The European Migration System and Global Justice

A First Appraisal

Enrico Fassi and Sonia Lucarelli (eds)

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Reconsidering European Contributions to Global Justice (GLOBUS) is a research project that critically examines the EU's contribution to global justice.

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Chapter 5

National case studies: Perspectives of justice and implications for the EUMSG

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This chapter draws together the results of the preliminary analysis on the migration legislation of Italy, France, Germany, the United Kingdom, Hungary, Greece and Norway. Considered together, and examined thorough the lens of the three conceptions of justice examined above, the case studies point out the tensions and potential contradictions existing both between the different demands of justice and, empirically, within several components of the EU Migration System of Governance (EUMSG).

Justice as non-domination

Some of the terms and concepts used in the migration domain – be they nation specific or EU norms and regulations and their transpositions into national contexts – testify to potential violations of the principle of non-domination as to the relationships between the EU, Member States and third countries, and/or between the EU and Member States.

The emergence of power-informed relationships with third countries is one of the most significant cases found through this analysis. The Member States, as well as the EU, adopt and elaborate approaches – based on *quid pro quo* practices or privileged relations with some countries at the expense of others – that rely on the existence and the exploi-

tation asymmetrical power relations. For example, through the 'decreto flussi' ('flows decree') approach – linking foreign workers' quotas to the third-country's cooperation in the fight against 'clandestine immigration' and the readmission of irregular nationals – Italy can exert its power on relations with specific countries, privileging those countries where effective cooperation in migration management is at play and discriminating the others. *De facto* discriminatory legal and conceptual framings like this reveal subtler instances of the arbitrary interferences presented above. As it may already be inferred, the third-country's integrity and sovereignty can be encroached upon with measures whose definitions and declared targets do not directly involve a state-to-state relationship. In this sense, instruments like the 'decreto flussi' are liable to infringe the non-domination principle affecting both migrants and their country of origin. This is similar, to a large extent, to the approach developed by France in drafting bilateral agreements with third countries. Here, the rise of a discourse based on the concept of 'co-development' has produced a situation where the political and economic advantage of France towards the concerned third countries is used as a leverage to impose France's own priorities, in particular to control irregular migration and govern mobility in a more efficient manner for its economic system. Germany is also a notable case, since it does not only push its agenda on third-countries through 'regular' bilateral agreements provided with readmission clauses. Arguably, Germany has realized a subtler and possibly more effective way to exert domination on third states through the (in)famous EU-Turkey deal on asylum seekers – the controversial 'informal' agreement where Germany is considered one of the primary advocates. What makes the deal relevant in normative terms is that it allegedly enables a Member State to indirectly dominate over third, non-signatory countries (e.g. Syria) without the drawbacks that a bilateral commitment would entail.

On the other hand, Member States can be (or perceive themselves to be) victims of domination by the EU or by other Member States. One case in point is Greece, where the whole process of Europeanisation of migration and asylum legislation has not always served the country's national interest. Greece and Italy, more than others, have endured EU's specific approaches, such as the Dublin regulation, the hotspot approach, the perverse consequences resulting from the understanding of the relocation system, which have only exacerbated pressure on already weak systems. Italy, for example, has perceived the hotspot as

'imposed' by the EU, as a measure to ensure the proper fingerprinting of all migrants and 'select' different categories of migrants.

The case of Hungary is particularly interesting as it shows both dynamics at play. On the one hand, the country's perception that its position within the EU holds the risk of being dominated by other actors that have vastly different institutionalized practices and historical migratory processes, has often led Hungary to react to 'EU dominance', for example criticizing the 'forced settlement quota' system (Council Decision 2015/1523, Council 2015b) as arbitrary interference in Hungarian sovereignty. At the same time, Hungary gave way to, and engaged in dominating practices vis-à-vis individuals and third states alike. Not only is Hungary trying to block the return of asylum seekers to Hungary within the Dublin system, but the state managed to effectively exclude potential asylum seekers from enjoying their internationally guaranteed rights, and arbitrarily altered a sensitive, interstate legal procedure, that impaired the interests of a third state, namely, Serbia. Moreover, with Act XLIV of 2010, Hungary established preferential terms to naturalize ethnic Hungarians, including those 'historical' ethnic Hungarians that since the Treaty of Trianon (1920) have been living in the neighbouring countries. This was a highly political decision that was not conciliated with these countries and caused tensions in the bilateral diplomatic relationships. In this sense, the case of Hungary adds to the exam of justice as non-domination provided in the previous chapter indicating that, despite the 'Westphalian assumption' underlying this normative notion, attention must also be paid to mutual perceptions and national identities in order to accurately identify interference effects despite the relative lack of 'material factors' at play.

The perspective of state-on-state domination – either in a direct form or through the takeover of the EU system– may seem so threatening that the intergovernmental dimension *per se* might be regarded as a danger. If that were the case, any conception of justice different from non-domination would be not just an alternative vision but rather a solution to an objective problem. Nevertheless, the zero-sum-game is only one of the possible configurations of non-cosmopolitan, non-supranational relations among Member States, between the Member States and the EU or with third countries. The persistence of a 'Westphalian' dimension was not intended, especially in Europe, as ruling out all non-state actors as simply irrelevant. This goes for the migration policy area too and in the case of Member States in particular, where

decentralised and sometimes local actors play a relevant role. In normative terms, the presence of a plurality of governmental actors trying out new ways to achieve gains in terms of effectiveness does not (necessarily) mean impinging on cosmopolitan values or ruling out any possible role of the EU in this policy area. Breaches of the principles of non-domination are expected, both within the EU and in dealing with third states, but neither is inevitable.

