



# **The European Migration System and Global Justice**

A First Appraisal

*Enrico Fassi and Sonia Lucrelli (eds)*

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# Chapter 6

## The EU, migration and justice: a tentative conclusion

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Seen from a normative standpoint, migration is a very tricky issue in that it touches upon and puts under strain the legitimate justice claims of a number of different actors: states, non-state polities (the EU), international organizations, but also citizens, individual migrants, clusters of migrants (asylum seekers, regular and irregular migrants and so on). What each one of these actors perceives as a legitimate justice claim might appear an essential violation of justice from the perspective of another. The relation of migration to a concept of justice based on a multi-layered evaluation is equally complicated to assess; namely, justice as non-domination, as impartiality and as mutual recognition. As already observed, these three conceptions refer to different levels of interactions between the subjects of what we defined as the EUMSG. Non-domination refers to a condition in which an actor is not subjected to (i.e. is free of) any kind of arbitrary interference or control on the part of other actors. *Impartiality* recalls an idea of 'equal basic rights and liberties' and the pre-eminence of human rights over sovereignty rights. Mutual recognition stresses the role of reciprocity and the right of each relevant subject (individual, group or polity) to be recognised in their identity, ruling out the possibility to determine 'a priori' what is normatively right and fair.

The existence of competing (or conflicting) normative claims is by no means only true of migration, yet people's transnational movement is a particularly troublesome issue as it touches upon the fundamental sovereign prerogative of a state to decide who is allowed to enter and stay on its own territory and with which rights and duties. This implies to include specific questions in relation to the three conceptions of justice in our discussion. In dealing with non-domination, we have to consider the complex relation between the EU and its Members States, as well as the relations with third actors. In terms of *impartiality*, we have to inquire how legal categories are defined and their impact on the application of universal norms of human rights. In dealing with mutual recognition, we have to ask to what extent the lack of recognition with respect to the subjectivity of migrants may correspond to an act of injustice.

The analysis conducted on terms, definition and concepts employed within the EUMSG has highlighted the inevitable tensions between ideal aspirations and the concrete handling of migration. In an ideal cosmopolitan world, the freedom to move from one country to another would be granted as a universal right, and there would be no distinction between types of migrants. In the real world, organized in states or not-too-dissimilar polities (the EU), migration is the *de facto* entry in a socio-political community of citizens (with rights, duties, values and a shared political identity) assumed to be a coherent group where the immigrant is an 'odd man out'. As a consequence, the hosting community attaches labels (refugee, economic migrant, regular/irregular migrant, asylum seeker) and applies selection criteria (nationality, country of origin, risk of persecution, gender, age, ethnicity, historical background, economic situation) to immigrants. Based on this categorization, immigrants are sent through different paths, staying in different types of temporary hosting structures, having different prospects of remaining in the country of arrival or being returned home or somewhere else. In an ideal cosmopolitan world, all this would amount to a system of domination of states on individuals. In the real world, however, this is just the outcome of the rules of the game that make socio-political life as we know it possible – and probably more democratic than it would be if a world state did exist and humankind were actually organized in a world cosmopolitan polity.

However, an evaluation of justice only based on sovereign states' prerogatives would not be sufficient for a number of reasons. First, the Westphalian logic is by no means the only one that is able to provide

legitimacy to international conduct, as evidenced by the development of international law, particularly with reference to human rights. Second, being that migration is a global, age-old phenomenon that has greatly affected the features of today's socio-political world, it seems reasonable for it to be managed through instruments of supranational governance and global norms, even though the latter still fare very poorly in terms of effectiveness and coherence. Third, in a world populated by subjective individuals and not (only) national citizens or human beings as natural rights bearers, each and every migrant is a unique person, whose migration claims should be evaluated based on their subjective features for a system of migration to be really fair and just. In the long run, then, the real world's migration governance is called to strike a balance among different logics of justice, which, at least today, appear hardly reconcilable.

