stop-ukip-eroding-its-traditional-working-class-base-9413408.html> (last accessed 26/05/2014).

the basis that migrant workers represent a 'reserve army of labour'. While liberal admissions policies may seem to indicate an inclusionary stance towards foreign nationals, neoliberal support for limitations on the social and economic rights of workers also indicates a preference for a system where the employer has supreme control over the working relationship - for both foreign and for native workers too. Neoliberalism is typified by the retrenchment of citizenship rights (Jessop, 1993; Ellen, 2007; Haque, 2008; Wacquant, 2009), from the removal of trade union bargaining rights under Margaret Thatcher in the 1980s to the retrenchment of welfare benefits under Schroeder's Hartz IV reforms. In this context, citizenship is less of a demarcation of inclusion and exclusion.

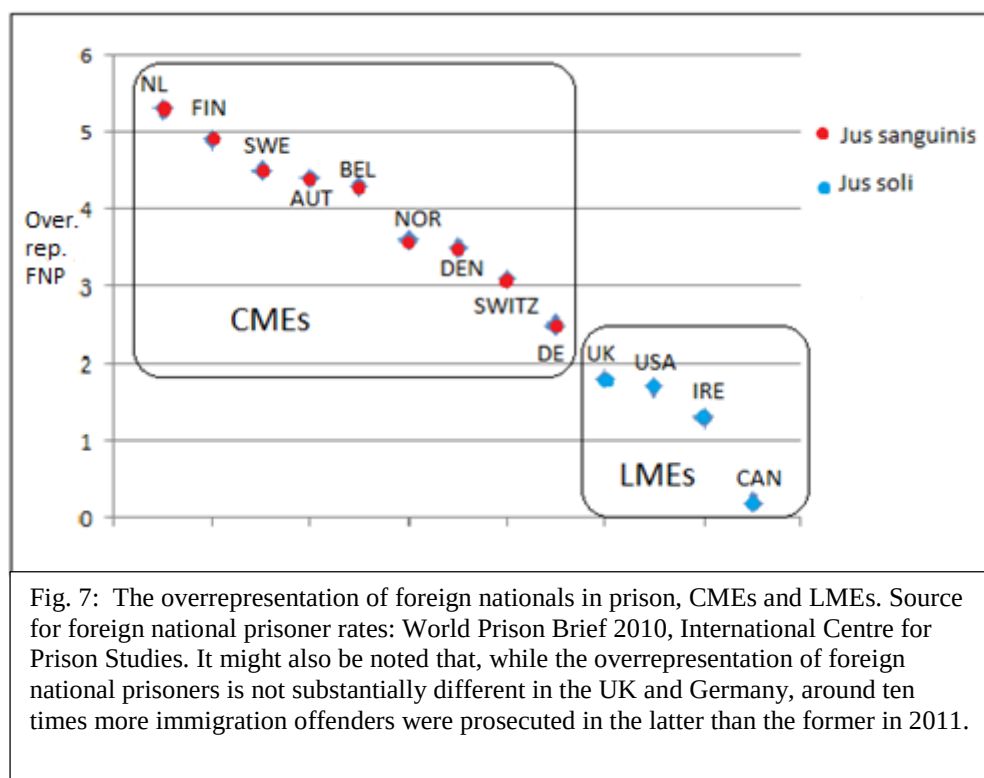
Punitive Exclusion across the Varieties of Capitalism: the Importance of Citizenship?

This analysis has important consequences for an understanding of national differences in the treatment of immigrant populations. While the continuing overrepresentation of foreign nationals in prisons speaks, at least in part, to the effects of immigration controls (including the criminalisation of illegal immigration), the overrepresentation of ethnic minorities - the naturalised descendants of immigrants - in the criminal justice systems of the UK and Germany speaks to the fact that citizenship is less and less of a guarantee against marginalisation and criminalisation.

In turn, the weak association between citizenship and inclusion in neoliberal economies offers one explanation for differences in immigration control regimes across

the Varieties of Capitalism. In particular, (neo)liberal market economies tend to have more liberal naturalisation policies, based on *jus soli* principles, and lower rates of foreign nationals in prison while coordinated market economies tend to have more restrictive naturalisation policies based on descent-based belonging and higher rates of foreign nationals in prison (see Fig. 7 below). The relationship between Variety of Capitalism and immigration policy might be related to the fact that mass immigration carries the risk of destabilising the political conditions that are required for an extensive welfare state or a coordinated economy policy (Freeman, 1986; Bommers and Geddes, 2000). Conversely, it may also be that different conceptions of belonging - as manifest in citizenship norms - reflect or contribute to the cultural conditions that predispose a country towards developing certain types of economies. It may be because coordinated market economies are associated with more intensive immigration control regimes, as discussed in the following chapter. Finally, it may reflect the fact that citizenship is more closely guarded in coordinated market economies because it means more as a marker of belonging. There is a something of a trade-off between rights and openness to immigration.

As such, a tentative finding is that the criminalisation of ethnic minority ‘street crime’ in neoliberal markets is a ‘functional equivalent’ for stricter immigration policy and the criminalisation of foreign nationals in coordinated market economies. Both patterns of criminalisation play a role in disciplining a defined group of others, and warehousing the social dislocations caused by their marginalisation.



However, this is not to say that ethnic minorities fare better in coordinated market economies and in particular, in Germany, than in liberal market economies. There are no comparable statistics on the criminalisation of naturalised immigrants and their descendants in the UK and Germany. Indeed, Germany does not systematically record data on ethnicity or migrant background and the criminal justice system.⁹⁹ However, all available studies have found an overrepresentation of immigrant minority youth in German prisons (Mansel, 1988; Diehl and Blohm, 2003; Pfeiffer, Kleimann et al., 2005). Further, second-generation immigrants in Germany do worse in other indicators of marginalisation when compared to their counterparts in the UK. In particular, in the UK, first-generation immigrants tend to be more disadvantaged than their German counterparts. However, by the second-generation, substantial improvements occurred for

⁹⁹ Britain breaks down data into different categories: Black, Asian, White, Mixed, Other and Unknown. However, these are 'self-identification' categories and therefore, give little information about migrant background. The broad nature of the grouping is also problematic because it subsumes national and ethnic groups who might have very different criminalisation patterns.

all groups, besides Afro-Caribbean men. By contrast, Central and East European and Turkish male immigrants in Germany have worse outcomes in terms of their employment and wage rates than their parents (Algan, Dustmann et al., 2010).

Relatively poor outcomes for second-generation immigrants reveal a schism within German society. While traditional Varieties of Capitalism approaches highlight the fact that coordinated market economies are associated with lower levels of inequality (Rueda, 2000; Hall and Soskice, 2001: 21), the dualisation perspective focuses on labour conditions for workers at the margins of the coordinated labour market. In this analysis, the institutional stability of the coordinated market economy obscures the ways in which an increasing number of workers are excluded from the protections afforded to core workers in coordinated market economies (Palier and Thelen, 2008).

A key argument made in chapter four is that immigrants are particularly vulnerable in the German labour market because of their exclusion from the protections afforded 'core workers' under the coordinated market institutional framework. German society is riven with inequalities in many other ways too. For instance, the education system has been designated the worst of all European countries for incorporating immigrant children (OECD, 2006). The reasons for this relates to the structure of the German education system. The biggest issue is that students in German public schools are consigned to specific tracks that determine their life prospects from a very early age. In turn, children of immigrants are far more likely to attend the least prestigious type of school - *Hauptschule* - than the children of German nationals. As a result, Germany exhibits

greatest difference in the average test scores for schools which the children of immigrants attend and those which the children of natives attend (Dustmann, Frattini et al., 2012).

A second issue within the education system is the limited amount of early years' education. Children do not start school until they are six years old, there is little statutory childcare and school days are shorter than the European average. This means that any disadvantages that immigrant children bring to school - for instance, issues with the German language - are rectified at a later date than would be the case in other countries. In turn, a lack of state-provided early years' support - which might have been contested on the basis that they make it more difficult for women to (re)enter the labour market - is a legacy of a strong maternalist streak within the West German welfare state, under which women's roles were largely defined in terms of their care-taking responsibilities (Lewis, 1992).

Marginalisation might also arise from workplace discrimination. Germany has been a laggard in developing anti-discrimination legislation. Following a protracted political struggle, the resulting legislation - memorably called 'stinky hand cheese that has lain out in the sun for too long' by CDU politician Mr. Gehb¹⁰⁰ - has attracted criticism from human rights activists, who claim that the law fails to provide adequate protection for many minority groups. One of the key issues with the current formulation of the Equal

¹⁰⁰ Reported in "There is NOT a Discrimination Problem in Germany" – The Contradictory Case of European Harmonization and Germany's Ineffective Anti-Discrimination Law', Humanity in Action, accessible here: <http://www.humanityinaction.org/knowledgebase/26-there-is-not-a-discrimination-problem-in-germany-the-contradictory-case-of-european-harmonization-and-germany-s-ineffective-anti-discrimination-law> (last accessed 12/05/2014).

Treatment Act 2006 - and one which potentially contravenes the EU Anti-discrimination Directives - is that it lacks a clause protecting employees from discriminatory termination. Instead, the Equal Treatment Act 2006 points to the pre-established German law governing termination of employment. However, while courts which enforce the 'Protection against Dismissal Act' Kündigungsschutzgesetz can recommend a fine (of no more than three months' salary), they cannot force the employer to reinstate an employee's position. Another issue is that victims must file their report within two months. This is particularly problematic for immigrants, who might leave the country (or even, lose their right to stay in the country) before they are able to make a claim (Arnold and Falconer-Stout, 2010). Despite the continuing opposition of business groups, who argue that Germany does not have a discrimination problem, recent studies have shown that discrimination continues to be a problem for foreigners and minorities in the workplace in Germany (Kaas and Manger, 2012).

Finally, immigrants in Germany are socially excluded because of the traditional - if weakening - ethno-cultural conception of German citizenship. What is particularly unusual in Germany - and something that is not replicated to the same degree in the UK - is the way in which second- and even third-generation 'immigrants' will insist that they are not German (Kilif, 2005: 170). This is the failure of multiculturalism in Germany. In turn, exclusion from mainstream society may, at times, translate into angry resistance and a greater assertion of difference (Eickelman and Piscatori, 1990: 163). In this inflammatory context, it is not surprising that foreign nationals and their descendants are overrepresented in the criminal justice system.

These factors undermine a simplistic distinction between Germany and the UK, in terms of how ‘punitive’ the two societies are. As Lacey (2008) has argued, the institutional factors that mean coordinated market economies have lower overall prison rates than liberal market economies clearly do not have the same effect on the prison rates of foreign nationals, who are even more disproportionately represented in the prisons of the former than the latter. To this, might be added the experience of a newly emerging, ethnic minority class, who may have citizenship but are in an even more marginalised position than their parents were. Much as neoliberalism means that it is possible to be both a citizen and socially excluded in the UK, the increasingly dualised nature of the coordinated economy implies the emergence of ‘spaces of precarity’ within German citizenship. Further, processes of marginalisation do not only affect persons with a migrant background. As the racialisation of the debate on welfare benefits and unemployment¹⁰¹ in Germany shows, ethnic heterogeneity threatens to destabilise the working class political base that supports the coordinated market economy. The continued exclusion of foreigners and their descendants means it is likely that Germany will continue to drift towards its neoliberal neighbours, in its labour market and in its criminal justice processes. In this context, punitive immigration policy is but one part of a larger process of state exclusion - and may lose its significance as citizenship means less and less.

¹⁰¹ ‘The Unemployed are all lazy – aren’t they?’ (‘Arbeitslose sind alle faul – stimmt’s?’), 15/08/2011, Der Spiegel, accessible here: <http://www.spiegel.de/karriere/berufsleben/mythen-der-arbeit-arbeitslose-sind-alle-faul-stimmt-s-a-779896.html> (last accessed 12/05/2014).

Ch. 3 The Border is Everywhere? Internal Migration Controls in the UK and

Germany

Introduction

The chapter discusses the policing of ‘internal borders’ in the UK and Germany. While the word ‘border’ brings to mind the physical boundaries encompassing the nation-state (the ‘external border’), there are points of control and surveillance at several junctures on the migratory journey (Vogel, 2000; Guiraudon and Joppke, 2001; Broeders, 2007: 10). Migration control can, for instance, be pushed ‘outwards’ to foreign consulates issuing visas; pre-boarding checks at international airports; and to interdiction efforts in EU boundary countries such as Soviet Republics and Turkey (Lahav, 1998; Aas, undated). At the same time, controls also be shifted ‘inwards’, targeting foreigners who have already entered the national space. These internal controls work in two ways: firstly, by preventing migrants from gaining access to a job, service or home to which they are not entitled; and secondly, by ensuring that irregular migrants (or those who are facilitating their stay) come to the attention of the authorities (Vogel, 2000).

The chapter offers a comparative analysis and explanation of differences in internal controls. In particular, it speaks to an underlying aim of the thesis: to explore the applicability of the Varieties of Capitalism framework to differences in the processes comprising the ‘punitive regulation of immigration’ in the UK and Germany. In this endeavour, the thesis challenges neoliberal-materialist perspectives as expressed in De

Giorgi (2010) and Wacquant (2009), which gloss over national differences within Europe in favour of universalising trends.

While the previous chapter focused on differences in the extent to which immigrants are criminalised, this one explores the extent to which differences as associated with the Varieties of Capitalism affect the structure and intensity of internal migration control practices. Internal controls map onto pre-existing structures within the labour market, in the welfare state or in the housing market. As such, differences associated with the Varieties of Capitalism differences are most likely to be apparent in internal immigration controls. At the same time, as Barker (2012) comments, an overriding focus on economic factors within much work on the criminalisation of immigration denies the importance of non-material factors, including questions of national identity and belonging. Thus, this chapter also considers the importance of other reasons for why internal immigration control varies in the two countries.

One of the key themes that emerges in this chapter is the importance of considering coordination between the different actors carrying out immigration enforcement tasks. In both countries, internal immigration control is enforced by and within a variety of state and non-state, public and private organisations (Jones and Newburn, 2006; Vogel, 2009). Much as the responsibility for policing provision in most liberal democracies is shared between a widening range of governmental and non-governmental providers (Loader, 2000; Jones and Newburn, 2006; Stenning, 2009), there is also far more to internal immigration control than what the state does alone. Thus, in addition to the state

organisations for which immigration enforcement is a central or defining part of the purpose – the Home Office’s Immigration Law Enforcement unit in the UK; the Finanzkontrolle Schwarzarbeit in Germany - governments also ‘deputise’¹ to third-parties for immigration enforcement, such as trade unions, bosses, landlords, school teachers, doctors, landlords and welfare services.

The fragmentation or pluralisation of enforcement’s institutional landscape means that co-ordination capabilities become a far higher priority. As a result, above and beyond any ‘on-the-ground delivery of visible police functions’ (Loader, 2004: 67), internal migration control revolves around mutual databases, registration and identification requirements and information-sharing. Previous work by Dennis Broeders has examined the emergence of pan-European databases used for the identification, surveillance and control of irregular immigrants (2007) and the use of digital databases in immigration control in Germany (2009). The present chapter supplements this work with a comparative examination of the ways in which information-sharing is shaped by the underlying organisational structure in the UK and Germany. In particular, it asks how possibilities for coordination are facilitated or limited by the pre-existing institutional structures typifying the two types of economy.

The chapter will also reveal how the coordination of the different actors responsible for enforcing immigration control is stymied by competition, conflict and a lack of common goals. Some of the third-parties to whom immigration control has been

¹ To use a term found in Lahav (1998).

delegated find an advantage in not complying with certain enforcement requirements. The most obvious example is the benefits that some employers derive from illegal foreign employment, such as paying lower wages (Karlson and Katz, 2003; Jones, Ram et al., 2006). A more sympathetic case is evident in the cases of social workers, teachers and doctors who resist the imposition of immigration duties because of humanitarian concerns. In both cases, coordination has to be compelled through any one of a number of mechanisms, from force to persuasion, economic pressure, norm creation and manipulation. Thus, although the general principle is for the state's immigration authorities to target irregular migrants themselves, at times it is the non-compliant third-parties who become the objects of punishment (Broeders, 2009; Sitkin, 2014).

Where tensions between immigration authorities and third-parties erupt into political battle, competing positions are often explained with reference to basic values such as liberty, privacy, data protection, confidentiality, compassion and security. The issues contested in these debates seem, on the surface, to have very little relation to the labour market differences as described in the Varieties of Capitalism typology (Hall and Soskice 2001). However, the chapter also argues that there may be some relationship between the underlying economic structure and the ways that societies organise the relationship between the state and the individual.

The next part of the chapter outlines the ways that immigrant controls limit access to key societal institutions in the UK and Germany. It describes: access to the labour market, the welfare state (concentrating on the education and healthcare systems), the private

housing market and finally, street-based controls. The final section of the chapter offers explanations for why the two countries have developed different control systems. In particular, while some of these differences can be attributed to the Varieties of Capitalism, others reflect factors specific to each country. The chapter ends by discussing the extent to which differences between the two countries are likely to remain.

Internal migration controls

Access to the labour market

Germany

Of all the different types of internal controls discussed in this chapter, it is not surprising that controls on the labour market resonate most closely with the Varieties of Capitalism typology. Germany has developed an extensive labour market control regime, marked by systematic coordination between the different actors involved in enforcement. In turn, this system has been developed as a corollary of the existing coordinated political economy, characterised by policy actors with a strong incentive to fight against illegal foreign employment.

Germany was one of the first countries in Europe to introduce employer sanctions for the illegal employment of foreigners in 1972, under amendments to the ‘Employment Promotion Act’ (Arbeitsförderungsgesetz, S. 229 (1) 2). Today, employers are liable to an administrative fine for the employment of foreigners without a work-permit² (or for hiring a company that does so). Criminal penalties are available for the employment of five or more foreigners without a work-permit, employment in poor conditions, the employment of foreign minors without a work permit³ and the illegal supply of temporary foreign workers.⁴ Foreign nationals commit administrative offences where they are employed without a work permit⁵ or are self-employed without permission.⁶

Unlike the UK, the introduction of employer sanctions in Germany was relatively uncontroversial. The few immigrant associations that existed during the early 1970s endorsed sanctions as a way of quelling xenophobic sentiments among the general public and drawing the line between illegal and legal immigration (Cornelius, 2004: 243). Trade unions supported sanctions because they wanted to ensure that workers would not be displaced by cheap, foreign employment.

Most puzzlingly, employer associations also supported employer sanctions (Cornelius, 2004: 243). This policy preference might seem counterproductive. However, the support of German employers for sanctions spoke to the coordinated nature of the

² S. 404 (2) 3 ‘Criminal Code’ (Strafgesetzbuch)

³ S. 10, 11 ‘Fighting Illegal Employment Act 2004’ (Schwarzarbeitsbekämpfungsgesetz)

⁴ S. 15, 15a ‘Temporary Employment Act (Arbeitnehmerüberlassungsgesetz)

⁵ S. 404 (2) 4 Strafgesetzbuch

⁶ S.98 (3) 1 ‘Residence Act’ (Aufenthaltsgesetz)

German labour market at that point in time, under which firms were bound by a series of collective agreements on wages and working conditions. In this context, German employers wanted to avoid being undercut by firms who could offer lower prices by virtue of employing foreigners without the right to work. Both the unions and the employer associations' support for employer sanctions corroborates the argument made in the Varieties of Capitalism literature, that actors involved in policy-making tend to prefer reforms that conform to the pre-existing national-political economy (Bucken-Knapp, 2007).

The coordinated nature of the German labour market is also reflected in strong information-sharing requirements between the different actors involved in the labour market. These are a hall-mark of a coordinated economy. During the application stage, employers are obligated to ask prospective employees for their 'tax card' (Lohnsteuerkarte) and 'social security card' (Sozialversicherungsausweis) (Vogel, 2001; Sinn, 2005; Broeders, 2009). In turn, the local residential registration offices - who issue the tax cards that all workers in Germany must hold - check residence and work permits as part of this process and will only deliver these cards if the recipient's immigration and work status is regular (Vogel, 2001). This makes the accidental employment of undocumented migrants in otherwise regular, tax-paying jobs rare in Germany. Instead, the illegal employment of foreigners usually requires an explicit agreement between employer and employee (Cyrus and Vogel, 2001).

In addition, until 2011, the ‘Federal Agency for Labour’ (Bundesagentur für Arbeit) within the Ministry of Labour also carried out a series of cross-checks to ensure the legality of employment. These actions included the Kontospiegelverfahren, a quarterly check of national social security data against national work permit data, where the Ministry would identify cases in which no work permit matched a foreign national’s social security number. This information was then submitted to the local ‘labour office’ (Arbeitsamt) for investigation (Cyrus and Vogel, 2001). Where there was a discrepancy, a warning letter would be issued to the employer (Sinn, 2005).

The preventative effect of these cross-checks was considerable. As the ‘Federal Office for Migration and Refugees’ (Bundesamt für Migration und Flüchtlinge) stated, ‘cross-check data exchanges preclude recorded employment with a false social security or tax cards’ (BAMF, 2005: 11). Both employer and employee knew that unauthorized employment could be detected if it involved a regular payment of taxes. However, the Kontospiegelverfahren procedure is no longer in operation. In particular, the Residence Act 2005 moved the work permit allocation process from the Federal Ministry of Labour and Social Affairs to the Foreigners’ Office. Subsequently,⁷ data protection issues and a lack of IT architecture between the two departments have meant the Agency for Labour can no longer internally check work permit data against social security data (personal communication, Finanzkontrolle Schwarzarbeit, 08.09.2012). There may, however, be plans to re-introduce a similar procedure in the near future.

⁷ The Federal Agency for Labour continued to carry out the Kontospiegelverfahren for all valid work permits. However, these all expired by 2011 (personal communication, Finanzkontrolle Schwarzarbeit, 08/09/2012).

Illegal foreign employment may also be discovered through inspections. Much as employer sanctions have had their legislative basis in Acts more generally oriented towards controlling illegal employment, inspections for illegal foreign employment are subsumed into the general workplace inspections regime. Since 2004, a special unit within the customs authorities - the 'Financial Control of the Black Economy' (Finanzkontrolle Schwarzarbeit) (FKS) with over 6,000 personnel working out of 113 offices - has been in charge of controlling aspects of illegal employment.⁸ However, the FKS is not quite a labour inspectorate. Its purpose is not generally to look at working conditions (asides from the working conditions of posted workers) or health and safety. Instead its mandate concerns enforcement against illegal employment and the non-payment of taxes. The FKS has the same powers as the police and are able to conduct inspections without suspicion - another sign of employer support for controls on the labour market.

The advantage of this organisational arrangement is that different labour market issues can be controlled simultaneously. In 2011, the FKS questioned a total of 524,015 persons, including 67,680 employers.⁹ Most of the work done by the FKS relates to employment offences unrelated to immigration status. For instance, out of the 168,384 investigations that it launched in 2011, only 11 per cent or 15,044 were concerned with

⁸ In 1997, customs officers deployed in workplace inspections were assigned the rights and duties of police officers and, as such, became investigative personnel operating on behalf of the public prosecutor's office under the 'Act to Amend the Third Book of the German Social Code' 1997 (Sozialgesetzbuch III-Änderungsgesetz) (Kupiszewski and Mattila, 2008). The FKS also has the power to prosecute 'administrative offences' (Ordnungswidrigkeiten) under S. 36 of the 'Administrative Offences Act' 1968. (Gesetzes über Ordnungswidrigkeiten)

⁹ 'Customs annual statistics 2011' (Bundeszollverwaltung Jahresstatistik), accessible here: http://www.zoll.de/SharedDocs/Broschueren/Die-Zollverwaltung/jahresstatistik_2011.html?nn=104300 (last accessed 06/04/2014).

illegal foreign employment.¹⁰ Nonetheless, in subsuming immigration controls into unitary inspectorate for the labour market, the FKS avoids issues of coordination and duplication. In turn, over the course of the 67,680 workplaces they visited, the FKS discovered 7,410 cases of employment without a work permit, 1,615 cases of illegal residence and 134 cases of self-employment without a permit.¹¹

The inspection regime is also marked by a high degree of coordination between different labour market institutions. First, the Finanzkontrolle Schwarzarbeit shares information with the Chamber of Commerce - a body common across the coordinated market type, responsible for registering all companies other than handicraft businesses, the so-called 'free' professions (medicine, law, engineering, and chemistry) and farms. Second, the customs authorities and the social partners (trade unions and employer associations) have created 'Alliances against Illicit Work and Illegal Employment' (Bündnisse gegen Schwarzarbeit und illegale Beschäftigung) (Kupiszewski and Mattila, 2008) in the construction, transport, logistics, meat processing, commercial cleaning, painting/decorating and textile cleaning/textile industries. These alliances are facilitated by the existence of already close working relationship between the partners to these agreements, a proximity typifying interactions within a co-ordinated market economy framework.

¹⁰ Data given by personal request, Email communication, Finanzkontrolle Schwarzarbeit, 10.09. 2012.

¹¹ *ibid*

The Finanzkontrolle Schwarzarbeit is also officially supported in its endeavours by eighteen institutions, including the federal and state police, the ‘foreigners’ authorities’ (Ausländerämtern) and the ‘Federal Agency for Labour’ (Bundesagentur für Arbeit). These bodies must share information necessary for the tasks comprising enforcement against illegal employment, as outlined in the ‘Fighting Illegal Employment Act 2004’ (Schwarzarbeitsbekämpfungsgesetz, S. 4). As a result, in addition to its own databases (including the ZIVIT database), the Finanzkontrolle Schwarzarbeit has direct access to a variety of external databases including EURODAC,¹² the Police Information System (INPOL), the ‘German Pension Insurance’ files (Deutsche Rentenversicherung) and the ‘Central Register of Foreigners’ (Ausländerzentralregister), which contains information on all foreigners legally in the country, apprehended or repatriated and, since 2002, all accepted and rejected visa requests (Sinn, 2005).

However, the ability of the FKS to access information is limited by data protection and privacy requirements. They are not able to have direct access to all necessary databases, but must ask for the ‘administrative assistance’ of other agencies. Thus, access to the EURODAC database in Hamburg, has to be carried out ‘in the care of the federal police’ at the Hamburg Airport or at the Main Station. A recent court ruling¹³ has established that the Ausländerzentralregister represents discriminatory behaviour with regards to EU nationals, because no such database exists in respect of German nationals

¹² Short for European Dactyloscopy. EURODAC is the European fingerprint database for identifying asylum seekers and irregular border-crossers.

¹³ Heinz Huber v Bundesrepublik Deutschland [2008] European Court of Justice, Judgement made 16 December 2008 (Case C-524/06)

(and is, in fact, banned under constitutional principles).¹⁴ Subsequently, all data on EU nationals has been anonymised.

Information-sharing is also stymied by the fact that different actors within the ‘immigration policing family’ have different priorities. For instance, interviewees suggested that staff from the Finanzkontrolle Schwarzarbeit do not always share information with the foreigners’ authorities where they have been convinced of the humanitarian repercussion of data sharing.¹⁵ However, given that information-sharing is a legal obligation, these acts of defiance are not openly stated and as such, have not become a site of open political battle. Similarly, under S. 87 of the Residence Act (2005), labour court judges have the duty to pass on information to the Aliens Authorities if illegal migration status comes to light during the course of court proceedings - as long as it does not harm the ‘vital personal interests’ of the persons involved (Kupiszewski and Mattila, 2008). However, one labour court judge suggested that this does not always occur, on the basis of humanitarian concerns.¹⁶ It is difficult to know how widespread this practice is. However, a foreigners’ office in North Germany emphasised that it ‘very rarely’ received tips from labour courts or from the FKS.¹⁷

¹⁴ In 1983, the German Constitutional Court blocked the implementation of a nation-wide census of German citizens - and a nation-wide database - because it was seen to contravene the right of information self-determination under Art. 3 (1) (see Bundesverfassungsgericht (Constitutional Court), Judgement made 15.12.1983 1 BvR 209 269/83, reported in Hornung and Schnabel (2009)). Instead, information on the residence of citizens is kept in local offices. However, this also leaves open the question of whether the Ausländerzentralregister is constitutional, given that foreigners are also covered under these rights.

¹⁵ Migrant rights advocate, Berlin, interviewed on 26/02/2013

¹⁶ Labour court judge, Hamburg, interviewed on 27/07/2012

¹⁷ Email correspondence, foreigners’ office, North Germany (26/07/2012)

There is, therefore, conflict between the different actors responsible for immigration enforcement. Nonetheless, the coordinated nature of German labour market controls – epitomised by strong working links between institutions and systematic information-sharing - has historically been far more effective than the UK's. However, controls on the UK's labour market have recently intensified. It is to the UK context that this chapter now turns.

UK

The UK was the last country in Western Europe to introduce employment sanctions. Reluctance to accept employer sanctions reflected its belief that its island position and strong port-of-entry immigration controls made unauthorised work less common in the UK than on the Continent (Ryan, 2005-2006). There were also concerns that employer sanctions would lead to discriminatory hiring practices – an outcome that has been partially realised (Evans, 2008). However, it also reflected the interests of the Confederation of British Industry, who were keen to ensure that no extra burden was placed upon business. Employer sanctions were finally introduced in 1996, under the Asylum and Immigration Act (Sch. 8). Subsequently a civil penalty regime was introduced in 2008 (Immigration, Asylum and Nationality Act 2006, S. 15).

The current system is, however, flawed in one major respect. Employers in the UK are exempt from prosecution or sanctions so long as they have checked certain documents (Aliverti, 2011). However, this system leaves checks at the application hands solely in the

hands of non-experts - employers - who are left to judge the validity of a document themselves. Until recently, they had no information with which to make this decision. Since 2008, 'biometric residence permits' were made compulsory for most categories of foreign nationals (Warren and Mavroudi, 2011), which can be checked online against a nationwide database.¹⁸ This represents a step towards the more coordinated model of immigration control used in Germany.

The UK has also introduced new information-sharing requirements for the allocation of tax cards. Employers are obligated to ask for an employers' National Insurance numbers, which is an 'administrative indicator used by the Department of Work and Pensions and HMRC to record Tax and National Insurance contributions and payments of benefits'.¹⁹ Until 2005, the Department of Work and Pensions (DWP) instructed Jobcentre staff to issue National Insurance numbers even when there was evidence that immigration status had been falsified. This was because 'any prosecution action in respect of the falsified immigration documentation would be the responsibility of IND²⁰ - NOT DWP'.²¹ This remarkable instruction is an indication of the total lack of coordination between institutions involved in the control of illegal employment in the UK.

¹⁸ An employer checking service is also available in cases where the individual has an outstanding application or appeal, has presented an application registration card or offered a certificate of application for validation, see 'Preventing Illegal Working', UK Border Agency, <http://www.ukba.homeoffice.gov.uk/business-sponsors/preventing-illegal-working/support/ecs/> (last accessed 01/11/2013).

¹⁹ Freedom of Information request, HMRC 3697.

²⁰ 'The Immigration and Nationality Directorate'

²¹ 'The Department of Work and Pensions'

However, the enforcement regime has tightened considerably. Today, ‘all cases are checked for the right to work’ against the UKBA’s central reference system database²² before a National Insurance number is allocated. It has clearly become much harder – although not impossible²³ - for irregular migrants to gain access to National Insurance numbers. In turn, where irregular immigration status is discovered, the Department of Work and Pensions have a legal pathway for sharing information with the immigration authorities.²⁴

In terms of the inspection regime, the biggest issue that the UK faces is the fact that controls for irregular foreign work are siphoned into a separate enforcement unit. The enforcement of irregular migrant work in the UK is tunnelled into the far smaller Civil Penalty Compliance team within the Immigration law Enforcement and Compliance division in the Home Office.²⁵ Like Germany, inspectors working for the Civil Penalty Compliance team have seen their powers significantly expanded,²⁶ which allows them to conduct inspections independently.

²² Freedom of Information request, DWP, 1214.

²³ Insurance numbers are readily available on the black market – partially because they do not expire when right to leave or work runs out - and can be easily used by imposters, in part because they contain no biometric data (Düvell, 2008).

²⁴ Under S. 122B Social Security Administration Act 1992

²⁵ The immigration authorities have gone through a number of organisational transformations in the past decade from the UK Immigration and Nationality Directorate, the short-lived Border and Immigration Agency and then the UK Border Agency and the Border Force. On 1 April 2013, the UK Border Agency was split into two separate units within the Home Office: a visa and immigration service and an immigration law enforcement division. The chapter will use ‘immigration authorities’ as a general term for these organisations.

²⁶ S. 8 The Immigration and Asylum Act 1999 and Asylum and the Immigration Act 2004 (s.14).

Nonetheless, the problem with subsuming controls against irregular foreign employment into a specialised unit is that it has limited the resources available for enforcement. In 2011, there were a mere 41 members of staff working on the Civil Penalty Compliance Team.²⁷ This can be compared to the 1,300 members of the German FKS prevention team who are required to spend at least 50 per cent of their working hours on patrol. In turn, the Civil Compliance Team conducted a mere 5,083 illegal working enforcement visits²⁸ - a number that can be compared with the 67,680 employers checked in Germany in the same year. The fragmented nature of labour enforcement has limited the UK's ability to implement widespread controls. By contrast, the role of the FKS in responding to all sorts of illegal employment means that coordination is not such an issue.

In turn, the labour market inspection regime is highly fragmented, with each agency controlling a different aspect of the shadow economy. For instance, Her Majesty's Revenue and Customs controls the evasion of direct and indirect taxation; the Department for Work and Pensions is primarily concerned with benefit fraud; the Gangmasters Licensing Authority targets the supply of labour in agriculture, horticulture and the shellfish industry; the Health and Safety Inspectorate focuses on health and safety standards in the workplace, and so forth.

²⁷ Freedom of Information request, UK Border Agency, 2900.

²⁸ Freedom of Information request, UK Border Agency, 24287.

Information-sharing and coordination between the different actors involved in the control of illegal foreign employment is also significantly less advanced than in Germany. There is no such thing as Germany's Ausländerzentralregister, with information on every foreigner on the territory (although the biometric residence permit service may constitute a step in that direction). There are no alliances between trade unions, employer associations and the immigration authorities. There is no statutory duty for various agencies to work together. Joint working might be undermined by the different priorities and objectives of the agencies. In fact, Health and Safety Executive guidance warned inspectors against passing on information to the former UK Border Agency, arguing it could result in the rapid deportation of potential witnesses, turning on some occasions into 'life or death' situations.²⁹

There have, however, been some efforts to improve inter-departmental coordination³⁰ subsequent to the damning judgments contained in the Treasury's 'Grabiner report' on illegal working (2000).³¹ In particular, a number of workplace joint working protocols and memorandums of understanding³² have emphasized the need to 'share intelligence when officials encounter serious issues that could be of concern to

²⁹ 'Joint Workplace Protocol for sharing information between the HSE and other Government departments and agencies', Health and Safety Executive accessible at: http://www.hse.gov.uk/foi/internalops/ocs/001-099/84_6/index.htm (last accessed 26.11.2013).

³⁰ This included a tiny pilot project of joint shadow economy teams, which concluded 2006, see 'Joint Shadow Economy Teams, United Kingdom', Eurofound, accessible here: www.eurofound.europa.eu/areas/labourmarket/tackling/cases/uk004.htm (last accessed 06/05/2014).

³¹ Find at: <http://archive.treasury.gov.uk/pdf/2000/grabiner.pdf> (last accessed 26.11.2013).

³² Between the former UK Border Agency and the Employment Agency Standards (EAS) inspectorate, Department of Work and Pensions, Her Majesty's Revenue and Customs, the Gangmasters Licensing Authority and the Health and Safety Executive.

their counterparts in other departments.’³³ The success of this venture depends on the particular agency. Over the past 3 years, the Gangmasters Licensing Authority passed on information to the former UK Border Agency 285 times³⁴ while the Health and Safety Executive has only done so once.³⁵ The difference between the two agencies can be explained by the fact that the Gangmasters Licensing Authority was founded in response to the deaths of a group of illegally resident Chinese cockle-pickers at Morecombe Bay. From the start, the task of immigration enforcement was a given part of the Authority’s remit.

In addition, until 2012, Her Majesty’s Revenue and Customs (HMRC), which holds data on employment and tax contributions, explicitly rejected ‘bulk data matching’ for fear of repercussions under the Data Protection Act (1998).³⁶ Fear of criminal prosecution for the wrongful disclosure of HMRC information (S. 42 of the UK Borders Act 2007) means that information-sharing only occurred in the UK on a case-by-case basis. However, in the past year, the guidance has changed so that bulk data matching does occur, although records are not kept of its use. The legality of such measures regarding data protection issues has not been investigated. What is clear is that the UK - like Germany - is intensifying its labour market control regime. The fact that this has occurred under an explicitly neoliberal government indicates that the desire to control immigration

³³ ‘Appendix 1: Memorandum of Understanding – Cross-government co-operation on the Workplace Joint Working Protocol’, Health and Safety Executive, accessible here: http://www.hse.gov.uk/foi/internalops/ocs/001-099/84_6/appendix1.htm (last accessed 06/05/2014).

³⁴ Freedom of Information request, Gangmasters Licensing Authority, PF/AW.

³⁵ Freedom of Information request, Health and Safety Executive, 2013080368.

³⁶ ‘Joint working with the UK Border Agency’, HMRC, accessible here: <http://hmrc.gov.uk/manuals/idgmanual/IDG55120.html> (last accessed 12/01/2012).

supersedes the desire to prevent extra burdens on employers. This issue will be further discussed in the conclusion.

The final difference between the two countries' labour market regimes concerns the standards of proof that are needed before checks are made. While the Finanzkontrolle Schwarzarbeit can conduct 'proactive' checks, Civil Compliance Team is required to have 'reasonable suspicion' based on facts, information and/or intelligence - relevant to a specific workplace or to individual workers - that immigration laws have been or are being breached before conducting an inspection (Trade Union Congress, 2010). As one member of the Civil Compliance Team commented, 'the reason why illegal working enforcement visits are intelligence led is due to an assurance given to Parliament prior to the introduction of the legislation....that particular businesses would not be repeatedly targeted'.³⁷ This limitation speaks to the power of neoliberal business interests in the policy-making process at that time.

Access to welfare

Overview

³⁷ Email correspondence, Civil Penalty Compliance Team, 09/11/2012.

Of the remaining societal institutions described in this chapter, immigration controls within the welfare state system are the most likely to be affected by differences as described in the Varieties of Capitalism literature. As the introduction to the original text outlines, strong evidence suggests that ‘there is a correspondence between types of political economies and types of welfare states’ (Hall and Soskice 2001:50). This section looks at access to the welfare state and in particular, the education and healthcare systems.

Access can be broken down into two elements (Morris, 1998; Vogel, 2000). The first revolves around eligibility. In both Germany and the UK, the right to welfare is often mediated through immigration status, with welfare agencies implementing a number of procedures to check whether people are eligible for the benefits and services for which they have applied. The discovery of individuals’ illegal status may cause them to be excluded from the scheme. More seriously still, however, is the risk of deportation where welfare authorities are able and/or required to pass information about illegal immigration to the immigration authorities. With some notable exceptions, as discussed in this chapter, all public authorities in Germany are covered by the ‘duty to denounce’ irregular immigrants to the immigration authorities where they discover illegal residence in the course of their duties.³⁸ By contrast, there is no overarching requirement in Britain for welfare authorities to provide the immigration authorities with information.

³⁸ As one report by the Federal Ministry of Migration and Asylum stated ‘more important than police controls...migrants will face checks on their residence status at practically every office they could be in contact with’ (BAMF, 2005: 10).

Reporting duties within education systems

Germany

In Germany, the federal states each have their own law regarding the education of undocumented children. In all states but Berlin, compulsory school attendance requirements do not apply to undocumented children. This fact provides the backdrop for the exclusion of irregularly resident children from German schools, which can choose not to enrol a student where illegal residence was discovered.

Until recently, under S. 86 Residence Act 2005, schools, like all public offices in German, had to inform the *Ausländerbehörde* when they discovered the illegal residence of the child. The duty meant that for irregular migrants, enrolling their children in school might lead to deportation (Cyrus, 2004). Teachers who did not comply with the ‘duty to denounce’ could be charged with the criminal offence of aiding and abetting illegal stay (S. 96 of the Residence Act).

However, this duty only applied when illegal residence was discovered in the fulfilment of their office. *Bundesländer* that were more sympathetic to irregularly resident children’s right to education were able to put in place less stringent registration requirements, which meant that they would not find out about irregular residence in the first place. For instance, in *Nordrhein-Westfalen*, schools were not allowed to require

registration cards and passports in the course of registering students. By contrast, state regulations in Hessen meant that applicants had to present a valid residence permit during school registration. Further, the legal definition of local residence was taken to imply registered residence, rather than place where one sustains oneself (Vogel and Aßner, 2010: 10). These requirements meant that irregular residence was far more likely to be discovered in the registration process.

In 2012, schools and educational establishments across the whole of the country were made exempt from reporting requirements. This followed an open letter from the then Minister of the Interior, Wolfgang Schäuble, who said that, ‘Children cannot be responsible for their parents’ behaviour. For humanitarian as well as societal reasons, it is for us to support the right of children under the age of 18 to attend school, even where they have no right of residence’.³⁹

Although this development signals a significant liberalisation of the control regime, there are still many schools that refuse to accept children without valid residence permits (Laubenthal, 2011). One issue is cost. Without proof of earning, irregularly resident parents are bound by law to pay the highest prices for nursery education.⁴⁰ This issue is exacerbated by the fact that German children enter school at six - about two years later

³⁹Letter from Minister of the Interior Dr. Wolfgang Schäuble from 14 May 2009 to the Leader of the Commission of German Bishops and others from the Civil Society (‘Schreiben des Ministers des Innern Dr. Wolfgang Schäuble vom 14. Mai 2009 an den Leiter des Kommissariats der deutschen Bischöfe und andere Fragesteller aus der Zivilgesellschaft’), discussed in Vogel and Aßner, 2010: 5.

⁴⁰‘Children without Status: legal hurdles have fallen – but problems remain’ (‘Statuslose Kinder: Gesetzes-Hürde gefallen – doch damit ist es nicht getan’), GEW, accessible here: http://www.gew.de/Statuslose_Kinder_Gesetzes-Huerde_gefallen.html (last accessed 06/05/2014).

than their counterparts in the UK. This means that irregularly immigrant children in Germany miss more early years' education under the cost restrictions to nursery education than they would do in the UK. As is further discussed in the conclusion, the late starting date of children in Germany is tied to the maternalist nature of the German welfare state, whereby women are expected to stay at home, in an arrangement that is complementary to the underlying, coordinated political economy.

In addition, the children of the undocumented face difficulties registering for the general accident insurance which covers all other students. The fact that the school could be held responsible in case of an accident is often given as an argument as to why they do not allow children of undocumented migrants in their institution.⁴¹ No such requirement applies in the UK.

Finally, in terms of post-16 education, Germany operates a 'dual system of apprenticeships' - a form of vocational education funded by employer and the state together, where the trainee spend part of his or her time in a vocational college and the other part at a workplace. Nearly two-thirds of young people take part in apprenticeships (Steedman, 2010: 23). This system encourages the reproduction of the specific skills that corporate strategies in coordinated market economies tend to require (Hall and Soskice 2001:51). In turn, employers, as private institutions, are not obligated by the duty to denounce apprentices to the immigration authorities. However, they do require tax cards

⁴¹ 'Basic Social Rights', PICUM, accessible here: http://picum.org/picum.org/uploads/file_/Basic per cent20Social per cent20Rights per cent20study per cent20-Germany.pdf (last accessed 26/05/2014)

and social security numbers, given the fact that apprenticeships are considered a form of employment.⁴² Thus, the same controls that permeate the labour market prevent irregular immigrants from accessing vocational education in Germany.

UK

In the UK, all Local Education Authorities (LEAs) have a duty⁴³ to provide a school place for every child aged 4 through 16 residing on a temporary or permanent basis in the catchment area. This includes the approximately 120,000 school aged children in the UK who are in the country illegally (Sigona and Hughes, 2012: vii). Thus, irregularly resident children are entitled to attend publicly funded schools. In order to safeguard this right, there is no obligation for a UK education authority or school to request proof of a child's immigration status or any duty of disclosure forcing schools to divulge information to the immigration authorities.

Proposals to introduce school controls and disclosure requirements are met with particularly strong opposition. Recently, a series of leaked emails from the inter-ministerial group on migrants' access to benefits and public services in March 2013 indicated that they were considering changing the rules around the role of schools in

⁴² Conversely, foreigners with a toleration certificate are allowed to access apprenticeships and can, in fact, gain a residence permit upon completion of the training (S. 18a 'Residence Act 2005)

⁴³ Under S. 13 of the Education Act 1996

immigration enforcement.⁴⁴ The teachers' unions reacted swiftly and angrily to the suggestion that controls might be introduced. Lesley Gannon of the National Association of Head Teachers argued that children should not be held 'responsible for the actions of their parents, it's simply not fair.'⁴⁵ Notably, Christine Blower of the National Union of Teachers compared the introduction of immigration enforcement in health and welfare: 'We have heard politicians talk of immigrants as "health tourists." This is unacceptable. The Government must not create conditions that imply that the children of immigrants are 'education tourists'.'⁴⁶ In both of these cases, the innocence of children was used to justify their particular exemption from immigration enforcement - a discourse which also underlies the recent ban on children in immigration removal centres (see Anderson, 2012).

Still, the fact that schools and LEAs require proof of a pupil's address is likely to pose significant difficulties to irregular migrants, who may not have such a thing as a permanent address (Sigona and Hughes, 2012) (see section on private housing). Further, while it is noted that the 'majority of schools in the UK still represent safe environments, testimony from school professionals indicates that the former UK Border Agency was increasingly pressuring schools to share information regarding the immigration status of their pupils' (PICUM, 2011: 24).

⁴⁴ One email read: 'barring children, whatever their migrant status, from compulsory education has pretty much been ruled out by ministers and at the moment is off the table for cross-government discussions. The question now is whether, if not to enforce a ban, it would nevertheless be helpful to carry out migrant status checks as part of school admissions', see 'Ministers planning immigration crackdown on 'education tourists'', 27/03/2013, The Guardian, accessible at: <http://www.theguardian.com/politics/2013/mar/27/ministers-immigration-crackdown-education-tourists> (last accessed 10.01.2014).

⁴⁵ *ibid*

⁴⁶ *ibid*

Finally, the situation changes drastically once a child reaches the age at which compulsory education ends at 16. In terms of further education (age 16-19), the Learner Eligibility Guidance (2010) states that a pupil must lawfully reside in the United Kingdom to obtain a free place (YPLA, 2010). However, there is no regulation stipulating that schools must pass information pertaining to students' migration status.

Universities, by contrast, are more tightly interwoven into immigration enforcement. All prospective students from non-EU countries must have a Tier 4 student visa. In turn, the University must have a sponsorship license and fulfil several duties like contacting the immigration authorities when the student fails to enrol, misses ten expected contact sessions or more generally is suspected of breaking the conditions of stay. In 2011-2012, a nation-wide campaign regarding the misuse of student visas and bogus colleges led to almost half of all educational institutions being struck off the approved sponsorship list.⁴⁷ A high profile example was when London Metropolitan University lost its sponsorship licence for 'a number of serious breaches of their sponsor duties'.⁴⁸ The decision left 2,700 non-EU overseas students in limbo, with many of them facing a choice between transferring to another university or leaving the country.⁴⁹ Given the huge financial loss implied in losing sponsorship, universities are strongly compelled to abide by requirements. However, the lack of substantial public backlash in these cases indicates

⁴⁷ 'Bogus college check catches 124', BBC News, 8 January 2008, accessible at: <http://news.bbc.co.uk/1/hi/education/7177033.stm> (last accessed 10.01.2014).

⁴⁸ 'London Metropolitan University's licence revoked', gov.uk accessible here: <https://www.gov.uk/government/news/london-metropolitan-universitys-licence-revoked> (last accessed 10.01.2014)

⁴⁹ 'British visa ruling leaves thousands in limbo', 03/09/2012, International Herald Tribune

that irregular immigrants' access to university education is conceptualised differently to pre-16 education - namely, as a luxury rather than a right.

Reporting duties within healthcare systems

Germany

Institutional variations between the German and UK healthcare systems have influenced the regimes that the two countries have set up to both regulate irregular migrants' access to health provision and extend immigration control into the medical field. Hospitals, emergency units and general practitioners in Germany are obligated by law to provide medical treatment regardless of health insurance or residency status. Braun & Würflinger (2001: 18) note that this law of obligation is often cited by politicians as evidence of the adequacy of medical care available to undocumented migrants. Further, medical confidentiality meant that doctors and medical staff in hospitals could be prosecuted under S. 203 'Criminal Code' (Strafgesetzbuch) for passing on 'secrets' about irregular migrants - including immigration status. Hospital staff are, in general, exempt from the duty of disclosure.⁵⁰

⁵⁰ All public offices have to notify the Foreigners Office when they obtain information on undocumented foreigners while fulfilling their public office. However, because the gathering of information on the residence status of the patients is not part of the fulfilment of their office, hospitals and doctors are not bound to report undocumented migrants (see S. 87 Residence Act 2005).

However, due to the payment structure, irregular immigrants' access to German healthcare is considerably more complex than it first appears. In contrast to the universal nature of the UK National Health Service - which is funded out of general taxation - the German state healthcare system is organised on the basis that individuals are insured through their place of employment or through another working family member. Subsequent to treatment, compulsory 'statutory health insurance programmes' (Krankenkassen) reimburse hospitals and GPs for services rendered. Although insurance based healthcare systems are not a common feature of coordinated market economies, it is worth noting that healthcare in Germany was negotiated as part of a series of settlements made between the trade union, employer associations and the government (Manow, 1997) - namely, an early form of collective bargaining. This issue is further discussed in the chapter's conclusion.

In this context, the key issue for irregular migrants in Germany accessing healthcare is their exclusion from insurance schemes. As above, because of strong checks within the labour market, the vast majority of irregular migrant workers are in undeclared unemployment. As a result, they will not be registered by their employers in health insurance schemes. Neither can they apply for unemployed persons' state-funded health insurance schemes without divulging their status.

The process of checking evidence of health insurance at the point of service is strictly observed (Romero-Ortuno, 2004: 255). Where patients are unable to pay, social welfare offices are responsible for reimbursing public hospitals for medical services. In

particular, under S. 24 of the ‘Asylum Seekers Benefits Act’ 1993 (Asylbewerberleistungsgesetz), illegal residents in Germany are entitled to free medical care in cases of acute sickness and pain, childbirth and pregnancy (Kupiszewski and Mattila, 2008). The ‘Law for Infectious Diseases’ 2000 (Infektionsschutzgesetz, S. 69) stipulates that some infections such as tuberculosis should be diagnosed and treated anonymously and free of charge at public health offices.⁵¹ However, in applying for this reimbursement, the patient would have to disclose his/her residence status to the social welfare office, which is bound by the reporting requirement.⁵² An exception is made in the case of emergency hospital treatment, where confidentiality is extended to social services, who are not permitted to inform the aliens’ authorities where they find out about irregular residence.⁵³

If an individual is unable to provide a valid insurance card, the hospital administration usually tries to find another person or institution that will sign documentation assuming responsibility for the cost of treatment, usually even before treatment has commenced. Other reported examples of hospital treatment include: hospitals arranging the ‘deportation’ of undocumented patients at their own cost by sending them by ambulance to countries such as Poland or the Ukraine (since

⁵¹ By contrast, planned hospital treatments such as operations or the treatment of chronic diseases like diabetes are not available to undocumented migrants. HIV/AIDS testing is also anonymous and free: however, treatment is not paid for unless migrants have at least a Duldung or ‘stay of deportation’.

⁵² Under S.76 of the ‘Foreigners’ Act’ 1990 (Ausländergesetz) 1990 and later, by S. 86 of the ‘Residence Act’ 2005 (Aufenthaltsgesetz). Notably, most irregular migrants in Germany are entitled to the social rights defined in S. 3 and 4 Asylum Seekers Benefits Act, which outlines that ‘the essential need for food, housing, heating, clothing, health and personal care and household goods will be met in kind’. However, specific eligibility is determined on a case-by-case basis and illegally resident migrants cannot claim for pension funds, child benefits or child-rearing allowances. Further, as above, social welfare offices are obliged to identify claimants’ residence status and forward the results to the aliens’ authorities. This prevents those eligible from accessing social support.

⁵³ Art. 121 ‘Federal Social Welfare Assistance Act’ 1994 (Bundessozialhilfegesetz) lies down the conditions under which providers can ask social services for reimbursement of the costs incurred.

transportation is less expensive than hospital treatment in Germany); offering a poorer standard of care; retaining personal documents of patients such as passports in an effort to ensure payment (Scott, 2004); or even reporting undocumented migrants to the Foreigners' Office.⁵⁴ Alternatively, another strategy often used is that irregular immigrants will come in to the hospital with another person's insurance card. However, this is a highly risky strategy. Insurance cards contain information on blood type and pre-existing conditions. Complications can arise in treatment because of conflicting information (FRA, 2011: 37-38).

In response to these issues, organisations such as Maltese MedezinMigrantin run programs in a number of German cities, operating volunteer GP clinics and collecting donations to pay hospital bills.⁵⁵ There are also reports of doctors treating patients 'under the table', particularly in large public hospitals, where doctors presumably have more autonomy (Scott, 2004). However, these are not widespread initiatives. Thus, irregular immigrants' access to healthcare in Germany is fraught with the risk of discovery.

The UK

⁵⁴ 'Basic Social Rights', PICUM, accessible at: http://picum.org/picum.org/uploads/file_/Basic%20Social%20Rights%20study%20-Germany.pdf (last accessed 10.01.2014).

⁵⁵ Initiatives to provide medical support for 'illegalised migrants' are in fact illegal under the Residence Act but as Keiser et al (2000:9) write, this is generally tolerated by the authorities due to a concern 'for the people's health'. An added advantage for the state in allowing medical support is that it does not have to absorb the costs of providing health care to irregular immigrants.

The British system works in an entirely different manner. The UK's National Health Service is (mostly) funded out of general taxation. Denunciation is far more haphazard due to the fact that it is not predicated on a regular reimbursement of fees, although as discussed below, this may change under the provisions of the Immigration Act 2014.

The right to health for undocumented migrants is outlined in various international legally binding covenants to which the UK is a signatory.⁵⁶ However, the meaning and scope of the right to health lacks clear definition (Hendriks and Toebes, 1998; Toebes, 1999; Pollard and Savulescu, 2004). The lack of conceptual clarity plays itself out in the variegated access of irregular immigrants to healthcare in the UK. In particular, both eligibility for free healthcare and third-party reporting requirements in the UK depend upon whether the service is included as primary healthcare (GPs, community services) or secondary healthcare (hospitals, trusts).

Relatively strict rules are in place for free secondary health care. The criterion for eligibility is 'ordinary residence', which has been defined in case law as both 'lawful' and 'settled' residence.⁵⁷ As such, illegally resident persons are not generally eligible for free secondary healthcare,⁵⁸ although patients requiring immediately necessary and urgent must be treated irrespective of their ability to pay. Further, anytime someone registers for

⁵⁶ See: the International Convention on Economic, Social and Cultural Rights 1966 (entry into force January 3rd, 1976), which does not initially make distinctions between legal and 'illegalised' foreigners; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, (entry into force December 18th 1990), particularly Art. 28 (Scott, 2004).

⁵⁷ *R v Barnet LBC Ex p Shah* (Nilish) [1983] 2AC 309 HL

⁵⁸ Notable exemptions to this rule are 'immediately necessary' treatments, which must be provided in advance of payment, and public health services, which includes treatment for tuberculosis and sexually transmitted disease but excludes the notable example of HIV treatment (Pollard and Savulescu, 2004).

secondary health care, they are meant to provide evidence that they have lived legally for a certain amount of time. In 2013, a consultation paper produced by the Home Office (2013) suggested that these checks are applied inconsistently across the NHS. Under the new Immigration Act 2014, the NHS will have new responsibilities to ensure that they are properly charging where appropriate (although the details of this have yet to be worked out). The effects of this change are yet to be seen. There is no, as yet, any suggestion to implement sanctions for doctors or NHS staff who do not abide by immigration regulations.

By contrast, illegal residents are eligible for free primary healthcare. As independent contractors to the NHS, GPs are free to include someone into their lists, needing neither party to request/produce documentary evidence of identity or migration status. In fact, what rules do exist, work to the favour of irregular immigrants. Any person, whether registered with a GP or not, who requires treatment that is regarded by a GP as ‘emergency or immediately necessary’ must receive that treatment free of charge for a period of up to 14 days (Romero-Ortuno, 2004: 257-258). Furthermore, a number of practices have been threatened with legal action where they have refused to accept irregular immigrants as patients.⁵⁹

⁵⁹ ‘GPs forced to register illegal immigrants after threat of legal action’, Pulse, 22/12/2011, accessible here: <http://www.pulsetoday.co.uk/gps-forced-to-register-illegal-immigrants-after-threat-of-legal-action/13234713.article> (last accessed 10.01.2014).

As part of a drive to intensify internal controls, the current coalition government has also outlined plans to make irregular immigrants pay for primary health care.⁶⁰ A key argument made here is that the current differentiated system of access ‘makes it difficult for hospitals to administer overseas visitor treatment charges because they struggle to differentiate between GP-referred patients who are chargeable, and those who are not’ (Home Office, 2013: 22). However, the government faces strong opposition to the introduction of eligibility requirements in primary healthcare from within the medical establishment, including the powerful British Medical Association, who ‘would strongly oppose any system where GPs are required to act as UK Border Force agents’.⁶¹

Notably, the proposals do not make any suggestions that GPs will be bound to pass information to the immigration authorities if they do discover illegal residence (Singer 2004:1904). Health professionals present themselves as strongly driven by the duty of care, which is seen as contradictory with immigration enforcement. However, the boundaries are not clear. With regard to their duty of confidentiality, regulations further stipulate that ‘while there is a public interest argument for reporting the patient’s immigration status’ the decision to report must be weighed against ‘the medical needs of the patient and the wider public’.⁶² Obligations of medical confidentiality outlined in the NHS Constitution prohibit the disclosure to third-parties of patient information by the NHS and/or by other medical practitioners. Still, it is not defined whether confidentiality

⁶⁰ These are not contained in the Immigration Act 2014. However, it is possible that they will be introduced under secondary legislation, see ‘The Immigration Bill and Access to Healthcare’ (NAT, 2013).

⁶¹ Dr Laurence Buckman, chair of the British Medical Association’s GP Committee, quoted in ‘Overseas NHS visitor charges require more than thought warns doctors leaders’, BMA 03/07/2014, accessible here: <http://bma.org.uk/news-views-analysis/news/2013/july/overseas-nhs-visitor-charges-require-more-thought-warn-doctors-leaders> (last accessed 10.01.2014).

⁶² ‘Implementing the Overseas Visitors Hospital Charging Regulations. Guidance for NHS Trusts in England. Department of Health’, NHS, Department of Health, (April 2004), p.40

is limited to medical information or to any information about the patient, which could include contact details and immigration status. Furthermore, case law has established that medical confidentiality can be overridden by ‘public interest’, albeit only under ‘very special circumstances’.⁶³

Still, there is some evidence of increased denunciation by the NHS. A memorandum of understanding declares that the NHS Protect - the operating name for the Counter Fraud and Security Management Service - will both ‘inform UKBA where any instances of suspected immigration offences come to light’ and ‘respond to information requests’, subject to confidentiality agreements. Between 1 Jan 2012 and August 2013, the NHS Protect passed on information to the former UK Border Agency on 82 occasions.⁶⁴ A Migrant Rights Network report presented a case study where an illegally resident pregnant woman was told that, ‘If you need treatment, you’ll have to pay for it privately or go to Urgent Care Centre or A&E, and your details will be passed to our Counter-Fraud team and the Home Office’ (MRN, 2011: 1) One lawyer consulted for this study also mentioned that he had represented ‘several cases’ where NHS professionals had passed on information to the UK Border Agency. In the end, clients became ‘too fearful’ to proceed.⁶⁵ The instances outlined here mean that access to secondary healthcare does carry a small degree of risk of discovery for irregularly resident migrants in the UK.

⁶³ *W v Edgell* [1990] 1 ALL ER 835

⁶⁴ Freedom of Information request, NHS Protect, 2013.08.001. It has also received information 30 times in same time period.

⁶⁵ Email correspondence, London-based solicitor, 19/09/2012

Nonetheless, much as coordination is less systematic in the British labour market than the German labour market, so too is the welfare state less integrated into immigration control enforcement. In turn, some of these differences relate to underlying structures complementary to the underlying political economy. Strong information-sharing requirements within the German welfare mirror those present in the labour market.

Controls in the private housing market

Germany

This section explores access to the private housing market. There is no obvious reason why Varieties of Capitalism differences should manifest themselves in controls on private housing market. However, the structure of private housing controls in each country shows some continuity with controls in the other societal institutions discussed here, in terms of the intensity and structure of information-sharing. As discussed in the conclusion, this may suggest some interdependence between the different institutional structures.

In Germany, housing controls are part of a wider system of housing registration (Cyrus, 2008: 9). Both foreigners and German citizens alike register with the Citizen's Office or Town Hall. This provision applies to all persons staying over three months in Germany. Landlords are obliged to help registration authorities enforce compulsory

registration. Foreigners' residence permits are checked in the course of registration and the relevant Foreigners' Authority is routinely informed where irregular residence is discovered (Vogel, 2000). Thus, like welfare controls, information-sharing requirements make it virtually impossible for illegally resident migrants to gain access to private housing without the landlord's compliance (Stobbe, 2004). In turn, irregular immigrants are highly exposed to landlords' arbitrary actions, insofar as the fear of disclosing their status makes it impossible for them to take legal action in case of tenancy disputes.

Immigration controls in the German private housing market could be viewed as an unintentional offshoot of the registration system. However, it should be noted that registration requirements were, in the first place, aimed at controlling the mobility of the foreign poor - although the precise definition of 'foreign' has changed over time. In particular, household reporting requirements in Germany are a historical legacy of the desire to control the social assistance claims of landless working classes and vagrants. These were introduced even before the German nation-state formally existed and were aimed both at people from outside of German lands and visitors from outside the local municipality (Torpey, 2000). Later, during the 19th century, mass population movements became commonplace as members of the ambitious working class abandoned their rural hamlets for the promise of the urban industrial centres of Berlin, Silesia and the Ruhr. Wanting to control this 'masterless Rabble' (Torpey 2000), many Bundesländer introduced registration requirements, primarily motivated by security concerns and the desire to both control mobile taxpayers and regulate the movement of trained artisans. By 1867, new arrivals were mandated to register with the police within 14 days of arrival, first across the North German Federacy and later across southern Germany (Jackson,

1990). In the twentieth century, the requirement to register with the ‘Police Registration Body’ (Polizeiliche Meldewesen) under the ‘Empire Registration Ordinance’ 1938 (Reichsmeldeordnung) constituted a central plank in the Third Reich, which viewed this as a means of ensuring the separation of the races (Kempner, 1946). Given this background, the fact that today’s residential registration requirements have an exclusionary element is hardly surprising.

UK

In the UK, no such system of registration exists. Private landlords do not have to register themselves with the state unless they own large multiple-occupancy housing.⁶⁶ They are not responsible for notifying the authorities when there is a new tenant.⁶⁷ Furthermore, until recently, although many landlords and letting agents made checks on prospective tenants - for instance, asking to see evidence of identity or seeking third-party references - these were aimed at protecting the landlord’s assets and revenues, rather than statutory immigration measures.

The Immigration Act 2014 has recently introduced requirements for landlords to conduct immigration checks on tenants, with financial penalties for those who provide rented accommodation to illegal immigrants unless they have carried out sufficient

⁶⁶ Under the Housing Act 2004, S. 61 and secondary legislation made under that Act.

⁶⁷ Although the head of the household is required to register eligible voters in his/her household under S. 23 (3) of The Representation of the People Act. A £1000 fine is possible for non-compliance.

checks. This model of enforcement is similar to the employer sanction regime and is similarly controversial. The resident landlord's association strongly opposed the landlord controls, using similar discourses to those by employer associations during the introduction of employer sanctions. First and foremost, they opposed the fact that controls will imply 'unwanted 'red tape' and additional costs for landlords. Second, they argued that the checks will be ineffective, given that they place the onus for enforcement on untrained staff and because illegal immigrants refused by one landlord 'will simply move on either to an ignorant landlord who does not check or an unscrupulous landlord who will take them on anyway' (RLA, 2013: 9). Finally, they also criticised the proposals because of the risk of 'unintended discrimination' by landlords who are scared of penalties (ibid, p. 5).

Given the profits that landlords have made from exploiting irregular immigrants, it is an open question as to whether the resident landlord association's concern for the welfare of immigrants is genuine or is better understood as a way of protecting its members' interests. However, the Immigration Law Practitioners' Association also voiced opposition to the introduction of housing controls. Their major argument was that 'people lawfully in the UK, including British citizens, cannot always produce identity documentation' (ILPA, 2013: 2). This is not understood as a mere administrative technicality. Instead, they quoted the Home Secretary's introduction to the second reading of the Identity Documents Bill, in which he argued that 'We are a freedom-loving people... discomfort [towards ID cards is] born of a very healthy and British revulsion towards bossy, interfering, prying, wasteful and bullying Government'(ibid). In doing so, the ILPA framed their opposition in terms of the British character. In turn, the

government's decision to introduce controls represents their judgment that immigration enforcement justifies an intrusion into the private housing market - something which is notable given the political orientation of the two parties in the coalition. This issue is discussed further in the chapter's conclusion.

Public identity checks

Germany

The effects of the VoC are least likely apparent when it comes to public identity checks because there is no obvious relationship between differences in labour market institutions and variation in the regulation of public space. However, here too, there are some continuities in terms of identification requirements, which suggest some interdependence between the different institutions in each country.

Germany has no bespoke internal immigration enforcement unit. Instead, immigration enforcement is the task of the police. Today, Germany has the 'Federal Police Agency' (Bundespolizei) - responsible for border zones, airports and transportation hubs - as well as 16 state police forces (Ländespolizei). Both tiers of police are responsible for enforcing immigration control (Doomernik and Jandi, 2009).

With regards of the identity control regime, one of the most important differences between the UK and Germany is that German citizens must own an identity card and be able to produce it within a reasonable period of time if asked to by the police. In turn, German police generally need reasonable suspicion of a crime to make an identity request. However, a number of federal states have nominated ‘dangerous areas’ where this restriction no longer applies (Schneider, 2010). These deprived, urban areas tend to have a high proportion of ethnic minority communities.⁶⁸

Furthermore, the federal police and all but six of the *Ländespolizei* have also introduced so-called *Schleierfahndung* controls that can be conducted - even in the absence of any specific event or reasonable cause for suspicion - within 30km of the border or else in major traffic areas such as motorways, airports or train stations (Graf, 2006; Vogel, 2009). These powers were introduced when internal borders were lifted between Germany and its continental neighbours under the Schengen Implementation Agreement 1990 and are rhetorically justified by the fight against cross-border organised crime and illegal migration (Kant, 2000).

Altogether, these initiatives have given German police considerable discretion to request identification papers without reasonable suspicion or specific cause. Further, German police tend to use these for the control of immigration. In particular, German police forces arrested 78,324 persons for immigration offences in 2011 (*Polizeiliche*

⁶⁸For instance, in Hamburg, the designated ‘Dangerous Areas’ (*Gefahrengebiete*) are St. Pauli, Sternschanze, Altona-Altstadt and Altona Nord.

Kriminalstatistik, 2011), including 24,002 for illegal entry. This is considerably higher than is the case in the UK. Otherwise, German ‘police criminal statistics’ also suggest a divide in enforcement patterns between the country’s left-leaning north and politically conservative south. For instance, Berlin - German’s multicultural capital, located in the northeast of the country - has among the lowest arrest rates for immigration crimes. Similarly, a Hamburg police officer consulted for the purposes of this study stated that controlling illegal migration is of ‘secondary importance’ to other crime-fighting purposes.⁶⁹ By contrast, the southern states of Bayern, Hessen and Baden-Württemberg have the highest arrest rates for immigration crimes. Around 82 per cent of persons stopped under Bayern’s Schleierfahndung controls were foreign nationals (Kant, 2000).⁷⁰

The most controversial aspects of the German identity check regime relate to its tolerance of racial profiling. A 2010 administrative court decision⁷¹ approved the use of skin colour as basis for officials inquiring about immigration status in certain hotspots of illegal migrant activity. However, racial profiling was subsequently outlawed by the Constitutional Court,⁷² on the basis that it conflicted with Art. 3 of the Constitution⁷³ and the Equal Treatment Act (2006). This ruling brings the legal regime in Germany close to that of the UK’s. However, it is notable that it took a legal case for racial profiling to be

⁶⁹ Email correspondence, Hamburg regional police officer, 26/10/2012.

⁷⁰ In the months following the July 2005 London bombings, Hessen, Baden-Württemberg and Bayern organised mass identity checks in the vicinity of mosques and Muslim-owned business areas. German officials interviewed in one study (Neild, 2009) were keen to emphasize that every raid must have a case-specific evidentiary basis connecting it to criminal Islamic structures. At the same time, a counter-terrorism officer interviewed for the purposes of this paper also admitted that, ‘the main goal of these controls is to find people who are living in Germany illegally or [engaged in] other related crime’ (2009:66).

⁷¹ Administrative Court of Koblenz, judgement of 28 Feb 2010, document number 5 K 1026/11.KO

⁷² ‘Constitutional Court’ (Bundesverfassungsgericht) 1 BvR 518/02 from 4.4.2006, Para-Nr. (1 - 184)

⁷³ ‘No one must be treated in a disadvantaged or privileged manner due to his/her sex, descent race, language, origin, faith or religious or political opinion or disability’.

prohibited. The weak nature of the anti-discrimination movement in Germany is discussed further in the conclusion.

The UK

In the UK, public identity checks are carried out by the police and by the immigration authority. Until the 1970s, the police were primarily responsible for what little internal immigration enforcement took place.⁷⁴ The then-Immigration Service did not have a permanent inland enforcement team, nor were its powers of arrest used as a matter of policy, with detection of potential deportees being largely seen as a matter for the police (Du'vell, 2008).⁷⁵ However, the police resented the use of their resources for immigration enforcement, as opposed to other, more prioritised crime control activities (Jordan and Düvell, 2002). In addition, the desire to maintain good community relations inhibited police involvement. The suffocation of Joy Gardner, an irregular immigrant from Jamaica, during the course of her arrest by immigration and police officers in 1993 was a central cause in the police's reappraisal of its role in immigration enforcement (Gibney, 2008). The need for greater sensitivity around issues of nationality was undoubtedly magnified by recurring scandals relating to institutional racism in the police (most notably the Stephen Lawrence case, see Lord W. Macpherson, 1999).

⁷⁴ 'Deportation', HC Deb 23 March 1977 vol 928 cc540-1W, accessible here: http://hansard.millbanksystems.com/written_answers/1977/mar/23/deportation#S5CV0928P0_19770323_CWA_31 (last accessed 21/05/2014).

⁷⁵ 'Immigration: Detection of Illegal Entrants', HL Deb 22 July 1970 vol 311 cc974-6, accessible here: <http://hansard.millbanksystems.com/lords/1970/jul/22/immigration-detection-of-illegal-entrants> (last accessed 21/05/2014).

Today, the immigration authorities and the police work together in ‘Crime Reduction Operations’ (‘CrOps’) where there is suspicion that immigration crime would be uncovered alongside other crime. However, the immigration authorities have taken a more central role in internal immigration enforcement, including workplace controls (as above) and Street Operations or ‘StOps’, which they carry out on their own. Yet street raids have been fairly low priority for the immigration authorities. Whereas it conducts hundreds of workplace raids yearly and served immigration offence papers to 21,298 persons in 2011,⁷⁶ the UK Border Agency took part in a mere 32 street-based operations in 2011-2012, 19 of which were in Hammersmith Broadway alone.⁷⁷ Note the strong bias in the UK, unlike Germany, towards controls in the capital city.

Another difference between street based identity checks in the two countries regards far stronger legal prohibitions against racial profiling in the UK. The former UK Border Agency’s guidance prohibited inland ‘fishing exercises’ where random individuals are questioned about their migration status.⁷⁸ UK immigration officers cannot base their checks on racial appearance and must instead satisfy a two-stage burden of proof. Firstly, there must be sufficient intelligence (often a tip from the public) regarding the congregation of irregular migrants at a specific place at a specific time. Secondly, once officers arrive on-site, they must have information suggesting that there is cause to suspect a specific individual of being an illegal immigrant. Officers have a great deal of

⁷⁶ Freedom of Information request, UK Border Agency, 22081.

⁷⁷ Freedom of Information request, UK Border Agency, 23978.

⁷⁸ ‘Enforcement’, UK Border Agency, accessible here: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/oemsectione/chapter31?view=Binary> (last accessed 21/04/2012).

discretion to interpret what constitutes grounds for suspicion, which might include people trying to avoid immigration officers who are clearly visible, as well as other similarly ‘nervous’ behaviour.⁷⁹ It remains the case that, other than in border zones like airports, immigration officers have no power to compel people to respond to a request for information. If the person simply walks away, there is no power to arrest them.

The situation with the British police is slightly different. Police officers are allowed to stop anyone in a public place and ask them to account for themselves.⁸⁰ However, ‘stop and account’ powers do not invoke a duty to respond (Liberty, 2012). In addition, police do not have permitted to stop and search persons for a suspected immigration offence, although when evidence comes up in the course of the encounter, they are allowed to make arrests for an offence other than the one that had justified the search in the first place.

Finally, the police cannot conduct stop and search without ‘reasonable suspicion’ - with two notable exceptions. First, the Criminal Justice and Public Order Act 1994 S. 60 introduced the right for inspectors to authorise stops without suspicion for a specified period over a maximum of 24 hours based on the reasonable belief that a serious crime will be committed. S.60 powers were originally introduced to prevent violent offences at sporting and other large-scale events but are used as more general crime-fighting tools

⁷⁹ Program segment, UK Border Force, accessible here: www.youtube.com/watch?v=chQVBpA3g68&feature=related (last accessed 21/01/2012).

⁸⁰ ‘Police Powers’, Citizens Advice Bureau, accessible here: www.adviceguide.org.uk/england/law_e/law_legal_system_e/law_police_e/police_powers.htm#stop_and_account (last accessed 21/05/2014).

nowadays, accounting for 10 per cent of stop and searches in 2009-2010 (own calculations, Ministry of Justice, 2010).

Second, S.44 of the Terrorism Act 2000 empowered senior police officers to authorise stops without suspicion in cases where they considered this an ‘expedient’ way of preventing acts of terrorism. London was continuously subject to such an authorisation for most of the decade after the Act came into force (Bridge, 2011), although S.44 was later declared unlawful in a court case at the European Court of Human Rights where the plaintiffs were represented by Liberty, the NGO.⁸¹

The question then becomes to what extent police powers for street-based controls are used for immigration enforcement purposes. Out of the 650,000 persons stopped and searched - or the 1897 people arrested - under S.44 powers in the last 10 years, 119 people were transferred from the police to the immigration service (Home Office Statistics, 2012). Similar data is not available for S.60 stop and searches. These powers are largely associated by the police with anti-knife and gun crime operations rather than immigration offences. All the same, a Home Office report found a regular flow of arrestees picked up ‘purely on the basis of their immigration status’, as a result of either ‘lorry-stop drop-off’ operations or joint immigration/police actions (Hamilton-Smith and Patel, 2006). In 2011-2012, the London Metropolitan police force arrested a not inconsiderable number of 1,285 persons for immigration offences following stop and

⁸¹ Gillan and Quinton vs. The United Kingdom [2010] ECHR 28

searches, out of a total of 5,152 arrests for immigration overall.⁸² Statistics are patchy but London seems to account for the lion's share of all UK police action on immigration enforcement. For instance, total immigration arrests amounted to 18 in South Yorkshire in 2010;⁸³ 348 in Devon in 2011;⁸⁴ and 97 in Suffolk in 2011.⁸⁵ Despite the poor-quality of data, the evidence suggests that authorities in the UK discover far fewer people living in the country illegally than their counterparts in Germany.

Conclusion: how much does the Varieties of Capitalism matter?

The final section of the chapter asks to what extent differences in immigration controls cleave to the logic of the Varieties of Capitalism typology.

Labour market controls: institutions, policy preferences and information-sharing

Given the focus within the Varieties of Capitalism typology on labour market institutions, it is unsurprising that labour market controls show the clearest influence of the VoC. One way in which this manifests is that immigration controls within Germany's labour market build on pre-existing institutions that have no functional equivalent in liberal market economies. For instance, the Finanzkontrolle Schwarzarbeit is supported by the German

⁸² Freedom of Information request, London Metropolitan Police, 2012080002362.

⁸³ Freedom of Information request, South Yorkshire Police, 20110176.

⁸⁴ Freedom of Information request, Devon Police, 00273/12.

⁸⁵ Freedom of Information request, Suffolk Police, 597/11/12.

Chambers of Commerce, statutory bodies that coordinates many aspects of the labour market and which most business are required by law to join. ‘Statutory membership’ is explained with reference to the ‘self-management of the economy’, with the German Chamber of Commerce carrying out ‘a large number of tasks instead of the state’ (including the coordination of vocational education).⁸⁶ In turn, compulsory registration in a Chamber of Commerce is a common feature across many coordinated market economies and is concomitant with the institutionalisation of a ‘system of inter-company relations [to allow] coordination [and] standard-setting’ (Hall and Soskice 2001:28).

By contrast, while there is a British Chambers of Commerce, it is a private body and membership is voluntary. Further, not only are there no agreements to work alongside the immigration authorities, the British Chambers of Commerce tend to oppose restrictions on immigration and the intensification of immigration control.⁸⁷ In turn, this is a policy preference concomitant with a neoliberal approach to market regulations, under which any additional obligations are understood as a barrier to the free market.

This highlights another way in which the Varieties of Capitalism affects possibilities for immigration control in the labour market - through differing policy preferences. VoC approaches argue that differences between the two types of economy remain because policy actors prefer choices complementary to the pre-existing institutional structure

⁸⁶ Why is there statutory membership of the Chamber of Commerce and Industry’, Deutsche Industrie- und Handelskammertag, accessible here: <http://www.dihk.de/en/about/who-we-are/faq/faq/statutory-membership> (last accessed 30/04/2014).

⁸⁷ See, for example, ‘London Chamber of Commerce and Industry Response to UK Border Agency (UKBA) Consultation on Limits to Non-EU Economic Migration’, accessible here: <http://www.londonchamber.co.uk/docimages/7816.pdf> (last accessed 07/05/2014).

(Wood 1997). In short, in liberal market economies, actors will prefer choices that ward against extra regulation; in coordinated market economies, they will prefer measures that protect the existing institutional framework.

Another example of the impact of differing policy preferences regards the role of trade unions. For instance, in Germany, ‘Alliances against Illicit Work and Illegal Employment’ have been negotiated between the Finanzkontrolle Schwarzarbeit and the social partners (trade unions and employer associations) in many industries. There are no such agreements in the UK, not least because the relationship between the trade unions and employer associations tends to be more adversarial. In turn, the fact that there are no alliances for combating illegal employment represents the less systematised nature of relationship between labour market institutions in the UK, as is typical for a liberal market economy.

The ‘outsider’ position of trade unions in the UK also allows them to adopt the more radical stance of supporting immigrants’ rights. As one interviewee from the construction union UCATT argued, ‘people worry about wages being undercut, but we have always been clear, we are completely against exploitation of all workers’.⁸⁸ The Trade Union Congress opposes employer sanctions on the basis that they ‘concentrate more power into the hands of would be abusers’.⁸⁹ An inclusionary stance towards immigration is also the case in the USA - the ideal type of a liberal market economy - where trade unions have

⁸⁸ Trade unionist, London, interviewed 12/03/2013.

⁸⁹ ‘Illegal Working: Don’t penalise, regularise!’, TUC, accessible here: <http://www.tuc.org.uk/international-issues/usa/migration/illegal-working-dont-penalise-regularise> (last accessed 07/05/2014).

focused considerable resources on organising both legal and illegal immigrant workers (Delgado, 1993; Milkman, 2006).

By contrast, the fact that German unions' power is derived from their institutionally embedded role in collective bargaining has 'hindered an active search for new ideas and identities' (Haucap, Pauly et al., 2001: 1; Behrens, Fichter et al., 2003: 27), including membership organizing among new forms of workers. Instead, trade unions have an ambivalent attitude towards non-standard workers, including irregular immigrant workers (Lillie and Greer, 2007). While new 'migrants' rights' initiatives within the trade unions represent the emergence of cross-border solidarity in Germany,⁹⁰ the proliferation of agreements between immigration control bodies and trade unions represents the continuing salience of a protectionist attitude, under which the primary aim of the union is to protect existing labour standards (and 'core' workers), rather than doing what is best for the most vulnerable workers in the industry.⁹¹

Thus, 'Alliances against Illegal Work and Illegal Employment' can be seen as an example of the dualised nature of the German coordinated political economy, under which protections for 'core workers' are purchased at the cost of new inequalities at the margin of the labour market (Goldthorpe, 1984: 329). This issue emerges as a key theme in the following chapter. Importantly, while the literature on the dualisation of the

⁹⁰ Notable examples include MigrAr Hamburg, DGB Faire Mobilität, AK undocumented work, and the Beratungsbüro für entsandte Beschäftigte.

⁹¹ Another example of an exclusionary stance towards immigrants was found in construction trade union IG-BAU's controversial campaign in 2007 - 'Ohne Regeln geht es nicht' ('it's not going to happen') - which encouraged people to anonymously alert the authorities of illegal work.

coordinated market economy highlights recent transformations in the political economy (Palier and Thelen, 2008; Eichhorst and Marx, 2010) it should be noted that German trade unions have long adopted an exclusionary stance towards immigrants, as epitomised by their support for the introduction of employer sanctions in the early 1970s. As the UK's Trade Union Congress has highlighted, employer sanctions are designed both to penalise employers and to exclude irregular immigrants from the labour market. This was not, however, a concern for German trade unions. Thus, the German coordinated political economy has always worked more to the benefit of some than others.

The impact of the VoC on differences in the two countries labour control regime is also felt in information-sharing requirements. More intensive information-sharing is a hallmark of coordinated market economies because strategic, systematic interaction between firms requires 'institutions that reduce the uncertainty that actors have about the behaviours of others...[including] institutions providing capacities for... the exchange of information among actors... [and] the monitoring of behaviour' (Hall and Soskice, 2001: 10). In turn, immigration control in Germany is marked by systematic information flows between agencies - as facilitated by the Ausländerzentralregister, alliances and statutory information-sharing obligations. By contrast, the UK has been a laggard in adopting information-sharing requirements, although recent initiatives to improve information flows - as manifest in bulk-data matching between the HMRC and the immigration authorities and the establishment of the biometric residence permit database - represent a step towards a more integrated control regime.

Problems with information-sharing in the UK are exacerbated by the fragmented organisational structure. The most significant difference between the labour control regimes in the two countries is the organisational structure of enforcement against illegal foreign employment, with tasks subsumed into the small Civil Compliance Team within the Home Office in the UK and into the larger Finanzkontrolle Schwarzarbeit within the customs authorities in Germany. Subsequently, the key issue with policing the illegal employment of foreigners in the UK has been the difficulty of coordinating between the different agencies involved in labour market control.

In the UK context, the political project of neoliberalism is one of the key reasons explaining this organisational choice. First, Britain was the last country in Western Europe to introduce employer sanctions. This was partially because of the belief that Britain's position as an island meant illegal working was less of a problem than on the continent, as well as the notion that employer sanctions might worsen discriminatory hiring practices (Ryan, 2007). It was also 'proving difficult to devise additional measures for dealing with unauthorised employment that are both practical and acceptable'.⁹² Unlike Germany, where employers welcomed sanctions on the basis that it would help to ensure rogue firms did not undercut the existing coordinated political economy, firms in neoliberal UK regarded any extra regulation as a burden.

⁹² Illegal Immigrants, HC Deb 06 February 1979 vol 962 cc89-90W, accessible here: http://hansard.millbanksystems.com/written_answers/1979/feb/06/illegal-immigrants (last accessed 30/04/2014).

By the time that employer sanctions were introduced, the Conservative government had passed the Trade Union and Employment Act (1993), which shut down wage councils and, by proxy, the Wages Inspectorate.⁹³ The outcome was that by 1996, when employer sanctions for the illegal employment of foreigners were first introduced through the Asylum and Immigration Act, there was no such thing as a general workplace inspectorate (Bell and Wright, 1996) besides from the occupational Health and Safety. Parliament briefly debated whether the Employment Service - the predecessor of today's JobCentre Plus - should be put in charge of controlling illegal foreign work, before deciding against this. The reasons were never stated in the consultation documents, although the lack of any enforcement units within the Employment Service at the time is one likely explanation. Instead, the Immigration Service was already heavily involved in the control of illegal foreign work, having, for instance, detected over 10,000 illegal workers in 1994 (Home Office, 1995). The most logical step was to subsume controls on illegal foreign employment into immigration policing, rather than labour market controls. This has been the structure of enforcement against illegal foreign employment ever since.

By contrast, the inclusion of foreign employment controls into general labour market controls in Germany reflects the conceptualisation of immigration as a labour market issue (Stobbe 2004). As the previous chapter outlined, German citizenship was understood from the beginning in terms of common ethnic descent (Brubaker, 1992; Bade and van Eijl, 2011). In this context, Germany considered itself a 'labour-importing'

⁹³ In 1967, 141 inspectors were working on behalf of the Department of Employment Wages Inspectorate, making 51,108 workplace visits that year, or about one in every seven workplaces in the country. Many of these visits were 'routine', meaning that they were undertaken without officers having any intelligence about possible transgressions (Beaumont, 1979).

nation, rather than a country which would welcome the permanent settlement of foreign nationals (Bade, 1994).

As a result, from 1905, the recruitment and control of foreigners was not performed through a specialist immigration authority but through the German Field Worker Centre (Deutsche Feldarbeiterzentrale), which later became the 'German Work Centre' (Deutsche Arbeitzentrale) (Rhoades, 1978; Bade, 2009). The relationship between immigration and the labour market policy was further solidified by the fact that Germany lost the few colonies it had during the Treaty of Versailles. Unlike Britain, where immigration in the mid-twentieth century was legitimised by the idea of the 'returning subject', in Germany, guestworkers were conceptualised as temporary workers who were expected to leave after their work was done (Rist, 1978). Concomitantly, the 'Federal Labour Office' (Bundesanstalt für Arbeit) was involved, both in the recruitment of foreign nationals during the 1960s and, following the oil crisis and the slowdown of the German economy, in organising the recruitment stop in 1973 (Martin and Miller, 2001). Throughout the 1980s, the labour inspectorate was responsible for policing illegal foreign employment. In turn, the involvement of the customs authorities under the 'Finance Administration Law' 1991 (Finanzverwaltungsgesetz 1991) was convenient because the Schengen Implementation Agreement - which abolished checks at external borders across the continent - meant many customs officers would otherwise have lost their jobs if they were not given new tasks.

In 1993, the customs authorities gained equal responsibility with the labour inspectors for the control of illegal foreign employment, as well as benefit fraud and the inspection of employers' documents.⁹⁴ In 1998, following discussions about the inefficiencies of relying on police to effect controls, the customs authorities were designated law enforcement authorities and awarded police powers accordingly.⁹⁵ Finally, in 2004, the Finanzkontrolle Schwarzarbeit was created as a separate agency from within the customs authorities, recruiting 5,000 labour inspectors and border control guards (Lillie, 2007: 566).

Thus, the central role of labour market actors in the control of immigrant work in Germany is a long-standing tradition. The main advantage of having one organisation in charge of controlling all aspects of illegal working is that agencies face fewer issues with the duplication of work and do not have as many co-ordination problems to overcome. The fact that immigration was understood as a labour market issue in Germany - and organised on this basis - also explains another element of the German control regime: the Kontospiegel cross-checks. In particular, the fact that work permits were allocated by the Ministry of Labour, rather than the immigration authorities allowed the Ministry of Labour to carry out a cross check between registered employment places and work permit data. This prevented the regular, tax-paying employment of foreigners without the right to work.

⁹⁴ 'Die Geschichte der BillBZ (Bekämpfung illegaler Beschäftigung)' Pressestelle Zoll, 06/11/1998 ('The Story of the BillBZ (Fight against illegal employment)'), Press centre of the customs authorities, 06/11/1998.

⁹⁵ 'Zusammenstellung zum Vortrag „20 Jahre Finanzkontrolle Schwarzarbeit' (Summary of the presentation '20 years of the Financial Control of the Black Market'), internal document from the Finanzkontrolle Schwarzarbeit.

Conversely, the fact that work permits are now allocated by the immigration authorities has meant that the Kontospiegel process is no longer in operation. The German labour control regime also suffers from some degree of fragmentation. Information-sharing issues also arise from data protection and privacy requirements, as limit the access of the Finanzkontrolle Schwarzarbeit to the EURODAC database.

Finally, the relationship between the different agencies involved in immigration controls can be limited by a lack of common goals. For instance, it was suggested that the Finanzkontrolle Schwarzarbeit and labour court judges do not always share information about illegal residence or illegal foreign employment with the immigration authorities. In both countries, humanitarianism can be a barrier to effective immigration enforcement - an issue that is particularly acute in welfare controls.