The burden of this reconciliation weights on the EUMSG, even more than traditional state actors. This occurs for two main reasons. The first has to do with the expectations about the EU as an international actor. The EU has shaped its self-representation around the idea of being a community of values where human dignity, freedom/liberty, democracy, equality, justice, rule of law, solidarity, regulated liberalism/capitalism and ecological modernisation are in centre (Lucarelli and Manners 2006). The EU's foreign policy has been based on those values, and a certain distinctiveness in this respect has frequently been claimed by the EU itself, scholars (Manners 2002; Keukeleire and Delreux 2014; Whitman 2011) and observers (Cf. Chaban et al 2015; Lucarelli 2014). Ultimately, the EU's legitimacy and credibility depends on its ability to show coherence with respect to those values, and effectiveness with respect to its own political objectives (Lucarelli, Cerutti, Schmidt 2011). It comes as no surprise, then, that the EU frequently refers to its own values in its documents on migration, is highly attentive to the respect of international agreements and underlines the importance of respecting human rights and the human dignity of migrants. It is not surprising either, that, among the declared aims of the EU's search and rescue operations in the Mediterranean, the protection of the EU's borders is accompanied by the protection of migrants' lives (see the Agenda on Migration of 2015). At the same time, however, the protection of borders can actually trump the protection of human rights – as it is the case with the recent EU-Turkey agreement. In this case, the discrepancy between actual behaviour and self-representation becomes all the more clear and troublesome for a values-based actor as the EU.

Second, migration governance is particularly problematic to the EU due to the latter's peculiar system of governance. The existence of different levels of governance, a highly complex system of shared competences between EU institutions and the Member States, and the array of different national legislations on migration existing in each Member State make the EU system of migration vulnerable to a series of breaches of justice. Cases of 'internal domination' on EU-Member states have occurred and have been denounced in Italy, Greece, and Hungary. At the same time, instances of Member States-to-Member States 'internal domination' have resulted from lack of solidarity, as well as unilateral decisions affecting others (i.e. Germany's decision to let in Syrian refugees without prior consultations with its fellow Member States). Moreover, breaches of the impartiality principle are also the inevitable result of small-yet-relevant differences among the Member states' legal systems and practices with respect to migration and asylum.

However, there is another feature of the EU system of governance that impinges on the EU's ability to abide by justice in its migration policy: its complex nature as a 'process' other than an 'actor'. By its own character, the EU is not only an international actor, but also a *process* of integration of states – a process/actor that has always tried to cope with the double goal of 1) (re)creating the conditions for the process to carry on, and 2) being efficient as an actor in the management of a certain policy area. The massive arrival of migrants to the European territory and their uneven distribution among the Member States soon started to challenge and put at risk the main achievements of the European integration process (the Schengen agreement above all), as well as the EU's credibility in the eyes of increasingly Eurosceptic domestic publics. The EU's response has consisted in an attempt to manage the domestic challenges posed by migration, while at the same time safeguarding migrants' safety. However, the instrument used (attempts to Europeanise the national component of the EU migration system, the hotspot and relocation approaches, agreements with third countries, Trust funds) have sometimes resulted in more breaches of justice as non-domination (against EU-Member States and EU-third countries), impartiality (as in the case of the EU's list of safe countries of origin, or the weak human right protection conditionality clauses included in the EU's agreements with third countries), and mutual recognition (the framing of the response as an emergency has diminished the ability of the system to ensure due attention to the distinctive other, which instead tends to be collapsed into categories of generalised others).

Does this imply that the EUMSG fails to comply with justice claims and pursue its normative goals? Such a verdict would be too harsh. The EU system is one of the most advanced in terms of attention granted to the protection of human rights, and has improved its ability to subsume national differences while also guaranteeing a certain attention to specific individual needs, as evident with the introduction of subsidiary protection and other forms of 'humanitarian' protection envisaged at the Member States' level. Moreover, the tension among the three notions of justice is not an intrinsic feature of the EU, but can rather be regarded as a result of a conflict between the normative logics that underlie the three conceptions of justice, and that appears really hard to cope with.

Furthermore, as stated in the introduction of this report, a final verdict on the compliance of the EUMSG with global justice cannot be grounded only on a preliminary assessment of the terms, definition and concepts employed and will need further research on the European practices.