Welfare controls: complementary to the Varieties of Capitalism?

With regards to the other types of internal immigration measures discussed in this chapter, the influence of differences as described in the Varieties of Capitalism typology are less direct than is the case for labour market controls. However, of the remaining areas of control, welfare controls are most likely to show some influence of the VoC, given that 'there is a correspondence between types of political economies and types of welfare states' (Hall and Soskice 2001:50).

In the case of healthcare controls, the effect of the VoC on immigration enforcement is found in the way that the structure of the healthcare system in each country complements the underlying economic structure. In turn, possibilities for immigration controls are mapped onto (and constrained by) the pre-existing organisation of the healthcare system. In the UK, healthcare is free at the point of cost. These factors have meant checks on eligibility for services have traditionally been applied in a haphazard fashion, although this is something that might change subsequent to the implementation of the Immigration Act 2014.

By contrast, in Germany, the country's healthcare system is structured so that the vast majority of German residents belong to compulsory *Krankenkassen* ('statutory health insurance programmes'), which then reimburse hospitals and GPs for services rendered. It is in the reimbursement of such costs by the social welfare offices that the duty to denounce illegal migrants exists. In turn, Germany's health insurance model co-evolved alongside collective bargaining, as part of a series of settlements made between the trade union and the government (Manow, 1997). The co-evolution of the two systems of management is evident in their similarities: much like trade unions and employer associations have considerable autonomy from the federal government in the management of the labour market, Germany also 'grants groups representing major societal interests important responsibilities in healthcare financing and administration' (Giaimo, 2002: 86), most notably, health insurance providers. At the same time, it should be noted that models of healthcare cut across the varieties of capitalism. There are healthcare systems funded out of general taxation in coordinated market economies such

as Denmark and Sweden, and insurance based models in liberal market economies, such as the USA. There is no necessary fit between the type of healthcare model and variety of capitalism.

In the education system, the influence of the VoC is most obvious in controls on post-16 education. The structure of further education in both countries is very different. While most students in the UK stay in school or attend a college, around two-thirds of German students partake in a dual apprenticeship system (Steedman, 2010: 23). Apprenticeships both support and are indicative of a coordinated market economy. On the one hand, they facilitate the reproduction of the ‘specific skill’ set required in coordinated market economies (Estevez-Abe, Iversen et al., 2001). On the other hand, they require coordinating institutions, most notably, powerful employer associations, who are able to compel their members to support trainees. However, it also means that labour market controls enter the schooling system. Irregular immigrants are prevented from accessing apprentices by the same mechanisms through which they are blocked from regular employment.

The impact of the VoC is also felt in a more indirect way through exclusion from nursery provision. As above, the cost of nursery education is a prohibitive factor for irregular immigrants in both countries. In turn, cost prohibitions have a more severe effect in Germany than the UK because children start school at the later age of six. The comparatively late starting date is a legacy of the maternalist West Germany welfare state, under which women were expected to stay at home, while their husbands –

employed in full-time, well paid and skilled jobs - earned enough to support the family. Although the male-breadwinner model cuts across the varieties of capitalism (Lewis, 1992), women are far more likely to stay at home in coordinated market economies than in liberal market economies (Iversen and Wren, 1998: 515; Gottfried and O'Reilly, 2002). There is therefore, some relationship between the underlying political economy and the construction of gender roles, which makes itself felt in late starting dates for children, as well as shorter schooling hours. These factors contribute to the extremely poor performance of Germany's education system in integrating immigrant children (OECD, 2006).

Identity and registration requirements: British liberty vs. Prussian authoritarianism?

Other differences in immigration control regime seem to be motivated by factors with very little to do with the Varieties of Capitalism. For instance, a particularly sensitive and controversial aspect of the policing regime in the UK is identity checks. In the UK, the obligation for citizens to carry and present national ID cards has been the exception rather than the rule. For instance, ID cards were reluctantly introduced during both the First and Second World War but withdrawn fairly quickly in peacetime as 'an unacceptable police power'. Decades later, a proposed clause (S.28 (3)) in the Immigration and Citizenship Bill 2008 allowing the police and the former UK Border Agency to demand identification from anyone on permission of the Secretary of State was violently opposed by civil rights groups like Liberty and roundly criticised in the media. Identity checks invoked widespread public condemnation on the basis that they are discriminatory and more

generally, that they contravene fundamental freedoms in Britain. As former MP Bernie Grant described, ‘the right to walk the streets is a fundamental one, and one that is quite rightly jealously guarded’ (cited in Bowling and Phillips, 2002: 139). Even far-right politician Nigel Farage has condemned street identity checks as un-British.’⁹⁶

The argument that differing notions of freedom affect immigration controls, also makes its way into the works of Vogel (2001), who has argued that the German public’s *laissez-faire* attitude towards identity controls on foreign nationals can be at least partially explained by the fact that that personal identification has a long history in Germany and is viewed as something ‘normal’. Because most Germans carry their ID cards and are ready to show them, there is a lesser sense that an act of discrimination is taking place when foreigners are being checked.

On first glance, these issues appear to be an issue entirely outside of the purview of the Varieties of Capitalism. However, there are similarities in the ways in which countries of the same variety of capitalism conceptualise the relationship between the individual and the state, which suggests some level of interdependence between these dimensions. For instance, coordinated market economies are more likely to have compulsory identity cards and registration requirements than liberal market economies. By contrast, strong resistance to these types of obligations across liberal market economies has been tied to the fact that these nation states inherited a common law tradition from the UK, under

⁹⁶‘Nigel Farage attacks Home Office immigrant spot checks as un-British’ , 02/08/2013, Peter Dominizak and Hayley Dixon, The Telegraph, accessible here: <http://www.telegraph.co.uk/news/uknews/immigration/10219174/Nigel-Farage-attacks-Home-Office-immigrant-spot-checks-as-un-British.html> (last accessed 27/05/2014).

which law generally defines what is prohibited rather than required.⁹⁷ Further, the fact that many liberal market economies are settler nations might also have had an effect on the construction of freedom as a matter of freedom from state interference.

Another factor that has been widely invoked in debates about immigration control in the UK is the potential for controls to have discriminatory effects. These concerns motivated the early adoption of prohibitions on racial profiling by the police. By contrast, it was not until a case came to court in 2010 that Germany explicitly outlawed racial profiling. Another example of differences in notions of discriminatory behaviour is found in the regime around employer sanctions. While guidance from the Home Office suggests that all employees should be checked for the right to work,⁹⁸ German employers are advised to check foreign nationals more thoroughly by asking for passports and work permits (GAO, 2006).

Germany's comparatively weak culture of anti-discrimination (Peucker, 2007)⁹⁹ may seem surprising considering Germany's history. Indeed, the 25 year old black German

⁹⁷ Legal experts explain this difference by the so-called Diceyan notion of 'residual liberty' in common law, which implies that everything a citizen does is legal unless explicitly made illegal by government (Wadham, 2006). As David Davis, Shadow Minister for Home Affairs argued, 'the reason the common law countries are unique in this respect is that they are the countries which presume that the citizen is free to do anything unless there is a law against it. That is rather different from the Napoleonic law countries' (see House of Commons Hansard Debate for 25 June 2005 p. 14). Similar concerns marked the debate on the establishment of the British police force (see Ashworth and Zedner, 2014: 38).

⁹⁸ 'Draft Code of Practice for employers. Avoiding unlawful discrimination while preventing illegal working, v.2 April 2014', Home Office, accessible here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300001/Draft_Code_of_practice_for_employers_to_avoid_discrimination_V2_0.pdf (last accessed 07/05/2014).

⁹⁹ For instance, it took almost six years of emotional debates to transpose the EU Equality directives, with the opponents framing the law as a 'bureaucratic monster', which would lead to a waste of court time with fake complaints 'discrimination hopping' (GAO, 2006).

student who brought the case for racial profiling forward was also initially charged with slander for telling the officers that conducted the checks that he felt their methods were reminiscent of those of the Nazi SS.

However, arguably, the Holocaust itself provides one explanation for why Germans have not developed a sufficient narrative of state discrimination. In the first place, race distinction remains a taboo. Secondly, racism is mainly understood in the context of Anti-Semitism and fascism (Solanke, 2005). As expressed by one anti-discrimination activist interviewed for the present thesis, ‘with the German history and the Third Reich, the starting point with anything related to racism is right wing movements and fascism... A racist is bald head with black shoes. It cannot be a normal person.’¹⁰⁰ However, the problem with ‘over-identifying the fight against racism with the activities extremist groups is that ... they are exceptional’ (Donald and Rattansi, 1992). In short, racism can also be institutional and part of everyday life. This feature has little to do with the Varieties of Capitalism and instead, speaks to the unique politics of race in Germany.

The lack of a political movement around racial discrimination in Germany also speaks to differences in the conception of belonging. Mass migration to the UK in the twentieth century mainly occurred in a context of de-colonialisation (Spencer, 1997). As a part of the British conceptualisation of colonials as ‘subjects’ of ‘the motherland’, migrants from the Commonwealth held British citizenship and had a free right to enter the country until 1962. They also had the right to vote in national elections - something

¹⁰⁰ Anti-discrimination activist (Skype interview), 03/07/2010.

that was clearly a decisive factor in Labour's decision to promote the first Race Relations Act in 1965 (Solanke, 2005).

Although it has become increasingly difficult to gain British citizenship, it remains that the vast majority of people from black and minority ethnic communities are British citizens. Unlike Germany, where citizenship was based on a shared ethno-cultural background, a longstanding framework exists for understanding Britain as a multi-racial nation-state (Armitage, 2000). As a result, 'police raids to find illegal immigrants and the demanding of passports from people long established in this country' can be framed in terms of these operations' inevitable damage to UK race relations.¹⁰¹ Prohibitions on racial profiling (Police and Criminal Evidence Act 1984, Code A) were introduced following recommendations in the Scarman report, which highlighted the role of the disproportionate use of stop and search powers by the police against black citizens as a key factor in the Brixton riots in 1981.

By contrast, although Germany did have some colonies, they were not as extensive as Britain's, largely due to the fact that the unification of Germany only took place in 1871, after the 'Scramble for Africa' commenced (Chamberlain, 2014). The ones Germany managed were confiscated in the Treaty of Versailles in 1914. This meant that mass migration to Germany came under the ruse of the *Gastarbeiter*. Despite the settlement of immigrant populations during the twentieth century, Germany continued to

¹⁰¹ 'Immigration and Race Relations', HC Deb 06 December 1973 vol 865 cc1546-82, accessible at: <http://hansard.millbanksystems.com/commons/1973/dec/06/immigration-and-race-relations-1> (last accessed 30/04/2014).

deny that it had become a 'land of immigration'. In so doing, it stymied wider discussions of race relations and allowed what might be considered discriminatory practices in the UK to continue.

Again, there is some relationship between economic type and citizenship norms in a society. In particular, liberal market economies all have citizenship based on the *jus soli* principle, while citizenship in coordinated market economies is based on the principle of *jus sanguinis*. All 'settler nations' are liberal market economies. As discussed in the previous chapter, there are many reasons for why this could have occurred, from the possibility that mass immigration undermined the solidarity required for a coordinated economy policy (Freeman, 1986; Bommers and Geddes, 2000) to the possibility that certain economic conditions might have encouraged different types of citizenship norms.

Thus, it is arguable that the Varieties of Capitalism - and its associated cultural adjuncts - provide the pre-conditions for a more intensive internal immigration control regime in coordinated market economies. However, the case for the above should not be overstated. For instance, a major reason for why immigrants were conceptualised as temporary labour in Germany, rather than permanent settlers, was because of the lack of a colonial ties. However, this is neither a common feature of coordinated market economies, nor something that can directly tied to differences as described in the Varieties of Capitalism. The meaning of immigration varies in different contexts, according to the particular history of that nation-state. Similar, each country has its own conception of the appropriate relationship between the state and the citizen, as evident in

considerable variation in the precise data collected and level of compulsion associated with the national identity card.

In addition, it would be difficult to argue that the civil rights of foreigners are better protected in the UK than in Germany. Continuing ethnic disproportionality in stop and search policies (Bowling and Phillips, 2007) undermine the British self-conception as a nation of tolerance. Further, it is also worth noting that biometric residence permits are rolled out across the foreign population while British politicians pride themselves on resisting the introduction of identity cards for British nationals on the grounds of civil liberties and a deeply felt allegiance to personal freedom.¹⁰² There is therefore a distinction between what is considerable tolerable for citizens and for foreign nationals (and indeed, towards the black and minority ethnic citizens who are indirectly affected by these controls).

Foreign nationals in the UK have suffered as a result of extra controls introduced as part of the fight against terrorism. Discriminatory effects can happen implicitly, as was the case with stop and searches under S. 44 of the Terrorism Act 2000, when it was left to the discretion of the police officer to decide whether the appearance of the suspect justified a check. A more explicit example was found in Part 4 of the Anti- Terrorism,

¹⁰² In 1977, the Home Affairs Select Committee briefly considered and rejected the idea of ID cards, arguing that identity cards are not 'acceptable to the British people, who are rather fond of their freedom' (see 'Illegal Immigration and Employment', HC Deb 24 June 1977, vol 933, cc1995-2040) Over thirty years later, Home Office Minister Damian Green argued that 'laying ID cards to rest demonstrates the government's commitment to scale back the power of the state and restore civil liberties...This is just the first step in the process of restoring and maintaining our freedoms', see 'National Identity Register destroyed as government consigns ID card scheme to history', accessible here: <https://www.gov.uk/government/news/national-identity-register-destroyed-as-government-consigns-id-card-scheme-to-history> (last accessed 07/05/2014).

Crime and Security Act 2001, under which suspected international terrorists who couldn't be deported, could be indefinitely imprisoned without charge or trial. This provision only applies to foreign nationals. Both of these measures have been declared unlawful in recent court decisions.¹⁰³ The judiciary provides an obstacle to governments' ability to control immigration.

Similar processes affect foreign nationals in Germany. For instance, the Ausländerzentralregister contains information on over 10 million foreigners, while the creation of a national database of citizens is prohibited under constitutional law. More recently, terrorism has justified a number of illiberal policies, with discriminatory effects on foreign nationals. For instance, in an attempt to identify 'sleepers' of terrorist organisations, the German authorities decided to resort to the so-called Rasterfahndung method, under which universities, employers, health and social insurance agencies were required to provide to the police the personal records of all persons presenting suspect features (i.e.g male, Muslim, national of or born in one of 26 listed countries with predominantly Muslim population, a current or former student, and legally resident in Germany). However, this measure was declared unconstitutional because preventative data screening is incompatible with the fundamental right of

¹⁰³ S. 44 has subsequently been declared unlawful by the European Court of Human Rights, who argued that it violated the right to private life because the power was so broad it failed to provide safeguards against abuse, see *Gillan and Quinton vs. The United Kingdom* [2010] ECHR 28. Part 4 was declared unlawful in *A v. Secretary of State of the Home Department* [2004] UKHL 56. Subsequent legislation has reintroduced a series of preventative, liberty-restricting measures applying to terrorism suspects, although these now apply to both British and foreign nationals. For a fuller discussion of preventative measures in terrorism control, see Tadros (2013).

informational self-determination (Kett-Straub, 2006).¹⁰⁴ Here too, the judiciary acts as a bulwark towards more extreme, discriminatory practices.

In turn, while some of the differences in the two countries' immigration control systems are an offshoot of other control systems, it should be noted that both the UK and Germany have created novel systems of control that affect foreign nationals alone. In turn, the more that controls for foreign nationals differ from those that are in place for nationals, the less obvious or direct the relationship is between the institutional structures as outlined in the Varieties of Capitalism and the method of migration control - as discussed in further detail below.

Convergence

Recent shifts in the UK's immigration control regime bring into question the extent to which differences between the two countries will remain. Over the past 20 years, UK has implemented a number of internal controls that have been in operation in Germany for some time, including employer sanctions, identity checks by the tax authorities, information-sharing between agencies and databases for the identification of irregular immigrants. More recently, the Immigration Act 2014 includes a number of new internal control measures, including identity checks at hospitals, landlord sanctions, a ban on councils giving social housing to individuals with no connection to the area, new powers

¹⁰⁴ According to Article 2 (I) in connection with Article 1 (I) of the Constitution, see Bundesverfassungsgericht, 1 BvR 518/02

to check driving licence applicants' immigration status and a requirement for banks to check against a database of known immigration offenders before opening bank accounts. These are explicitly designed to make it 'harder for people who are here illegally to stay here'.¹⁰⁵ Following years of being a laggard in internal controls, the UK is quickly implementing one of the most exclusionary internal immigration control regimes in Europe.

There are many reasons for why this is occurring. One 'structural' reason is that external borders have become less of a distinguishing feature of the UK in recent years. Many illegally resident foreigners entered the country legally, but have subsequently lost the right to be in the country. Although the UK's historical allegiance to external border control means that joining the Schengen borderless travel area is unlikely for the near future, the growth of a resident population of foreign nationals has alerted politicians in the UK to the need for an internal control regime.

In addition, with regards to immigration policy, Lavenex (2007: 312-314) has argued that 'spill-over' from one country's immigration policy provides the rationale for a downward spiral in immigration policy. The tightening of laws in one country enforces a downward 'spiral of restrictionism' (Thielemann and El-Enany, 2008: 4) in which other countries subsequently strengthen their laws as to not become 'magnets' for unwanted immigration. Such considerations encouraged the introduction of employer sanctions in

¹⁰⁵ 'May: Living in the UK to get tougher for illegal immigrants', 10/10/13, BBC News, see <http://www.bbc.co.uk/news/uk-politics-24469584> (last accessed 29/04/2014).

the UK, when the government became concerned that it was the only European country not to police its labour market in this way (Ryan, 2007). In this context, the UK looked to its continental neighbours for examples of good policy. Through policy learning - encouraged as part of a wider process of integration into the EU - governments develop a shared understanding of what is possible in immigration control.

It is, however, notable these controls are being introduced by a coalition government which, in many respects, should be opposed to them on ideological grounds. First, the Liberal Democrats, who have historically campaigned on a platform of commitment towards individual freedom, spearheaded the campaign to scrap identity cards for citizens. However, as above, it has been willing to allow biometric residence permits for foreign nationals. Second, the neoliberal Conservative leadership are expressly committed to a platform of reducing burdens on business - with the notable exception of employer and landlord sanctions. The fact that controls are being introduced in this context suggests that the economic and cultural factors that have meant that the UK has historically operated a far laxer control regime, have rapidly lost their salience.

Thus, within the constraints posed by pre-existing institutional configurations, the UK is moving closer to Germany's intense control regime. The extent to which internal controls will actually deter irregular immigration - the stated aim of the Immigration Act 2014 - remains uncertain. Even if controls do prevent irregular migrants from accessing jobs, housing, and education, it does not necessarily follow that this will either deter future immigrants from coming to the country or encourage irregular immigrants to leave

the country. Many will stay here regardless. Instead, the likely outcome for at least part of the population is widespread destitution, criminalisation and exploitation as irregular immigrants are increasingly pushed ‘underground’ away from regular society (Engbersen and Broeders 2009). Indeed, in an analysis that seeks to explain why immigrants are underrepresented in American prisons and overrepresented in European prisons, Melossi (2012) argues that the fact that ‘undocumented immigrants can remain in the US undetected may in fact protect them – and American society – from the risk of crime, whereas the European obsession with identifying migrants’ lack of documents may increase the likelihood of crime’ (p. 12). The more conspiratorial analysis of De Giorgi (2010) highlights the functions that immigration controls play in constituting foreign nationals as a precarious workforce. To this end, the following chapter explores the consequences of immigration status on foreign nationals’ ability to avoid exploitation.

**Ch. 4 ‘Space of precarity’: how immigration status leaves foreigners vulnerable
to precarious employment in the UK and Germany**

Introduction

In 2004, the bodies of 21 Chinese irregular immigrants were found on the shores of Lancashire’s Morecombe Bay. Hired by gangmasters to pick cockles, the group, mostly young men in their 20s and 30s, were trapped by incoming tides and died. The high-profile tragedy threw a spotlight on the shady, underground world of local gangmasters and, more generally, highlighted the risks and dangers of clandestine migration into the British economy.

Subsequently, successive UK governments have introduced a host of measures aimed at preventing workplace exploitation among British and foreign workers alike. Immediately following the Morecombe Bay tragedy, the Labour government introduced the Gangmasters Licensing Act 2004, requiring all labour providers in the agriculture, food processing and shellfish-gathering industries to be licensed by a centralised authority. The Act also provides a criminal offence for employers using an unlicensed gangmaster.¹ That same year, the Asylum and Immigration (Treatment of Claimants) Act introduced criminal offences for trafficking for the purposes of slavery and forced labour (S. 4). This was the first time that trafficking for non-sexual offences had been subject to

¹ Subject to due diligence, see S. 13 (2) Gangmasters Licensing Authority 2004.

criminal prohibition. Following criticism of the UK legal regime on forced labour in two cases before the European Court of Human Rights,² the Coroners and Justice Act (2009) created criminal offences for holding another person in slavery or servitude or requiring them to perform forced or compulsory labour (S.71). More recently, in late 2013, Home Secretary Theresa May pledged a ‘modern-day slavery crackdown,’ promising new criminal offences, greater resources allocated to enforcement and tougher sanctions for traffickers and gangmasters. Announced to great fanfare, the Modern Slavery Bill - the ‘first of its kind in Europe’³ - consolidates existing slavery offences, increases maximum sentences and creates an ‘Anti-Slavery Commissioner’.

Similarly, in Germany, there is also evidence of increased legislative activity concerning workplace exploitation.⁴ In 2006, Germany ratified the ‘Palermo Protocol’⁵ and the Council of Europe Convention on Action against Trafficking in Human Beings and subsequently introduced the offence of ‘trafficking for the purposes of labour exploitation’ into the ‘Criminal Code’ (Strafgesetzbuch, S. 233). Other criminal offences relevant to issues of workplace exploitation include fraud (S. 263), unlawful imprisonment (S. 239) and blackmail (S. 253, 255).

² In *Kawogo v. UK*, victims of forced labour had approached the police, but their forced labour was not investigated as a crime. In *Siliadin v. France*, the European Court of Human Rights argued that member states had an obligation to penalise slavery and forced labour.

³ ‘Modern Slavery Bill published’, Gov.uk, accessible at: <https://www.gov.uk/government/news/modern-slavery-bill-published> (last accessed 14/07/2014).

⁴ Although it has been argued that the association of forced labour with the specific practices of the Nazi government has stymied the debate on related issues to some degree. Cyrus (2005: 8) points out that ‘[m]any commentators hesitate to use the term forced labour for any contemporary situation. Some believe that the harm the Nazi regime did to forced workers during the Second World War prohibits the use of this term for contemporary situations’.

⁵ Otherwise known as the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

In criminalising these activities, the British and German governments have taken on a particular role as the protector of exploited workers, in opposition to a guilty party - the greedy employer, the trafficker, the gangmaster - whose nefarious practices it tries to control. However, framing the issue in such a way denies the state's complicity in rendering a specific group of workers - immigrant workers - uniquely vulnerable to exploitation.

By contrast, neoliberal-materialist analyses argue that the state plays a central role in siphoning foreign workers into precarious employment. Restrictive, 'illegalising' admission policies across the Western world interact with 'hyper-criminalising' immigration controls (De Giorgi, 2010: 153) to create a host country population of irregular migrant workers whose legal precarity make them ideal fodder for employment in post-Fordist or neoliberal economies (Calavita, 1992; Calavita, 1998; Wacquant, 1999; De Genova, 2002; Calavita, 2003; De Genova, 2004; Palidda, 2005; Bauder, 2006; Palidda, 2009; De Giorgi, 2010; Escobar, 2010; Nagels, 2010). In this view, borders operate not to exclude foreign nationals, but rather as flexible gateways, whose exclusionary effects materialise in immigrants' subordinate position in host country labour markets. Thus, immigrants face a constant threat of punitive sanctions - criminalisation, detention, deportation - that undermine their ability to negotiate on an equal footing with employers (Morales, 1983; Heyman, 1998; De Genova, 2002). In turn, as the enforcer of border control, the state plays an integral role in fostering foreign nationals' subordinated inclusion in the workplace. The unique power of employers over their foreign workers is propped up by the rules and regulations of the state.

The effects of immigration status on people's ability to avoid exploitation are most obvious among those without papers, who fear that their employers - and, indeed, anyone aware of their legal situation - may denounce them to the authorities. However, the threat of detention and deportation also affects regular immigrants' labour market behaviour because their right to stay is often tied to specific employment obligations (De Giorgi, 2006). Many migrants, although legally resident, are not allowed to work; others' right to work is limited to a particular employer or occupation or subject to time or location restrictions; still others may enter only if they are working. When workers do not abide by these conditions, they - like irregular immigrants - are liable to deportation and/or criminalisation. Further, many migrants are excluded from the social and economic rights that native workers enjoy (Bloch, 2000). These factors coalesce to place immigrants in an institutionally vulnerable position.

This chapter explores the particular ways in which immigration legislation 'fashions' particular employment relationships that leave immigrant workers particularly vulnerable to exploitation (Anderson, 2010). To this end, it analyses the conditions attached to five immigration statuses - seasonal workers, domestic workers, Romanian and Bulgarian migrants working under the freedom of establishment, asylum seekers, posted workers - and finally, the legal regime governing illegal work by foreigners. In particular, it examines the interaction between immigration status and labour law. The two spheres have historically been viewed in isolation from one another: the former viewed as exclusively concerned with the regulation of workers' entry rights and the latter dictating the conditions of work once on the national territory. However, as the chapter shows, it is precisely the intersection of immigration and labour law that creates the legal framework

governing the rights of both regular and irregular migrants. The chapter also comments on immigrants' access to social rights.

A secondary aim of this chapter is to understand the way in which immigrants are fashioned into precarious workers⁶ in different ways in Germany and the UK. As described in the introduction, the theoretical literature does not speak to the possibility of national variations in social control or in the relationship between immigration law and work in a post-Fordist world – a lacuna that the thesis sets out to address. To this end, Germany and the UK were chosen as representations of different types of economies within the European context, as described in the 'Varieties of Capitalism' framework (Hall and Soskice, 2001). The chapter therefore also explores the extent to which 'spaces of precarity' are created differently in the two contexts.

Two disclaimers are, however, necessary. It is axiomatic that there is a gap between law in the books and law as practiced. Hence, there are undoubtedly many cases in which immigrants are treated fairly by their employers, despite lacking legal immigration status – and likewise, many legal migrant workers that enjoy rights that their employers do not respect. Because of the methodological limitations of this study (as described further in the Appendix) this chapter can offer only a preliminary exploration of the way in which immigration status is associated with exploitation in practice. Instead, it intends to illuminate the ways in which immigration status leaves immigrants in an institutionally

⁶ Precarious work can be defined by four indicators of the quality of work: degree of certainty of continuing work; control over the labour process, including access to representation structures such as trade unions and work councils; degree of regulatory protection; wage insufficient to support oneself as well as dependents, see (Rodgers, 1989: 3-5). This chapter will discuss issues pertaining to each of these dimensions.

vulnerable position and the potential effects that this can have on their ability to avoid exploitation.

Second, no country perfectly resembles the ideal type of a liberal or coordinated market economy, as described in the Varieties of Capitalism typology. Relatedly, the typology does not take account of the way that national economies change over time (Kang, 2006). The extent to which immigration has had an effect on the institutions characterising corporatist Germany will be explored in the next chapter. In turn, although it is likely that the chapter uncovers certain aspects that will be shared across different nation-states within the same type, the fact that each country has its own unique labour market system partially limits the generalizability of the analysis beyond the German and British contexts.

Overview of German and British labour markets

German labour market

Germany represents a particular variant of coordinated market economy: a dual industrial relations model, with workers' interests represented on the sectorial level by trade unions and on a firm level by work councils (Hassel, 1999: 485). Unionisation rates are actually

lower than the UK's (18 per cent compared with 25.8 per cent).⁷ However, collective bargaining coverage is far higher because of institutionalised possibilities for the extension of collective bargaining agreements across whole workforces and sectors. Today, around 56 per cent of workers in West Germany and 38 per cent in East Germany are covered by sectorial collective bargaining agreements, with a further 9 per cent and 13 per cent covered by company-level agreements (IAB-Betriebspanel, own calculations). Coverage varies by industry – whereas manufacturing and construction boast high coverage rates, employees in newly emerging service industries are unlikely to be covered by agreements (Dull, 2013).

Workers' rights in Germany are shaped by the interaction of collective bargaining and statutory legislation. As a result, they vary by sector. For instance, the 'Working Time Law' 1994 (Arbeitszeitgesetz) covers all employees with the exception of managerial staff and dictates a maximum eight-hour work day as well as a maximum 60-hour work week. However, deviations from the terms contained in the legislation are possible by collective or firm agreement. Other rights contained in statutory legislation include six weeks of sick pay,⁸ workers' compensation/accident insurance, four weeks of minimum paid leave and 10 paid holiday days (Ray and Schmitt, 2007: 2), minimum notice of dismissal, 14 weeks' of full paid maternity leave and 12/14 months of partially paid parental leave⁹ and paid rest breaks. There is, however, no minimum wage. Instead, minimum wage rates are either decided through collective bargaining by sector or, as a

⁷ 'Trade Union Density', OECD STAT, accessible here: http://stats.oecd.org/Index.aspx?DataSetCode=UN_DEN (last accessed 30/04/2014).

⁸ 'Germany, Krankenvergütung, Sick Pay', Eurofound, accessible here: <http://www.eurofound.europa.eu/emire/GERMANY/SICKPAY-DE.htm> (last accessed 03/05/2014)

⁹ 'Family related leave and industrial relations', Eurofound, accessible here: <http://www.eurofound.europa.eu/eiro/2004/03/study/TN0403101S.htm> (last accessed 03/05/2014)

last resort, according to provisions contained within the Constitution (S. 138) that prevent ‘immoral wages,’ which has been interpreted as two-thirds of the prevailing wage in the job and region (Peter, 1995: 113).¹⁰

However, in general, Germany has far stronger employment protections for both regular and temporary workers than the UK, including quicker claims to and expansive reasons for unfair dismissal.¹¹ Traditionally, Germany has had far lower rates of non-standard employment. For instance, rates of self-employment were low throughout the 1990s (Arum and Müller, 2009: 68). Subsequent to the liberalisation of qualification requirements and other initiatives to increase the number of new businesses, self-employment rates approach those of the UK’s (11 per cent to 13 per cent, respectively) (Fritsch, Kritikos et al., 2012: 17). Restrictions on agency working have also been loosened, which has augured a growth in this sector. However, unlike the UK, agency workers in Germany enjoy the immediate right to equal pay and treatment for agency workers¹² and at just over 1.5 per cent of the population, represent a marginal proportion of the working population (compared to 5.2 per cent of the population who work as agency workers in the UK (E.M.A.R., 2008: 2).

¹⁰ Bundesarbeitsgericht (Federal Labour Court), Judgement made 22.04.2009 5 436/08

¹¹ See ‘Strictness of employment protection – individual dismissals (regular contract)’, accessible here: https://stats.oecd.org/Index.aspx?DataSetCode=EPL_CD (last accessed 30/04/2014) and ‘Strictness of employment protection – individual dismissals (temporary contract)’, accessible here: https://stats.oecd.org/Index.aspx?DataSetCode=EPL_CD (last accessed 30/04/2014).

¹² Although the parties to a collective agreement can dispose of the principle of equal pay and treatment. As a result the number of collective agreements in the temporary work sector have increased (Mitlacher, 2008). Since 2013, there has been a generally binding collective agreement in the temporary agency, defining minimum wages and conditions.

Finally, workers rights' have also been expanded under pressure from the European Union. The Directive on Part Time Work translated into provisions making the equal treatment of part-time workers mandatory, while European directives on discrimination formed the basis for the 'Equal Treatment Law' 2006 (Allgemeines Gleichbehandlungsgesetz).

The UK labour market

The UK is the prime example of a liberal market economy in the European context. This means that there is an absence of institutions that coordinate the labour market and represent workers' interests. The unionisation rate is 25.8 per cent.¹³ However, there are no mechanisms for the extension of collective bargaining results. As a result, only 31 per cent of workers are covered by collective agreements.¹⁴ Instead, labour rights are derived predominately from statutory legislation, which includes a national minimum wage of £6.31 per hour for over 21 year olds, unpaid parental leave, 39 weeks of partially paid maternity leave,¹⁵ a 48-hour maximum work week¹⁶ and four weeks of paid holiday break.¹⁷ Statutory employment protection is weak in comparison with Germany. Workers

¹³ supra note 6

¹⁴ 'United Kingdom: Industrial relations profile', Eurofound, accessible here: http://www.eurofound.europa.eu/eiro/country/united.kingdom_4.htm (last accessed 03/05/2014)

¹⁵ 'Maternity leave and pay', Gov.uk accessible here: <https://www.gov.uk/maternity-pay-leave/pay> (last accessed 03/05/2014).

¹⁶ 'Maximum weekly working hours', Gov.uk, accessible here: <https://www.gov.uk/maximum-weekly-working-hours> (last accessed 03/05/2014).

¹⁷ 'Holiday entitlement', Gov.uk accessible here: <https://www.gov.uk/holiday-entitlement-rights> (last accessed 03/05/2014).

are not able to claim for unfair dismissal before two years of employment and there are no restrictions on the use of fixed-term contracts.¹⁸

A weak regulatory framework encourages the proliferation of non-standard employment. Labour agencies in the UK do not generally need to be licensed and agency workers were one of the ‘least protected groups in the British labour market’ (Forde and Slater, 2005: 250) until the Agency Workers Directive 2008 was transposed into British law in the Agency Workers Regulations 2010. Now, agency workers have the same rights as employees after 12 weeks at the workplace. However, some employers are avoiding these responsibilities through zero-hour contracts, which do not oblige employers to provide work for the employee. By contrast, the German Federal Labour Court upheld a minimum income for employment contracts and said that the employer is responsible for paying regardless of whether work is available or not.¹⁹

Immigration status

Asylum seekers

Germany

¹⁸ See ‘Detailed information on employment protection’, OECD, accessible here: www.oecd.org/employment/protection (last accessed 03/05/2014).

¹⁹ ‘UK zero-hours contracts vastly underestimated’, DW.DE, accessible here: <http://www.dw.de/uk-zero-hour-contracts-vastly-underestimated/a-16998940> (last accessed 03/05/2014).

Asylum seekers²⁰ in Germany are able to work one year after arrival. Since 2013, asylum seekers who have lived in Germany for four years have the same access to the labour market as German and EU citizens.²¹ However, before this point, asylum seekers are allowed to work only under the proviso that no German or EU citizen or foreign national with permanent residency status is available to fill the particular job in question. Furthermore, they are also forbidden to work in a self-employed capacity.

Finally, until recently, their ability to find work was curtailed by the ‘residence requirement’ (Residenzpflicht) - a policy unique in the European context - under which asylum seekers were not allowed to leave a designated surrounding administrative area without permission until their claims are resolved. Such a requirement made it very difficult to find and maintain employment. Furthermore, the cost of exit permits eroded the incentive for working.²² Following the example of Brandenburg in 2010, all but two of the 13 Bundesländer of Germany have given asylum seekers freedom of movement over areas wider than the immediate administrative district, which will make it somewhat easier to find work (Wendel, 2013). However, the area over which asylum seekers are

²⁰ The same provisions detailed in this section apply to ‘tolerated migrants’: asylum seekers whose application is rejected but cannot be deported for humanitarian or practical reasons. The ‘tolerated’ are often stuck with this status for years - around 55 per cent have had the toleration status for longer than six years, 38 per cent for over eight years, see ‘Pushed into exclusion: the legal status of the ‘tolerated’ in Germany’, accessible here: <http://migrationeducation.org/22.1.html?&rid=102&cHash=dcf33166a864a4d85f8b9b1a91f42bd7> (last accessed 06/01/2014).

²¹ ‘Asylum seekers will find it easier to get a job’ (‘Asylbewerber sollen leichter einen Job bekommen’), 17/05/2014, Süddeutsche.de, accessible here: <http://www.sueddeutsche.de/wirtschaft/vorlage-des-arbeitsministeriums-asylbewerber-sollen-leichter-einen-job-kriegen-1.1674755> (last accessed 06.01.2014).

²² Kleine Anfrage, Drucksache 17/1911, accessible here: <http://dip21.bundestag.de/dip21/btd/17/019/1701911.pdf> (last accessed 06.01.2014).

allowed to travel varies by federal state and conservative Hessen and Baden Württemberg have maintained exit fees for asylum seekers leaving their immediate residential area.

These conditions constrain the participation of asylum seekers in the labour market. As one federal state's guidance notes discuss, given the fact the 'even qualified people are often unable to find a job in their field...it is difficult for asylum seekers to find employment in Thuringia' (Peters and Metze, 2006: 7). Thus, although asylum seekers have the right to work after one year, conditions act as de facto ban on employment within the first four years of residence. Lack of work also has connotations for the immigration status of tolerated immigrants.²³ Denied skill training, language courses or job experience for so long, the tolerated have found it difficult to find the employment needed in order to apply for a permanent residence. Restrictions on their status therefore contribute to the continued 'illegalisation' of this population.

Lack of access to legal employment has meant that some asylum seekers 'have little choice but to work in Schwarzarbeit [the black economy].'²⁴ If discovered, asylum seekers are protected from deportation on the basis of an outstanding asylum application. Furthermore, illegal employment is still subject to employment law in the German context, which means they are able to claim for unpaid wages and social security contributions, should they want to. However, it may be difficult to prove who the employer is, how many hours were worked and what the terms and conditions of

²³ Failed asylum seekers who cannot be removed for humanitarian or practical reasons.

²⁴ Academic, München, interviewed on 19/03/2013

employment actually were in court.²⁵ Further asylum seekers are liable to criminal fines when they work illegally. These structural factors prevent them from making claims. This issue is further discussed in the section on illegal work.

For the few who do find legal employment, the work permit is valid only for the company and position specified on the application. As discussed further in the following, being unable to leave a job leaves migrants in a situation of increased personal dependency and is a key factor in allowing exploitation to occur. Finally, asylum seekers in Germany are eligible for special community service jobs. These allow them to earn a little extra money to supplement social benefits - a structure that mirrors the infamous 'One-Euro jobs' for social assistance recipients introduced in the Harz IV reforms. The introduction of this form of employment was conceptualized and criticized by many as part of the neoliberal offensive against the welfare state and trade unions (see Detje, Pickshaus et al., 2005). Similarly, the community jobs scheme has attracted considerable criticism for its exploitative qualities. First, asylum seekers are compelled to accept a job offer, should they receive one. Second, jobs pay a maximum of 1.05 euros (90p) an hour - a wage level set deliberately low to reflect the concern that these jobs do not act as an incentive for false asylum claims. Because of public backlash, Deutsche Bahn - a key supplier of these jobs - withdrew its support for the programme.²⁶

²⁵ 'Irregular Russian Immigrants in Germany: A 'Protection with Consequences' Approach to Protection Against Discrimination and Exploitation', Becker, P. and Dewhurst E., accessible here: http://cream.conference-services.net/resources/952/3365/pdf/MGDNF2013_0209.pdf (last accessed 03/05/2014), p.10.

²⁶ 'One Euro Job: German Rail Scraps Refugee Work Project', 25/07/13, Spiegel Online, accessible here: <http://www.spiegel.de/international/germany/refugee-project-deutsche-bahn-cancels-asylum-seeker-1-euro-job-a-913054.html> (last accessed 06.01.2014).

Finally, the majority of asylum seekers who cannot find employment rely on the social welfare benefits they receive through the ‘Asylum Seekers Benefits Act’ 1993 (Asylbewerberleistungsgesetz). These were recently raised from a monthly rate of 224 euros (around £188.61) to 346 euros (£287.62) after the German Constitutional Court argued that the previous level of payment did ‘not correspond to the fundamental right to a humane level of subsistence’.²⁷ However, despite the changes, the amount that asylum seekers receive is still substantially lower than the poverty line for a single person (938 euros per month),²⁸ although it should be noted that asylum seekers also receive free accommodation at group homes.

UK

Asylum seekers’ right to work is more heavily circumscribed in the UK context than in Germany, where maintaining a distinction between asylum seeking and labour immigration routes is seen as a central strategy in the deterrence of false asylum claims.²⁹ Since 2005, asylum seekers who had been waiting over 12 months for an initial decision have the right to apply for work.³⁰ However, in practice, most asylum applicants cannot

²⁷ Bundesverfassungsgericht, 18. Juli 2012 1 BvL 101/10, 1 BvL 2/11. Reported in ‘German court rules benefits for asylum seekers are inhumane’, 18/07/2013, Spiegel Online, accessible here: <http://www.spiegel.de/international/germany/german-court-rules-benefits-for-asylum-seekers-are-inhumane-a-845066.html> (last accessed 03/05/2014).

²⁸ ‘Fragen und Antworten’ (‘Questions and Answers’), Leben mit Hartz IV, accessible here: http://www.leben-mit-hartz-iv.de/Armut_in_Deutschland_Fragen_und_Antworten.pdf (last accessed 06.01.2014).

²⁹ ‘Employment’, UK Border Agency, accessible here: <http://www.ukba.homeoffice.gov.uk/asylum/support/employment> (last accessed 06/01/2014).

³⁰ S. 360, Part 11B, Immigration Rules, accessible here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279707/Immigration_Rules_-_Part_11B.pdf (last accessed 20/05/2014)

work because the majority (78 per cent) of initial decisions are decided within six months.³¹ Permission to work expires once the asylum claim has been finally determined.³² As in Germany, working in a self-employed capacity or setting up a business is prohibited. Finally, since 2010, asylum seekers can only take up a post that is included on the list of shortage occupations. Thus, when asylum seekers do find a job, their ability to change employment is extremely limited.

Asylum seekers who work illegally are liable to prosecution.³³ Furthermore - and unlike in Germany - the prevailing doctrine of illegality (Dewhurst, 2012) states that when a contract is not legal, the employment rights that it contains are not enforceable.³⁴ In terms of welfare rights, asylum seekers have the right to financial support and accommodation,³⁵ although this right is jeopardized when they do not abide by the conditions contained with the asylum support agreement. Support is also not given if it is decided that the application for asylum did not occur 'as soon as reasonably practicable'.³⁶

³¹ 'Initial decisions', UK Border Agency, accessible here: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/initial-decision/> (last accessed 06/01/2014). Furthermore, 'the Secretary of State shall only consider such an application if, in his opinion, any delay in reaching a decision at first instance cannot be attributed to the applicant', S. 360, Part 11B Immigration Rules.

³² Unless they have submitted further submissions for asylum and have waited for over 12 months for a decision, see *Tekle v. Secretary of State for the Home Department* [2008] EWHC 3064 (Admin).; *R (ZO [Somalia] & Ors) v. Secretary of State for the Home Department* [2009] EWCA Civ 442

³³ Failing to observe a condition of leave, including a condition not to take up paid employment, is a criminal offence under S. 24 (1) (b) (ii) Immigration Act 1971.

³⁴ *Vakante v. Addey & Stanhope School and Others* [2004] UK/EAT/0565/03/RN.

³⁵ S. 95 Immigration and Asylum Act 1999.

³⁶ S. 55 1 (b) Nationality, Immigration and Asylum Act 2002. However, there are exceptions for families, people with special needs and cases in which a refusal of support would be a breach of the individual's human rights.

In turn, the quality of support is meagre due to enduring fears that offering substantial benefits will act as an incentive for false asylum claims. Housing is provided, but asylum seekers cannot choose where it is (generally outside of London and the South East) and it is usually 'hard to let' accommodation that Council tenants do not want. Living expenses are, at approximately £160 monthly for a single adult,³⁷ about half of the value of benefits given to German asylum seekers. Furthermore, financial support is generally given in vouchers to be used at particular shop and on particular items - a system that has been described as highly stigmatizing and inflexible (Doyle, 2008).³⁸ There are also no community employment options to top up benefit levels. Recently, the Home Secretary Theresa May has been ordered to re-calculate the level of benefits paid to asylum seekers after the High Court ruled that she acted unlawfully in failing to increase benefits in line with living expenses since 2011.³⁹ The Home Office is currently appealing this decision.

Domestic workers

Domestic workers are some of the most vulnerable workers in both countries. In general, the home-based nature of domestic employment poses unique challenges in terms of monitoring living and working conditions. Close proximity and the private nature of the

³⁷ 'What you'll get', Gov.uk, accessible here: <https://www.gov.uk/asylum-support/what-youll-get> (last accessed 03/05/2014).

³⁸ 'Parliamentary Briefing: Immigration, Asylum & Nationality Bill Clause 43 – Asylum Support (Vouchers)' (2006), accessible here: http://www.refugeecouncil.org.uk/assets/0001/5900/IAN_Bill_Vouchers.pdf (last accessed 23.02.2014).

³⁹ Refugee Action, R (On the Application Of) v The Secretary of State for the Home Department [2014] EWHC 1033.

work mean that domestic workers are especially vulnerable to sexual abuse (Anderson, 1997: 44). Furthermore, employers' discomfort with the idea of bringing a market relationship into the home can translate into blurry boundaries in terms of what it is appropriate to ask the worker to carry out (Anderson, 2007). In such cases, the idea of the domestic worker as a 'member of the family', rather than an employee, obfuscates the duty of the employer to respect the worker's employment rights, as well as their right to privacy and 'time off'. As will be further described below, these sector-specific vulnerabilities can be exacerbated by conditions attached to domestic worker programmes.

Germany

Germany ran a guestworker programme for domestic workers from East Europe until 2011, whereupon the end of transitional restrictions meant nationals from the acceding Eastern bloc could have free access to the labour market. Subsequently, Germany has maintained a more limited visa scheme under the 'Employment Ordinance' (Beschäftigungsverordnung). Here, au pairs from outside the EU (Ukraine, Russia, Georgia and China) and from Romania and Bulgaria can live and work in German households, performing child caring as well as cleaning activities for a non-renewable period of between six months and one year.

Importantly, the scheme is not formally understood as a labour immigration route, but instead as a cultural exchange and language-learning opportunity. The

conceptualisation of the programme in this fashion is evident in a number of status features, including the age of the au pair and the language ability of the host family. The most controversial element of the programme is that the au pair is not understood as earning a wage. Instead, s/he earns ‘pocket money’ (Taschengeld), which is currently set at a minimum of 260 euros a month. This amounts to under 9 euros (£7.30) a day or around 2 euros an hour (£1.70) - far below any conceivable living wage. However, it should be noted that the vast majority of regularly employed domestic workers in Germany do not enjoy the right to a minimum wage because there is no generally applicable collective bargaining agreement on wages in the industry (Carls, 2012). In addition, although domestic workers are covered by most labour laws, they are exempt from limits on weekly hours and occupational health and safety.⁴⁰ The fact that workers in non-standard industries are not covered by collective bargaining on wage and working conditions is one of the key drawbacks in the German coordinated market economy. By contrast, foreign au pairs are subject to weekly working time limits,⁴¹ which are stricter than the requirements of the working time regulations. In this respect, they are actually better protected than their domestic counterparts.

In addition, the host family is responsible for food and accommodation, usually a ‘private room within the household’ although the live-in aspect is not mandatory. The possibility of living outside of the household allows a greater degree of separation between employment and private life - a key issue in this type of employment - although

⁴⁰ However, there are general health and safety regulations under the Civil Code (Bürgerliches Gesetzbuch) that apply to domestic workers (see: Carls, 2012: 16).

⁴¹ Unless an exemption is agreed prior to employment, the au pair is not allowed to work more than 6 hours a day and 30 hours a week (excluding babysitting duties) and must have four afternoons off a week to attend a language school.

it is unclear the level of autonomy the au pairs themselves have over choosing where they live and what rights they have to demand more suitable accommodation. However, au pairs do have the right to change employer at the discretion of the foreigners' authorities.⁴² This gives au pairs in Germany a certain degree of flexibility in terms of avoiding exploitative working conditions, which they do not enjoy in the UK (see below). Furthermore, employers must ensure that the au pair is privately insured in the cases of illness, pregnancy, childbirth and injury from accidents.

However, critics have argued that the problem with enforcing domestic workers' rights in Germany is not so much an issue of a lack of formal rights but instead reflects difficulties in enforcing against illegal working practices in the 'twilight zone' of the home (Kocher, 2012). It should also be noted that the au pair visa accounts for a very small percentage of migrant domestic work. In 2011, the Federal Agency for Labour (Bundesagentur für Arbeit) granted 6,795 visas for au pair work.⁴³ This compares with estimates that around four million households employ about one million domestic workers, of which an estimated 666,000 are migrant workers (Carls, 2012: 7). Thus, the majority of domestic workers in Germany - whether of German or foreign nationality - work as part of the shadow economy (ILO, 2013: 12). This situation is facilitated by the fact that the Finanzkontrolle Schwarzarbeit (FKS) are not allowed into the 'private sphere'. In turn, the exclusion of the FKS from the private sphere derives from the

⁴² S. 12 'Employment Ordinance' (Beschäftigungsverordnung).

⁴³ Kleine Anfrage, Drucksache 15/4791, accessible here: <http://www.au-pair-in-deutschland.de/01aktuell/BerichtderBundesregierung.pdf> (last accessed 06.01.2014).

constitutional right to privacy⁴⁴ rather than any labour market-institutional difference as described in the Varieties of Capitalism. However, as the UK example shows, even where enforcement agencies are allowed into the home, it is cost prohibitive to institute a thorough enforcement regime.

Finally, domestic workers in diplomatic households face a unique situation (Kartusch, Rabe et al., 2011). Under the Vienna Convention on Diplomatic Relations 1961, signatory states have to facilitate the entry of diplomats' private domestic staff. In 2003, an agreement between Germany's foreign ministry and embassies in the country dictated that diplomats should pay their household employees a minimum monthly salary of 750 euros in addition to providing them with free room and board. In addition, they agreed to working time limits of 40 hours per week and 4.50 euros for each hour of overtime. However, domestic workers in Germany are left particularly vulnerable because of diplomatic immunity.⁴⁵ A famous case widely reported across the media and policy reports was that of Ms. Hasniati, an Indonesian woman who suffered such abuse at the hands of a Yemenite diplomat over the course of her four years of employment that she was admitted to hospital weighing 35 kilograms and suffering from tuberculosis. Even though the case showed clear indications of trafficking - including deprivation of freedom, work under slavery-like conditions, physical violence and deprivation of

⁴⁴ Little effective control is exercised over illegal employment in private households in Germany. This is partially because of low yields from these kinds of inspections. However, it is also because of constitutional protections of privacy. Art. 2 (3) of the German Constitution implies that the greater the intensity of a state intervention, the less likely it is to be justified under the guiding rule of proportionality (see Cyrus, 2004; Lutz, 2010). This constitutional provision was explicitly formulated as a response to horrors of the totalitarian Nazi state. In turn, the *Schwarzarbeitsbekämpfungsgesetz* 2004 does not include powers for the FKS to enter private homes.

⁴⁵ Under Art. 9 of the Vienna Convention, the foreign minister can declare a diplomat a *persona non grata*. However, this provision has never been utilised. Instead, diplomatic solutions are preferred.

personal ID papers - the perpetrator's diplomatic status deprived Ms. Hasniati of her right to any kind of criminal prosecution of her offender.⁴⁶

UK

The UK operates three programmes for domestic workers. First, it has an au pair scheme for nationals of Australia, New Zealand, Canada, Japan, Monaco, Taiwan and the Republic of Korea. Participants have to be aged between ages 17 and 27, unmarried and without dependents and are allowed to reside in the UK for two years. Au pairs are expected to do no more than 25 hours a week of childcare or light-household chores, and in return they are given 'pocket money' of approximately £45 per week. Much like their German counterparts, this group is not understood as workers, but instead as young people on a cultural exchange. As such they are excluded from employment legislation, including the minimum wage, and social rights. The au pair is, however, covered by the National Health Service. The universalistic nature of the British welfare state therefore means that arranging healthcare is not left to the employer, as is the case in Germany.

Migrants from other countries are eligible for the 'domestic worker visa'. Under this visa, a domestic worker travels to the UK with a non-British employer who has been granted the right to reside in the UK through a separate category or with a returning UK

⁴⁶ 'Ban Ying, Berlin: Securing the Rights of Domestic Workers for Diplomats', Global Alliance Against Traffic in Women, accessible here: http://www.gaatw.org/index.php?option=com_content&view=article&id=694:ban-ying-berlin-securing-the-rights-of-domestic-workers-for-diplomats&catid=95:member-profile&Itemid=67 (last accessed 06.01.2014).

expatriate. Domestic workers are allowed to stay only for a maximum of six months. These (mainly female) workers come from a variety of countries, such as India, Indonesia, the Philippines and Sri Lanka, whereas their employers are mainly Middle Eastern, Indian or British nationals (Wittenburg, 2008). The programme is intended to make the UK attractive to wealthy transnational migrants by offering them scope to relocate not only themselves but also their households, which may include their paid domestic staff (Fudge, 2013). In 2012, around 15,553 visas were granted in the ‘domestic worker in private household’ category.⁴⁷

The conditions attached to the UK’s domestic worker visa are particularly troubling in terms of exacerbating workers’ susceptibility to exploitative working practices. First, domestic workers on this visa must live in their employers’ house. This arrangement can make them extremely vulnerable. As a former irregular immigrant worker and campaigner for immigrant rights described, ‘If you stay there the employer ask you to do some jobs without pay. Much more misuse’.⁴⁸ The live-in aspect means that the exploitation that occurs is shrouded from public view. It also means employer/host family has the power to control access to the means of survival - accommodation and food - as well as power over wages and social intercourse (Anderson, 2007: 255).

The live-in requirement is also implicated in another problem that migrant domestic workers face in terms of their employment rights. Domestic workers in the UK are

⁴⁷ ‘Non-European Labour migration to the UK’, The Migration Observatory: <http://migrationobservatory.ox.ac.uk/briefings/non-european-labour-migration-uk> (last accessed 06.01.2014).

⁴⁸ Migrant Worker, London, interviewed on 15/06/2012.

excluded from a number of labour standards, such as the maximum weekly working time, restrictions on the duration of night work and occupational health and safety legislation. The one advantage that British domestic workers have over their German counterparts is that they have access to a statutory minimum wage. By contrast, Germany - like most other coordinated market economies - leaves the negotiation of minimum wages to the social partners in each sector.

However, in the UK, if domestic workers are ‘treated as a member of the family’ they fall under an exemption to the national minimum wage.⁴⁹ These issues affect all domestic workers, including British nationals. However, foreign nationals are more likely to fall under this exemption because of the live-in requirement, which constitute one of the main legal tests for deciding whether a domestic worker is a member of the family. For instance, in a recent case, Ms. Udin was found on appeal to fall within exemption despite the fact that her accommodation for part of her time with the family was a mattress on the dining room floor.⁵⁰ Other tests revolve around the provision of accommodation and meals and the sharing of tasks and leisure activities. Thus, despite the fact that the UK has a universal minimum wage - a policy commensurate with its position as a liberal market economy - many workers fall outside of its remit. The importance of considering sector-specific regulations is considered in further detail in the chapters’ conclusion.

⁴⁹ Regulation 2, National Minimum Wage Regulations 1999.

⁵⁰ *Nambalat v. Taher & Anor; Udin v. Pasha & Ors* [2012] EWCA Civ 1249.

The second major issue with the domestic worker visa is the lack of employment portability. From 2012, domestic workers are ‘not allowed to change employer while [they] are in the UK or change to a different type of employment’.⁵¹ However, as the charity Kalayaan, who were the drivers of a campaign to end this same restriction in 1997, argue ‘taking [action against one’s employer] would be unthinkable if the worker had to continue working for their employer and residing in their household and would be impossible if workers lost their right to remain in the UK when they fled from an abusive employer’ (Lalani, 2011: 6). The Coalition Government has responded by arguing that the fact that an employment contract has to be presented in the visa application process will encourage compliance with employment law. However, the extent to which a ‘leaflet outlining their employment rights at the point of obtaining a visa will be enough to protect them from exploitation’⁵² is questionable, given that the requirement for a contract is already in place. Furthermore, in over 50 per cent of cases examined in a recent study, the contracts do not contain enough information to ascertain whether the worker is paid the minimum wage (Clark and Kumarappan, 2011).

More controversially still, the Coalition Government has argued that ‘the biggest protection for these workers will be delivered by limiting access to the UK through these routes’.⁵³ Domestic workers are now allowed to stay for only six months, are not allowed

⁵¹ ‘Domestic workers’, UK Border Agency, accessible here: <http://www.ukba.homeoffice.gov.uk/visas-immigration/working/othercategories/domesticworkers/> (last accessed 06.01.2014).

⁵² ‘Government confirms new tough rules on settlement and domestic workers,’ 01/03/2012, Ruth Grove-White, Migrants Rights Network, accessible here: <http://www.migrantsrights.org.uk/blog/2012/03/government-confirms-new-tough-rules-settlement-and-domestic-workers> (last accessed 03.01.2014).

⁵³ ‘Immigration (employment related settlement, overseas domestic workers, Tier 5 of the points based system and visitors),’ 29/02/2012, Home Office, accessible here: <http://205.139.89.196/publications/about->

to change immigration categories and are denied a route to settlement. However, as Genova (2004) and De Giorgi (2007) make clear, restrictive immigration does not necessarily stem the flow of immigration. As women increasingly seek to enter the labour market, strong demand for migrants' domestic work can be seen in the context of the increasing care burden implied by an ageing population, in conjunction with the inadequate provision of child and elderly care by the state (Anderson, 2007: 250). As the German case also implies, restrictive admissions requirements contribute to the 'illegalisation' of domestic work by foreign nationals. In turn, as discussed in greater detail in the following, irregular immigrants are even further excluded from the labour protections offered British workers. The changes introduced by the Coalition Government are likely to leave migrant domestic workers in situations of greater precarity.

Finally, domestic workers employed in a diplomatic household in the UK enjoy some rights other domestic workers do not, including some flexibility in the length of the visa and the ability to sponsor dependents. Nonetheless, as in Germany, an additional problem facing domestic workers in a diplomatic household visa is that the employer can claim diplomatic immunity under the Vienna Convention on Diplomatic Relations 1961. However, a recent Employment Appeals Tribunal⁵⁴ ruled that claims by two domestic workers against embassies could proceed on the basis that the Charter of Fundamental Rights of the European Union requires the State Immunity Act 1978 to be disapplied for claims raised under EU directives. The decision has far-reaching consequences for the

us/parliamentary-business/written-ministerial-statement/employment-related-settle-wms/?view=Standard&pubID=1010251 (last accessed 03.01.2014).

⁵⁴ Benkharbouche v. Embassy of the Republic of Sudan [2013] UKEAT 0401_12_0410; Janah v. Libya [2013] UKEAT/0020/13 /GE & UKEAT/0401/12/GE.

formal rights of domestic staff in diplomatic workers, whose employers are now advised to comply with the standards contained in UK employment law.

Seasonal workers

Germany

Since 1997, the ‘seasonal worker’ (Saisonarbeiter) programme has been the single greatest labour migration programme in Germany (BAMF, 2011: 40). In 2012, just fewer than 200,000 workers arrived on this programme, with permission to work for up to six months. The vast majority work in agriculture or horticulture. However, the programme is open to any employer who can claim seasonal fluctuations in demand, with the notable exception of the construction industry (Kępińska, 2012: 539). As a migrant rights advocate interviewed for the thesis said, ‘In Berlin, everyone can work as seasonal worker because there is seasonal demand [in the city]’.⁵⁵ Previously, Polish workers comprised between 86 and 92 per cent of all foreign seasonal workers in Germany (Kępińska, 2012: 539). Since the end of transitional arrangements in 2011, the national composition has changed, with increasing numbers of Romanian, Bulgarian and Croatian workers.

⁵⁵ Migrant rights advocate, Berlin, interviewed on 26/02/2013.

As previously discussed, a key area of potential vulnerability in labour migration programmes is constrained employment portability, which hinders migrants' ability to escape exploitative working situations when and where they occur. Recent changes to Germany's Saisonarbeitnehmer programme have increased employment portability for the Bulgarians and Romanians, who no longer need work permits, do not have to be registered and can change employers as often as they like.⁵⁶ However, the 8,000 seasonal workers of Croatian nationality are still subject to the traditional permit system.⁵⁷ Croatian nationals have to apply for a new work permit if they want to change employers - something that increases their dependence on their employer.

On the other hand, the permit procedure does have other advantages from the perspective of protecting Croatian workers from exploitation. Under the permit procedure, Croatian workers receive a job contract before departure that sets out wage expectations and working conditions as well as health insurance (Kępińska, 2012: 549-550). The 'Central Foreigner Placement Service' (Zentral Auslands- und Fachvermittlung) checks the contract or the job advertisement to ensure conditions are 'comparable to those enjoyed by domestic workers'.⁵⁸ While this does not necessarily prevent exploitation in reality, the contract procedure allows Croatians to verify the employment relationship. This is useful for claiming social rights, both in Germany (for

⁵⁶ 'Saisonbeschäftigung' ('Seasonal work'), Bundesagentur für Arbeit, accessible here: http://www.arbeitsagentur.de/nm_27346/Navigation/zentral/Unternehmen/Arbeitskraeftebedarf/Vermittlung/Saisonbeschaeftigung/Saisonbeschaeftigung-Nav.html (last accessed 06.01.2014).

⁵⁷ 'Placement of Croatia seasonal workers' ('Vermittlung kroatische Saisonarbeitnehmer'), Bundesagentur für Arbeit, accessible here: <http://www.arbeitsagentur.de/zentraler-Content/Veroeffentlichungen/Merkblatt-Sammlung/MB-ZAV-Vermittlung-kroatische-Saisonarbeitnehmer.pdf> (last accessed 06.01.2014) p.6.

⁵⁸ Email communication, 'Central Foreigner Placement Service' (Zentrale Auslands- und Fachvermittlung), 13/05/2013)

instance, in the case of illness) and in the home country, when seasonal migrants might otherwise face issues accessing the accrued pension and social rights (Cyrus, 2005).

Despite these efforts, seasonal workers are institutionally vulnerable to exploitation in Germany. Unlike the UK, where there is a general minimum wage (and, until recently, an agricultural minimum wage set at a slighter higher level), there is no sector-wide minimum wage for the agriculture, horticulture or hospitality industries in Germany.⁵⁹ When workers want to make a wage claim, lawyers have to argue that the wage paid is immoral, interpreted as two-thirds of the ‘normal wage’ paid by the relevant sector and regional economy.⁶⁰ However, it is difficult to establish what this might be. Furthermore, leaving the negotiation of minimum wages to market forces allows a downward drift in wages, particularly when there is high demand for work. Most seasonal agricultural jobs advertised on a popular labour exchange website saisonarbeit-in-deutschland.de are six euros (£5.00) an hour, excluding deductions for accommodation (either a room in the house or in a ‘container’) and meals. However, some jobs are available for four euros - far below what would be considered a fair wage when compared to minimum rates in collective bargaining agreements.

Employers have also been known to manipulate job titles to avoid sectorial wage floors. For instance, an interviewee reported a major fast-food chain restaurant in Munich used seasonal workers as cleaners, but formally named them ‘kitchen helpers’ to avoid

⁵⁹ From 1 July 2013, a collective wage agreement puts the wage floor at 7.00 euros per hour for farm work which requires only a short amount of vocational training. However, very few employers are signed up to the agreement.

⁶⁰ Bundesarbeitsgericht (Federal Labour Court) Judgement made 22.04.2009 5 436/08.

having to pay the minimum wage that has been negotiated in the cleaning sector.⁶¹ Thus, Germany's collective bargaining system leaves both foreign and domestic workers unprotected in certain sectors.

UK

Between 2007 and the end of 2013, the UK ran a smaller programme for 21,500 workers, called the Seasonal Agricultural Workers Scheme (SAWS), for Bulgarian and Romanian nationals. There are no immediate plans to reintroduce a seasonal work programme because 'unskilled and low skilled labour needs should be satisfied from within the expanded EEA labour market'.⁶² The following section discusses the former SAWS programme.

SAWs workers were allowed to plant, gather, process and pack crops and handle livestock for up to six months' duration. Unlike Germany, workers were limited to the agriculture and horticulture industries. It is worth noting that agriculture is the riskiest industry sector in the UK.⁶³ In the UK, fewer than one in a hundred employees work in agriculture, but there are about one in ten fatal injuries to employees in the industry.⁶⁴ Ill-

⁶¹ Migrant rights advocate, Berlin, interviewed on 26/02/2013.

⁶² 'Written ministerial statement on the Seasonal Agricultural Workers Scheme and the Food Processing Sectors Based Scheme', 12/09/2013, Home Office, accessible at <https://www.gov.uk/government/speeches/seasonal-agricultural-workers-scheme-and-the-food-processing-sectors-based-scheme> (last accessed 24.02.2014).

⁶³ 'About health and safety in agriculture', Health and Safety Executive, accessible here: <http://www.hse.gov.uk/agriculture/hsagriculture.htm> (last accessed 03.01.2014).

⁶⁴ *ibid*

health is almost twice the rate for other industries, particularly musculoskeletal disorders, and there are high cancer registrations because of the use of carcinogenic pesticides and insecticides as well as long periods spent outside exposed to the sunlight. Thus, sectorial limitations as contained in the SAWS programme have siphoned migrant workers into some of the most dangerous work in the country.

Since 2007, Romanian and Bulgarian workers have had the right to live in the UK. As a result, they were no longer vulnerable to deportation where they lost their SAWs-permits. However, workers on the SAWs programme nonetheless faced issues with employment portability. With no general right to work, their ability to find new employment was circumscribed. They had to wait three months before being appointed to another position at a registered farm.⁶⁵ The practical difficulties of finding a job in rural areas meant it was very difficult to find a new employer. Around 90 per cent of work permits were given to named migrant workers, indicating the existence of well-institutionalised networks. The advantages of the naming system for migrants was that the employer was either known or recommended by another contact (Rogaly, 2008: 1432). However, it also indicated the presence of close-knit communities, within which migrants known to be ‘troublesome’ were more likely to be excluded from further employment. Notably, the National Farmers Union’s vocal opposition to the shrinking of SAWS was based on the fact that workers in this programme are tied to particular employers (Anderson, 2007a). The lack of employment portability - problematic from the

⁶⁵ ‘Questions and Answers’, UK Border Agency, accessible here: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/workingintheuk/a2questionsandanswers.pdf>, p. 22 (last accessed 06.01.2014).

perspective of migrants' rights - was precisely what made migrant workers attractive from the employer's point of view.

A key difference in the organisation of the seasonal worker programme in the two countries was the fact that the UK system was privatized. This way of organizing state provision reflects the influence of the neoliberal preference for small government (Rogers, 2012: 6). Under SAWS, nine private UK-based licensed operators, on contract with Work Permits (UK), were responsible for recruiting workers, assessing and monitoring farms and ensuring proper working conditions, in a system that was designed to build in a degree of protection for workers against exploitation. Concordia, for instance, checked each farm before they registered and then 'subsequently at least annually while the workers are present'.⁶⁶ Between 2012 and 2013, they carried out 300 visits to 285 sites.⁶⁷ The UK Border Agency were informed any time a farm had been deregistered - which 'has happened on a number of occasions in the past' - and have the option of informing the other operators.

On this basis, it appears as if seasonal workers in the UK were better protected than those in Germany, where no such checks occurred. However, under SAWS single farms were also allowed to act as sole operators and hire workers directly. In these cases, worker conditions were subject to no independent oversight. The consequences of this were predictable. In 2006, S & A Produce were accused of a host of exploitative

⁶⁶ Email communication, Concordia, (10/11/2013).

⁶⁷ *ibid*

practices, including cramped living conditions, charging injured workers fees for medical care, poor pay, long hours and a demanding a 'entry fee' of £300 just to work at one of the sites. This led to an enquiry by Sainsbury's and Tesco and the subsequent implementation of a clear grievance policy for seasonal workers. However, S & A remained an official operator for SAWS until the programme's closure at the end of 2013.⁶⁸

A final issue with the SAWS programme was that there was no standard procedure for recruiting workers abroad. Cases were reported of Ukrainian workers paying between £1,000 and £2,000 for a visa (Black and Tenaglia, 2005: 7). Although the UK's Employment Agencies Act 1973 (S. 6) prohibits the charging of fees to obtain work placements, this is extremely difficult to enforce for workers recruited privately abroad. Since 2007, third-party recruiters, both UK-based and based abroad had to be licensed by the Gangmasters Licensing Authority (GLA). However, farms recruiting under SAWs were exempt from these licensing requirements. By contrast, all agencies in Germany have to be licensed.

Self-employment: freedom of establishment and contract workers

Germany

⁶⁸ 'Supermarket inquiry into strawberry slaves', 15/07/2006, The Telegraph, see <http://www.telegraph.co.uk/news/uknews/1523974/Supermarket-inquiry-into-strawberry-slaves.html> (last accessed 03.01.2014).

Eleven countries have joined the EU in the past decade.⁶⁹ Germany placed restrictions on nationals from acceding states, preventing them from working without applying for permission for the first seven years following accession. However, under European law, transitional restrictions do not apply to the freedom of establishment, defined as ‘the right to take up and pursue activities as self-employed persons and to set up and manage undertakings in other EU states’.⁷⁰ The predictable result of this has been a siphoning of East European immigrants into self-employment (Schulze Buschoff, 2006: 4). In 2008, around 40 per cent of recent EU10 migrants in Germany were self-employed - far higher than previous generations of immigrants (Kahanec, 2009).

For optimists, increases in self-employment announce a change in work attitudes within the labour force: a trend towards a new spirit of entrepreneurialism and more autonomous concepts of work (Gottschall and Kroos, 2003: 5). Undoubtedly, many self-employed workers are not in a precarious situation, but instead enjoy the ‘non-pecuniary’ advantage of self-direction and flexibility that being one’s own boss affords (Benz and Frey, 2008; Benz and Frey, 2008). Nonetheless, the funnelling of East European nationals into self-employment through the freedom of establishment has a number of troubling consequences in terms of vulnerability to precarious work.

⁶⁹ The ‘A8’ who joined in 2004 are Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, and Slovenia. The ‘A2’ who joined in 2007 are Romania and Bulgaria. In 2013, Croatia joined the EU.

⁷⁰ Art. 49 Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01.

The first issue with self-employment restrictions is that it severely limits the jobs that this group can do. A key issue here is one of qualification barriers. One restriction to the right to establishment is the condition that the person concerned ‘provide evidence of his/her professional qualification where legal or administrative provisions so require’.⁷¹ This has particularly important connotations for migrants, whose foreign qualification(s) are unlikely to be given the same weight as domestically acquired skills and may not be recognised at all (Lucio, Perrett et al., 2007). Recognising that qualification requirements would potentially lead to discrimination between European and domestic nationals in terms of the ability to establish oneself in the host nation-state, the European Free Movement of Professionals’ Directive⁷² aimed to ensure mutual recognition, thus allowing that everyone should have the right to practise his/her profession in all EU/EEA countries.

The issue of qualification recognition is particularly salient in the German construction and construction-related industries, in which people are required to have extensive and rigorous training before they set up their own business. This feature is a legacy of the coordinated nature of industrial relations within the industry, under which trade unions negotiated qualifications barriers alongside an employer-funded system of vocational training. Amendments to the German Handicrafts Code in 2004⁷³ eased

⁷¹ ‘Handbook: Rules on the supply of work or services in relation to the EU freedom of services and establishment’, Federal Ministry of Finance, accessible here: http://www.pressburg.diplo.de/contentblob/1609004/Daten/91068/04_hanbuch_dienst_eng.pdf (last accessed 06.01.2014) p. 13.

⁷² Council Directive 2005/36/EC of the European Parliament and of the Council [2005] OJ L 255.

⁷³ ‘Relevant Changes made by the new Handicrafts Code 2004’ (Maßgebliche Änderungen durch die neue Handwerksordnung 2004), IHK Trier, accessible here :<http://cms.ihk-trier.de/ihk-trier/Integrale?MODULE=Frontend.Media&ACTION=ViewMediaObject&Media.PK=603&Media.Object.ObjectType=full> (last accessed 06.01.2014).

qualification requirements for a number of occupations in construction-related industries, such as bricklayer, tiler, plumber or carpenter (Blanpain, 2008). Nonetheless, ‘A2’ migrants (from Romania or Bulgaria) are more likely to work ‘in some construction jobs like Abrisshilfe [‘demolition aid’] or Hilfsarbeit [‘unskilled work’]...where [you] don’t need professional status, you can totally become self-employed’, whereas if you apply for a job that requires a particular qualification, ‘under German law, they can say, you are still missing this course and this course’.⁷⁴ The qualification barriers that remain in Germany mean that A2 nationals are largely limited to low-skilled self-employment.

The second issue is the exclusion of self-employed workers from social and employment rights. The self-employed do not generally pay into the public insurance system for unemployment insurance and sick pay funds, which means that they are not entitled to these services. Since 2007, it has been compulsory for self-employed workers to join a health insurance fund. However, a major problem is that many foreign self-employed workers are unaware of this requirement: ‘they think, there is European health insurance card from East Europe and think they are insured and don’t know that they must be insured here too’ (Hamburg-based migrant advocate, 04.03.2013). The particular structure of Germany’s insurance-based healthcare model operates to the disadvantage of self-employed workers.

A third issue is that self-employed persons in Germany are understood as their own bosses and seen as equal to the parties they contract with. As a result, self-employment

⁷⁴ Migrant rights advocate, Berlin, interviewed on 26/02/2013.

does not attract any statutory employment rights. In addition, self-employed workers are excluded from collective bargaining on wages, because the ‘Law Against the limitation of competition’ 1958 (Gesetz gegen Wettberwerbsbeschränkungen) prohibits ‘businesses’ from seeking arrangements on prices.⁷⁵ This exclusion is particularly important in the German coordinated model, given the centrality of collective bargaining in the negotiation of wages and working conditions for employees.

Without formal recourse to employment rights, when self-employed workers are mistreated, their only possible recourse is to prove that the economic reality of the working relationship is more akin to employment, and then to make a claim on this basis. Proving ‘bogus’ self-employment is extremely difficult, because self-employment is defined according to numerous dimensions that carry equal weighting. This means that many circumstances fall into a gray zone between ‘pure’ self-employment and employment. Germany introduced the category of ‘dependent self-employment’ to account for this issue (Sorge, 2009). Workers that fall into this category enjoy limited employment and social rights.

Finally, increasingly complex subcontracting chains have made it more difficult to protect self-employed workers - or the employees they hire. Germany has signed bilateral agreement with Turkey, Bosnia and Herzegovina, Serbia, Macedonia, Bulgarian, Romania and Croatia for a fixed number of ‘contract workers’

⁷⁵ According to Art. 12a of the Collective Agreement Act (Tarifvertragsgesetz), however, it is possible to conclude collective agreements for those persons who are considered by law to be ‘similar to an employee’.

(Werkvetragsarbeitnehmer). These are self-employed workers who provide services - including labour - in Germany, mostly in the construction industry and the meat processing industries.⁷⁶ One issue is ‘tax reimbursements’ (Lohnsteuerrückvergütung). As one Munich-based migrants’ rights activist explained it, ‘you get taxes back when you have this contract for a number of months and so when they go back to Turkey then they can claim taxes back and they sign a Vollmacht [‘power of attorney’] so that contractors can claim the money back for them and of course the workers wouldn’t get the taxes’. Although courts in Turkey are aware of this issue, it is harder to convince German courts that the documents signing over the power of attorney were signed under duress - usually at the airport, on pain of losing the contract for work.

More generally, international subcontracting chains have been used to obfuscate responsibility for poor working conditions and a lack of wage payment. It is not uncommon for firms to simply disappear. Responding to these issues, IG-BAU has successfully lobbied for two forms of general contractors’ liability in the construction and construction related sectors.⁷⁷ The Germany Bundestag is considering expansion of these provisions to other sectors in the years to come (Asshoff, 2009).

76 ‘Merkblatt: 16, Beschäftigung ausländischer Arbeitnehmer aus Staaten außerhalb der Europäischen Union im Rahmen von Werkverträgen in der Bundesrepublik Deutschland’, (‘Information sheet: 16, The employment of contract workers from outside the European Union in Germany’), Bundesagentur für Arbeit, accessible here: <http://www.arbeitsagentur.de/zentraler-Content/Veroeffentlichungen/Merkblatt-Sammlung/MB-16-Beschaeftigung-auslaendischer-AN.pdf> (last accessed 06.01.2014).

77 Under S. 28e 3a-3f of the Social Code IV (Sozialgesetzbuch), employers are liable for ‘the performance of the obligation [by the subcontractor] to pay its employees’ wages and social security contributions, unless they can prove they made a ‘reasonable assessment’ of the circumstances and ‘without fault’ could assume that payment would be made. Art. 1a of the Posted Workers Act 1996 (Arbeitnehmer-Entsendegesetz) ‘establishes a liability of the principal contractor of works and services for the obligations of the client, intermediary contractor and temporary work agency (hirer) concerning payment of minimum

UK

Unlike Germany, Britain allowed the free movement of workers from the eight East European countries that acceded in 2004. However, Romanians and Bulgarians were, until the end of 2013, subject to transitional restrictions and Croatians are currently under transitional restrictions. Similar to those in Germany, self-employed workers in the UK are also less protected than employees. In British law, employees are subject to labour law, a body of law introduced to intervene in the employment contract and compensate for the market-based subordination of the employee vis-à-vis the employer (Perulli, 2003: 6).⁷⁸ By contrast, self-employed are subject to civil and commercial law (Buschoff and Schmidt, 2009). This means they decide ‘how much to charge for [their] work and how much holiday to give [themselves]’.⁷⁹ Although they do not have the right not to be discriminated against⁸⁰ and are entitled to a safe and healthy working environment on their client’s premises, they are exempt all other statutory employment rights. Instead of claiming for unfair dismissal in an employment tribunal, aggrieved workers can claim for a breach in contract in a small claims court.⁸¹

wages to workers and leave fund contributions to the Leave and Wage Equalisation Fund of the Building Industry (Urlaubs- und Lohnausgleichskasse der Bauwirtschaft, ULAK)’.

⁷⁸ There is also a second category of ‘worker’ with most (not all) of the same rights as employees. These apply to all contracts in which an individual agrees to personally carry out work without running a genuine business of his or her own and include working time, minimum wage levels, disability discrimination, part-time work and protection from unauthorised wage deductions (Böheim and Muehlberger, 2006: 6).

⁷⁹ ‘Are you a worker, employee or self-employed’, nidirect, accessible here: <http://www.nidirect.gov.uk/are-you-a-worker-employee-or-self-employed> (last accessed 06.01.2014).

⁸⁰ S. 39(1) Equality Act 2010. Only applies to workers (including dependent self-employed) and self-employed with a contract for personal services.

⁸¹ ‘Employment Status’, TUC, accessible here: <http://www.tuc.org.uk/workplace/tuc-19836-f0.cfm> (last accessed 06.01.2014).

The fiscal incentives to opt for self-employment are bought at the expense of some longer term disadvantages of access to state benefits. The general contractor avoids the National Insurance contribution, around 12.8 per cent of employees' gross wage payment, whereas the self-employed worker pays a lower contribution, representing a savings of about seven per cent on gross earning (Briscoe, Dainty et al., 2000). However, without an entitlement to sick pay, these people are obligated to work through sickness. Furthermore, deprived of any pension entitlements, they face an old age of mean-tested poverty - unless, as self-employed, without a designated retirement age, they have to work until they die (Harvey, 2001). As UCATT describes, the self-employed 'make no provision for their retirement, thus increasing their vulnerability in old age' (UCATT, 2008). A recent report has found that two-thirds of self-employed workers are not paying into pensions.⁸²

Much as in Germany, much self-employment is bogus, particularly in the UK's construction industry: one estimate suggests that as many as 80 per cent of the taxed self-employed would be designated employees, if they were to go to employment tribunal (Harvey, 2001: 21). The challenge of prosecuting bogus self-employment is complicated by the fact that many nominally 'self-employed' workers in the UK sign up with agencies or payroll service companies (Elliot, 2009). Once individuals sign a contract with the third party they no longer have a legal relationship with the general contractor but instead are legally defined as self-employed subcontractors or 'freelance operatives' of the

⁸² 'Two third of self-employed are not paying into pensions, report finds', 03/05/2014, The Guardian, accessible here: <http://www.theguardian.com/money/2014/may/03/self-employed-not-paying-into-pensions-thinktank> (last accessed 04/05/2014).

payroll company itself. The implication of this is that the general contractor is protected from liability for employment or tax issues - despite the fact that they retain the right to 'negotiate the provision of labour' with the 'freelance operative' (ibid.).

This would not happen in Germany - at least not legally. It is a legal requirement for all companies lending out individuals to clients in Germany to be licensed by the German Authorities and to abide by the universal collective agreement in the temporary agency sector.⁸³ This is a legacy of controls on agency working and subcontracting negotiated by the unions. Further, under the general contractors' liability, if a nominally self-employed person is found to be employed, the contractor is responsible for unpaid social security contributions. By contrast, there is no general contractors' liability in the UK, in the construction industry or elsewhere. Thus, the Olympic Village was the subject of scandal when general contractors argued that there was nothing they could do about the Bulgarian workmen who were not paid their final month's wages by employment agency James Varney.⁸⁴

Finally, qualification barriers are less stringent for self-employment in many industries in the UK than in Germany (accounting, construction, electricians, etc.). This is indicative of their respective economic structures. Protected professional statuses function alongside strict dismissal legislation and generous unemployment insurance so as to

⁸³ S. 1 'Temporary Employment Act' 1972 (Arbeitnehmerüberlassungsgesetz).

⁸⁴ 'UCATT Take Legal Action over Unpaid Olympic Wages' press release. Nonetheless, Lend Lease agreed to pay out after union pressure, see 'UCATT Secures Unpaid Wages for Members on Olympic Site' press release. As argued by advocates and unions in both countries, public relations pressure is often more effective than making a claim.

encourage workers to invest in the specific skills that support high-quality production in coordinated market economies. By contrast, liberal market economies are absent of the coordinating institutions required to implement this specific-skilled production equilibrium (Estevez-Abe, Iversen et al., 2001). Instead, the primary consideration is ensuring a ‘light-touch’ approach to new businesses. Nonetheless, the complex procedures involved in setting up as self-employed have contributed to Romanians’ and Bulgarians’ participation in cash-in-hand work to survive. The issue of illegal work is discussed in the next section.

Illegal work

The illegal employment of foreign workers can take many forms (Junkert and Kreienbrink, 2008: 15). The following section concentrates on two sub-categories of illegal foreign employment: when foreign nationals are illegally resident and do not have the right to work,⁸⁵ and when foreign nationals are legally resident but do not have the right to work. In turn, there are two elements that determine the legal framework around illegal migrant work: the enforceability of employment rights during undeclared or illegal employment and the extent to which courts are under a duty to pass on information about immigration status to the relevant authorities.

Germany

⁸⁵ With the exception of ‘tolerated immigrants’ in Germany, who do not have the right of residence but cannot be deported and do have the right to work after four years in Germany.

Illegal workers are allowed to claim for the infringement of labour rights in Germany.⁸⁶ However, there may be difficulties in evidencing the employment when there is no contract. For instance, a lawyer interviewed for the study worked on a case in which ‘those two clients were Bulgarian and working [illegally] on construction sites, tearing down stuff and then cleaning the house, getting debris and rubbish out...one of him lost his thumb doing that and then they were cheated by the employer for the wage’.⁸⁷ In this case, the claimants were successful at getting witnesses to corroborate the fact of their employment. However, the general problem is ‘if they want to get the next job, they don’t want to get trouble and that’s why no one is interested in becoming a witness’. Further, working (or being in self-employment) without a work permit⁸⁸ attracts an administrative fine of up to 5,000 euros. In 2011, the Finanzkontrolle Schwarzarbeit recorded 7,410 cases of employment without a work permit and 134 cases of self-employment without a permit (personal communication, Finanzkontrolle Schwarzarbeit, 08/08/2012). This provides a disincentive towards approaching the authorities.

The penalties for irregularly resident foreigners are far worse. Although there is no criminal offence for working without legal residence status, irregular immigrants in Germany can be prosecuted for illegal residence (S. 95 Residence Act). In addition, under section 86 of the Residence Act (2005), courts are obliged to report illegal residents to the foreigners’ authorities, provided that the duty to report such findings is not outweighed by

⁸⁶ S. 134 ‘Federal Law Book’ (Bundesgesetzbuch).

⁸⁷ Trade union lawyer, Munich (26.02.2013).

⁸⁸ S. 404 (2) 4 Criminal Code (Strafgesetzbuch) (employment without a work permit); S. 98 (3) 1 Aufenthaltsgesetz 2005 (‘Residence Act 2005’) (self-employment without a permit).

the vital personal interests of the persons involved. Cyrus (2004b: 70) has criticised this act, arguing that these regulations turn courts of law into auxiliaries of immigration control bodies. The law's very existence has a strong preventative effect: as explained by a Hamburg-based labour court judge,⁸⁹ 'these cases [involving illegal residents] are really rare...because people are too scared to come forward'. By increasing the risk for illegal migrants who are thinking of suing employers for their exploitative practices, these regulations create additional incentives for the illegal employment of non-German labour and put non-German workers at an unfair disadvantage (Cyrus, 2004). Neither can irregular immigrants in Germany approach the police, as the latter are bound by duty to investigate all crimes, including illegal residence, and then to inform the foreigners' authorities. This makes irregular immigrants very vulnerable to victimization (Vogel, 2010).

A slightly different situation ensues in the case of irregular immigrants who have been trafficked for the purposes of labour exploitation. Trafficking does not necessarily have anything to do with international migration since it is possible for a person to be trafficked in their own country (Anderson, 2012) but it is often associated with irregular migration. This results in part from the legal vulnerability of this population, which reflects in turn the state's criminalisation of migration.

The 'Act Transposing the Residence and Asylum Directives of the European Union' 2007 (Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der

⁸⁹ Interviewed on 28.07.2012.

Europäischen Union) included a reflection period of at least one month - plus a renewable residence permit lasting at least six months - to help victims who testify as witnesses during criminal proceedings (Follmar-Otto, 2009). Prosecutors have the right to order police protection for the duration of the trial. However, this does not protect the victims' families living in the home country. Further, victims are often deported once the criminal proceedings have concluded. Thus, migrants' access to justice is largely conditioned by the extent to which it facilitates prosecution interests. It is also very difficult to prove a trafficking offence, particularly when the person involved arrived legally. One trafficking expert argued, 'there is a misinterpretation...by the public prosecution office, they think there has to be chain, some physical sign of people being held, like a prison'.⁹⁰ This ignores other ways in which coercion and deception about working conditions can arise.

Finally, in corporatist Germany, the trade unions are a central institution for the representation of workers' rights. Irregular immigrants were traditionally unable to gain access to the legal protections offered by trade unions. Besides from the issues of language barriers and cost, without a bank account, it becomes difficult to make the monthly contributions, without which trade unions officially do not lend legal assistance. Furthermore, irregular immigrants 'are scared of everything' that might have something to do with the state. According to one migrants' rights activist in Hamburg, this is particularly the case for East European and Russian immigrants, who associate trade unions with the repressive state apparatus of COMECON.⁹¹ Further, alliances between the

⁹⁰ Trafficking project manager, Berlin, interviewed on Skype, 20/03/2013.

⁹¹ Migrants' rights activist, Hamburg, interviewed on the 27/02/2013.

trade unions and the Finanzkontrolle Schwarzarbeit - who are under the general obligation to inform the foreigners' authorities where they discover illegal residence - indicate divided loyalties when it comes to irregular immigrants.

Changing attitudes on behalf of the trade unions are, however, evidenced by a growing number of 'solidarity organisations' (Solidaritätsorganisationen), which provide (generally) free representation for both regular and irregular immigrants. Some of these cases go to court, where the lawyer stands in for the irregular immigrant to avoid the latter's risk of arrest and deportation; most are settled out of court. In one case involving workers on a construction site in Hamburg, the trade union used the threat of media exposure to pressure a general contractor to pay the workers' wages - despite the fact that they were subject to an exemption to the general contractors' liability. In this case, the payment of back wages was described as 'humanitarian aid'.

UK

In the UK, judges are not under the obligation to pass information about irregular immigration status to immigration authorities, although there is nothing that prevents them from doing so. The key issue for foreigners working illegally is the prevailing doctrine of illegality (Dewhurst, 2012), which states that when a contract is not legal, the employment rights that it contains are not enforceable. Despite pressure from Europe, the UK has held steadfastly onto its 'non-protection' stance, opting out of an EU Directive that would have provided undocumented migrant workers with the right to recoup unpaid

wages. The rationale behind the Directive was based on the principle that employers benefit a great deal financially from irregular immigrant labour and the obligation to pay outstanding remuneration could increase the cost and risk of hiring an irregular immigrant. However, the UK has reiterated the position that the introduction of provision for back pay of any outstanding remuneration to illegally employed foreign nationals ‘could encourage some illegal workers to work in the knowledge that even if they are identified and removed from the UK they will still be paid in full’.⁹²

Illegal foreign workers are prevented by the ‘doctrine of illegality’ from seeking redress in cases of labour exploitation. To date, there are no cases in which the foreign national has been working without permission and has successfully made a claim on the basis of employment rights. Until recently, questions remained about the right of irregular immigrants (and, more generally, claimants with illegal contracts) to claim for discrimination because the offence is based on statutory remedies as opposed to a contractual claim. However, *Hounga v. Allen*⁹³ has narrowed the possibilities for making a claim on this basis. Ms. Hounga - a Nigerian national who came to the UK as a 15-year-old to perform housework and childcare for the Allen family - brought a number of claims before the Employment Tribunal, who rejected her claims for unfair dismissal, breach of contract and unlawful deductions from wages and holiday pay on the grounds that they arose out of the illegal contract. However, the claim for dismissal on racially discriminatory grounds was, initially, allowed because the court agreed that the admitted illegality - the violation of immigration rules - did not bar her claim based on the statutory

⁹² ‘Ad Hoc Query on the payment of back wages to foreign illegal workers returned to their country of origin’, European Migration Network.

⁹³ [2012] EWCA Civ 609

tort of racial discrimination. The Employment Appeals Tribunal made a similar distinction. However, Ms. Houna's employers took the case to the Court of Appeal, who decided that all of Ms. Houna's claims, including the discrimination claim, should be barred, because it was 'inextricably bound up' with the illegality in question and therefore to permit her to recover compensation would appear to condone her unlawful conduct.

Thus, judges in the UK have tended towards a strict interpretation of the doctrine of illegality to the detriment of migrant workers' employment rights. This interpretation of the doctrine of illegality arguably contravenes the Race Directive 2000, which permits no derogations on the grounds of public policy from the general principle of protection against discrimination (Forshaw and Pilgerstorfer, 2005: 7-8). Indeed, the Race Directive clearly states that protection against discrimination constitutes a 'universal right' and specifically requests that states take the necessary measures to ensure that any 'laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished' (Art. 14a).

However, it should be noted that a small number of irregular migrant workers make claims in court. This occurs because of the fact that employers might similarly be interested in not having the illegal status of the claimant come to light, because of the risk of penalty. In such cases, the employer and an irregular migrant agree that the latter's status will not be revealed in court. As one lawyer described, 'quite often you get into a game of bluff and counter bluff. They might say, the worker is illegal and then you reply, well, are you going to go out and admit to everyone that you have been employing

someone illegally?’⁹⁴ Similar to the German context, the desire to keep the issue of illegal employment secret means that cases are also sometimes settled out of court. This is one of the rare occasions when third-party sanctions have an indirectly positive effect on irregular migrants.

Finally, the rules are different when it comes to people who have been trafficked - although, much like Germany, the current system has been heavily criticized for not offering enough protection to potential victims. Since the implementation of the Council of Europe Convention on action against Trafficking in Human Beings in 2005, the UK has introduced a 45 day reflection and recovery period during which victims cannot be deported. However, leave to remain beyond this period is discretionary.⁹⁵

In addition, recognition as a trafficking victim is difficult. For instance, the charity Kalayaan argued that ‘we have never had an experience where the police see this withholding of documents as an indicator of trafficking and decide to investigate further’.⁹⁶ Further, foreign nationals who present themselves as victims of trafficking are often treated as potential immigration offenders. The former UKBA’s operational guidance stated that operational ‘enquiries into whether a person is a victim of trafficking should take precedence over enquiries into the individual’s immigration status’.⁹⁷

⁹⁴ Immigration lawyer, London, interviewed 19 June 2012.

⁹⁵ ‘National referral mechanism’, Serious Organised Crime Agency, accessible here: www.soca.gov.uk/about-soca/about-the-ukhtc/national-referral-mechanism (last accessed 04/05/2014).

⁹⁶ ‘The Trade in Human Beings: Human Trafficking in the UK’, Home Affairs Committee, accessible here: <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmhaff/23/2307.htm> (last accessed 04/05/2014).

⁹⁷ *ibid*

However, former Home Office Minister, Mr. Alan Campbell has spoken about immigration officers' suspiciousness that irregular migrants might be claiming to be victims in order to get round immigration rules (PICUM/La Strada, 2011). Similarly, research by the Anti-Trafficking Monitoring Group has also raised concerns regarding differential treatment of victims depending on their immigration status, with EU nationals twice as likely to be recognized as a victim compared with non-EU nationals.⁹⁸ The trafficking framework leaves much to be desired in both the UK and Germany.

Freedom to provide cross-border services: 'posted workers'

Germany

Posted workers are persons 'employed in one EU member state but sent by their employer on a temporary basis to carry out work in another member state' whilst remaining under the direction of the home state employer. Their employers save money by paying social security contributions in the sending country, rather than in the host country. Since the *Rush Portuguesa* case,⁹⁹ transitional arrangements are not applicable in cases of posting workers because the situation of posting has been interpreted as an aspect

⁹⁸ 'Background: Human Trafficking in the UK', Anti-Slavery, accessible here: http://www.antislavery.org/english/campaigns/background_on_trafficking_for_forced_labour_in_the_uk.aspx (last accessed 04/05/2014).

⁹⁹ *Limitada v. Office National d'Immigration* [1991] European Court of Justice, 2 CMLR 818

of an employer's freedom of services.¹⁰⁰ Third-country nationals can also be posted, provided that they have legal residence and employment in the sending country. There were an estimated 226,850 posted workers in Germany in 2011 (E.C., 2011: 8), of whom approximately one-third were employed in the construction industry.

The employment rights of posted workers are shaped by a unique interaction between European Union and national law. On the European level, Art. 3 of 1996 Posted Workers Directive declares that posted workers are to be employed on the basis of 'minimum terms and conditions of employment¹⁰¹...in the Member State where the work is carried out...as laid out in law, regulation, or administrative provision and/or; collective agreements or arbitration awards which have been declared universally applicable' (Art. 3 (1)). In fact, by the time of the Posted Workers Directive, and in the midst of scandal regarding the issue of low-wage posted workers in the construction industry, Germany had passed the Posted Workers' Act 1996 (*Arbeitnehmer-Entsendegesetz*), which outlined that posted workers were subject to the minimum employment standards of the host country.

¹⁰⁰ However, Germany has applied restrictions on the right to provide services in the construction industry (and related industries) in the cleaning of buildings, equipment and transport as well as in the activities of interior decorators in areas that suffer from high unemployment.

¹⁰¹ Regarding maximum work periods and minimum rest periods; (b) minimum paid annual holidays; (c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes; (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; (e) health, safety and hygiene at work; (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; (g) equality of treatment between men and women and other provisions on non-discrimination.

Posted workers in Germany are constructed as precarious workers in Germany because of the way in which minimum standards are defined in European legislation. As outlined in the Laval case,¹⁰² the absence of a law or a universally applicable collective agreement means that there is no minimum standard that must be applied to posted workers. Thus, although employment rights that are based on statute apply to posted workers, collectively bargained employment rights need to be universally binding.

This has particular connotations in Germany, where collective bargaining plays a central role in the negotiation of wages and working conditions. Thus, although certain employment rights, such as working time and health and safety, are based on statute and are therefore applicable to posted workers, posting companies could avoid paying German-level wages because there was (and is) no statutory minimum wage.

Subsequently, universally binding minimum wages have been negotiated in construction, construction-related industries, waste management, mining, roofers, electrical trades, cleaning, care, security services and, most recently, agency working, which also apply to posted workers. However, in industries that have not been able to negotiate wage floors, posted workers are vulnerable to the most extreme forms of wage exploitation. For instance, the Belgian Minister of Economy complained to the European Commission that conditions in Germany's meat industry were distinguished by 'Chinese conditions' of employment. On a recent tour to Germany's slaughterhouses, he found Romanian and Bulgarian workers posted to Niedersachsen enduring ten-hour days for

¹⁰² Laval Un Partneri Ltd v Svenska Byggnadsarbetareförbundet [2008] IRLR 160 C-341/05

salaries as little as three euros an hour. In turn, low labour costs have created a ‘race to the bottom’ in the European meat industry, including the high-profile relocation of ‘Danish Crown’ to Germany.¹⁰³ As one interviewee described, ‘the big meat companies say, it’s not our business it’s another company and we are not even legally allowed to make them some demands or requirements regarding treatment of workers....of course, they do not accept moral responsibility’.¹⁰⁴

Even in those industries that are covered by the Posted Workers Act 1996, evidence suggests that minimum working conditions are often not respected (E.C., 2012). The legislation in Germany requires written documentation of posted workers’ contracts with detailed information on wages and working hours to be kept on-site in case of controls by the Finanzkontrolle Schwarzarbeit. However, these books can be manipulated, for instance, recording far fewer hours than are actually worked. Through this method, employers contravene both working time and wage regulations. In addition, firms might not pass on holiday contributions to employees (Wagner, 2014). In Germany, the now defunct European Migrant Worker Union (EMWU) has information on 39 cases on its website concerning more than 900 posted workers from Romania and Poland in the construction sector who have not been paid according to German minimum wage provisions (E.C., 2012). The exploitation of posted workers is facilitated by the fact that posted workers are usually only in the country for a short period time and are isolated from normal worker representation frameworks in practice in the German context. Thus,

¹⁰³ Documentary: ‘Fleischebranche: Deutschland ruiniert seine Nachbarn’ (‘Meat industry: German ruins her neighbours’), ARD, accessible here: http://mediathek.daserste.de/sendungen_az/310918_panorama/5987792_fleischbranche-deutschland-ruiniert-seine-nachbarn (last accessed 04/05/2014).

¹⁰⁴ Trade Unionist, Hamburg, interviewed on 04/03/2013

it is not only posted workers immigration status but also the dynamics of their migration that lead them vulnerable to exploitation.

In recognition of the special vulnerability of posted workers, the limitation period for filing a claim for the enforcement of minimum wage claims has been extended for posted workers to six months (S. 9 (3) Posted Workers Act). This is longer than three months minimum as decided by the constitutional court, but considerably shorter than the five years negotiated by trade unions in the German construction industry. Thus, although the structure of German industrial relations protects some workers, it leaves others outside of its remit. This issue will be further discussed in the conclusion.

UK

In contrast to Germany, which introduced regulation on posted workers prior to the EU legislation, in the UK, the Posted Workers' Directive - referred to as the 'Auf Wiedersehen' Directive - was heavily resisted. Rather than considering the issue of low-wage competition on British shores, the then-Conservative government focused almost exclusively on the impact on British firms and workers in Europe who would lose their competitive advantage if forced to adhere to stricter continental labour standards.¹⁰⁵ The UK's policy position belied the neoliberal orientation of the then-Conservative government, as well as the fact that UK was predominantly an exporter rather than an

¹⁰⁵ 'Strikes over foreign workers – what's really going on?' 04/02/2009, Open Europe, accessible here: <http://www.openeurope.org.uk/Content/Documents/PDFs/postedworkers.pdf> (last accessed 06.01.2014).

importer of cheap labour (Davies, 2002; Novitz, 2010) - which is still the case (Clark, 2010). As a result, there are far fewer posted workers in the UK: 34,760 in 2010 (ISMERI Europa, 2012: 124). Nonetheless, fears of being undercut by cheaper labour have gained greater prominence in recent years, as demonstrated by the high-profile mass strike at Total's Lindsey Oil Refinery over the use of Polish posted workers.¹⁰⁶

There is no specific legislation transposing the Posted Workers' Directive in the UK. Instead, the territoriality clause has been removed from the UK employment legislation so that statutory rights apply to all workers in the UK. Unlike Germany, where the centrality of non-universal collective bargaining has limited the ability of the posted workers' regulations to equalise the rights of posted and native workers, the greater reliance on statutory employment rights in the UK context ensures that posted workers enjoy similar employment rights to native workers, including the minimum wage.

However, as in Germany, where posted workers' employment rights are contravened, prosecution is complicated by the use of complex international posting chains. For instance, in Usksmouth, UK, the German-based thermal insulation subcontractor Damar was found guilty by an employment tribunal of unpaid wages and illegal deductions from the wages of its Polish workers and ordered to pay over £250,000. As explained by a trade unionist involved in the case, 'Damar was running 3 books, one book to the auditor that said national rates of pay and conditions, then an amount that said

¹⁰⁶ 'Report of an Inquiry into the circumstances surrounding the Lindsey Oil Refinery dispute', ACAS, accessible here: <http://www.acas.org.uk/CHttpHandler.ashx?id=1019&p=0> (last accessed 06.01.2014).

what would be paid into the Polish worker bank accounts and then the actual bank statements'.¹⁰⁷ However, it has proven impossible to obtain the wages because of the difficulties in enforcing cross-border claims. Both countries suffer from the proliferation of 'letter-box' companies' - when companies are registered overseas so as to benefit from the lower social security contributions, but there is no physical presence of a company to prosecute should exploitation become apparent. Possibilities for retrieving wages in the construction industry are also limited by the fact that there is no general contractors' liability in the UK.

Nonetheless, the issue of posted workers achieves far less prominence in the UK, largely because of the fact that there are far fewer posted workers in the UK than in Germany and most posted workers in the UK are professional - compared to the more heterogeneous and blue-collar nature of posted employment to Germany (Clark, 2010; ISMERI Europa, 2012). Although there is no systematic research available on why different countries attract different amounts and kind of posted workers, one possible hypothesis for why posting companies prefer Germany is precisely the gulf between the more expansive rights of core workers and the deregulated spaces that posted workers inhabit, which translates into a significant competitive advantage. This advantage is directly linked to the fact that collective bargaining does not cover all workers. By contrast, posted workers in the UK get the same rights as domestic workers - and so there is no financial incentive for this type of employment to proliferate.

¹⁰⁷ Trade unionist, UK, Telephone interview (29/04/2013).

Exploitation across the Varieties of Capitalism

There are many issues confronting immigrant workers, from a lack of employment portability to live-in requirements; from self-employment restrictions to exclusion from social protections. As this chapter has outlined, immigrant workers are constructed as institutionally precarious workers in both countries. At the same time, the process by which immigrant workers are siphoned into precarious work varies in the two countries under study. This section asks to what extent are differences in the institutional position of foreign workers due to variation as described in the Varieties of Capitalism typology.

Immigrants' different labour market positions in the two countries are due partially to differences in the conditions attached to the respective immigration statuses. For instance, asylum seekers' right to work is more heavily circumscribed in the UK than in Germany, although the *Residenzpflicht* complicates job search and retention in Germany in a unique manner. Domestic workers of private households are subject to a more stringent set of conditions in the UK than in Germany, including the fact that they are not allowed to change employment and have to live with their employers. In Germany, the construction of the *au pair* visa as a cultural and language learning exchange - in conjunction with the absence of a universal minimum wage in the domestic work sector - leaves foreign domestic workers in a highly precarious situation in terms of remuneration.

For the purposes of the present analysis, however, a singular focus on immigration status conditions is insufficient. Instead, the aim is to understand the ways in which

immigration status constructs someone as a precarious worker differently in the two contexts because of institutions particular to the Varieties of Capitalism.

One example in this vein is qualification barriers. These tend to have a negative impact on immigrants' ability to find skilled employment because of issues verifying qualifications and training received abroad. As Brouwer (1999: 3) comments, 'immigrant doctors driving taxis and foreign-trained chemists delivering pizzas are well-worn clichés' because of the protection of certain occupational titles. Thus, qualification barriers as contained in the Handicrafts Code blocked access to certain forms of self-employment in Germany's construction industry, for instance, in a way that does not occur in the UK. In turn, German qualification barriers are embedded in a wider system of vocational education that supports a high-skill, high-wage equilibrium within the industry (discussed further in the following chapter). The emphasis on 'specific skills' is congruent with Germany's position as a coordinated market economy (Estevez-Abe, Iversen et al., 2001).

The rights of self-employed workers are also constructed differently in the two countries. In both the UK and Germany, the self-employed are excluded from both statutory employment rights and rights as delineated in collective bargaining agreements. However, the substantive impact of exclusion from collective bargaining has greater weight in Germany, given the more significant importance of this form of negotiation to the delineation of workers' wages and working conditions.

The fact Germany's industrial relations are based on collective bargaining has particular connotations for the legal regime confronting posted workers.¹⁰⁸ Companies posting workers do not need to adhere to collective agreements that are not universally applicable. The extension of collective bargaining agreements across the whole workforce of certain key sectors in Germany has enabled some equalisation in terms of the working conditions of posted workers - although the focuses on setting minimum standards means that the Posted Workers Act has not effectively protected high-wage labour markets (Verschueren, 2008). This is because of the practice of skill downgrading, when employers reclassify particular skilled jobs in other to avoid payment of the higher wage rates. Furthermore, there are many industries with no universal minimum wage, most notably, the meat packing industry, which has been subject to a series of scandals in recent months for its poor working conditions. The European legal regime governing the regulation of posted workers both exposes and exploits the weakness of the German-coordinated model.

Further, what is notable in the German context is that migrants are excluded by precisely the institutions that have been developed to protect core workers: social insurance systems and collective bargaining. This finding fits in with the literature on 'insider-outsider' cleavages in coordinated market economies (Grüner and Hefeker, 1999; Lindbeck and Snower, 2003; Palier and Thelen, 2010), where the advantages for labour market 'insiders' in secure employment relationships is bought at the expense of 'outsiders' - of which migrants, as newly arrived members of society, are a paradigmatic

¹⁰⁸ 'Germany: industrial relations profile', Eurofound, accessible here: <http://www.eurofound.europa.eu/eiro/country/germany.pdf> (last accessed 06.01.2014).

example. This is not to say that immigrants in the UK are protected to a greater extent than immigrants in Germany, with the notable exclusion of posted workers in industries not covered by collective bargaining agreements on wages. Given the complexity of each immigration status and the rights that arise from them, it is difficult to definitively pinpoint Germany or the UK as more or less likely to siphon foreign nationals into exploitation. As mentioned previously, immigration status conditions can also vary dramatically between the two countries. It is, however, safe to say that the particular construction of exploitation is different in the two countries and that some of the problems facing immigrant workers in Germany arise from its structure as a coordinated market economy.

However, structural differences in the construction of immigrants as precarious workers can arise out of factors not strictly limited to institutional differences as described in the Varieties of Capitalism. For instance, the UK's doctrine of illegality severely limits the ability of irregular immigrants and, more widely, immigrants in illegal employment to claim their employment rights. This principle originates in a case in the 18th century concerning tea-smuggling.¹⁰⁹ By contrast, in Germany, the fact that unauthorised employment does not mean exclusion from employment rights is not specifically derived from the collective bargaining typifying Germany as a coordinated market economy. Instead, the origin of this rule is to be found in the Civil Code, which was institutionalized in the early part of the German Empire to avoid issues of unfair competition between legal and illegal workers.

¹⁰⁹ *Holman v. Johson* [1775] 1 COWP 341. Although it should be noted that reporting duties in Germany and, more generally, irregular migrants' fear of authorities mean that irregular immigrants are unlikely to enforce employment claims in either country.

In addition, self-employed workers are excluded from contribution-based social benefits - an issue that is more compelling in the German context because of the way in which access to the welfare state is filtered through the social insurance model. To some extent, the social insurance model of the German welfare state can be seen as a structure that coevolved with the coordinated model of capitalism (Manow, 1997: 6). However, it should be noted that welfare provisions (health, unemployment, pensions) in the Western world's foremost liberal market economy - the USA - are also structured according to insurance contributions. Thus, the question of whether access to social rights is an issue of underlying political economy is open to interpretation.

The applicability of the Varieties of Capitalism framework to differences in immigrants' actual experiences is even more limited. The particular challenges of the migratory process exert an effect on the work lives of foreign nationals, even when legal parity with citizens is immediately available. Here, issues such as a lack of language (Dustmann and Fabbri, 2003), information about rights and difficulty in navigating a new culture are important factors to consider. Furthermore, many migrants have accrued considerable debts to fund their migratory journeys or may be responsible for the upkeep of family members back in their home states (Taylor, 1999). Financial responsibilities such as these put pressure on the migrant to earn money quickly - a situation of

desperation that is not conducive to a powerful negotiating position on the labour market.¹¹⁰

Conversely, the actual experience of migrants may vary from working under exploitative terms and conditions to working in highly paid, rewarding and skilled jobs (Lucas, 2008: 7). Migrants have agency vis-à-vis these constraining circumstances and, indeed, some manage to obtain stable and dignified employment relations despite considerable challenges, including illegality. It nonetheless remains that the conditions inherent in migration status creates particular spaces of precarity, leaving migrants unusually vulnerable to exploitation.

At the same time, exploitation is also an issue that faces native workers. This brings us to a central issue: whether migrant workers' face a qualitatively different set of concerns or whether their situation is an extension of the pressures facing all workers. Under a Marxian point of view, capitalism is a system based fundamentally on the exploitation of wage labour (Miles, 1987: 31). Here, all workers are exploited, to different degrees, by those who own the means of production, because workers are compelled to sell their labour power in order to survive. However, as is central to the neoliberal-materialist analysis, foreign nationals are subject to a state of special

¹¹⁰ For instance, a Munich-based activist (interviewed on 23.04.2013) reported on a case in which two Bulgarian workers were not paid the 3,000 euros owed after two weeks 'off the books' work on a small construction site. The workers, with the help of a local migrant rights organisation, managed to acquire the lawyer and eventually initiate a court case. In the morning of the first hearing, however, the boss called the men and offered them 500 euros if they would sign a document absolving him of responsibility. Despite the 'immorally low' level of this offer, Andreas took the money because he had a wife in Bulgaria who needed money immediately for healthcare costs.

‘hyperdependence’ (Zhou, 2012). This is partially because of the aspect of deportability in which they do not abide by the conditions of their residence (De Giorgi, 2007; De Genova, 2002, 2004). It is not only that they lose their livelihoods but also their right (and in some cases, their family’s right) to continue legal existence in a territorial space. In some of the described cases, it was the risk of deportation that made immigrant workers especially dependent on their employers. For migrants who are not deportable - EU immigrants and asylum seekers - labour market disadvantage arises from other structural disadvantages: restrictions to self-employment or to particular jobs, a ban on employment altogether, inferior access to social rights.

Figuring out an appropriate response to this issue is not, however, straightforward. In the UK, the Conservative-Liberal Coalition Government has argued that one of the key ways of tackling migrant workers’ exploitation is through limiting opportunities for legal immigration. Thus, the governments’ overarching populist goal of reducing immigration to the ‘tens of thousands’ is shrouded in humanitarian concern for the immigrants’ welfare. However, shutting down legal avenues for immigration is associated with increases in illegal immigration. As Nicolas De Genova (2004) explores in his article on the history of the USA’s immigration policy on Mexico, ‘ostensibly restrictive immigration laws purportedly intended to deter migration have nonetheless been instrumental in sustaining Mexican migration, but only by significantly restructuring its legal status as undocumented’ (p. 161). In turn, the exclusion of illegalised immigrants from employment rights firmly establishes this population as powerless workers.

Neither is the expansion of migrant workers' rights an automatic solution. For instance, unlimited portability of a permit might help the worker to escape an exploitative situation. However, it goes against the *raison d'être* of work permit programmes because employers frequently use retention as an advantage of migrant labour (Waldinger and Lichter, 2003; Anderson, 2006; Dench, 2006; Anderson, 2010). Indeed, as a recent cross-national and comparative study of immigration programmes has found, 'insisting on equality of rights can come at the price of more restrictive admission policies' (Ruhs, 2013). The political impetus for a legal immigration policy – and more broadly, employers' desire to hire foreign nationals – is motivated by the restrictions on migrants' labour power, as related to their immigration status. In turn, and given the context of gross global inequality in wealth and opportunity, it is possible that immigrants would prefer openness and the possibility of a legal - albeit disadvantaged - position over illegality in or exclusion from the host state altogether. Thus, Ruhs (2013) suggests identifying key rights (including minimum employment conditions) and allowing the selective and temporary restriction of other rights, including welfare rights, choice of employment and family reunification.

In any case, the current system of penalising the immediate actors perpetrating the exploitation represents a half-solution at best. Although the criminalisation of employers, gangmasters and smugglers has played an important role in showcasing the state's authority - or alternatively, in a more conspiratorial analysis, in obfuscating the central role of the state in migrant workers' exploitation - it has also made it more difficult to graft immigrant's exploitation to a labour regulation approach. Difficult questions about

the rights of immigrants - and indeed, wider questions about the institutionally unequal nature of the labour market - are put to one side (Fudge and Strauss, 2013).

In both in the UK and Germany, governments have been unwilling to uproot the legal construction of migrant workers' unfreedom from a trafficking and forced slavery paradigm, which remain firmly planted in the criminal law (Fudge and Strauss, 2013). In this arena, the Europeanization of immigration and labour law may offer potential avenues for extending immigrant rights. For instance, the Race Directive provides a potential challenge to the blocking of discrimination claims under the doctrine of illegality.¹¹¹ In 2005, the European Court of Human Rights argued that member states had an obligation to penalise slavery and forced labour (*Siliadin v. France*) - a ruling that fuelled attempts by human rights groups Liberty and Anti-Slavery International to press for the creation of a new criminal law offence targeting forced labour without the need for any elements of trafficking (Fudge and Strauss, 2013: 15). As Guiraudon (1998) has commented, politicians' ability to promote restrictive and populist immigration policy is heavily constrained by the judiciary, whether this is through transnational human rights treaties and international courts or conflicts with national law. A key example here is the role of the Constitution Court in Germany, which ruled against the 'inhumane' level of asylum benefits.

¹¹¹ 'Discrimination Claims and Illegally Procured Employment Claims. A critique of the issues in *Vakante v Governing Body of Addey and Stanhope School* (No. 2) [2004] ICR 279', Pilgerstorker, M. and S. Forshaw, 2004, accessible at http://www.oldsquare.co.uk/pdf_articles/3100112.pdf (last accessed 24.02.2014).

However, it should also be noted that international treaties can also lead to the imposition of punitive immigration policies, as noted in the literature on 'Fortress Europe' (Overbeek, 1995; Geddes, 2000). Further, as has been discussed in this chapter, the Europeanization of immigration law has severely limited the ability of the (German) state to deal with the challenge posed by posted workers - an issue discussed in greater detail in the following chapter. Finally, as epitomized by Theresa May's recent threat to leave the European Convention of Human Rights over the issue of the deportation of irregular immigrants with families in the UK,¹¹² it is likely that the government will heavily resist efforts to improve the socio-legal rights of immigrants when they can.

Given this context, it is tempting to approach governments' discourses of care for migrant workers in a cynical fashion. However, contradictory legal regimes are perhaps better understood in terms of the conflicting priorities that politicians try to balance. In this case, politicians are caught between the desire to limit immigration, to ward against the worst instances of exploitation, and finally, to support business. In turn, these aims reflect the desires of different groups in society. When firms may increasingly desire a flexible, low-cost workforce, the general public oscillates between horror at tragedies such as the one in Morecombe Bay and a generalised desire to reduce immigration.¹¹³ In this context, state contradictions are the manifestation of the cognitive dissonance that we

¹¹² 'Conservatives promise to scrap Human Rights Act after next election,' 30/09/2013, Alan Travis Guardian <http://www.theguardian.com/law/2013/sep/30/conservatives-scrap-human-rights-act> (last accessed 28.10.2013).

¹¹³ 'UK Public Opinion towards Immigration: Overall Attitudes and Level of Concern', Migration Observatory, accessible here: <http://www.migrationobservatory.ox.ac.uk/briefings/uk-public-opinion-toward-immigration-overall-attitudes-and-level-concern> (last accessed 06.01.2014).

all apply to the foreigners in our midst, rather than an elaborate ruse to constitute foreigners as exploitable workers.

Ch. 5: The least of their problems: immigration and coordinated industrial relations in the German construction sector

One of the major critiques advanced in this thesis has been that the neoliberal-materialist analysis of immigration policy does not take differences between nation-states into consideration. Speaking to this issue, the thesis has explored the relevance of underlying labour market differences as described in the Varieties of Capitalism literature on the choice of internal migration control instrument and the relationship between immigration status and precarious employment.

This chapter reverses the previous line of enquiry to ask what immigration's effect has been on coordinated labour market institutions in the German construction industry, focusing on the post-war Gastarbeiter, contract workers between 1989 and 1992; posted workers from the 1990s onwards, and finally, post-accession 'self-employed' workers. In particular, it highlights the ways in which the impact of immigration depend on the particular context in which they are received and the extent to which immigrants are constructed as precarious workers through immigration law. The chapters' findings also add to the burgeoning literature questioning the salience of the distinct coordinated market economy, as described in the Varieties of Capitalism typology (Hall and Soskice 2001). By highlighting the impact of immigration on host country labour markets, it interrogates the utility of considering immigration controls in isolation from wider transformations in the quality of work.

Nation-states have developed distinct institutions for the negotiation of wages and working conditions. Understanding and explaining these differences lies at the heart of comparative political economy. To this end, the Varieties of Capitalism typology (Hall and Soskice 2001) emphasizes the distinction between liberal market economies (LMEs) such as the UK and USA, characterized by ‘market-based’, decentralized industrial relations, and coordinated market economies (CMEs) such as Germany and Sweden, where firms use non-market relationships to coordinate their endeavours with other actors. Thus, where macroeconomic policy and market forces are the most important factors explaining the negotiation of wages and working conditions in LMEs, CMEs are typified by a comprehensive web of institutions - namely, trade unions, employer associations, work councils and embedded collective bargaining - which provide a framework for strategic and stable deliberation between bosses and workers (Behrens, 2003:25-26).

The presence of institutions with a capacity for articulating and representing workers’ interests explains why coordinated market economies have traditionally been associated with lower levels of economic insecurity and inequality (Rueda 2000).¹

¹ Wage inequality is limited in coordinated market economies, because institutionalized collective bargaining insulates the process of wage-setting from market forces (Hall & Soskice 2001; Soskice 1990, 1999). Furthermore, the development of institutions that ensure firms not directly invested in training will not poach extensively from firms that do (Hall & Soskice 2001; Finegold and Soskice 1988; Culpepper and Finegold 1999) means that workers in coordinated market economies are more likely to develop specific, vocational skills. In turn, this means that workers in coordinated market economies compete on the

However, as the preceding chapters have outlined, coordinated market economies can also be dualised, implying increasingly flexibility and precarious working conditions at the margins of the labour market. Foreign nationals are more likely than Germans to be at the margins of the employment market.

In much of the original work on the Varieties of Capitalism (Hall and Soskice, 2001; Hall and Soskice, 2004), Germany was considered the exemplar of the coordinated market economy, with strong trade unions and employer associations, extensive collective bargaining and a well-developed vocational education system. However, as the authors of the Varieties of Capitalism typology acknowledge, the fact that countries cluster around one of the two Varieties of Capitalism does not mean that countries of the same type have exactly the same institutional framework. The German collective bargaining system is uniquely embedded into the institutional environment.

The German industrial relations model

Firstly, Germany has particularly stringent limits on the extent of state involvement in collective bargaining. This can be seen as a reaction to bad experiences with compulsory state arbitration under the Weimar Republic, where poor decision-making contributed to Germany's plunge into a severe Depression (and arguably laid the foundation for the emergence of National Socialism, see Evans and Geary, 1987). Today, the right of trade

basis of (high) skill. In liberal market economies, by contrast, workers – outside of those with high general skills - compete on the basis of (low) wages.

unions and employer associations to autonomy in collective bargaining (*Tarifautonomie*) is grounded in the freedom to form associations under Art. 9 of the Constitution (Daeubler 2003:23). Unlike other coordinated market economies like France and the Netherlands, the German state has traditionally rarely stepped in to declare an agreement generally binding across a whole industry. The legal framework is largely designed to strengthen the role of the social partners and to facilitate effective industrial self-government (Streeck 1983). In so doing, it has limited state involvement in the formulation of labour and social rights.

Secondly, the Constitution places strict legal restrictions on the definition of parties entitled to take part in collective bargaining. This has led to a near total monopoly on interest representation (Hassel, 1999: 487). This feature implies that established institutions are protected from competition from new organisations and wards against the more fragmented institutional environment found in the UK.

Finally, although technically only unionized employees are subject to the ‘collective agreement’ (*Tarifvertrag*), in practice, the terms and conditions contained in the agreement are extended across the workforce represented by the signatories (Blanpain, Blanke et al., 2005).² This means that all workers - not only those belonging to a union - are covered by collective agreements where they work for firms that are represented by employer associations. This practice means that unionization is less meaningful as a

² Among other factors, the right of equality of treatment between employees carrying out similar work has an influential role in promoting the extension of collective agreements across the entire workforce.

direct indicator of the strength of collective bargaining in Germany, although it remains that a union's ability to push terms and conditions forward is tied to its ability to prove continuing relevance, as inferred from membership figures.

The institutional framework on collective bargaining has protected trade unions in Germany and laid the foundations for the institutionalization of class conflict (Geiger and Rodax, 1949) through which workers' rights are regularly articulated. However, it has not come without its costs, including negative effects for immigrant workers. The fact that German unions' power is derived from their institutionally embedded role in collective bargaining has 'hindered an active search for new ideas and identities' (Haucap, Pauly et al., 2001: 1; Behrens, Fichter et al., 2003: 27; Hassel, 2007), including membership organizing among new forms of workers. The ambivalent attitude of the German trade unions towards irregular immigrant workers is a sign of this.

The other notable feature of Germany's industrial relations is its 'dual industrial relations' structure. In addition to industrial collective bargaining by trade unions, workers' interests are also represented by work councils at the firm level. The two types of institutions are legally independent and a strict division of competences and powers applies (Hassel, 1999: 486; Heeg, 2012: 2).³ Trade unions are generally opposed to the decentralization of bargaining to work councils, because it implies the loss of solidarity between firms. At the same time, there are overlaps between the two types of

³ Work councils are not permitted to call a strike and are generally barred from negotiating on subjects that are settled by industrial agreements, particularly wages. However, opening clauses in collective agreements can provide exceptions to this rule (Blanpain, Blanke et al., 2005: 23).

organisations, not least because work councillors often belong to trade unions, and may recruit new members for the trade unions (Behrens, 2009). In addition, works councils are also charged with supervising the implementation of industrial agreements. Thus, while the relationship between work councils and trade unions can translate, on occasion, into conflict, most of the time, trade unions and work councils work together for the achievement of common goals.

The problem of change

Supporters of the Varieties of Capitalism typology argue that countries are unlikely to shift direction. There are two major arguments made to this effect. One argument is that firms in the two types of economy compete on wholly different terms. Where the low skilled production of liberal market economies supports cost-competition, in coordinated market economies, firms compete internationally on the basis of high-quality (Estevez-Abe, Iversen et al., 2001; Busemeyer and Trampusch, 2012). Workers might cost more, but they are significantly more productive than their counterparts in less regulated countries, such as the UK (Proverbs, Holt et al., 1999) and need less supervision. The competitive advantage of maintaining a highly skilled labour-force supports the continuation of particular forms of supportive institutions, including a well-financed vocational skills system and a social welfare system that encourages workers to invest in specific skills (Estevez-Abe, Iversen et al., 2001). Those of a more political inclination argue that even objective, economic reasons for regime transformation would not necessarily translate into regime change, given that coordinated institutions are

interwoven into the political framework (Hall and Soskice, 2003; Basinger and Hallerberg, 2004; Johansson, 2014). As such, they cannot be readily dissolved.

However, other analyses argue that the VoC framework does not adequately account for institutional change (Goodin, 2003; Howell, 2003; Watson, 2003). In particular, ‘race to the bottom’ theorists argue that the coordinated market economy is no longer sustainable in the face of the new demands placed upon it through globalization (see, for example Drezner, 2001). In this view, competition between countries for investment becomes sharper as companies are increasingly able to move production to places where labour, environmental and tax regimes imply lower costs. In turn, the intensification of low-cost pressures undermines the deliberative institutions and protective regulations that typify coordinated market economies and augurs convergence to a singular, ‘business-friendly’ liberal form of capitalism (Goodman and Pauly, 1993; Kitschelt, 1999; Drezner, 2001; Konzelmann, Wilkinson et al., 2005).

Rather than focusing on the well-researched effects of globalization, the present chapter interrogates the extent to which immigration has had an impact on German industrial relations. The view that immigration undermines coordinated industrial relations is based on the idea that employers’ incentive structures are changed when they gain a reservoir of workers whose expectations are oriented to conditions in their country of origin rather than the host country where the work is performed (Streeck, 1998; Lillie, 2007; Krings, 2009; Streeck, 2009). The opportunity to use cheap workers enables employers to achieve a ‘disorganisation’ (Traxler, 1996) of the existing labour market by

allowing expensive native-educated skilled labour to be replaced by foreign workers. Through this process, employers are gradually discouraged from collective bargaining or funding vocational education. Simultaneously, the power of organised labour is weakened by the influx of non-unionized workers. Immigration is used by employers to push towards the 'low road' of weak worker representation and cost-competition found in liberal market economies.

Construction: the most likely case

The chapter examines whether immigration has disorganised coordinated industrial relations in a specific sector: construction. A number of factors make construction the 'most likely' case for disorganisation through immigration. Construction's structural features - the project based nature of work and seasonal fluctuations in demand - mean that employers are unlikely to prefer a full-time employment model (Bosch and Zühlke-Robinet, 1999; Fellini, Ferro et al., 2007). The fact that most construction work cannot, for obvious reasons, be done anywhere else than the construction site means that the optimum strategy for cost cutting lies not in relocation (as is the case for the manufacturing sector) but in the importation of low-cost workers (Bommes and Geddes, 2000: 189). Wage-cutting represents a significant money-saving device as labour costs comprise around 35 per cent of total costs - far higher than in other industries (Küchler, 1995: 47).

The choice of the German construction sector for analysis is also justified because it was considered one of the centrepieces of coordinated capitalism throughout the twentieth century (Hunger, 2001: 111; Jansen, 2009). Despite the uniformity implied in the Varieties of Capitalism literature, subsequent analyses have argued there may be coordinated sectors in broadly liberal national markets and liberal sectors in conservative countries (Caviedes, 2004; Crouch, Schröder et al., 2009: 655). Where an industry begins as liberal, there is no scope for exploring the extent to which its conservative features have eroded through time. Thus, it is important to choose an industry that was at one stage highly coordinated. As will be described in further detail below, despite the fact that construction's structural features meant that employers could have preferred 'low-wage, low-skill' workers, the presence and strength of coordinating institutions meant that German construction industry was organised on the basis of 'high-wage, high-skill' production throughout the mid twentieth century (Syben, 1998).

Finally, both the volume and type of immigration changed drastically from the late 1980s onwards (Jansen, 2009: 111). This is important because neoliberal-materialist perspectives emphasise the fact that migrants' lack of power relative to domestic labour – the condition that makes them so attractive to employers (Castles and Kosack, 1972; Freeman, 1979) - is a direct consequence of their ongoing potential for falling into illegality, rather than an intrinsic property of immigration per se. By examining different types of immigration, the role of state policy in crafting precarious foreign workers will come to the fore.

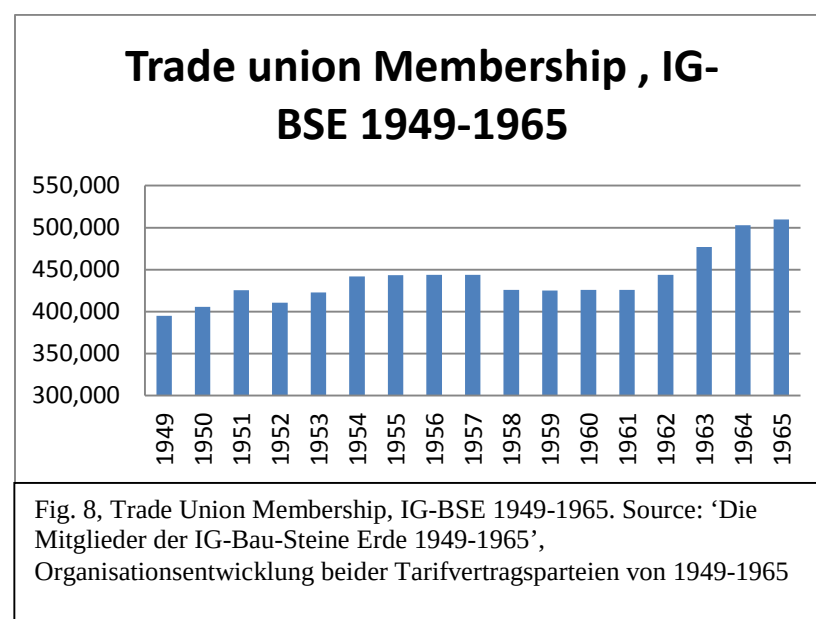
The chapter is structured in the following manner. The first section describes the institutionalization of coordinated production regime in the German construction industry in the post-war period. The following sections describe the impact of four successive epochs of immigration on the construction industry: post-war Gastarbeiter; contract workers between 1989 and 1992; posted workers from the 1990s onwards; and finally, post-accession ‘self-employed’ workers. The third and final section offers a discussion of the information presented, before commenting on the continued applicability of the Varieties of Capitalism typology.

The institutionalization of coordinated industrial relations in West Germany

There is no fixed starting point for the emergence of coordinated industrial relations in the German construction industry. Trade unions, employer associations and workers guilds were active within the industry by the end of the nineteenth century (Bosch and Philips, 2003: 57). However, the basic structure of the modern German industrial relations system in construction solidified within a short period after the end of the Second World War. Since then, the major collective bargaining partners have stayed the same. On one side, the construction union IG-Bau-Stein-Erde (IG-BSE), which became IG- Bau Agrar Umwelt (IG-BAU) in 1996, formed one of the original member unions of the West German umbrella trade union organisation, the Deutsche Gewerkschaftsbund (DGB). IG-BSE represented workers from construction and construction-related trades, finishing trades and finally, the building materials industry. On the other side, employers

were represented by two associations: the Hauptverband der Deutschen Bauindustrie (HDB) for large industrial construction businesses; and the Zentralverband des Deutschen Baugewerbes (ZDB) for small- and medium- sized craft firms (Pellegrini 1989). Both the HDB and the ZDB are member organisations of the overarching employers' association, the Bundesvereinigung der Deutschen Arbeitgeberverbände (BDA).

Union membership grew rapidly from 395,000 in 1949 to 509,725 in 1965 (see Fig. 8), representing around one-third of workers in the construction and construction related trades (Bosch 2012). Given the fact that collective agreements generally applied to all companies belonging to the employers' organisations that were party to the agreements, it was high rates of firms' membership in employer associations that led to near universal collective bargaining coverage within the industry. On the eve of reunification in 1990, an estimated 99 per cent of construction workers in West Germany were covered by collective agreements (Streeck, 1997: 244).



The achievement of high collective bargaining coverage was particularly impressive given that the industry has always been made up of high number of small- and medium-sized firms, which are harder to organize than their larger, industrial counterparts (Pellegrini, 1989). The fact that high coverage was achieved indicated the fact that West German employers knew that a decent level of remuneration and employment security, as negotiated through collective bargaining, would be necessary to attract and retain high-skilled labour in an industry with notoriously difficult working conditions (Müller-Jentsch, 1973). Collective bargaining - nationally organised, so as to ensure common standards applied both to construction companies operating outside their own regions and to workers from several firms in different regions brought together to form work teams - also helped to avoid industrial conflict at the level of single companies (Wood, 2001). Wages and working conditions were delineated in an increasingly dense and comprehensive network of collective agreements, rather than being subject to market forces. As a result, companies largely competed on the basis of productivity, availability and skill, rather than the low costs made possible through precarious employment practices (Jansen, 2009: 111-112; Bosch, 2012).

Another factor specific to the West German construction industry was the wide scope of collective bargaining agreements. In other industries, negotiations between trade unions and employer associations were limited to key issues like wages and working hours. In addition, IG-BSE and the two employer associations negotiated a series of universally applicable policies to compensate for the construction industry's structural features and 'normalize' employment relations within the industry (Voswinkel, 1999).

For instance, the German construction industry is distinguished by seasonal fluctuations in output. It often becomes too difficult to work during the bitter winters. Previously, when work stopped due to bad weather, employers would fire their workers. However, in 1959 IG-BSE successfully lobbied the government for Schlechtwettergeld – a ‘bad weather allowance’ - for workers in the construction main trades during winter.⁴ The bad weather allowance consisted of partial tax subsidies to firms for employment costs during the winter period in case of a weather-induced shortfall of work. It also gave access to unemployment insurance for all construction workers where there was no work (Arntz and Wilke, 2009). This policy led to significant reductions in seasonal unemployment (Hartwich, Laatsch-Nikitin et al., 1975; Zühlke-Robinet, 1998; Arntz and Wilke, 2008). Notably, the policy was motivated by the fear of a mass emigration of German construction workers to wealthier nations and a corresponding lack of workers at home - a very different situation to the one that ensues in the German construction industry today.

In addition, from 1957 onwards, all employers in the construction main trades have had to pay contributions to the ‘Vacation and Wage compensation fund’ (Urlaubs and Lohnausgleichskasse) (ULAK) and the Zusatzversorgungskasse (ZVK), which funds supplementary pension credits for construction workers who do not work steadily.⁵ Similarly, in response to a declining number of apprenticeships,⁶ every construction company has paid 2.8 per cent of their gross wage sum into ULAK since 1974, from

⁴ ‘Law concerning measures to promote year-round employment in the construction industry’ 1959 (Gesetz über Maßnahmen zur Förderung der ganzjährigen Beschäftigung in der Bauwirtschaft).

⁵ By 1997, ULAK accounted for 19.9 per cent (in West) and 17.95 per cent (in East) of gross pay, see Bosch (1999: 246).

⁶ By the early 1970s, apprenticeships had fallen from 10.2 per cent of the overall workforce in 1950 to 1.8 per cent (Bosch and Zühlke-Robinet, 1999).

which companies that provide apprenticeship and vocational training can have part of their costs reimbursed (Soskice, 1994; Syben, 1998: 35).⁷ The levy reduces the risks of the poaching of trainees by non-training firms so that more and more firms offer training.

Finally, normalized working conditions were also maintained through prohibitions on atypical forms of employment. For instance, only persons who became a Meister through an arduous process of training were able to establish businesses in many occupations within construction (Clarke and Wall, 1998: 563-564; Jansen, 2009). The effect of this qualification barrier, established in the 'Handicrafts Code' 1953 (Handwerksordnung), was to depress the number of self-employed workers in the industry (Luber, Lohmann et al., 2000). It also meant that West German subcontracting was motivated by the special skills and quality of work of the Meister, as opposed to the desire to cut costs (Clarke and Herrmann, 2004: 528).

Temporary agency working was also strictly controlled in West Germany (Shire and Van Jaarsveld, 2008: 5-6) and in particular, in the construction industry. In 1982, IG-BSE and the two employer associations negotiated a generally binding ban on temporary agency workers in the construction main trades industry (Mayer and Paasch, 1984; Sahl and Bachner, 1994). Although some construction companies got around this obstacle by claiming they were construction-related industries, the sum total of both the qualification

⁷ The additional contribution for apprenticeships speaks to a fundamental issue with training within the construction industry. Despite requiring a skilled workforce, workers' low job tenure means that construction companies are reluctant to invest in skills that can be easily transferred to other companies.

barriers and agency restrictions was that most construction workers in West Germany were in direct and regular employment.

Immigrations and the salience of the coordinated market economy

Guestworkers

As described in previous chapters, mass immigration to West Germany in the mid-twentieth century occurred under the guise of the ‘guestworker’. Initially recruited for agriculture and construction, guestworkers quickly spread across many branches of the economy (Castles, 1985), concentrating in low-skilled industrial and manual employment (Jacoby, 2003; Bosch, 2013).

Despite the size of the incoming population - and the considerable wage differentials between sending and the host countries - the guestworkers did not, in the main, effect the well-regulated employment relations (Cremers, 2008: 698). There are many possible reasons for this. First and foremost, guestworkers arrived in a time of West Germany’s economic miracle. In 1960, for the first time in recorded history, there were more vacancies than recorded unemployed (Castles, 1985) - which meant that employers were competing for workers, rather than the other way around. In turn, when West Germany entered into its first post-war recession in 1966-67, a temporary ban on recruitment was

initiated and guestworkers suffered a disproportionate amount of unemployment. There was an unquestioned priority for German nationals (Bosch, 2013).

Second, the support of the powerful unions for the bilateral programs was only granted through the assurance that employers would abide by the principle of equal treatment with native workers (Hunger, 2001). Compliance with this was facilitated by the fact that most recruitment of foreign workers was organised centrally through the Federal Labour Office, who checked contracts and sourced workers through a series of offices in sending countries. Employers usually respected the principle of equal treatment, although migrants were often paid at lower 'minimum' levels of collectively bargained agreements (Power, Garling et al., 1979: 89). Investigations carried out in 1972 found that there was an average of only 66 DM difference in the gross pay and salary of foreign workers and all workers in Germany (Bundesanstalt für Arbeit 1972: 96 in Boos-Nünning, Hohmann et al., 1976: 38). Compliance was facilitated by the oversight of trade unions, whose extensive and premeditated organisation efforts among guest workers led to even higher membership rates among foreign nationals than among German workers (Rist, 1979).

This is not to say that migrants avoided exploitation during the guestworker period. Foreigners - keen to earn as much money as possible, as quickly as possible - were more likely to work overtime and thus, should perhaps have earned even more than their German counterparts. Power et al. (1969:116) found that guestworkers' productivity was often so high that employers would retrospectively try to renegotiate piece rates

downwards - to the chagrin of domestic and foreign worker alike. In addition, annual renewal requirements for work permits facilitated employers' attempts to avoid re-hiring foreign workers at higher rates of salary (Power et al, 1969:90), although many companies chose to retain their foreign workforce instead of continually training new employees (Seifert, 1998). Finally, as discussed in chapter two, foreigners' offices had almost total discretion over the right of residence. Immigrants who were involved in trade union activities, or who changed employers, were liable to deportation.

Nonetheless, certain structural features meant that immigration had less impact on industrial relations within the German construction industry than was later to be the case. Widespread opportunities to gain a working permit meant that illegal immigration was not as serious an issue as later prevailed. In addition, the public monopoly on employment placement services was an obstacle to the development of the sorts of agencies which later played a central role in organizing illegal foreign employment, although some did exist (Power, Garling et al., 1979: 37). Furthermore, as above, the qualification barriers that depressed self-employment amongst the German population also inhibited foreign firms from setting up in West Germany (Bosch and Philips, 2003). Up to the late 1980s, very few construction projects in Germany were carried out by foreign enterprises (Lubanski, 1999). The sum total of these regulations meant that almost all foreign workers were legally and directly employed in regular working situations with German employers - a far easier situation to control than that which arose later, when employment relations became characterized by complex, international subcontracting chains and increasing numbers of immigrants worked illegally.

Following the worldwide oil crisis and ensuing recession in 1972, the West German government announced a total ban on the recruitment of foreign workers. At this point, migrants comprised 14 per cent of the total employed workforce in construction (Thomas, 1982: 130). This number declined dramatically to 9.8 per cent in 1990 (Jones, 1994: 1441) - a development that indicates migrants' position as a 'reserve army of labour', ready to be discarded when no longer needed (Castles and Kosack, 1985; Avci and McDonald, 2000: 194-195). Despite the ban on new labour immigration, West Germany continued to receive new immigrants, under the categories of family reunification and increasingly, asylum seeking. People moving from behind the Iron Curtain were often accepted as refugees or returning ethnic Germans and were granted unlimited residence and work permits with social rights almost equal to those of native Germans (Hoenekopp, 1997). However, as discussed in chapter two, asylum recognition procedures became increasingly strict in reaction to the growing number of asylum seekers that came from countries outside of East Europe. The result was increasing numbers of illegally resident failed asylum seekers.

The economic climate worsened throughout the early 1980s. Between 1980 and 1983, unemployment tripled to over 9 per cent (Streeck 1983), at which point the socialist leaning government was replaced by Chancellor Kohl's Conservative-Liberal coalition. However, unlike the UK, where Prime Minister Thatcher was successfully launching an extensive and successful attack on what remained of the British collective bargaining system, legal protections as contained in the constitution ensured that a similar phenomenon did not occur in West Germany- despite increasingly adversarial relations between the right-wing government and the umbrella trade union organisation. The

overarching employers' association supported 'neoliberal' reforms including amendments to the 'Protection Against Dismissal Act' 1969 (Kündigungsschutzgesetz), which made it easier to dismiss someone and amendments to the Employment Protection Act 1969 (Arbeitsförderungsgesetz), which took away the right to unemployment insurance for workers on strike. However, it broadly maintained its commitment to the centralised, collective bargaining system (Knevels, 1985; Streeck, 1988; Hassel, 1999). Thus, although wage increases slowed throughout the late 1980s, the construction industry retained its coordinated industrial relations, with high employer association/coverage rates, a high proportion of dependent workers and a healthy trade union. The high-skilled equilibrium was indicated by the fact that three Facharbeiter (qualified workers) were employed for every general labourer (Syben, 1991). In other words, immigration up to this point had not fundamentally disorganised coordinated industrial relations in the West German construction industry.

Contract workers

Reunification implied the transfer of West Germany's industrial relations model to the East. The two states had developed very differently in their 45 years apart. Under the former Deutsche Demokratische Republic (DDR) all firms belonged to the central state and elaborate plans directed the allocation of inputs, outputs, wage levels and prices (Krueger and Pischke, 1992; Fichter, 1997). There were no employer associations. Instead, production activities were grouped under Kombinate that did not correspond readily to the sectorial divisions used in West Germany (Diniño 1999: 21). East

Germans' background in a hierarchical, command based economy had gave them little basis for participation in collective bargaining (ibid). Finally, East German firms' productivity lagged far behind that of their West German counterparts. As such, they were incentivized to opt-for competition on the basis of low costs, rather than the costly, high-wage, high-production system that has been negotiated through West German-style collective bargaining. Instead, many firms in the East chose to negotiate wages with work councils instead of paying employer associations' membership fees (Dinino 1999:24). Reunification aggravated the Achilles heel of collective bargaining systems: the precarious nature of employer consensus.

The transfer of trade union structures was, in the short term, far easier to organize because of the ubiquity of trade union membership in the former DDR. Technically voluntary, the pressure to join a union was such that 'Free German trade union association' (Freier Deutscher Gewerkschaftsbund or FDGB) boasted a near universal membership. Given the infiltration of FDGB by the 'Stasi' - East Germany's notorious secret police - the West German trade unions argued 'there could be no consideration of a fusion' with the East German trade union institutions upon reunification (Fichter, 1997: 85-86). Instead, FDGB members were encouraged to transfer their membership to West German unions. Almost half of East Germany's near universal trade union movement transferred their membership to DGB affiliated unions (Boll 1994). The IG-BSE increased membership by almost 75 per cent to 777,000, so that 42.4 per cent (330,000) of its members were from the East in 1991 (Fichter 1997).

Reunification was accompanied by a massive increase in immigration. Previously, possibilities for mass migration had been stymied by closed borders across East Europe and the high costs associated with international transport (Menz, 2001). Following the fall of the Iron Curtain, East Europeans' share of total immigration flows increased from 5 per cent in 1974 to around 33 per cent in 1992 (Hoenekopp, 1997: 4). It became possible to commute daily from Poland and the Czech Republic into East Germany (Reim and Sandbrink, 1996; Rudolph, 1996; Williams, Baláz et al., 2001). In turn, comparatively high wages, the relative proximity of Germany to East Europe and prior network effects acted as a magnet for immigration from the former Eastern Bloc - both legal and illegal.

In 1989, Germany resurrected temporary foreign worker programs with a number of Central and East European (CEE)⁸ states (Castles, 2006), this time, in the form of bilateral 'contract workers' (Werkvertragsarbeitnehmer) treaties. These were the first labour migration programs initiated by the German government since the recruitment stop in 1972 and were motivated by the fact that the German government wanted to stabilize relations with the newly capitalist East European economies, as well as offer a regulated outlet for what would otherwise be substantial illegal immigration (Menz 2001: 256). In addition, Germany was desperately in need of construction workers - this time, to update East Germany's crumbling infrastructure.⁹

⁸ Poland, Hungary, Croatia, Slovenia, Bosnia-Herzegovina, Macedonia, Romania, the Czech Republic, Slovakia, and Bulgaria, as well as Latvia and Turkey. The treaty with the Federal Republic of Yugoslavia was suspended due to economic sanctions and the interruption of diplomatic relations. Of all CEE countries, Poland was allotted the highest quota for contract workers by the German government (Menz 2001).

⁹ 'Building Boom Attracts Hordes of Illegal Eastern Workers', 11/12/99, Tim Jones, European Voice, accessible here: <http://www.europeanvoice.com/article/imported/building-boom-attracts-hordes-of-illegal-eastern-workers/38008.aspx>, (last accessed 20/05/2014).

The number of contract workers peaked in Germany in 1991 with 94,902 workers, of whom around 75-80 per cent went into the construction industry (Hunger, 2001). Contract workers made up around 12 per cent of the total workforce (Pischke and Velling, 1993: 1). In turn, the number of foreign workers in the German construction market increased rapidly from around 10 per cent to approximately one quarter of the labour market (Menz 2001) - a figure that included both regular (contract and directly employed) and irregular foreign workers.

Much like the guestworkers before them, contract workers were to be 'paid according to standard German labour treaties for a comparable type of work'¹⁰ as a prerequisite for their employment (Menz 2001: Appendix). However, a number of factors meant that the so-called 'new guest workers' (Rudolph, 1996) were migrating under qualitatively different conditions than their precursors. Firstly, German contractors only had to pay home country social security contributions for contract workers (Nienhüser 1999). Taking the high non-wage labour costs in the German construction industry into account, this represented a saving of approximately one quarter of what employers would normally pay German workers (Schierup, Hansen et al., 2006: 152-153).

¹⁰ Art. 4, 'Agreement of 31 January 1990 between the Government of the Federal Republic of Germany and the Government of the Republic of Poland on the posting of workers from Polish undertakings to carry out works contracts' (Vereinbarung zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Republik Polen über die Entsendung von Arbeitnehmern polnischer Unternehmen zur Ausführung von Werkverträgen) in Menz (2001: 266).

Secondly, contract workers were not directly employed as the guest workers had been. Instead, they were employed as subcontractors for other foreign contractors, who were working for German companies. In turn, subcontracting complicated the task of controlling potential illegal employment. New forms of illegal foreign employment emerged, including banned agency work disguised as contract work (Pischke and Velling, 1993). Further, the introduction of foreign firms and subcontractors, less likely to join employer associations, was also a residual contributing factor in explaining declining employer association membership.

These factors set the stage for mass illegal foreign employment and low-wage competition, particularly in East Germany, where cheap immigrant labour met employers less beholden to the idea of a coordinated labour market. Many employers were non-compliant with the equal pay and conditions clause, cheated out of their earnings through exorbitant charges for accommodation and equipment. In addition, estimates suggested that for every legal contract labourer, one ‘illegal worker’ (without a residence title or work permit) found his way to the German labour market (Menz 2001).¹¹

Increasing numbers of foreign workers, however, lead to the displacement of native workers (Pischke and Velling, 1993). Demand in the industry was so high in the early 1990s that the construction sector might have suffered from labour shortages without mass foreign employment. In addition, and despite the lack of unionization among

¹¹ A rapid increase in illegal foreign employment offences was recorded between 1991 and 1993 (Polizeiliche Kriminalstatistik 1991-1993). It is possible that this shift reflects greater priority in enforcement. However, it is more likely, given the factors outlined above, that this increase reflects the rapid growth in illegal work and illegal residence.

contract workers, union membership rates increased in the early 1990s because of the transfer of unions to the new Bundesländer. These factors meant that coordinated industrial relations were not immediately disorganised. However, trouble was soon to come.

Posted workers

The trade union IG-BSE pushed for the closure of the contract worker program, arguing that this form of immigration had encouraged the proliferation of irregular employment (Treichler, 1998: 211-212) and had threatened the high standards of German construction production (Kahmann, 2006: 187). In 1993, the German government markedly reduced the quota of CEE contract workers and added restrictions on the use of contract workers in areas with high unemployment. However, this merely contributed to the ‘illegalisation’ of the workforce.

Further, from the early 1990s onwards, increasing numbers of posted workers from within the European Union more than compensated for the decline in contract workers from Central and East Europe (Bosch and Zühlke-Robinet, 2003). Subsequent to the conclusion of the Maastricht Treaty in 1992, the crystallization of the single European market augured an increased reliance on foreign subcontractors across the whole of Europe (Nienhüser, 1999; Hunger and Santel, 2003: 75) but particularly in Germany, where the construction industry was still booming and wages were among the highest in the region (Dupre, 1998). Unlike contract worker programs negotiated with non-

European states, the fact that posted workers travelled under the European right to freedom of services meant that Germany was not able to limit the number of people coming as EU posted workers. By the mid-1990s, one in five construction workers in Germany was employed by a company based outside of Germany (Wagner 2013). In turn, of the 180,000 posted workers working legally in Germany in 1996, almost 90 per cent of them were from EU Member States (Cremers et al. 2007).

Even more than contract workers, intra-EU posting represented a real danger to the German model of coordinated industrial relations (Abella, 2006). In particular, the obligation to pay workers a wage equivalent to the collectively agreed German wage did not apply to posting companies within the EU. Under German law,¹² posting companies were able to pay their posted workers according to the wages and working conditions found in their country-of-origin (Worthmann, 2002: 145; Worthmann and Zühlke-Robinet, 2003). Neither were they bound by the obligation to pay host country social security contributions. For the first time in history, employers could legally undermine the principle of territorial equality through the use of migrant workers (Hunger and Santel, 2003: 80).

The situation became more precarious as the German construction industry entered into a recession. Declining demand for construction services reflected the retrenchment of the generous tax benefits and subsidies that had supported re-building in East Germany,

¹² Art. 30 (2) 1 'Introductory Act to the Civil Code' (Einführungsgesetz zum Bürgerlichen Gesetzbuch) determines that a labour contract is principally governed by the law of the country where the worker habitually carries out his work, even if he is temporarily posted to a different country. Since 17.12.2009, Art. 30 EGBGB is superseded by Art. 8 of the Rome I Regulation (see Schlachter, 2010).

which in turn indicated increasing concerns about the impact of reunification on the national budget (Pollack, 2000). West Germany also suffered from declining demand for residential house building (EC 2002). Changing economic conditions meant that the construction industry could no longer accommodate both German and foreign workers.

In addition, German firms could no longer compete with foreign posting firms who were often in a position to submit more competitive bids on account of the lower costs of hiring foreign workers. Around 3,700 mostly small and medium sized German firms were declared bankrupt in 1995 (Lubanski and Sörries, 1997: 2-5; Bommers and Geddes, 2000). Large companies could not sustain their permanent workforces and began to delegate most of the work to foreign subcontractors (Bosch, Weinkopf et al., 2011: 29). Most of the job losses within construction were from this process of ‘hollowing out’: the number of employees in companies with over 500 workers crashed from 100,000 to 20,000 between 1995 and 2005 (Ziouziou and Gluch, 2010), while the number of firms with 0-19 employers rose from 55 per cent in 1995 to 82 per cent in 2011.¹³ By the end of the 1990s, around 30 per cent of work was subcontracted compared to 12 per cent in 1970 (Hunger 2001).

By the mid-1990s, EU posted workers and illegal immigrants were displacing workers within the industry (Rudolph, 1996; Hunger, 2001) - although it should be noted that much of the replacement effect involved the substitution of previous generations of immigrants (contract workers and some former guestworkers) with new immigrants.

¹³ Data available on request from Statistisches Bundesamt.

Frequent reports told of the degrading living and working conditions faced by posted workers (Rack, 1997). Posting was associated with undermining the ban on agency workers, as commercial leasing firms, typically based in the Netherlands, organised bogus posted 'self-employed' workers from Great Britain or Ireland as quasi one-man subcontractors (Weipert, 1994).

The simultaneous introduction of a new, legally unequal form of immigration and entry into a recession put industrial relations in the construction sector under considerable pressure. In 1995, only 51 per cent of Eastern employers were bound to collective agreements, compared to 82 per cent in the West (own calculations, IAB-Betriebspanel). In addition, non-compliance with collective agreements was rife. A study carried out by the construction union found that only 20 per cent of East German construction workers were paid the collectively bargained rates (Bosch 2012: 54).

In turn, the trade union IG-BSE lost around 50 per cent of its new East German members between 1991 and 1996.¹⁴ Thus, while trade union density in the East was higher than in the West immediately following reunification, the picture quickly reversed (Schnabel and Wagner, 2003). This was partially due to increased unemployment in the Eastern regions: the unemployed are less likely to be union members than the employed (Streeck, 1998). However, East Germans who kept their jobs were also less likely to maintain union membership (Fichter 1997: 27). West German trade unions had shown

¹⁴ Whereupon it merged with Gewerkschaft Gartenbau-Landwirtschaft-Forsten (the 'Union for Landscaping and Agriculture') to become IG-BAU.

themselves be incapable of saving jobs after reunification (Dininio, 1999). Furthermore, relationships between the two regions were strained by cultural barriers and mutual distrust. In both the East and West, employees left the unions because they did not feel well-represented (Schnabel and Wagner, 2003).

The weakened bargaining position of the construction union was reflected in its inability to resist a series of liberalising labour market reforms. First, an exemption from the ban on agency working was made for construction companies who abided by the same collective agreements for three years or were bound by the same universally binding agreement (Rudolph and Schröder, 1997; Salzmann-Hennersdorf, 2011).¹⁵ Second, Chancellor Kohl's government retreated from its financing of the bad weather allowance in 1996 because of financial difficulties within the Federal Employment Agency brought on by the costs of reunification (Bosch and Philips, 2003).¹⁶ Thousands of workers were fired in the first winter, despite the fact that the employers and unions had negotiated a special compensatory collective agreement.¹⁷ Finally, opening clauses were introduced for East German companies to reduce the collectively agreed wage for both workers and vocational trainees by up to 10 per cent upon agreement of the works council.¹⁸

The regulation of posted workers

¹⁵ Law to amend the lending of works in the construction industry' 1994 (Gesetz zur Änderung des AFG im Bereich des Baugewerbes).

¹⁶ 'Downward wage flexibility agreed for the German construction industry', Eurofound, accessible here: <http://www.eurofound.europa.eu/eiro/1997/07/inbrief/de9707126n.htm> (last accessed 15/05/2014).

¹⁷ The policy was reinstated in 1998 by the incoming left-wing government headed by Gerhard Schroeder.

¹⁸ *supra* note 16

Working conditions were deteriorating fast within the industry. Something had to be done. Mindful of the threat represented by the introduction of ‘islands of foreign labour law’ into Germany (Hanau, 1997: 145), IG-BAU had long lobbied for the regulation of posted workers. The construction industry’s two employer associations also came round to the idea of regulating posted workers when German firms began to declare bankruptcy due to competition from EU posting firms (Lubanski and Sörries, 1997).

In 1996, and despite strong opposition by Germany’s free market party, who openly spoke of wanting to see the construction ‘cartel’ disorganised, Germany adopted the Posted Workers’ Act’ (Arbeitnehmer-entsendegesetz).¹⁹ The legislation introduced the notion (later adopted in the European directive)²⁰ that posted workers should be subject to host country minimum wages and conditions, although employers would still save money by paying home country social security contributions.

This legislation was only the first step. In order to avoid contravening the freedom to provide services, the Posted Workers’ Act 1996 stipulated that collective agreements had to be universally applicable before they applied to posted workers (S. 3) (Bücker and Warneck, 2010: 34). However, in order to protect the constitutionally grounded autonomy of the trade unions and employer associations, the process of declaring a wage agreement

¹⁹ Notably, this act initially only applied to the construction main trades industry, in homage to the dire situation faced in the sector. The construction-related industries followed soon after. The Posted Workers’ Act has been subsequently extended to other industries.

²⁰ Posted Workers Directive 1996

generally binding by state involvement was very complex (Haucap, Pauly et al., 2001). The agreement had to be ‘in the public interest’. It had to be ‘representative’.²¹ Finally, a committee of representative of the collective bargaining parties, including representatives from other industries, had to approve of the agreement. Only then could the Ministry of Labour declare the agreement ‘generally binding’, and then only for a limited period of time (Rattenhuber, 2011).

It took almost two years for the first ‘universally applicable agreement’ (Allgemeinverbindlicherklärung) to be established in the construction industry. The agreement dictated minimum length of leave, holiday pay, additional holiday allowance, the obligation to pay social security contributions for the holiday fund contributions and most importantly, minimum wages, which applied to both native and foreign workers. The process of declaring the agreement generally binding was arduous because it exposed tensions between different types of employers. The overarching, cross-sectorial employers’ association opposed the declaration of a minimum wage in the construction industry because of fears that it would spark pressure to adjust wage levels in other low-pay sectors. In response, construction’s two employer associations HDB and ZDB threatened to leave the employers’ association. However, a 1998 modification allowed the Ministry of Labour to declare an agreement generally binding in the absence of the cross-sectorial employer association’s consent through a ministerial decree (Menz, 2010; Schlachter, 2010: 35).²² This was a highly controversial move, with some arguing that it

²¹ Meaning that there was no other agreement with more signatories and at least 50 per cent of the employees affected by the generally binding agreement had to be employed by employers that supported the agreement.

²² S. 7 Posted Workers Act 1996.

contravened the long held principle of *Tarifautonomie*. Nonetheless, it allowed for the re-establishment of minimum standards throughout the construction industry.

Employers in different regions also had different policy preferences. In homage to the East Germans' low productivity levels, the generally binding collective agreement outlined different wage levels in the East and West of the country.²³ This did not, however, prevent the Berlin-Brandenburg office reneging on their membership with the 'Western-oriented' employer association and eventually establishing a separate association (the *Zweckverband Ostdeutscher Bauverbände*) (ZVOB) for small and medium sized firms in the new federal states (Blanpain, 2008). As the President of the ZVOB said more recently, 'the (Western) employer associations have little legitimacy in the new Bundesländer'. In turn, ZVOB's approach to the labour market is more recognizably neoliberal, including support for the reduction of wage levels, more working time flexibility and the introduction of opening clauses in all collectively bargained agreements.²⁴

Where both of the mainstream employer unions had been in agreement regarding the introduction of posted workers regulations, the support of the association for small- and medium-sized firms (the ZDB) began to waver after they lost a considerable number of

²³ Although in order to avoid competition between different minimum wages in Germany the territorial principle applies, which means the location of the site and not that of the company's headquarters determines which minimum wage has to be paid, see (Bosch, 2012).

²⁴ 'Regional employers' association in the building industry quits peak association', Eurofound, accessible here: <http://www.eurofound.europa.eu/eiro/1997/03/inbrief/de9703106n.htm> (last accessed 07/10/2013).²⁵ This was followed in 2006 by a working time increase without pay compensation; and in 2007, to making pay increases largely contingent on firm-level negotiations (Lillie and Greer, 2007).

their members to the ZVOB. Understanding the threat that the loss of the ZDB would pose to the future of collective bargaining in the construction industry, the trade union IG-BAU agreed to make concessions in return for a longer duration of the new collective agreement, including an unprecedented unconditional opening clause allowing the reduction of holiday pay at the firm level.²⁵ Data from 2005 showed that East German companies were far more likely to make use of opening clauses than their Western counterparts.²⁶

These outcomes betray the weakening position of IG-BAU - and the workers they represent - at the bargaining table. Nonetheless, the fact that minimum wages in construction remain higher than in other industries indicates that IG-BAU is in a stronger position than trade unions in other sectors (Bosch, 2013). The proportion of EU posted workers in construction has decreased continuously since 1996,²⁷ indicating that employers were less inclined to use this form of labour as it became more regulated and less economically advantageous.

Nonetheless, the construction industry continues to face significant issues controlling illegal employment practices (Worthmann and Zühlke-Robinet, 2003: 243; Cyrus, 2004). This is despite a series of legislative instruments aimed at controlling illegal employment,

²⁵ This was followed in 2006 by a working time increase without pay compensation; and in 2007, to making pay increases largely contingent on firm-level negotiations (Lillie and Greer, 2007).

²⁶ 'Use of opening clauses in collective agreements', Eurofound, accessible here: <http://www.eurofound.europa.eu/eiro/2006/06/articles/de0606019i.htm> (last accessed 21/05/2014).

²⁷ See 'Annual reports', (Geschäftsbericht) SOKA-BAU, accessible here: http://www.soka-bau.de/soka-bau_2011/desktop/de/Medienraum/Publikationen/Geschaeftsbericht/ (last accessed 21/05/2014).

including a general contractor's liability,²⁸ a 'withholding tax' for construction business not in possession of an exemption certificate and substantial increases in fines for violations of mandatory working conditions.²⁹ Illegality represents a threat to the future salience of the coordinated market regime, as employers choose cheap, illegal labour over adherence to collectively bargained standards (Voswinkel, 1999).

Non-compliance is facilitated by the fact that very few construction companies have work councils to oversee the implementation of collective agreements. Despite the 2001 amendments to the 'Work Constitution Act' 1952 (Betriebsverfassungsgesetz), which radically streamlined the election procedure for work councils in small- and medium-sized businesses, today only 4 per cent of construction employees work in a company with a works councils (Bosch, 2012). There is very little reliable data available for work council membership figures in the construction industry going back in time³⁰ and the fragmented structure of the construction industry means that it is likely that work council membership was never high in comparison with other industries. However, given that larger firms are far more likely to have works councils than small firms,³¹ it is also likely that the fragmentation of the industry has meant that there are fewer work councils than there were in previous years.

²⁸ Art. 28e (2) of the 'Social Code' IV (Sozialgesetzbuch); Art. 1 Posted Workers' Act 1996 (Arbeitnehmer-Entsendegesetz).

²⁹ S. 5 (3) Posted Workers' Directive 1996.

³⁰ For instance, Voswinkel (1996) estimates that in 1993, around one third of workers in the construction industry were in firms with work councils. However, this is an estimate relayed by IG-BSE/IG-BAU and there are no other methodological comments made with which to assess the accuracy of the figure given.

³¹ 'The larger the firm, the more likely they are to have a work council' ('Je größer der Betrieb, desto eher verfügt er über einen Betriebsrat'), Hans Boeckler Stiftung, accessible at: http://www.boeckler.de/5306.htm#cont_5522 (last accessed 07/10/2013)

Finally, the focus within the Posted Workers' Act 1996 on defining minimum standards - rather than establishing a pay scale across the industry - means that it has not effectively protected high-wage labour markets within construction (Verschueren, 2008). In East Germany, a recent study found that only 25 per cent of workers are paid above the minimum wage, compared to 66 per cent in West Germany (Bosch, 2013).³² This suggests the practice of skill downgrading, where employers reclassify particular skilled jobs in order to avoid payment of the higher wage rates.³³ Thus, in East Germany at least, the sector minimum is the going wage rate. Collectively bargained wages are paid to the minority of workers (Bosch, 2013).

The accession of East Europe, transitional restrictions and bogus self-employment

The final, significant development in immigration policy has been the accession of eleven East European states to the EU. The enlargement of the EU automatically implied a de-facto legalisation of residence for all the nationals of these countries. However, Germany implemented transitional limitations on labour market access for nationals of acceding nation-states for seven years following accession (2004-2011), as well as restrictions on the use of posted workers from transitioning countries. These restrictions were greeted with disdain by East European nationals.

³² Although more deviations from collectively agreed standards in West Germany in respect of other wage components such as travel and accommodation supplements and annual bonuses.

³³ In addition, the minimum wage for skilled workers in East Germany was abolished because firms did not implement it.



Fig. 9. photo of demonstration by Romanian and Bulgarian workers. Placards read 'We want to work'; 'We are not bad people.' Photo courtesy of Initiative Civil Courage, Munich.

While both IG-BAU and the two construction-sector employer associations, the HDB and the ZDB, supported these restrictions, the umbrella employer organisation representing all industries worried that waiting too long to open up the labour market to CEEC workers risked being left to choose from only those workers in whom other countries were uninterested because of their lack of skills or immobility.³⁴ Subsequent research somewhat supports these fears. Although the number of East European migrants has increased steadily since accession in 2004, it is likely that many more migrants would have been attracted to Germany had these restrictions not diverted them into the more open European countries (Kahanec, 2009; Baas, Brücker et al., 2010). Furthermore, it seems that the most skilled workers have been discouraged from coming to Germany, when comparing with the skills profile of previous generations of immigrants (Kahanec, 2009).

³⁴ 'Why do some EU members struggle to confer Freedom of Labor Movement?', Alex Caviedes, accessible at: http://www.euce.org/eusa/2011/papers/11e_caviedes.pdf p. 18 (last accessed 23/12/2013).

The other effect of transitional arrangement has been to inflate the number of self-employed workers. Self-employed workers do not fall under the transitional restrictions for the free movement of workers, but instead are protected as part of the freedom of establishment under Art. 49 of the Treaty on the Functioning of the European Union. Thus, self-employment is used as a means of penetrating the German labour market despite the restrictions (Kahanec, 2009). Approximately 40 per cent of recent EU10 migrants in Germany are self-employed - significantly more than previous flows of migrants from this region (Brenke, Yuksel et al., 2010).

The accession of the East European states was also associated with another amendment to the to Germany's self-employment regulatory regime. In particular, European states are committed to ensuring equality of access to the right of establishment for nationals of other European states (Blitz, 1999; Niessen, 2004). High qualification barriers, such as had been maintained in German construction, were considered anathema to the fulfilment of the intra-European freedom of establishment. Thus, under pressure from Europe, Germany radically amended the 'Handicrafts' Code' 1953 (Handwerkordnung), liberalising qualification requirements to set up as self-employed in many occupations within the construction and construction- related industries.



As Fig. 10 demonstrates, the amendments were followed by an increase in the number of self-employed workers in construction. Increases were recorded especially in the construction-related professions such as bricklayer, tiler, plumber or carpenter (Blanpain, 2008). For instance, in Germany at the beginning of 2004, there were 12,401 tilers in business. By the following year, there were twice as many. Out of the newly registered tilers, 10,990 were self-employed as ‘one-man firms’ (‘Ein-Mann-Betriebe’) - solo self-employed - a heretofore unusual mode of employment relationship within the construction-related industry. Furthermore, close to one quarter were foreign nationals: a far higher proportion than found in the general population (Jorens, 2009).

These developments reflect the effect of transitional restrictions in terms of siphoning Europeans nationals into self-employment. However, it is important to note that many German nationals are also increasingly adopting this form of employment relationship (ibid). In particular, the number of German self-employer workers has risen since the Harz IV reforms in 2004 introduced start- up grants to promote self-employment for unemployed welfare claimants (Vogler-Ludwig, 2010: 4).

Increases in self-employment put pressure on the collective bargaining system (Eichhorst, 2000; Brenke, Yuksel et al., 2010). As described in the previous chapter, German antitrust regulations forbid the self-employed to agree on common prices and fees. Thus, the growth of small self-employment implies another group of persons who are largely outside of coordinated market institutions. Furthermore, although Germany has adopted a series of policies to equalize the legal position of self-employed workers - most notably, compulsory health insurance since 2007 - their exclusion from collective bargaining and from statutory employment rights means that self-employed workers represent yet another low-cost competitive element. The growing proportion of self-employed workers - and concomitant decline in posted workers³⁵ - as a proportion of the total workforce perhaps indicates a certain degree of displacement of posted workers by self-employed workers.

³⁵ 'Annual reports', (Geschäftsbericht) SOKA-BAU, accessible here: http://www.soka-bau.de/soka-bau_2011/desktop/de/Medienraum/Publikationen/Geschaeftsbericht/ (last accessed 21/05/2014).

After over ten years' recession, the construction industry began to show signs of recovery in 2006. Notwithstanding the impact of the global crisis (2008-2010), gradual, cautious growth has been the norm in the sector. The more secure economic climate has been reflected in more generous collective agreements for workers. After a total lack of wage growth in the late 1990s and early 2000s, which saw hourly wage rates for construction workers in Germany fall quickly behind the amounts paid in other West European countries, today, average labour costs (wages plus non-wage contributions) within Germany are 24.7 euros per hour, which is just above the average for the 'EA17'.³⁶ Foreign employees made up only 7.5 per cent of employees in the construction industry in 2012 (Bundesagentur fuer Arbeit, 2012). This can be compared to 22.4 per cent in the hospitality trade. However, the number of foreign employees in the construction industry does not include the approximately 5 per cent of the workforce who are posted workers,³⁷ the unrecorded number of foreign nationals who work in a self-employed capacity or as contract workers and finally, immigrants working illegally. It is these latter groups that are most vulnerable to exploitation - and who, in turn, pose the greatest threat to the salience of the coordinated industrial relations model.

Discussion: Immigration and the Varieties of Capitalism

³⁶ Austria, Belgium, Cyprus, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia (as of 1.1.2014), Luxembourg, Malta, The Netherlands, Portugal, Slovenia, Slovakia, Spain. See 'Hourly Wage Costs Nace Rev. 1.1 (EUROSTAT).

³⁷ Own calculation, posted workers figures from 'Annual reports', ('Geschäftsbericht') SOKA-BAU, accessible here: http://www.soka-bau.de/soka-bau_2011/desktop/de/Medienraum/Publikationen/Geschaeftsbericht/ (last accessed 21/05/2014); total number of workers from Bundesamt Statistisches, accessible here: <https://www.destatis.de/DE/ZahlenFakten/GesamtwirtschaftUmwelt/Arbeitsmarkt/Erwerbsstaetigkeit/TabellenErwerbsstaetigenrechnung/ArbeitnehmerWirtschaftsbereiche.html> (last accessed 21/05/2014).

To what extent have coordinated industrial relations survived in the construction industry? And what is the role of immigration in new developments? Given that German is a dual industrial relations model, institutional change can occur on the firm level - through declining numbers of work councils - or the industrial level, through the disorganisation of industrial-level bargaining. This section examines the role of immigration on institutional change on both of these levels.

Institutional change

With respect to work councils,³⁸ in no other industry has the ‘betrieblichen Vertretungslücke’ (‘representation deficiency’) (Ellguth and Kohaut 2010:209) become so acute. It is difficult to discern whether the lack of firm-level representation is a new development, as the paucity of early data on work councils makes comparison across time difficult. Nonetheless, as above, given the strong correlation between firm size and work council membership, it is likely that the number of workers represented by work councils has decreased because of the fragmentation of the industry.

In turn, the ‘hollowing out’ of larger firms resulted from the combination of a new supply of foreign companies and workers alongside a changing economic situation (Bosch, Weinkopf et al., 2011: 30). In particular, demand for construction services fell

³⁸‘New data on bargaining coverage and works councils in 2007’, European industrial relations observatory online, accessible here: <http://www.eurofound.europa.eu/eiro/2008/11/articles/de0811019i.html> (last accessed 21/05/2014).

dramatically as a result of the retrenchment of state construction programs and tax subsidies and a concomitant decline in private house building (Ziouziou and Gluch, 2010). More recently, the growth of small firms within construction has been facilitated by start-up grants promoting self-employment among the unemployed, as well as the liberalisation of qualification barriers to self-employment under changes to the Handicrafts Code. These amendments were introduced to enable the right to freedom of establishment. As such, it is not immigration per se, but the protection of the European mobility regime that has had a detrimental effect on firm-level industrial relations.

The effect of work council retrenchment is that IG-BAU does not have the site-level structures to enforce its collective agreements on a day-to-day basis. Instead, it is the task of the Finanzkontrolle Schwarzarbeit to police Germany's construction sites. While the inspection regime is considerably more intense, this does not substitute for the presence of work councils. Non-compliance with agreements has risen as a result.

In terms of industry level collective bargaining, the last 25 years have seen a significant decline in the number of construction firms covered by collective bargaining agreements. From a high of 82 per cent in 1980, in 2011 only 68 per cent of firms in West Germany and 42 per cent of firms in East Germany were covered by collective agreements (WSI-Betriebspanel). From around 99 per cent of workers covered by agreements in 1989, today 72 per cent of construction workers in West Germany and 52 per cent of construction workers in East Germany are covered (ibid). These figures are not as stark as first appear. Since the West German construction labour market is around

three times larger than that of the East (503 000 workers to the East's 134,300) (WSI-Tarifarchiv 2012), the above figures mean that the majority of construction workers in Germany are covered by collective bargaining. Furthermore, while some employers are not officially covered by collective agreements, many claim to orientate their wages towards the standards contained within such agreements.

Finally, the construction industry has been unfettered by two significant trends that have beset other industries in Germany. Firstly, there has been very little devolution of bargaining to the firm level. Only two per cent of workers in the West and three per cent of workers in the East of the country are covered by firm-specific agreements (Ellguth and Kohaut, 2011: 243). Thus, construction has avoided the individualization of bargaining to the firm level - a development that increases wage differentials between workers in different firms and progressively softens industrial relations models from the inside (Behrens, Fichter et al., 2003). Secondly, neither the HDB nor the ZBD offer membership without collective bargaining (Jansen, 2009: 126). In sum, collective bargaining still plays a central role in the negotiation of wages and working conditions in the German construction industry. To say that the industry is now 'liberalised', would be wholly inaccurate.

Nonetheless, it is clear that collective bargaining is less important than it once was in both the West and East of the country. Two trends are occurring simultaneously: firms are cancelling their membership in employer associations and newly founded enterprises tend not to join employer federations (Ellguth and Kohaut, 2011; Dostal, 2012). What is

the role of immigration in these developments? One possibility is that domestic firms have been substituted by foreign firms who are less willing to join employer associations (either because they are not integrated into the existing German collective bargaining system or because they chose to compete on a low-wage basis). This factor would have had particular resonance in the mid-1990s, when around 20 per cent of workers were employed by firms based outside of Germany (Bosch, 2004). Today, that figure has declined to approximately five per cent of all workers in the construction main trades.

A second factor is that the growth in self-employment might also have had an impact on collective bargaining membership figures, given that self-employed workers are not permitted to take part in collective bargaining. In turn, restrictions on immigrants from newly acceding EU states mean that this group is increasingly working as self-employed (Kahanec 2009). At the same time, the aforementioned liberalisation of qualification barriers and the introduction of start-up grants means that self-employment is also increasing among the domestic population (Fritsch, Kritikos et al., 2012). It would be more accurate to say that self-employment has increased because of policies that have accompanied immigration, rather than immigration per se.

The main threat that immigration poses to collective bargaining coverage is that the incentive to participate in collective bargaining may be undermined by the low-wage ‘reserve army of labour’ of immigrants (Streeck, 1998; Lillie, 2007; Krings, 2009; Streeck, 2009). In this vein, it is important to note growing wage disparities between domestic and migrant workforces. The original guestworkers were employed on equal

terms to their German counterparts (even if they concentrated on the least prestigious and low-paid jobs available) and were subject to the same social security contributions. However, the post reunification era included the immigration of both contract and posted workers, whose wage and social security costs were significantly lower than those of German workers (Rürup and Sesselmeier, 1995). While posted workers' wages are now subject to a minimal level, the liberalisation of self-employment has allowed another avenue for cheap work outside of the collective bargaining system - although, as above, self-employment has grown among both foreign and domestic workers.

Finally, employers may pay their workers less than legally sanctioned rates, or hire them 'off the books.' Georg Menz (2001) argued that illegally employed workers constituted a third tier in the German construction industry. His sources argued that while skilled workers earned around 23 DM per hour and 'second-tier' workers (including posted workers) between 15-18.50 DM, illegally employed foreign workers were only earning 4-10 DM per hour (2001:261). This wage disparity offers a significant incentive for employers to replace domestic workers by foreign workers, although it should be noted that native workers can also be hired under illegal conditions.

However, the available evidence from the German construction industry suggests that domestic workers were only substituted in significant numbers when the industry entered into a recession - a finding that is mirrored in the international literature as well (see Devlin, Bolt et al., 2014 for an overview). It was only under the tough economic conditions of the mid 1990s that ultra-cheap EU-posted workers began displacing both

previous generations of migrant workers and German workers within the construction industry (Rürup and Sesselmeier, 1995). Thus, substitution only occurred where significant wage disparity met with severe recession within the industry, following the end of the post-Reunification building boom.

Reunification also had a more direct impact on industrial relations in the German construction industry through the introduction of a group of employers who could not compete on the basis of high quality production and high skill. Small- and medium- sized firms in the East argued that they could not afford the costs of adherence to collective bargaining. In this context, liberalising the process of declaring a collective agreement generally applicable was one of the only available ways of warding against the rapid disintegration of collective bargaining through employer disagreement (Bosch, 2013).³⁹ The other strong incentive for liberalising procedures around the extension of collective agreements came from the fact that the Posted Workers Act required that minimum standards were universal in a sector before they applied to posted workers.

The extent to which the controversial new procedure - which allows the Ministry of State, in conjunction with sectorial social partners, to circumnavigate the approval of the umbrella, cross-sectorial employer association in declaring an agreement 'generally applicable' - contravenes the constitutional right of industrial-self-employment is beyond the scope of the thesis. What is relevant is the way in which this episode illuminated the

³⁹ Under this view, the umbrella trade union DGB's prior lack of support for generally binding mechanisms is a severe misjudgement - one that can be explained only by the very slow pace at which the erosion of industry-wide collective agreements proceeded initially before starting to gather pace.

Achilles heel of collective bargaining: discord between employer groups. In the disputes of the mid 1990s, divisions occurred regionally; between firms of different sizes; and finally, as epitomized in the umbrella employer associations' opposition to minimum wages in construction, between employers in different industries. Immigration is only piece of a wider puzzle explaining differences in policy preferences.

The final institutional transformation within construction has been the steep decline in trade union membership in the industry. Germany has one of the lowest trade unionization rates in Europe (Hassel, 2007). Despite IG-BSE's merger with Gewerkschaft Gartenbau-Landwirtschaft-Forsten in 1996, membership figures have declined from 640,000 in 1995 to 298,000 in 2012. The reasons for membership decline are complex and include the struggles of retaining workers in East Germany who - like their employers - felt that their interests were not represented by the West German social partners. As far as immigration's role in declining trade union membership goes, one interpretation is that immigrants are harder to organise because of their high mobility, language/cultural barriers and concentration in precarious, transient employment.⁴⁰ However, this analysis obfuscates the political dimension of trade union mobilising. The fact that immigrants had higher unionization rates than Germans during the guest worker period suggests that it is not always the case that migrant workers are harder to organize and more reluctant to join unions than indigenous workers.

⁴⁰ 'The Struggle to Organise Migrant Workers', Migration Pulse, Migrants' Rights Network, accessible here: <http://www.migrantsrights.org.uk/migration-pulse/2011/struggle-organise-migrant-workers> (last accessed 21/05/2014). The difficulty of organising migrant workers was also a key theme in a number of interviews with trade unionists in both countries.

Instead, the exclusion of foreign nationals from trade unions in the post-guest worker age symbolized a series of consistent choices made by core members within the trade union. In Germany, labour courts tended to deny small organizations the right to conclude collective agreements, which provided a near monopoly of interest representation for the DGB trade unions, including IG-BAU. Without any real competition, mainstream unions might be reluctant to dedicate themselves to the search for new members (Hassel, 1999) and may take an exclusionary stance towards irregular immigrants. However, it remains that trade unions' power at the negotiating table is derived from the power to strike and the threat this implies for employers. As commented on by the Federal Labour Court, without being able to affect widespread strikes, collective bargaining is little more than 'collective begging'.⁴¹ Thus, trade unions' loss of membership figures is relevant in terms of outcomes for workers. It is to this dimension of change that the chapter now turns.

Change in outcomes

Equally as important in an analysis of changing industrial relations as institutional change are changes to outcomes in wages and working conditions. Despite the relative stability of a particular coordinated institutional configuration, changing actor preferences and shifts in power distribution may mean the same structures serve differently defined goals and produce very different outcomes (Hacker 2004), including those driven by logics more usually found in market-driven neoliberal economies. A good example here is the

⁴¹ Judgement of 10/06/1980, Bundesarbeitsgericht 1 AZR 168/79. In addition, trade unions gain the revenue they need for political action through membership fees.

ZVOB breakaway employer association, which calls for a recognizably neoliberal set of policies: minimum wages ‘only at marketable levels’, reduction in apprenticeship wages and social security contributions and the liberalisation of labour law.⁴² Institutional persistence cannot be equated with policy and outcome continuity.

To what extent are workers still protected in the German construction industry? The picture is decidedly mixed. Looking at the vocational education system, construction remains the only industry in Germany to have a universal levy for apprenticeships and as a result, still has a higher number of apprentices than any other industries within Germany (ZDB, 2009: 12). Despite this, the number of apprenticeships has declined radically from just under 100,000 in 1991 to around 40,000 in 2001 (Bundesanstalt für Arbeit, 1990-2002). Again, there are regional differences: the most significant declines are recorded in the East of the country.

The role of immigration in this development is contested. Bosch and Zühlke-Robinet (1999) argued that the substitution and marginalisation of small and medium German firms by foreign firms saw ever fewer training places available for young Germans, as up to two-thirds of apprentices are trained in workplaces of fewer than 50 employees.⁴³ This may have been a problem in the 1990s. However, the validity of the interpretation that failure in the apprenticeship system is due to a lack of available places is undermined by

⁴² ‘Aims and Objectives’ (‘Forderung und Ziele’), Zweckverband Ostdeutscher Bauverbände, accessible at: http://www.zvob.de/index.php?Forderung_und_Ziele (last accessed 25/12/2013).

⁴³ ‘Construction: drastic decrease in new apprenticeships’ (‘Bau: Drastischer Rückgang der neuen Ausbildungsverträge’), July 2009, Handwerksblatt, accessible here: <http://www.handwerksblatt.de/handwerk/bau-drastischer-rueckgang-der-neuen-ausbildungsvertraege-8730.html> (last accessed 21/05/2014).

the fact that 27 per cent of construction companies reported unoccupied training places.⁴⁴ Thus, the apprenticeship system is starving for want of trainees, not training possibilities.

This is not meant to imply that these developments do not also represent a failure on behalf of the industrial relations system. Instead, as discussed by Syben (1998: 35), low wages are a key risk factor auguring the disintegration of industrial vocational-education systems, as workers are no longer attracted to invest in the specific skills of a particular trade. Thus, new generations of workers may well have been disincentivised by wage stagnation in German construction until the mid-2000s. In turn, lack of demand for construction services was one reason for poor wage growth - a factor that has little to do with immigration. However, in 2010, despite growth in output, construction nonetheless managed to achieve a less than average increase in wages within the German context⁴⁵ - an outcome that indicates both unions' declining power and employers' decision to opt for low-wage production. As discussed above, both of these issues are at least tangentially related to immigration.

In terms of construction's unique social security system, construction main trades employers are still bound by the duty to pay extra contributions for holiday funds and supplementary pensions. Thus, for instance, after a brief hiatus, Schlechtwettergeld was

⁴⁴ 'Construction is urgently seeking apprentices' ('Bau sucht drigend Lehrlinge'), 16/10/2012, Focus.de, accessible here: http://www.focus.de/finanzen/karriere/ausbildung-baugewerbe-sucht-dringend-lehrlinge_aid_839812.html (last accessed 21/05/2014).

⁴⁵ 'Wage increase, but sinking real incomes' ('Tarifliche Reallohnsteigerungen, aber sinkende Effektivverdienste'), 21/01/2010, Press release, WSI - Wirtschafts- und Sozialwissenschaftliches Institut in der Hans-Böckler-Stiftung, accessible here: http://www.boeckler.de/pdf/pm_ta_2010_01_20.pdf (last accessed 21/05/2014).

quickly reinstated by the Social-Liberal government in 1998 and employers continue to pay contributions for this benefit. However, more generally, unemployment benefits have been retrenched under the Hartz reforms, which eroded the right of the long-term unemployed to earnings-related unemployment insurance and introduced new conditions for the receipt of benefits. Thus, while construction specific benefits have stayed intact, social protection in Germany as a whole has been considerably eroded.

A third dimension of the heavily regulated German construction industry was restrictions on non-standard employment relations. Thus, agency working and self-employment were both heavily circumscribed, the first by a total ban and the latter through qualification barriers. However, amendments to both the laws on self-employment and on agency working mean that non-standard employment is no longer a residual as once was - although Germany still has some way to go before it catches up with the UK's liberalised construction labour market. In turn, the loosening of restrictions on agency working and the withdrawal of qualification barriers occurred under the aegis of the European Union and the desire to promote the freedom of services and of establishment. In these cases, it is not that immigration itself is the destabilizing factor. Rather, it is the unique interaction between national and supranational law in the European Union that provided the context for legislative amendment.

The final transformation of note is the introduction of industry-level minimum wages across the construction. This represents both a success of and a challenge to the social partners. In particular, the empirical data suggests that in the East Germany, the minimum

wage is the going rate, rather than a bottom floor above which more skilled workers are paid. This apparent failure should perhaps be qualified by a reminder that collective bargaining was never as prominent in deciding wages and working conditions in the East. By contrast, compliance with the whole wage grid is high in western Germany (Bosch, 2013). More recently, Angela Merkel has announced the introduction of a minimum wage from 2015 onwards.⁴⁶ The extent to which the introduction of a statutory minimum wage represents the erosion of collective bargaining in Germany depends upon the process by which the minimum wage would be negotiated and in particular, what the role of the social partners would be. If the trade unions and employer associations retain some power over the process of minimum wage setting, it might be better to describe the development as a new type of cooperated industrial relations, rather than a retrenchment thereof. However, a statutory minimum wage certainly signals the declining importance of collective bargaining in the negotiation of wages and as such, may be understood as a regime-transformation development.

Conclusion

In conclusion, it would be an overstatement to say that coordinated industrial relations in the German construction industry have been disorganised. Collective bargaining still plays a central role in the negotiation of wages and working conditions. Nonetheless, the institutional framework shows signs of strain. In particular, the declining power of trade

⁴⁶ 'Angela Merkel approves Germany's first minimum wage', BBC News, 02/04/2014, accessible here: <http://www.bbc.co.uk/news/business-26851906> (last accessed 15/05/2014).

unions on the bargaining table, poor economic conditions and the falling proportion of firms belonging to employer associations have meant that the high-skill, high-pay equilibrium is under pressure.

However, despite the challenges that immigration presents, the evidence collected here does not find that immigration to be a necessary nor sufficient condition for disorganisation of industrial relations, as portrayed in more classic materialist accounts of immigration and the labour market (Castles and Kosack, 1972; Freeman, 1979). Instead, the chapter concurs with neoliberal-materialist perspectives, which emphasize the role of the state in making immigrants precarious. First and foremost, the effect of immigration on industrial relations depends to a great extent upon the extent to which incoming workers are ‘fashioned’ into particular types of illegalized or legally precarious, low-wage workers, who are then used to undercut domestic workers. The wider impacts of restrictive and marginalizing immigration policy on the labour market mean that both domestic and foreign workers have a common interest in maintaining the right of the latter. One of the key factors protecting the construction industry throughout the 1960s was the way in which guest workers were directly employed, on terms and conditions equal to those of native workers. By contrast, posting allowed the development of islands of foreign labour law and transitional arrangements siphon workers into precarious self-employment. Restricting the contract workers scheme was associated with rising numbers of illegal workers in the industry.

Second, other factors have posed equal or greater challenges to the salience of coordinated industrial relations in the German construction industry, including the volatility of business cycle; the Europeanisation of law; and most of all, the reunification of East and West Germany. Trade unions and employer associations faced extreme difficulties of transferring coordinated market institutions to the East German context. The continuance of fairly extreme disparities in economic context between the old and new Bundesländer means that East German employers are still far less likely to adopt the high-skill, high-wage equilibrium of their West German counterparts. The roots of industrial relations change in construction are undoubtedly to be found in the challenges of Reunification. In addition, the chapter argues that changes in industrial relations are the result of the complex, multi-causal interaction between a number of different variables, and immigration's effects at any one point in history are mediated by other influences.

Finally, the idea that immigration is, per se, a threat to the coordinated model contains within it the assumption that immigrants are somehow outside the established industrial relations model. This ignores the very real choices of trade unions in terms of organizing among migrant workers. Initially, IG-BAU responded to immigration in an exclusive manner (Erne 2008: 92). For instance, in 2004, IG-BAU launched the *Ohne Regel geht es nicht!* ('without rules, it's not going to happen!') hotline that was used to report instances of illegal employment. The union argued that it was tackling illegal firms rather than illegal individuals. However, the initiative undoubtedly blurred the lines between control and support and alienated many migrant workers. As argued in chapter three, the protectionist approach of the German unions can be analysed as a policy

preference typical for unions in dualised coordinated market economies, under which protections for ‘core workers’ are purchased at the cost of new inequalities at the margin of the labour market (Goldthorpe, 1984: 329).

As membership figures have fallen, IG-BAU have re-oriented themselves towards organizing among new migrant groups, including irregular immigrants. Here, it has situated itself at the forefront of exploring new transnational initiatives (Krings, 2009). For instance, it established separate transnational organization called the ‘European Migrant Worker Union’, although this quickly ran into considerable difficulty. It is indisputable that traditional forms of trade union organising usually do not succeed in increasing membership among foreign nationals, not least because of the often temporary stay of migrants. As one interviewee discussed, ‘if someone only comes for a couple months, doesn’t get paid, becoming a trade union member is costly and the logic in the construction is that we’re going to spend a lot of money which has been put in our organisation, by members who have been contributing for 10-20 years, for a super expensive case, spending it for someone who is going to be here for a few months’.⁴⁷ Nonetheless, the establishment of nation-wide ‘counselling offices for posted workers’ and an advice centre for undocumented migrants represent cautious examples of trade union transformations.

In sum, immigration does not necessarily imply an end to coordinated industrial relations. However, it requires new qualities of coordination, which embody more

⁴⁷ Migrant rights advocate, Berlin, interviewed on 01/03/2013.

inclusive notions of security and equality than have previously been the case. While the institutional foundations of coordinated market industrial relations have remained relatively secure to date, their continued viability and the effectiveness of the social partners in negotiating terms and conditions that protect workers, both domestic and foreign, depends in large part on the success of their re-orientation towards the diverse realities of the modern age. As is an emerging theme in this thesis, immigration policies have effects across the citizenship line. As such, resisting the encroachment of neoliberalism requires solidarity across borders.

**Conclusion: Neoliberal-Materialism, the Varieties of Capitalism and the
Punishment of Immigrants**

A fragmented but substantively consistent body of literature argues that ‘illegalising...and hyper-criminalising’ immigration policy in Europe (De Giorgi 2010:153) encourages the creation of a migrant workforce whose legal precarity make them ideal fodder for employment in post-Fordist or neoliberal economies (Calavita, 1992; Calavita, 1998; Wacquant, 1999; Bourdieu, 2002: 40; De Genova, 2002; Calavita, 2003; De Genova, 2004; Palidda, 2005; Bauder, 2006; De Giorgi, 2006; De Giorgi, 2010; Escobar, 2010; Nagels, 2010). In this view, ‘punitive strategies [of immigration control] should be analyzed against the background of an increasingly flexible and de-regulated neoliberal economy’ (De Giorgi, 2010: 147). Limited access to social, economic and political rights, restrictive border policies and the hyper-criminalisation of immigrant populations are different facets of the same mechanism by which foreign nationals and their descendants are turned into a ‘work hard and work scared’ labour force.

This concluding chapter summarises and discusses the results of the thesis. The thesis offers a refinement of the neoliberal-materialist analysis of immigration policy, as expressed in De Giorgi (2006; 2010) and others (see for instance Calavita, 1998; Wacquant, 1999; Calavita, 2003; Palidda, 2005). To this end, the thesis explores the limitations of neoliberalism as an explanation for developments in immigration control. First, immigration policy has both implicitly and explicitly aimed at disciplining immigrant labour before the ‘neoliberalisation’ of the European labour market. Second,

designating the 'economic realm as the driving force behind increased incarceration and the criminalization of migration...means that the literature cannot quite handle all the sources of variation and complexity that do not conform neatly to predicted outcomes' (Barker 2012: 117-118). There are other factors, beyond the material, that shape how states control immigrant communities. Third, as the Varieties of Capitalism literature highlights, countries vary substantially in the ways their economies are structured. Given the underlying assumption within the neoliberal-materialist analysis that immigration control systems respond to economic structure, the thesis explores the extent to which underlying differences in the institutional structure of political economies might translate into differences in immigration control and in the criminalisation of immigrants. It also examines the impact of differences in labour law on the process by which immigrants are made precarious workers. The final section then examined the extent to which immigrants disorganise the institutions that differentiate German coordinated capitalism from its neoliberal counterparts.

Disciplining immigrants prior to neoliberalism

The structural relationship between the economy and punishment in society is a key theme in Marxian analysis. As Richard Sparks (1980) argues, different authors writing from within the Marxian perspective have emphasised the extent to which criminal law reflects and perpetrates the power of the ruling classes over the working class. In the neoliberal-materialist position, the intensified criminalisation, illegalisation and

marginalisation of immigrant populations reflects the needs of employers in post-Fordist economies for a hyper-exploitable workforce.

To some extent, the criminalisation and marginalisation of foreign nationals has intensified in line with descriptions made in the neoliberal-materialist analysis. In both the UK and Germany, foreigners (and their descendants) are more overrepresented in prisons than they were prior to the 1970s. More foreign nationals are arrested on the basis of criminal immigration offences than was previously the case; more are deported. Both countries have developed a 'hierarchy of mobility' (Bauman, 1998: 69–76), under which the immigration of highly skilled workers is welcome, while family reunification and asylum admissions policies - which affect citizens of non-Western, poor countries - are problematized. Immigration enforcement agencies are becoming increasingly police-like, gaining access to the coercive powers that have previously been limited to crime control agencies.

On the other hand, the neoliberal-materialist view neither accounts for the ascent of liberalising elements in immigration policy in recent years (as manifest in: the accession of eleven East European countries to the EU and the extension of the freedom of movement to citizens of those countries; policies that have made it easier for Turkish nationals to naturalise as German citizens; a series of amnesties for failed asylum seekers in both countries; and a decrease in the overrepresentation of foreign nationals in prison in the UK) nor for the fact that immigration policies have reflected the desire to control the mobility and labour of the 'global proletariat' throughout time.

Indeed, while labour market effects have been, at times, a latent or undeclared outcome of state policy, at other times immigration policies have been used to weaken foreigners' labour market position in a quite explicit manner. As Weber commented in the 1890s when discussing the Ruhr Pole workforce, 'a nod to the government official next door suffices to dispatch him (the migrant worker) promptly back over the borders when he does not thoroughly submit to the wishes of the landowner' (Weber 1893: 71 in Armstrong, 1968). Similarly, after the Second World- War, Germany invited millions of low-skilled workers from Italy, Greece, Spain, Ireland, Turkey, Morocco, Portugal Tunisia and what was then known as Yugoslavia. While welcome as workers who would do the jobs Germans did not want to do, guestworkers were excluded from many of the economic and social rights of citizenship, and were discouraged from settlement through deportation. In the UK, European Volunteer Workers were subject to criminal sanction for work-related offences and could be deported when they changed employment. Mobility controls have always encouraged immigrants into the dirty and dangerous jobs nationals do not want to do. Precarity is not something particular to this time period, but is a quality governing some labour relations at all times.

The importance of non-material factors in immigration policy-making

In addition, state practices of criminalisation and exclusion have often been motivated by factors outside of the economic sphere: most notably, nationalism, xenophobia and

racism. While the neoliberal-materialist highlights the role of immigration controls in rendering foreign nationals vulnerable to exploitation, at times, the desire to limit immigration for these reasons has gone beyond what might be functional to economic interests. For instance, the mass expulsion of Poles from Prussia between 1885 and 1890 occurred despite the strong desire for a regular workforce. Instead, it was motivated by a particular vision of Volk-based nationalism, under which ethnic heterogeneity represented an intrinsic threat to the nascent state-building project. Similarly, during the 1950s both Labour and Conservative governments introduced a number of covert and sometimes illegal administrative measures to discourage black immigration, on the basis that it might upset racial harmony (Carter et al 1987). Subsequent limitations on the right of Commonwealth citizens to enter the UK predate rising unemployment and the subsequent neoliberalisation of the economy (see chapter 2).

The neoliberal-materialist approach also underplays the role of foreign policy considerations in immigration policy. For instance, it was the imperatives of the First World War that led Britain to accept Belgian refugees, while deporting enemy citizens from Germany. Another example is Germany's increasingly restrictive attitude towards asylum seekers throughout the 1980s, which was at least partially motivated by the fact that fewer and fewer came from beyond the Iron Curtain. The intensified securitization and criminalisation of young Muslim men in both countries might be understood in the context of the wider construction of Islam as a threat to the West (Fekete, 2004).

The insecurity that underlies the intensification of criminalising or exclusionary immigration policies appear not only in times of economic crisis but also in ‘the aftermath of wars, violent revolutions, the collapses of empires, or as concomitants of social departures too vast or too fast to be assimilated by the extant policing agencies’ (Bauman 1993:230). In turn, ‘the control of borders...has tended to substitute for the production of genuine and universal security’ (Weber, 2004: 359). Indeed, a common theme among scholars interested in the effects of neoliberalism on state punishment is that the state uses more punitive means for its own legitimisation as welfare solutions to social and economic insecurities are discredited (see Garland, 1996, De Giorgi, 2007; Bauman 1998:7, Wacquant 1999:216). This thesis would add that punitive methods of immigration management have been used as tools of legitimisation under many circumstances, including but not limited to the insecurities of neoliberal globalisation.

Finally, as evident in the success of UKIP in the European elections, the working classes are often more restrictive towards immigrants than their elected representatives in mainstream parties would prefer. While working class support for far-right parties may also originate from discomfort at the cultural transformations of their communities, it also has its basis in the desire to avoid economic competition. By contrast, neoliberal business interests support an expansive immigration regime, although this is under the proviso that foreign workers do not have the same rights as domestic workers. Given these patterns of political support, it is more accurate to say that the desire to protect existing labour standards - rather than the disorganisation of labour markets under neoliberalism - drives restrictions in immigration policy.

Variation between countries

Another issue with the neoliberal-materialist analysis is that it ignores differences between nation-states in favour of a more general description of trends across the Western world. The universalising (and dystopian) nature of its descriptions is a common thread among Marxian analysis and mirrors other work in the sociology of punishment, such as Wacquant's *Punishing the Poor* (2009), which argued that European states have more or less slavishly followed the American example of high prison rates, meagre and punitive welfare provisions and poor-quality employment. Similarly, proponents of the 'race to the bottom' thesis within the discipline of political economy argue that the intensification of competition under globalisation means that governments are forced to deregulate the business environment and retrench the welfare state to attract economy activity (Konzelmann, Wilkinson et al., 2005). This is also a view taken by Marx, who argued that 'national differences...are daily more and more vanishing, owing to the development of the bourgeoisie, to freedom of commerce, to the world-market [and] to uniformity in the mode of production' (Marx/Engels [1848]1977:235).¹

In these accounts, structural forces more or less inevitably push countries toward a common set of political and economic institutions over time. However, these perspectives do not take account the continuing substantial cross-national differences in how much neoliberalism has been embraced and how it has been handled. To this end, the *Varieties*

¹ Although condemning the conditions of life that this process would entail, Marx saw this as a necessary stage beyond which a unified socialist world lay waiting (Streeck, 2010).

of Capitalism (Hall and Soskice, 2001) typology has distinguished between the liberal and coordinated market economies. While governments in liberal market economies have adopted neoliberal methods of managing the economy, characterised by significant freedoms for businesses and higher levels of employment precarity for workers, coordinated market economies maintain the political-economic institutions that are associated with greater protections for at least a section of its workforce.

These differences map themselves onto the criminal justice system. In particular, coordinated market economies have less punitive criminal justice systems than liberal market economies, as exemplified by radically and consistently lower prison rates. As Lacey (2008) argues, more stable labour markets, generous welfare provisions, consensual modes of policy-making, constitutional safeguards and the insulation of the judiciary from populist pressures provide the institutional framework for the relatively benign nature of criminal justice in coordinated market economies. By contrast, criminal justice systems are more punitive in 'liberal market economies with majoritarian electoral systems' (p.76), which are typified by high levels of inequality, low levels of social cohesion and an adversarial political system which encourages politicians to support sensationalist policies aimed at the median voter. In this context, punitive methods of managing the poor are almost inevitable.

Lacey's (2008:115) analysis acknowledges that the same dynamics that prevent the mass criminalisation of nationals in coordinated market economies might not extend to immigrants. Similarly, in his review of Lacey (2008), De Giorgi 'submits the hypothesis

that the limited extension of the penal arm of the State has not prevented the intensity of penal policies from escalating...against outsiders... [most notably] non-European immigrants...whose treatment undermines the image of coordinated market economies as ‘tolerant’”(2009: 401).

This thesis speaks to the tension between the universalistic predictions outlined in De Giorgi (2010) and Wacquant’s (1999) neoliberal-materialist analyses and the approach advanced in Lacey (2008), which highlights the impact of national differences in political economy on the criminal justice system. However, while the ‘varieties of punishment’ perspective has so far concentrated on divergence in criminal justice systems, the thesis analyses differences in the management of immigrant populations, focusing on immigration control practices (including the criminalisation of immigration offences, enforcement structures and deportation) and immigrants’ and their descendants’ representation in criminal justice system. It has also interrogated the extent to which these differences can be attributed to factors described in the Varieties of Capitalism framework.

Variation in immigration control

As chapter three made clear, the most obvious impact of the Varieties of Capitalism typology on immigration enforcement in the two countries is in the development of controls within the labour market. For instance, the early introduction of employer sanctions in West Germany spoke to the mutual interest of employers and trade unions in

preventing the disorganisation of the coordinated market economy through the proliferation of firms that contravened the high labour standards dictated in collective bargaining agreements. Today, the close relationships between the Finanzkontrolle Schwarzarbeit and other labour market institutions (the Chamber of Commerce, trade unions, employer association) and more generally, tight information-sharing requirements between different agencies in charge of enforcement also indicate a strong orientation towards coordination in the management of the labour market.

By contrast, the UK had resisted pressure from the EC to implement sanctions against employers since the 1970s. In an increasingly neoliberal context, any regulation was conceived of as a burden. The fact that unauthorised foreign workers could be criminally prosecuted or even deported, while their employers would reap no penalty, is a pertinent example of the influence of the powerful classes on the law. Subsequently, the UK has introduced an employer sanction regime, although it is not as extensively enforced as Germany's. The main reason for this is that control of irregular immigrant work is carried out in the UK by a small 'Civil Compliance Team', rather than a general labour/tax inspectorate, for whom irregular immigrant work is one of many tasks. In turn, this organisational arrangement reflects the fact that by 1996, when employer sanctions were first introduced, the neoliberal-oriented Conservative government had closed the Wages Inspectorate (Bell and Wright, 1996) - the only body with a remit for making checks on labour relations. The legacy is a substantially less organised control regime aimed at illegal foreign employment.

In the welfare state, the clearest example of Varieties of Capitalism effects can be found in the further education system. In Germany, irregular immigrants are blocked from dual apprenticeships by virtue of the same controls that limit access to regular tax-paying employment. In turn, the prominence of work-based apprenticeships is both reflective and constitutive of a coordinated labour market economy. In addition, irregular migrant children in Germany suffer from a later statutory school starting date - a difference that the thesis also relates to differences in the construction of women's roles across the Varieties of Capitalism.

For the other areas of immigration control, the extent to which the underlying political-economic institutional structure explains differences in immigration control depends to a large degree on the perspective taken in the analysis. On the one hand, each aspect of a particular country's immigration control regime arises out of a complex mixture of economic, political and cultural considerations, unique to each place and each time period. From this point of view, differences in immigration control in the UK and Germany cannot be explained by the extent to which the two countries have adopted neoliberalism.²

On the other hand, it is noticeable that many of the 'cultural' institutions and norms that directly shape differences in immigration enforcement in the UK and Germany are

² In turn, the argument that immigration enforcement is influenced by factors outside of the economic structure mirrors the analysis of Stuart Hall and Gabriel Ben-Tovim, (1979), who disagreed with the Marxian notion that cultural, legal, political, and additional forms of life are 'superstructures' which grow out of and serve to reproduce the economic base. Instead, they emphasised the relative autonomy of cultural factors – race, nationalism - from class relations, and the importance of studying cultural, political and legal factors separately from economic structure.

shared by other countries in the relevant, liberal or coordinated, Varieties of Capitalism type. As above, the extent to which cultural institutions can be understood as independent from the underlying economy is a common debate within neo-Marxian analysis. However, it has not been explained as a way of explaining differences between capitalist countries, not least because Marx himself focused more on the convergence of nation-states towards the free market economy than on national differences (Streeck, 2010). Instead, it has been the job of scholars from within the Varieties of Capitalism paradigm to highlight variation in the form that capitalism takes, and the way in which those differences impact on the institutions of the criminal justice system. In turn, this thesis argues that some of the differences in immigration enforcement between the UK and Germany are driven by factors common across other nation-states within the same Varieties of Capitalism type.

One example of this dynamic is evident in the different arrangement of identity checks in the two countries. Until 2012, German police were allowed to stop and check the identity of someone on the suspicion of illegal residence in certain areas based on a visual assessment of a person's ethnicity. Racial profiling has subsequently been declared unlawful and in violation of anti-discrimination provisions in Art. 3 of the Constitution and the Equal Treatment Act of 2006.

By contrast, since the Police and Criminal Evidence Act 1984, legal safeguards have prevented police in the UK carrying out 'stop and search' without 'reasonable suspicion' that that person has committed an offence. In turn, reasonable suspicion cannot be based

on race or other personal characteristics. The same rules apply to the immigration authorities. While ethnic disproportionality in police controls are a well-established fact in British society (Delsol and Shiner, 2006; Bowling and Phillips, 2007), the anti-discrimination agenda has clearly had a greater prominence in British political debate than in Germany (Solanke, 2005).

There are three major reasons for differences in the development of identity checks in the two countries. First, Germany has traditionally oriented itself towards internal controls that operate once a foreigner is already in the country (Vogel, 2000), while the UK has more often focused on policing its external borders (Sitkin 2012). The long-standing British argument is that, as an island, the UK has a comparative advantage in border control - although in the age of air travel and with the Eurotunnel in operation, geographic location is no longer as strong a factor to distinguish the UK as it once was (Wiener, 1999). In turn, controls without suspicion inside Germany are a 'flanking measure' given the abolition of external borders in Germany through the Schengen Agreement 1990.

Second, police in Germany have a wider remit to demand identity verification without formal suspicion than their counterparts in the UK. Put simply, because not everyone in the UK carries an ID card and is ready to show it, identity checks on suspected foreign nationals are more likely to be seen as discriminatory. Indeed, British politicians often compare the love of freedom of British citizens to the Prussian acceptance of state control. The tradition of liberty of which Britons are so proud, could

perhaps be tempered by the fact they have tolerated lower levels of freedom for immigrants: as above, ID cards (in the form of biometric resident permits) were made mandatory for non-European foreigners staying in the UK for over six months in 2008, although they do not have to carry them at all times.

Finally, differences in discrimination legislation and in the operation of stop-checks can be seen against the backdrop of different notions of immigration. In the UK, the early development of race discrimination legislation was tied to a particular notion of the responsibilities owed to members of the British Empire, as well as the idea that citizenship was a matter of being born on British soil (*jus soli*). As a result, ‘police raids to find illegal immigrants’³ were framed in terms of their damage to race relations. Later, in the debate on the Schengen agreement, the British government expressed discomfort with flanking measures - ‘the kind of internal control that involves a much higher degree of discretion’ - and linked this issue to ‘the Stephen Lawrence inquiry on police relations with ethnic minority communities’.⁴ By contrast, the traditional ethno-cultural idea of belonging in Germany has encouraged the development of a citizenship system where immigrants were excluded from nationality. This concept was mostly succinctly expressed in successive governments’ argument that ‘Deutschland ist kein Einwanderungsland!’ (‘Germany is not a land of immigration!’) - despite rapidly growing

³ ‘Immigration and Race Relations’ HC Deb, 06 December 1973, vol. 865 cc1546-82, accessible here: <http://hansard.millbanksystems.com/commons/1973/dec/06/immigration-and-race-relations-1> (last accessed 21/05/2014).

⁴ ‘Examination of Witnesses (Questions 80-99)’, 09/12/1998, Select Committee on European Communities, Question 93 asked by the Chairman, Lord Lester of Herne Hill, accessible here: <http://www.publications.parliament.uk/pa/ld199899/ldselect/ldcom/37/8120903.htm> (last accessed 21/05/2014).

evidence to the contrary. In this context, government bodies were not charged with the positive duty of ensuring good race relations.

At first glance, the factors that differentiate the development of identity checks in the UK and Germany seem to have nothing to do with the economy. Indeed, Marxism has been criticised as incapable of dealing with issues of racial disharmony, sovereignty and nationalism, short of subsuming them under more general social relations that are production- or class-based or treating them as a kind of super-structural phenomenon (Parkin 1979, Schuster and Solomos, 2004).

However, as discussed in Chapter three, the fact that countries of the same variety of capitalism tend to share the same concept of citizenship raises questions about the independence of the underlying economic institutional structure and notions of belonging. It is notable that all liberal market economies have citizenship based on the *jus soli* principle, while citizenship in coordinated market economies is based on the principle of *jus sanguinis*. All 'settler nations' are liberal market economies.

In addition, coordinated market economies are more likely to have compulsory identity cards than liberal market economies. Strong resistance to identity cards across liberal market economies has been tied to the fact that these nation states inherited a common law tradition from Britain, under which law generally defines what is prohibited rather than required. The fact that many liberal market economies are settler nations might also encourage the construction of freedom as a matter of freedom from state

interference. In particular, in the USA, Canada, Australia and New Zealand, an enduring cultural trope of frontier masculinity (Murrie, 1998; Carrington, McIntosh et al., 2010) - and the celebration of independence from British rule - indicates a libertarian streak within popular discourse (Melzer, 2009). The dangers of state interference are invoked readily in debates on identity cards,⁵ databases,⁶ and police stop and search practices (Equality and Human Rights Commission, 2010: 3), as well as discussions on business regulation.⁷

A similar argument might have been made about private housing controls. All coordinated market economies have compulsory residence registration, while no liberal market economies do. Yet again, the institutionalisation of different norms regarding state interference translates into differences in the immigration control regime. In Germany, the responsibility of landlords to register tenants is part of a wider system of residence registration, which applies to everyone in the country. This makes it very difficult for irregular migrants to gain access to the private housing market. By contrast, until very recently, the lack of residence registration requirements in the UK made it somewhat easier for irregular immigrants to find housing (although they may have been more vulnerable to exploitation in poor quality accommodation). Notably, the Immigration Law Practitioners' Association (ILPA) framed their opposition to the introduction of landlord sanctions by reference to the fact that the British are a 'we are a freedom-loving

⁵ 'ID cards "threaten civil liberty"', 22/09/05, BBC News, accessible here: http://news.bbc.co.uk/1/hi/uk_politics/4271106.stm (last accessed 21/05/2014).

⁶ 'Databases', Liberty, accessible here: <http://www.liberty-human-rights.org.uk/human-rights/privacy/databases> (last accessed 14/04/2014).

⁷ 'Americans more likely to say Government doing too much', (2009) Gallup poll results, accessible here: <http://www.gallup.com/poll/123101/americans-likely-say-government-doing-too-much.aspx> (last accessed 14/04/2014).

people... discomfort [towards presenting ID cards is] born of a very healthy and British revulsion towards bossy, interfering, prying, wasteful and bullying Government'.⁶

Even when differences are not shared between all or most countries of the Varieties of Capitalism, labour market institutional structures - as described in the typology - still might have an indirect effect on wider immigration enforcement techniques. Internal border control requires the involvement of a wide range of both state and non-state agencies (Jones and Newburn, 2006). However, the possibilities for implementing immigration control across the pluralised 'immigration policing family' are constrained by pre-existing institutional structures. In turn, it is these institutional structures that bear the imprint of the wider labour market structure.

For instance, Germany and the UK have developed very different controls for extending immigration control into the medical field, which are based on differences in the underlying structure of healthcare. In Germany, irregular immigrants are vulnerable to discovery where they are uninsured and have to get their medical costs paid by social welfare office. While doctors are exempt from the duty to denounce irregular residence to the immigration authorities, the staff of the social welfare offices are not. In turn, Germany's health insurance model co-evolved alongside the coordinated market economy, as part of a series of settlements made between the trade union and the government (Manow, 1997). By contrast, the UK's National Health Service is (mostly) funded out of general taxation. Denunciation is a far more haphazard due to the fact that it is not predicated on a regular reimbursement of fees.

This is not to say that underlying labour market structure is the sole - or most important - factor in immigration enforcement. Decisions on immigration control are framed in the particular history and institutional framework of the country in question, which can include a wide range of factors far beyond the economic. Thus, one anti-discrimination activist interviewed for the study argued that the late development of public debate on the discriminatory practices of the police in Germany also indicates the fact that political debate on racism was, at least until recently, focused on anti-Semitic hate crime. The taboo on talking about police racism in Germany has to be seen in the context of the strong desire of the country to distance themselves from the unique crimes of the Third Reich. This is not a burden that the UK shares. Neither is it a factor that can be attributed to the Varieties of Capitalism. Instead, it represents the long shadow of a historically unique event.

Another example is the criminalisation in Germany of asylum seekers when they repeatedly contravene residence restrictions. A policy unique within the European context, residence restrictions were designed to ensure that no local municipality was disproportionately responsible for the burden of supporting asylum seekers. This consideration speaks to the federalised nature of social service funding in Germany (Adema 2005), rather than anything to do with the Varieties of Capitalism.

Neither does this thesis argue that there is a necessary and mutually enabling fit between immigration control and the institutions that comprise the Varieties of

Capitalism. An overly functionalist perspective obfuscates the complex negotiations around state policy, which involve each actor seeking to implement his or her vision of the correct distribution of power throughout society. In particular, while total convergence in immigration control regime is unlikely in the two countries under study, a desire to appease populist anti-immigration elements has led to the introduction of measures in the UK - landlord sanctions, eligibility checks across the National Health Service, sanctions for banks that allow illegal immigrants to access financial services, limits on access to driving licenses and increased surveillance of marriages to non-European nationals - that contravene long-held principles of freedom and tolerance. The economic and cultural factors that have meant that the UK has historically operated a far laxer control regime are losing their salience.

Nonetheless, it is apparent that there has been a significant coherence between immigration controls and underlying Variety of Capitalism, although the precise mechanisms by which institutional differences in the organization of the economy impinges on areas of state policy that requires further research. As Pak (1994:6) comments, 'the really interesting problem of immigration politics is the interaction between the economic and the cultural'. A focus on the former, to the detriment of the latter, limits the power of the neoliberal-materialist analysis.

Varieties of Capitalism and the criminalisation of immigrants

Immigration enforcement is just one aspect of the neoliberal-materialist analysis. Instead, a central theme is immigrants' hyper-criminalisation, as manifest in their overrepresentation in European prison systems. While the 'criminalisation of immigration' - the proliferation and increased enforcement of criminal immigration offences and document offences (Cachon, 2009) - contributes to this trend, the majority of foreign national prisoners are not incarcerated on the basis of their involvement in illegal immigration in Germany or the UK. Instead, foreign nationals are imprisoned for a wide range of criminal activity, most notably, theft, drug offences and violence against the person. However, this varies according to the ethnic/nationality group involved and more fundamentally, the length of time someone has been in the country. Newly arriving immigrants are more likely to be criminalised on the basis of involvement in illegal immigration than long-standing immigrant communities, whose criminalisation will mostly arise out of their involvement in street crime.

It is difficult to compare data on foreigners in prisons in the UK and Germany because of differences in categories used for measurement. The data discussed in chapter two shows that foreign nationals are more overrepresented in German prisons than their counterparts in the UK (by a factor of 2.3 versus 1.8). However, the category of 'foreign national' is not directly comparable in the countries because of differences in their citizenship practices (although these are far less salient than once was). Most people born in the UK have the right to citizenship. In addition, there are no restrictions on dual citizenship. Thus, basically all second-generation immigrants have citizenship. By contrast, while it has become significantly easier for second-generation immigrants to gain German citizenship since the early 1990s (Anil, 2005), there remain some people

who are born on German territory who do not have citizenship, either because their parents have not achieved the prerequisite settlement rights or because of rules limiting dual citizenship for the children of non-European immigrants. In turn, given the wealth of data suggesting that second-generation foreigners are more likely to be involved in criminal activity than their parents (Killias, 1989; Albrecht, 1997), the fact that second-generation are more likely to be subsumed into the ‘foreign national’ category introduces a source of bias into criminal justice statistics in Germany. It is possible that some or all of the additional overrepresentation of foreign nationals in German prisons relative to British prisons is due to the fact that the statistical category of ‘foreign national’ in the former contains more of the type of person that is likely to commit crime.

There are also no comparable statistics on the criminalisation of naturalised immigrants and their descendants in the UK and Germany. Indeed, Germany does not systematically record data on ethnicity or migrant background and the criminal justice system.⁸ However, all available studies have found an overrepresentation of immigrant minority youth in German prisons (Mansel, 1988; Diehl and Blohm, 2003; Pfeiffer, Kleimann et al., 2005). The fact that second-generation immigrants in Germany are less likely than their counterparts in other countries (including the UK) to have improved their economic position relative to their parents (Algan, Dustmann et al., 2010) does not bode well in terms of their ability to avoid becoming a marginalised, criminalised class within Germany. Chapter two discussed some of reasons for Germany’s failure to integrate the

⁸ Britain breaks down data into different categories: Black, Asian, White, Mixed, Other and Unknown. However, these are ‘self-identification’ categories and therefore, give little information about migrant background. The broad nature of the grouping is also problematic because it subsumes national and ethnic groups who might have very different criminalisation patterns.

second-generation. Most notably, Germany's education system has been designated the worst of all European countries for incorporating immigrant children (OECD, 2006). More subtly - but no less perniciously - second-generation immigrants have also suffered from the traditionally exclusive nature of German citizenship. It is hard to belong where you are not wanted.

If the statistics on the criminal justice system are taken at face value, what factors might explain the more intense overrepresentation of foreign nationals in German prisons than in the UK? It is tempting to look at structural factors within Germany's criminal justice system that might explain this discrepancy - including the highly differential use of criminal immigration offences. In particular, more than ten times as many foreigners are charged for immigration offences in Germany than in the UK. This reflects differences in the institutional framework of enforcement. In Germany, the fact that police are primarily responsible for immigration enforcement ensures that migration offences are dealt with through the criminal justice system. Cases are automatically passed to the public prosecutors, who can then choose from a wide range of options, including removal. By contrast, in the UK, the immigration law enforcement agency is an administrative body separate from the criminal justice system. Handing cases over to the UK Crown Prosecution Service is one step away from normal enforcement activities - and something that take enforcement agents out of the environment in which enforcement occurs. Further, the immigration authorities are not bound by the duty to pass on the offender to the public prosecutor. In this context, criminal prosecution is generally only used when administrative measures of enforcement - namely, detention and removal - are unavailable (Aliverti, 2012).

However, the criminalisation of immigration offenders in Germany does not have a strong impact on foreign national prisoner rates. In particular, because of the minor nature of most immigration crimes, the overwhelming majority of criminal immigration offenders in Germany are not imprisoned but receive less serious sanctions (normally, criminal fines) (Strafverfolgungsstatistiken 2012). Instead, criminalisation normally occurs on the basis of involvement in the ‘crimes of survival’ (De Giorgi 2010:159) that typify the offending patterns of marginalised groups in society.

Another aspect of the criminal justice system that might possibly lead to the more intense overrepresentation of foreign nationals in German prisons is the greater latitude of police in the country to conduct identity checks. No statistics are available on stop and search by ethnicity or nationality. However, what has been established is that extreme overrepresentation of foreigners in police suspect statistics is, to some extent, filtered out by prosecutors. In particular, prosecutors are significantly more likely to discontinue prosecution in cases involving foreign suspects (Albrecht, 1997). Thus, police suspicion does not necessarily translate into high rates of prosecution for foreigners. Other factors, including the insulation of the judiciary from political pressures and the wide spread use of diversionary tactics for juveniles (Jehle, 2009), might generally work in the favour of immigrant communities.

Instead, foreign nationals’ overrepresentation in German prisons can be seen as symptom of their generally socially and economically marginalised position in society.

As Albrecht (1987) comments, foreigners' overrepresentation in German prisons largely disappears when controlling for unemployment. In Germany, foreign nationals from outside the EU are particularly susceptible to unemployment, although this depends to some degree on the nationality in question. When they do find employment, foreign men earn around 72 per cent of their German counterparts (Lehmer and Ludsteck, 2013). There is, therefore, a definite concentration of foreign nationals in the lower echelons of the labour market. Many factors might explain their inferior labour market position, including the late introduction of workplace discrimination legislation, lack of recognised qualifications and language and cultural barriers. However, as discussed in chapter 4, immigrants are also institutionally constructed as precarious workers through immigration law. It is to this issue, that the chapter now turns.

Varieties of Capitalism, immigration status and 'spaces of precarity'

This thesis has explored the extent to which foreign nationals' vulnerability to workplace exploitation might arise out of the interaction of immigration status and labour/welfare law. They might be excluded from the employment rights that represent a countervailing force 'counteracting the inequality of bargaining power which is inherent in the employment relationship' (Edwards, 2009: 129). Foreigners' inferior access to social or welfare rights - unemployment assistance, housing benefits, free healthcare and so forth - also leaves them vulnerable to exploitation, given that they are then wholly dependent on their employer for the means to avoid destitution. They are likewise vulnerable to

deportation, a problem when the particular person's right to stay in the country is dependent on their employer.

The neoliberal-materialist analysis highlights the fact that exclusionary immigration policy translates into workplace exploitation. For instance, De Giorgi argues that 'narrowing the channels of legal access to a society of destination' (2007:158) is associated with rising levels of illegal immigration. In turn, illegal immigrants are in a more vulnerable position vis-à-vis their employers.

However, very little information is given about the ways in which legal immigrants are made vulnerable to exploitation - and how this process might vary in different contexts. To this end, the thesis explored the way in which 'spaces of precarity' are generated in the UK and Germany and the relevance of the Varieties of Capitalism framework to these differences.

The complexity of the immigration admissions systems and the various rules governing employment and social rights means it is difficult to delineate one country as more likely to construct immigrants as precarious workers than another. However, the thesis has identified certain disadvantages particular to the German context that are the result of institutional differences as described in the Varieties of Capitalism literature. For instance, transitional restrictions on newly acceding East European states - which meant the citizens of these states are largely limited to self-employment - had more exclusionary effect in Germany than in the UK because qualification barriers blocked access to certain

forms of self-employment in Germany in a way that does not occur in the same way in the UK context. In turn, these qualification barriers are embedded in a wider system of high-skilled production - a hallmark of the coordinated market economy type (Estevez-Abe, Iversen et al., 2001).

Another example was found in the regulation of posted workers. To avoid social dumping, both countries have provisions dictating that posted workers must enjoy minimum wage and working conditions. However, collective bargaining agreements on minimum wages and working conditions must be universally applicable before they apply to posted workers. This is not a problem in the UK because the minimum wage is defined in statute, rather than by collective bargaining - a common feature in liberal market economies (Bosch, 2012). However, in Germany, while certain industries have negotiated universal minimum wages, others with a weaker profile of collective bargaining - such as the meat processing industry and most service industries - have not. Thus, posted workers are more vulnerable in Germany.

As this example shows, the exact processes that mean 'core workers' (Jessop, 2002: 12) have extensive employment rights in the coordinated market economy are those that lead to the exclusion of foreign posted workers. By contrast, although the statutory rights circumscribed by the UK - a liberal market economy - are minimal compared to those gained by 'core workers' in Germany, they cover all workers.

The inequalities that German immigrants suffer in the workplace are also manifest in their inferior access to social rights. Notably, relatively low prison rates and a benign criminal justice policy in Germany have been tied to the ‘fuller and more supportive system of social welfare’ (Tonry, 2004: 1205), which is seen to both reflect and replicate an ideology of equality and social cohesion.⁹ However, this analysis fails to take the exclusionary nature of the German welfare state into account. The German social state is not universally generous. On the one hand, there are generous, insurance-based policies, which were introduced to tie core workers’ loyalties to the emerging Bismarkian state. On the other hand, there are social assistance benefits for the poor, which aim at avoiding destitution (Leibfried and Tennstedt, 1985). The bifurcated nature of the German, coordinated welfare state - to which access is almost exclusively mediated by prior occupational status - has only become more intense in recent years. In particular, and despite the economic imperative for cutting down on welfare costs, the political and institutional strength of Germany’s trade unions and employer organisations (Zohlnhöfer, 2001) means core workers’ social rights have only improved. By contrast, benefits rights have been drastically curtailed for groups more peripheral to the labour market, as manifest in the retrenchment of the long-term ALGII unemployment assistance under the Hartz IV reforms (Clasen, 2007).

The tight relationship between labour market position and welfare rights in Germany has particular consequences for foreign nationals’ social rights. With a less secure

⁹ Similarly, Lappi-Seppälä (2008) argues that low prison rates in Nordic states are related to its universalistic welfare state. By contrast, Barker (2013) highlights the exclusionary nature of the Swedish welfare state, where inclusion is based on blood ties. While the Varieties of Capitalism typology includes corporatist and universalistic welfare states in the same ‘coordinated market economy’ category, further work is needed to contrast the ways in which immigrants may be differently ex/included in these different welfare structures.

attachment to the labour market, foreigners are less likely to have built up entitlements to more generous insurance benefits. Instead, they concentrate in second tier assistance benefits (Riphahn, 1998; Riphahn, Sander et al., 2013). Thus, the exclusions of the labour market replicate themselves in inferior welfare state access. However, welfare state exclusion has also targeted foreigners more specifically. First, since 1992, a separate welfare benefits system has existed for asylum seekers. Second, foreign nationals can be deported for receipt of unemployment benefits.

The divisions described above - in the education system, in employment, the welfare state - provide evidence for the 'dualisation' of coordinated market economies (Palier and Thelen, 2010; Eichhorst and Marx, 2011; Hassel, 2012). In this perspective, coordinated market economies are faced with significant challenges, including globalisation and the rise of the service economy, to which politicians have responded with liberalising policies. However, strong and institutionalised political support for 'core' workers means that their rights have remained relatively unaffected. Instead, reforms have introduced new inequalities at the margin of the labour market, which 'compensate for the rigidities that prevail' in the core (Goldthorpe, 1984: 329). Thus, dualisation implies a strongly protected group of 'core' workers, alongside 'a growing number of workers outside the core' (Palier and Thelen, 2008: 4) who labour under conditions that look more like their counterparts in neoliberal market economies. The presence of coordinated institutions is no longer sufficient to ensure decent conditions for all workers. In turn, the rapid growth of income inequality in Germany (Abraham and Houseman, 1995; Gernandt and Pfeiffer, 2007) can be seen in the context of the dualised economy.

The idea that immigrants might be more likely to be marginal workers in dualised coordinated markets is nothing new. However, previous analyses within the dualisation corpus have focused heavily on labour market and welfare reforms as the genesis of immigrants' exclusion (Kreckel, 1980; Palier and Thelen, 2010). Only recently have 'restrictions' in admissions policies also been recognised as factor in immigrants' lower labour market position (Emmenegger, Palier et al., 2012: 125). This thesis argues, in addition, that theories of labour market dualisation would benefit from including an analysis of immigration status and its interaction with labour/welfare law.

At the same time, the poor labour market prospects of naturalised foreigners and their descendants and reports of high proportions of ethnic minority youth in German prisons (Düinkel, undated) indicate that naturalisation does not ward against marginalisation and criminalisation. Although immigration status may expose immigrants to varying degrees of vulnerability, citizenship in dualised Germany is no longer a demarcation of belonging and inclusion. It is entirely possible to be a citizen and to be economically excluded. In addition, exclusion can occur on the basis of ethnic or racial differences. Cultural exclusion also affects both foreigners and naturalised ethnic minorities in Germany.

However, the dualisation of German society does not mean that foreigners and their descendants in Germany are worse off than their counterparts in the UK, per se. By

contrast, the fact that prison rates are around twice as high in the UK as in Germany¹⁰ reveals that foreigners in the UK are still more likely to go to prison than their counterparts in Germany. Foreigners make a smaller group of outsiders in British society, although they are nonetheless, more likely to be in an outside position than British natives. Thus, most male, non-white immigrants earn less than their British counterparts and are more likely to be unemployed (Algan, Dustmann et al., 2010), despite having higher qualifications than natives. Despite a long tradition of anti-discrimination legislation, recent studies show significant racial discrimination in recruitment practices in Britain (Wood, 2009). Disadvantage carries onto the second-generation, with most ethnic minorities suffering lower employment rates and lower hourly wages than the white/white-British population (ibid). While ‘the UK stands out as having...much improved outcomes for the second-generation’ (Algan, Dustmann et al., 2010: 25-26) when compared to Germany and France, non-Western foreigners and their descendants are still subject to economic and social exclusion, including a separate and inferior system of social welfare for asylum seekers.

More generally, much the same as in Germany, naturalisation no longer guarantees access to the ‘Left Hand’ of the British state - ‘symbolised by education, public health care, social security, social assistance and social housing’ (Wacquant, 2001: 402). The declining value of British citizenship is manifest in the retrenchment of legal aid and welfare benefit cuts, as well as troubling developments in the criminal justice system,

¹⁰ Own calculations, Eurostat: Prison population (accessible here: http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=crim_pris&lang=en, last accessed 16/04/2014)) divided by Eurostat: Population on 1 January (accessible here: <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&language=en&pcode=tps00001&plugin=1>, last accessed 16/04/2014).

including rising prison rates and the proliferation of hybrid civil-criminal sanctions such as the ASBO, which are attractive to the authorities precisely because they sidestep the requirements of the criminal process (Ashworth and Zedner 2010). In both countries, the ‘criminology of the other’ (Garland, 1996: 461) increasingly seeps across the citizenship boundary.

The salience of the Varieties of Capitalism

The final issue confronted in the thesis regarded the salience of the Varieties of Capitalism typology. While the rest of the thesis explored the relevance of underlying labour market differences - on the choice of internal migration control instrument and the relationship between immigration status and precarious employment - the final chapter reverses the previous line of enquiry to ask what the impact of immigration is on host country labour markets. In particular, it looks at whether immigration has contributed to the liberalisation of industrial relations in the German construction industry - an industry that was, until the late 1980s, a paradigm of coordinated capitalism and one in which workers enjoyed a wide range of economic and social protections. It found that while reports of a total transformation within the industry are overstated (and underscore significant regional variation within Germany), there are increasing numbers of firms which operate according to a neoliberal logic. Ever increasing numbers of workers are paid low wages and are exempt from social benefits and employment protections. As manifest in the introduction of a minimum wage from next year, Germany is increasingly

forced into using the tools of a liberal market economy to control its labour market. The posted worker issue is an integral part of this regime-changing transformation.

The idea that immigration might pose a threat to working class interests was a significant if minor theme in Marx who argued that ‘the English bourgeoisie has not only exploited Irish poverty to keep down the working class in England by forced immigration of poor Irishmen, but it has also divided the proletariat into two hostile camps...it knows that this scission is the true secret of maintaining its power’ (Marx and Engels, 1972: 162). Subsequently, authors both within and outside of the Marxian perspective have discussed the role that immigration plays in moderating capitalist labour markets. More recently, Lillie (2007) and others (Streeck 1998; 2009) have argued employers’ incentive structures are changed when they gain a reservoir of workers whose expectations are oriented to conditions in their country of origin, rather than the host country where the work is performed. The ability to use cheap workers facilitates employers opting out of more expensive ways of attracting and retaining the labour they need, from investment in vocational education to higher wages. In this way, immigration contributes to the disorganisation of coordinated capitalism.

Using the case study of the construction industry, the thesis argued that other key factors have posed equal or greater challenges to the salience of coordinated industrial relations in the German construction industry, including the volatility of business cycle; the Europeanisation of labour law; and most of all, the reunification of East and West Germany. Change in industrial relations is the result of the complex, multi-causal

interaction between a number of different variables, and immigration's effects at any one point in history are mediated by other influences. Further, in agreement with the neoliberal-materialist account - and in contrast to traditional Marxism, which discusses immigration with no reference to the role of the state in creating precarious migrant workers - the evidence seems to indicate that it is not immigration, per se, that is associated with the disorganisation of coordinated capitalism. Instead, the effect of immigration on host country institutions is partially dependent on the extent to which immigrants - by virtue of their immigration status and the exclusions contained within - are constituted as precarious low wage workers and whether immigration occurs during a period of economic growth or decline.

Further, conceptualising immigration as an automatic threat to coordinated industrial relations presumes that immigrants are somehow unable to be assimilated into existing representation structures. This ignores the choices made by trade unions and work councils to include or exclude foreign workers, and obfuscates the role of the state in siphoning immigrants into precarious work. Assuring that both regular and irregular immigrant workers have the same rights in law as native workers - and ensuring that these rights are enforced - would go a long way towards neutralising the 'threat' of immigration to coordinated capitalism.

The extent to which this is realisable is, however, unclear. A recent study has found that insisting on greater equality of rights for migrant workers is associated with restrictive admission policies, especially for lower-skilled workers (Ruhs, 2011). As

above, employers only lobby for immigration on the basis that immigrants have a lack of power on the bargaining table, relative to domestic workers - an equation predicted in Marxian analysis (Castles and Kosack, 1972; Freeman, 1979). Further, working class resistance to open borders is at least partially motivated by the economic competition posed by cheap immigration. Famously, Milton Friedman argued that you can have open borders, or you can have the welfare state - but you cannot have both. To this, it might be added that it is difficult to have coordinated capitalism, where there is a reserve army of illegalised or otherwise precarious workers.

Whether these are foreign or native workers is, however, perhaps of secondary importance. As discussed above, domestic workers are also increasingly subject to 'workfare' and jobs paying considerably below a living wage (Jessop, 1993; Peck and Theodore, 2001; Kalleberg, 2009; Wacquant, 2009). Concepts such as 'non-standard' and 'marginal' employment shroud the ways in which employment is changing for many people. In turn, as evidenced by some limited, liberalising trends in immigration policy - and in contrast to the neoliberal-materialist perspective - it is possible that more liberal immigration and naturalisation policies might accompany neoliberalism. However, this does not necessarily represent a step towards inclusion, but rather the growth of 'spaces of precarity' within legal immigration status and citizenship.

Thus, the thesis warns against focusing on immigration controls in isolation. Instead of understanding immigrant workers as subject to a qualitatively different set of concerns, workers' vulnerability can be conceptualized along a spectrum of disadvantages and

risks. Criminal immigration offences and immigration controls are but one part of a criminalising and marginalizing system that might affect any particular individuals' rights, including the surveillance and control of defined communities, the retrenchment of the welfare state and an increasingly precarious economic situation. As described, the interdependence of foreign and domestic workers - and the ever-changing boundary of citizenship - underscores the insufficiency of considering immigration controls in isolation from wider trends in the economy, politics and society. In focusing on foreign nationals' subordinated inclusion, the thesis highlights one aspect of wider processes of exclusion, which may vary in form and function, but are constant over time and space.

Appendix

Part A. Research Design and Methodology

The choice of methodology should be guided by the purpose and rationale of the research (Bryman, 2001; Punch, 2005). This thesis aimed at refining the neoliberal-materialist analysis of immigration policy (2010), which holds that ‘the hyper-criminalization of migrations contributes to the reproduction of a vulnerable labor force whose insecurity makes it suitable for the segmented labor markets of post-Fordist economies’ (De Giorgi 2010: 148). In line with Barker (2012: 117), who criticises the implicit - and overriding - emphasis on economics in much recent literature on the criminalisation of immigration, I argued in the thesis that the neoliberal-materialist perspective would benefit from an understanding of the role of social, political and cultural factors in policymaking around immigration. I also critiqued the neoliberal-materialist perspective for ignoring the possibility that countries might vary in the regulation of immigrant communities.

To this end, the thesis compared the UK with Germany to examine differences in how underlying labour markets (see Hall and Soskice, 2001) structure variation in the overrepresentation of immigrants in prisons, the structure of internal immigration control and the process by which immigrants are constructed as precarious workers in the two countries under study. The final chapter of the thesis examined the effect of immigration on the institutions that differentiate coordinated market capitalism from liberal market capitalism.

The appendix contains an overview of the research design and methodology used in this thesis. The first section within the appendix contains an explanation of why I chose to use a small-n comparative case study design to explore the issues outlined above. I also discuss the limitations of this form of research design. The second section outlines the case-study selection process. As discussed in the introduction, the choice of the two cases was guided by the notion that each would represent one of the ‘types’ of economy outlined in the Varieties of Capitalism literature (Hall and Soskice, 2001). This section discusses the thought process behind selecting the UK and Germany as my two comparators and explains why other possible permutations were not considered appropriate.

The third section then explores why chapter six focused on the effect of immigration on industrial relations within a particular sector: construction. First, I discuss the reasons why a sectorial approach was preferable to one that highlighted the impact of immigration on the national labour market. Second, I explain why the German construction industry was chosen, above all other industries, as the most suitable for exploring immigration and its effects.

The fourth section discusses the methodological choices made during the thesis. In particular, the thesis utilises a triangulated methodology, including an extensive bilingual literature review on immigration, immigration policy and precarious labour; a doctrinal analysis of law; the collection and analysis of statistics; and semi-structured interviews.

The following section includes a discussion of the process by which each of the methods were applied, including, in the case of interviews, the sampling method. It outlines some of the challenges faced in conducting comparative research, including access, comparability of data and language issues, and how these issues were confronted in the course of the thesis. It also discusses some of the ethical issues associated with research into irregular immigration, and how these were confronted.

Research Design: Comparative Case Study

I chose a small n- comparative case-study design as the most appropriate for exploring the issues outlined above. Case-study research is concerned with the complexity and particular nature of the case in question (Howard, Newman et al., 2000: 171). Concentrating on a small number of cases facilitated the collection of the rich data needed to understand the historical development of immigration-control systems over time. As Hantrais (1999: 99) comments, ‘the two-nation study...enable(s) the researcher to investigate a much larger number of contextual or micro variables than is feasible in large-scale multinational studies’. This level of detail would not be possible with a larger number of cases.

Furthermore, choosing two nation states allowed me to move to the regional level where appropriate. This aspect was particularly useful in chapter five, as the reunification of East and West Germany and the subsequent regional disparities in economic development and cultural preferences for different forms of employment organisation

proved to be key to understanding immigration's effect on labour-market institutions in the German construction industry.

I could have explored these processes - the development of migration controls, the criminalisation of immigrant communities, the role of immigration status in generating foreign nationals' workplace precarity and the disorganisation of a labour market through immigration - in a single case. However, one of the major aims of the thesis was to explore the ways in which the developments outlined in the neoliberal-materialist analysis occur differently in different contexts.¹ Comparative research allows a consideration of whether theoretical propositions and empirical findings that are based on data from one country at one time are applicable to other contexts (Liu, 2007: 10). When established patterns are found to be invalid within the context of other countries, challenges and opportunities emerge for the development of a more precise knowledge about the nature of a particular phenomenon.

In turn, not only does the thesis involve 'the identification of similarities and differences over space and time' (Nelken, 2010: 31), it also explores the relevance of the Varieties of Capitalism framework to those differences. As Hantrais (1996) comments

¹ In this effort, I was inspired by the work of Nicola Lacey (2008), who argued that punitive penal populism is not the inevitable fate of advanced industrial democracies. Instead, she argues that key institutional differences help to explain striking differences in the capacity for penal tolerance in otherwise relatively similar societies.

‘...the aim may be to seek explanations for similarities and difference or to gain a greater awareness and a deeper understanding of social reality in different national contexts’.²

The major drawback of the research design is that the small number of cases - and (as will be further explored below) the non-random nature of sampling - means that the results of the thesis cannot be generalised to other cases. The thesis cannot argue that different countries will exhibit the same patterns as have been described here with regards to the criminalisation of immigrants, the development of immigration-control systems, the construction of immigrants as precarious workers, nor immigration’s effects on coordinated industrial relations. Instead, the foremost aim of this present study has been to qualify the generalising tendency found in contemporary materialist accounts of immigration policy. At the same time, the findings of the thesis do suggest hypotheses about the institutional relationship between a particular Variety of Capitalism and the dimensions outlined in De Giorgi’s materialist analysis. These hopefully will provide the basis for future research in this field.

Choice of Case Studies

² ‘Comparative Research Methods’, accessible at: <http://sru.soc.surrey.ac.uk/SRU13.html> (last accessed 13.01.2014) At the same time, this is not to deny the way in which state sovereignty in matters of criminal justice, immigration control or employment law are increasingly converging under the weight international factors. Although this study does not focus on transnational policy making, the effects of Europeanisation are discussed throughout the contribution as a significant variable explaining the development of policy regimes on issues such as immigration, trafficking, labour exploitation and policing.

The case-study selection process should be guided by the research question (Seawright and Gerring, 2008: 294). Numerous comparative instruments are available that describe the many dimensions along which advanced industrial nation states vary (Esping-Andersen, 1990; Lewis, 1992; see, for instance: Castles, 1993; Castles and Miller, 1998). I could have looked at the ways in which the processes described in the neoliberal-materialist analysis occur differently in countries with different forms of welfare states or different concepts of belonging. However, given that the neoliberal-materialist analysis focused on the relationship between neoliberalism and the punitive regulation of immigrants (2010), my primary motivation during the case selection was to pick two countries that varied in the extent to which neoliberalism had been adopted.

To this end, the Varieties of Capitalism (VoC) typology (Hall and Soskice, 2001) is the most cited example of a model addressing labour-market differences (Rueda, 2000; A. P Brinegar, Jolly et al., 2004; Estévez-Abe, 2005; Borang, 2007; Paul, 2011). The crucial differentiation at the heart of the VoC framework is between so-called liberal and coordinated market economies. As might be obvious from the names of the two types, ‘neoliberalism has taken deepest roots in...liberal market economies’ (Gibbs and O'Brien, 2008: 30), characterised by deregulated labour markets, lower levels of employment and social protection, decentralised industrial bargaining, weak trade unions, a shareholder value culture and liberalised inter-firm relations. Coordinated market economies, by contrast, are associated with greater market regulation, higher levels of job security and social protection, co-operative industrial bargaining, strong trade unions and a greater voice for employees in corporate governance matters (Rueda, 2000; Hall and Soskice, 2001).

By selecting two countries that fall into different Varieties of Capitalism categories, I have been able to examine the role of underlying labour-market differences on the punitive regulation of immigration and on the relationship between immigration status and vulnerability to exploitation. At the same time, in pursuing such an approach, I had to be careful that I did not reduce all differences between the two countries to underlying variation in the labour-market structure. Much as the materialist analysis can be criticised from the perspective that it overstates the role of economic factors in the development of punitive immigration policy and the hyper-criminalisation of foreign nationals in Europe, I too had to consider that non-material factors might explain differences between the UK and Germany. Thus, while the primary aim of the thesis was to refine De Giorgi's materialist analysis through an examination of variation in the regulation of immigrants, a secondary aim was to explore the applicability of the Varieties of Capitalism framework to differences discovered in the two countries under study. Even as the thesis mobilised the Varieties of Capitalism, it also tested the typology's applicability to the topic at hand.

Taking this issue into account, case selection was also guided by the desire to standardise other variables that might have had an effect on immigration policy. All of the countries discussed in the Varieties of Capitalism literature are broadly similar in terms of the high level of socio-economic development. This was important to standardise, given that lower-income nation states are the major net senders of immigrants to the West. As such, they have very different preferences when it comes to Western immigration policies, favouring greater liberalisation of labour immigration policies (Ruhs, 2013). Given the prominence of intra-European mobility within the region

and the importance of EU regulation in the management of immigration in Europe, I also wanted to choose two countries that belonged to the EU. This excluded most of the liberal market economies (the USA, Canada, Australia and New Zealand) and four of the coordinated market economies (Norway, Iceland, Switzerland and Japan). Of the remaining options, the UK and Germany are considered paradigmatic examples of liberal and coordinated market economies in Europe. Furthermore, practical considerations came into play. In particular, my residence in the UK and my knowledge of the German language and culture helped contribute to my final decision. Choosing two countries with which I am familiar was one way of avoiding the possibility of a common challenge in comparative research: misinterpreting the meaning of differences (Hantrais, 1999: 101). This issue is explored in further detail below.

Despite these efforts, there remain many ways in which Germany and the UK differ that could (and did) have an effect on immigration policies. For instance, citizenship in Germany has traditionally been based on the idea of a common ethnic background (Brubaker, 1992). In turn, the thesis found that the exclusionary, descent-based notion of German citizenship provided the ideological framework for attempts to constitute Polish workers and later ‘Gastarbeiters’ (guest workers) as temporary workers. Conversely, the fact that most immigrants to the UK throughout the mid-twentieth century were colonial subjects encouraged the early development of anti-discrimination legislation. Another issue - already highlighted in the comparative work of Vogel (2009) - was the impact of different conceptions of civil rights and obligations on variation in immigration control practices in the UK and Germany. Thus, the fact that German citizens are obligated to

carry identity cards and to register their residence provides the basis for a more intensive internal immigration regime.

At the same time, the thesis found quite significant Varieties of Capitalism effects, both in terms of immigration control practices and in the construction of immigrants as precarious workers. Further, it argued that many of the driving factors for differences in immigration control practices were shared among nation states of the same Variety of Capitalism type. These findings provoke further areas of research into the inter-relationships between the economy and the social and cultural norms of a particular society.

Finally, a fundamental issue with the use of typologies in the case-study selection process is that they describe differences between countries at a particular point in time and are therefore liable to become outdated. With regards to the Varieties of Capitalism typology, a great deal of literature has discussed the extent to which the differences as described in the typology are still salient (Streeck, 1998; Hassel, 1999; Palier and Thelen, 2008; Streeck, 2010; Hassel, 2012). In particular, as scholars within the race-to-the-bottom paradigm emphasise, the intensification of competitive pressures under neoliberal-globalisation means that distinctive features of the coordinated market economy will be eroded (see, for example Drezner, 2001). The thesis was guided by the desire to understand the role of immigration in such developments. The last chapter therefore reversed the previous line of enquiry with a final question ascertaining immigration's impact on the Varieties of Capitalism framework itself. In particular, it

examined the impact of immigration on industrial relations within the German construction industry - a choice discussed below.

Choice of Industry: Construction

The Varieties of Capitalism typology focuses on national-level differences. By contrast, the final chapter focused on the effect of immigration on coordinated industrial relations within a particular sector: the German construction sector.³ This is partly for reasons of scope - in one chapter, it would be impossible to adequately understand the impact of immigration on a whole economy.

More specifically, I chose the German construction sector because I believed it to be the likeliest to be disorganised through immigration. Sectors may exhibit institutions that differ from and may even 'defy' the overall national architecture (Crouch, Schröder et al., 2009: 655). There are coordinated sectors in broadly liberal national markets and liberalised sectors in coordinated market economies (Caviedes, 2004). I wanted to ensure that I was examining a sector that had once been a paradigmatic example of coordinated industrial relations. At the same time, I also wanted to look at a sector that was vulnerable to destabilisation through immigration.

³ Einat Albin, *Sectorial Disadvantage: The Case of Workers in the British Hospitality Sector*, Introduction & Ch.1 (DPhil dissertation, Oxford 2010) (on file with author).

Construction was a good choice in these regards. Demand for construction services is highly elastic, vulnerable to shifts in the business cycle and by season (Bosch, 1999). In addition, most work within the industry is project-based (Fellini, Ferro et al., 2007). Both of these factors combine to ensure that regular work is difficult to find. On the other hand, employers need to attract and retain a highly skilled workforce. This is difficult to do when working conditions are poor.

In response, employers are faced with two choices. First, they can offer a series of economic and social rights to compensate for the uncertain nature of employment - a process that usually requires a great deal of coordination between the different actors within the industry and results in high costs for employers. This is the approach that Germany favoured throughout the mid-20th century (Hunger, 2001; Bosch and Zühlke-Robinet, 2003). Second, they can try to find workers willing to put up with poor working conditions. This is where immigration comes in. Unlike manufacturing, where production can be outsourced to less-developed economies (Lillie 2007), the immobility of production in construction implies that the only way to cut wages is to source low-wage workers (Bommes and Geddes, 2000: 189; Hunger and Santel, 2003: 77). In turn, it is the fact that immigration might allow employers to opt out of agreements to make working conditions better, that means that immigration might have a disorganising effect on coordinated industrial relations. These factors made construction a 'most likely' case (Gerring, 2007: 232) for disorganisation through immigration.

The final factor that influenced my decision to examine the German construction industry was that both the volume and type of migration changed drastically from the late 1980s onwards (Jansen, 2009: 111). The number of immigrants increased because the breakdown of the Iron Curtain coincided with a building boom across the country (Menz, 2001). Demand for construction services occurred at the same time as an increasing number of immigrant workers became available. At the same time, the establishment of a single European market meant that an increasing number of foreign nationals came as posted workers - a new immigration category, initially exempt from the minimum wage and working-condition requirements that had applied to previous generations of labour immigrants (Cremers, 2006). The industry therefore provided a natural experiment for understanding the impact of different forms of immigration on industrial relations. Here, the chapter spoke to the subtle difference between traditional materialist analysis on immigration and the labour market - which portrayed immigration as intrinsically precarious (Castles, 1970) - and the neoliberal-materialist perspective, which highlights the role of immigration policy in making immigrants vulnerable to exploitation (see, for instance, Calavita, 1998; De Genova, 2002).

Research Methods: Triangulation and the Comparative Research Process

This thesis used a ‘triangulated’ methodology, combining ‘methodologies in the study of the same phenomenon’ (Denzin, 1970: 291). The aim of a triangulated methodology is to generate rich, multi-layered data from a variety of sources and through a variety of means, thereby enhancing the validity and reliability of findings. The present thesis used

a variety of research methods, including: doctrinal analysis of law; statistics; literature reviews and archival research; and, finally, interviews. These are explained in further detail below.

In addition, I wanted to avoid ‘criminological tourism’ (Nelken, 2011: 28), offering superficial and stereotypical comparisons between the two countries. With particular relevance to the present thesis, Zedner (1995) argues that ‘[One cannot] with credibility at any rate, write about continental criminal procedure without stepping outside the ivy clad walls of an Oxford college. Rather the research process entails developing a general theoretical (but distant) understanding at home-base, punctuated by a series of forays...into the terrain of study’ (p. 19). I spent a total of eight months in Germany, spread over three separate visits (summer 2012; Jan–Feb 2013; Jan–Feb 2014), during which I consulted extensively with migrants’ rights organisations, trade unions and other activists. By contrast, interviews with UK respondents occurred during the final two years of the thesis. The process by which I recruited respondents, and the challenges that I faced in conducting interviews in another country, are described in further detail below.

Zedner (1995) has also argued that the ability to read the literature of a country in which one wishes to conduct research is paramount. As I discovered, the problem of language becomes even more complex in field research that requires interviews and interaction with field subjects. In the present thesis, language issues presented a significant obstacle at the beginning of the thesis. Despite a working knowledge of German, the specific vocabulary of the field of enquiry was yet to be mastered. This

occurred only through extensive reading and spending a significant amount of time in the country. I also attended an advanced-level language tuition course in Hamburg.

Even bilingualism and the experience of living and working in two different countries is sometimes still not enough to surmount the barrier of primary socialisation (Brants, 2011: 57). Here, I have the benefit of a German mother and a large German family, who supported me throughout the thesis. Of particular advantage was the fact that many of my German family members had married foreign nationals. I was therefore lucky enough to have a ready-made sounding board for some of the emerging themes of the thesis. However, these advantages do not mean I was not vulnerable to the possibility of misinterpreting differences between the two countries. As the methods section will outline, I took a series of steps in order to avoid this issue.

Methods

Doctrinal Analysis

Doctrinal analysis asks ‘what is the law’ in a particular context. This form of research methodology was central to chapter two, where I examined the criminalisation of immigration offences, and chapter four, which looked at interactions between immigration and labour law. Primary legislation for Germany was usually sourced from the Federal Law Gazette (Bundesgesetzblatt); in the UK, legislation.gov.uk was a key

source. Westlaw, LexisNexis and jure.de were the main sources of case material. I also accessed German cases from the jurisprudence catalogue at the Hans Boekler Stiftung Library in Munich. Access to the library was negotiated through a colleague, who introduced me to employees at the Hans Boekler Stiftung.

I also made extensive use of academic commentary on legislation. This was particularly useful in the previously unknown German legal context. A particularly difficult part of this process involved translating German law, not only because of language difficulties, but also because certain terms and concepts do not have a precise equivalent in the English language. For instance, England does not have administrative offences, referred to as Ordnungswidrigkeiten in the German context. Furthermore, concepts and terms can have different meaning in different contexts. For instance, despite significant convergence between the two countries prosecutorial systems in recent years, the term prosecutor still means something different in Britain than in inquisitorial Germany, where ‘legitimate truth-finding...[is] dependent on the prosecutor discharging his tasks and duties and wielding his powers in a particular manner’(Brants, Ringnalda et al., 2011: 85). The extensive consultation of lawyers, legal experts and academics, as explained below, was one attempt to ensure that my unfamiliarity with the German legal system did not have an impact on the research’s validity.

Purely doctrinal analysis is limited insofar as it ignores the social context of law and the operation of law in practice. As such, the other research methods used in this thesis were motivated by the desire to move from law ‘in the books’ to a preliminary exploration

of law ‘as practised’. The thesis has, however, attempted to make the limitations of the methodological strategy clear. This has particular relevance for chapter four, where the evidence provided primarily aims to explore the ways in which immigrants’ vulnerability to exploitation is constructed in law, rather than the actual reality or probability of exploitation.

Statistics

The thesis used a wide variety of statistics. In chapter two, criminal justice statistics allowed an examination of the use of criminal powers in immigration enforcement and the representation of foreign nationals in prisons. The main sources here were the Prison Statistics and the Immigration Statistics 2012 in the UK and the Police Statistics (Polizeiliche Kriminalstatistiken), Prosecution Statistics (Strafverfolgungsstatistiken) and Prison Statistics (Strafvollzugsstatistiken) in Germany. For this chapter, I also accessed statistics on the use of deportation. The main sources used were the Control of Immigration Statistics in the UK and a combination of reports from the Bundesamt für Migration und Flüchtlinge and statistics reported in parliamentary enquiries (Kleine Anfrage) in Germany.

For chapter three in particular, the thesis received data from various control agencies. In the UK, I put in numerous freedom of information requests to the former UK Border Agency, the Civil Compliance Team, the London Metropolitan Police, the Gangmasters Licensing Authority and the Health and Safety Inspectorate. In Germany,

the Hamburg, Berlin and Munich police forces, the federal police force and the Finanzkontrolle Schwarzarbeit also sent information upon request.

In chapter five, statistics were collected on key indicators of the salience of coordinated industrial relations in the German construction sector, most notably, collective bargaining and trade union membership. These allowed a quantifiable measurement of the extent to which industrial relations are changing in Germany. The main source for collective bargaining was the IAB-Betriebspanel. I gained access to recent trade union membership figures through IG-BAU. I found older data on the number of members in an academic source on the construction industry. Importantly, these figures cover all the industries represented by IG-BAU, rather than the construction sector alone. As one trade unionist told me, figures for union coverage within the construction sector are secret because it might affect their bargaining position with employer associations.

The thesis generally used the original source for the statistics, rather than the figures reported in other literature. This was partially because of the risk that the secondary source would misreport the data - or the fact that the secondary source would not contain direction regarding the data's limitations. At other points, the primary data reported in the literature was patchy and did not cover the entire time period of interest. Thus, in chapter six, available, reported statistics on collective bargaining in construction were only available from the year 2000 onwards. In this case, the research retrieved data from the

original sources: the IAB ‘establishment survey’ (Betriebspanel) and the ‘historical establishment survey’ (Betriebs-Historik-Panel).

The thesis ran into considerable difficulties in terms of finding comparable statistics. Differences in legal definitions, the operation of criminal justice, and the reporting and recording practices of crimes are well-known problems that have haunted comparative criminologists for decades (Kalish, 1988; Liu, 2007). For instance, Germany collects data on four different types of actions relating to deportation: ‘Ausweisung’, which only refers to the termination of the residence title and not the action of removing the said person; ‘Abschiebung’ the enforceable act of deportation; ‘Zurückschiebung’, which refers to the deportation of people who have illegally entered the country within six months of their entering the federal territory; and ‘Zurückweisung’ which is rejection at the border. By contrast, the UK Immigration Statistics divides deportation into: enforced removals; removal at port and since 2004; voluntary departures made under the threat of removal. The term deportation applies only to ‘people (and the children of such people) whose removal from the country is deemed ‘conducive to the public good’ by the Secretary of State, or when recommended by a court in conjunction with conviction of a criminal offence punishable by a prison term’.⁴ This data is recorded separately in the UK. In the relevant sections (chapter 2), I make clear what type of removal action I am referring to.

⁴ Deportations, Removals and Voluntary Departures from the UK, Migration Observatory, accessible here: <http://migrationobservatory.ox.ac.uk/briefings/deportations-removals-and-voluntary-departures-uk> (last accessed 03/05/2014).

In addition, the data discussed in chapter two shows that foreign nationals are more overrepresented in German prisons than their counterparts in the UK (by a factor of 2.3 to 1.8). However, the category of ‘foreign national’⁵ is not directly comparable in the countries because of differences in citizenship practices. In the UK, it is still largely the case that people born in the UK have the right to citizenship. In addition, there are no restrictions on dual citizenship. Thus, basically all second-generation immigrants have citizenship. By contrast, while it has become easier for second generation immigrants to gain German citizenship since the early 1990s (Anil, 2005), there remain many people who are born on German territory who do not have citizenship, either because their parents have not achieved the prerequisite settlement rights or because of rules limiting dual citizenship for the children of non-European immigrants. In turn, given the wealth of data suggesting that second-generation foreigners are more likely to be involved in criminal activity than their parents (Killias, 1989; Albrecht, 1997), the fact that the second generation are subsumed into the ‘foreign national’ category introduces a source of bias into criminal justice statistics in Germany. It is possible that some or all of the additional overrepresentation of foreign nationals in German prisons is due to the fact that the statistical category contains more of the type of person who is likely to commit crime. This was an insurmountable issue and my only option was to make the limitations of the data clear.

Literature Review and Archival research

⁵ In addition, the UK records the ethnic origin of its prison population, while Germany does not.

The thesis used a literature review, first to establish the theoretical framework and second, to collect data. Sources included academic literature, policy briefs, consultation and commissioned papers, organisational reports and media sources. The literature review provided a basis for moving the analysis from a study of law ‘in the books’ to law as it is practiced, for instance, in policy papers and guidelines on the use of the law by control agencies. Secondary sources were also useful in terms of understanding historical context and the motivations for the enactment of specific laws and policies of interest.

I examined parliamentary debates in chapters two, three and four, all of which included an emphasis on the historical and political development of policies on immigration control and the regulation of immigrants’ work. In certain cases - for example, answering why identity cards were not introduced for British citizens - parliamentary debates were also used to explain why a policy had not been enacted. The two main sources of data were the Hansard Millbank systems (for the UK) and the Bundestag online-archiv (for Germany). As above, descriptions of political debates were contextualised within wider descriptions of the social, economic and cultural context drawn from the literature review.

Archival research was used to gain access to information that was not in the public eye. In particular, a number of internal organisational reports helped to substantiate the reasons why task responsibilities were allocated to the specific organisation. In the UK, this stage involved ordering documents on the Immigration Service from the British Library. In Germany, a very helpful worker at the Finanzkontrolle Schwarzarbeit was

kind enough to lend their time to scanning files on my behalf, after I approached him out of the blue. In addition, I ordered original reports from the Hauptverband des Deutschen Baugewerbes and the Bundesamt der Migration und Flüchtlinge.

Semi-Structured Interviews and Consultation

Finally, the thesis involved thirty seven interviews with thirty six respondents, eight of whom were migrant workers and twenty-five were immigration and employment lawyers, advocates and activists from migrant rights organisations, police and trade union officials involved in or overseeing efforts to support migrant workers in enforcing employment claims (list at the bottom of the Appendix). Most of the interviews were done face to face; a few were done over the telephone or on Skype. In addition, I spoke to workers at a weekly migrant rights clinic in central Munich. Data collection involved semi-structured interviews. Audio data was transcribed verbatim and transferred to the software package NVivo for management and analysis.

Access issues beset the national study, but are usually more pronounced in comparative settings because the researcher has usually not had the time to build up contacts in the area of study. Where I could not get an interview, I would engage in email correspondence with individual staff members. These email conversations were used as a method of clarifying a point of law, asking for specific information on the workings of a particular service or information signposting, rather than giving information about immigrant workers' experiences in the labour market.

However, in general, I found it relatively straightforward to recruit interview respondents, if time consuming. I began in spring 2012 with an internet search of the organisations and individuals working in the field of immigration and workplace exploitation in both the UK and Germany. I then called and emailed possible respondents. Many of the people first contacted were unavailable or felt that they would not have anything to contribute - however, of this group, most referred me on to someone else they knew who might be able to help. In addition, I attended a conference in Göttingen, Germany where I knew that people in the relevant field would be attending. I also helped to organise a conference on 'Migrants at Work' in Oxford. Gradually, I built up a network of respondents.

It was more difficult to gain access to immigrant workers. Here, I utilised personal contacts. In the UK, I have volunteered in immigrant rights' organisations for many years and knew a number of potential respondents as a result. In Germany, recruitment was done through family members. In addition, a migrants' rights activist, who I had interviewed previously, invited me to a migrant rights clinic in central Munich. Where possible, I sent a list of preliminary questions to respondents a few days before the interview. A semi-structured interview methodology allowed new ideas to be discussed during the interview, while providing a framework of themes for exploration.

Through interviews I sought to obtain a preliminary understanding of the way in which immigration controls work in practice. Migrants can be denied some rights that

exist in law (if they are scared of deportation) and/or enjoy rights that do not exist in law (e.g. medical doctors may in practice treat patients without the legal rights to healthcare) (Ruhs, 2011). However, given the sample's methodological limitation, by no means can this information be taken as representative of immigrants' experiences. For instance, the non-random sampling basis precluded the use of interview data as a way of definitively comparing differences in migrant worker experiences in the UK and Germany. The type of data produced in interviews is unreliable because of the 'Hawthorne effect', whereby interviewees tend to present themselves in a positive manner in order to gain the approval of the interviewer. More generally, data yielded by interviews is always subjective.

Nonetheless, interviews provided useful insights into the ways in which immigrants accessed the law. Activists informed me that they were more likely to use the threat of public denunciation and media pressure than the General-Unternehmerhaftung in cases of wage claims for illegal immigrants in construction. German lawyers discussed the problems with substantiating an illegal employment contract, or the problems with having a short statute of limitations for employment claims. In the UK, lawyers discussed the significance of the retrenchment of legal aid for immigration and employment cases. Moreover, key secondary respondents were able to report - and often substantiate - a wide variety of illegal employer practices, many of which did not go to court and were not, therefore, recorded in any legal database. Interviews served as a way of building relationships with members of key organisations so as to access internal documents and statistics. Finally, consultations with legal and academic experts often involved the clarification of a certain point of law.

As above, I predominantly interviewed secondary key respondents, rather than the migrants themselves. Migrants without a residence status may be part of a wilfully ‘hidden population’ (Zhang, 2012). There is no sampling frame. In addition, people in exploitative work situations may be fearful of talking to researchers because of the perceived or real risk of harm to them and their families (Duvell, Triandafyllidou et al., 2008: 12). There is the fear of deportation/detention where one’s residence status is not assured. There is also the fear of community response. As one Munich-based lawyer interviewed for this study described, after complaining to the trade union about his ill-treatment, ‘the client...ended up needing to be housed by social services in a safe house...it’s because it’s trafficking or the mafia that bring people here and they find out’.⁶ More generally, the key risk in ‘whistleblowing’ is that you build a bad reputation as a troublesome, non-compliant employee. This risk applies to all workers, but factors such as less-than-fluent language skills and a general lack of cultural know-how may mean that migrants are more likely to find work within small, close-knit communities - which, in turn, intensifies the pressure against speaking out.

Given this context, privacy and informed consent are central to the process of ethical research. Respondents were given an informed consent form. Furthermore, the desire for anonymity and confidentiality was assumed unless otherwise stated. Rather than using the name of the person or organisation, the thesis reported the type of institution interviewed (e.g. migrant rights organisation; migrant worker) and the date of the interview. Raw interview data was kept in password-protected files on a private computer.

⁶ Trade Union lawyer, München, interviewed on 25/02/2013

In sum, the thesis used a comparative case study method of the UK and Germany to refine the neoliberal-materialist perspective of immigration policy. A secondary aim was to explore the applicability of the Varieties of Capitalism framework to differences in the two countries. In choosing two countries with which I had familiarity, and through extensive consultations with both personal and professional contacts, I tried to avoid the possibility of misinterpreting information. Where data was not comparable, I made this clear to the reader. Finally, the thesis used a triangulated research strategy, involving doctrinal analysis, parliamentary debates, literature reviews, statistics, archival research and semi-structured interviews, recruited through snowball sampling. Access issues were not particularly pronounced and efforts were made to preserve the anonymity of respondents, given the sensitive nature of the project.

Part B. List of Interviews

Germany

Anti-discrimination activist, Berlin, interview conducted on Skype 03/07/2011
Migrant worker, Hamburg, 04/07/2012
Labour court judge, Hamburg, 28/07/2012
Migrant worker, Hamburg, 10/08/2012
Regional police officer, Hamburg, 26/10/2012
Academic, Gröningen, interview conducted on Skype, 11/01/2013
Migrants rights activist in Munich, interview conducted in Oxford, 08/02/2013
Academic, Munich, interviewed on 19/02/2013
Lawyer, Munich, 21/02/2013
Trade Unionist, Munich, 25/02/2013
Trade Union lawyer, Munich, 25/02/2013
Migrants' rights advocate, Berlin 26/02/2013; 01/03/2013
Anti-trafficking advocate, Berlin, 01/03/2013
Migrants rights activist, Hamburg, 27/02/2013
Trade Unionist, Hamburg, 04/03/2013
Trade Unionist, Hamburg, 04/03/2013
Migrant worker, Munich, 10/03/2013
Trafficking project manager, Berlin, interview conducted on Skype 20/03/2013
Migrants rights activist in Munich, interview conducted in Göttingen, 23/04/2013

UK

Immigrant worker, London, 13/06/2012
Immigrant worker, London, 13/06/2012
Immigration Solicitor, London, 19/06/2012
Immigration Solicitor, London 20/06/2012
Police, London, 23/06/2012
Migrants rights activist, London, 28/06/2012
Solicitor, London, 19/09/2012
Legal aid immigration solicitor, London, 15/02/2013
Trade unionist, London, 12/03/2013
Trade Unionist, London, 1/04/2013
Immigrant worker and migrants' rights activist, London, 20/04/2013
Trade unionist, London, 29/04/2013
Trade unionist, London, 29/04/2013
Immigrant worker, London, 15/06/2013

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