Justice as impartiality

All case studies present formal reference to international norms and values in the treatment of migrants and refugees – e.g. the International and European Convention on human rights – but also to the Constitutions of some of the Member States, which, in certain cases, similarly envisage the respect of fundamental human rights. Beside the adhesion to the principles of the protection of human rights, being signatory to these international instruments can also imply a concrete commitment to the mentioned role of 'enforcer' of cosmopolitan values and norms. This seems to be the case with the stable integration of UNHCR members in their respective asylum process. Moreover, many countries among those examined recognise specific 'national' statuses of humanitarian protection. The distinction between the rights recognised to refugees and the recipients of other forms of protection (see for example residence permits durance above) can contrast the principle of impartiality, as it produces different categories of individuals in need.

Even though several Member States have abandoned the use of negative terms such as 'illegal' or 'clandestine' migrants, opting for the more neutral 'irregular', only regulars have full recognition of rights and the treatment of irregular migrants is always at risk of rights violations. As has been noted, where the term 'illegal' is widely used, such as in Greece, this implies an even greater risk of violation of migrants' rights, adding to a more general problematic access to rights depending on different legal categories and nationalities. This kind of discrimination is nevertheless more general than simply related to one case. All countries have different treatments on the base of nationalities, starting from the right to regularly enter the countries, such as in the framing of the 'decreto flussi' in Italy or bilateral agreements framed in France, that create a differentiated system of entry depending on nationalities, skills and occupations. At least as far as formal documents are concerned (the same does not go for public debate),

Germany seems able to avert (or more effectively hide) the subtle process of 'criminalisation' by using terms tantamount to 'unpermitted'.

The relation between regular stay and 'work contracts' emerges as a source of potential limitation against impartiality, as it discriminates in different ways individuals and nationalities depending on job availability and actual opportunity to access work. Given the emphasis on 'universality' in conceiving justice as impartiality – deliberately factoring out, in a sense, 'contingent' aspects – it comes as no surprise that tensions regarding the compliance with this normative conception are forceful at the national level, where labour- and welfare-related policy issues are more relevant. More generally, the relation between the possibility to get a work permit and the double criterion of nationality (bilateral agreements) and employment situation, via the labour shortage evaluation such as in France or targeted recruitment policies such as in the Five-tier Point System active in the UK, are hardly compatible with a cosmopolitan idea of justice and even less with impartiality, unless we define impartiality as a technical parameter for the efficiency of the labour market. Moreover, the formal link between the employment situation and the residence permit – epitomized by the Italian 'residence contract' – can create a direct subjugation to employers.

A restrictive interpretation of family reunification, noted in most cases, is also a source of concern, as while the unity of the family is considered as a value to protect, the access to family reunification can be restricted in many ways as seen above. In Italy for example, family reunification has been defined in a pejorative way through time.

A final observation concerns the different types of limitation of personal freedom in detention centres, sometimes of asylum seekers and even of minors. Here we can observe the production of a sort of 'special right' for foreigners. This is even more visible in all types of emergency approaches dealing with migrants, notwistanding the ordinary legislation, and even more remarkable after the introduction of new centres with a dubious juridical nature as part of the hotspot approach in countries such as Greece and Italy.

Finally, as observed in the evaluation of the EU's approach, the definition of a national lists of 'safe countries' potentially opposes the principle of impartiality.

Justice as mutual recognition

One aspect that emerges from the case studies is the tension between justice as mutual recognition and the power that the EU and Member States have to unilaterally create and impose categories to other subjects, thus producing particular identity labels that may or may not be shared by the subject themselves. As noted by Mounz, while this 're-produces the power of the State through simultaneous inclusion and exclusion […] People, meanwhile, do not imagine their lives or identities in the terms of immigration policies and the categories they produce (in Baird 2016, 6). As pointed out above, the lack of dialogue and reciprocity makes it virtually impossible to comply with the recognition principle, since it prevents the involved parties from unravelling 'sticky labels' and bring to the fore the 'concrete other'.

This tension is visible, for example, in each case where ethnic or national belonging of the migrants has been considered the predominant criteria to classify incoming people – regardless of their specific subjectivity, both in terms of self-representation and peculiar life experiences. Moreover, a conceptual and legal framing based primarily on executive and bureaucratic rules rather than statutes – as it is the case with the UK – leads to a relationship between the arrival country's public authorities, and the migrants and/or states of origin that is informed by a (more or less latent) hierarchical principle. This normally discourages any genuine form of dialogue.

Moreover, in the case of the Member States, the 'emergency approach' adopted had the effect of reducing the attention to specific needs of groups or individuals. If the emergency approach has tended to consider migration as a temporary phenomenon, and thus acts against a more holistic view, the security issue related to the terrorist threat has led to even further risks. In the French case, for example, the formal declaration of the 'state of urgency' after the terrorist attacks in Paris in November 2015, converted into law, has led to an increase of the powers of police against the normal judiciary procedure, resulting in many complaints by organizations concerned with human rights protection and reports of mistreatment. Even the normal functioning of the state of urgency has an impact on migrants' life, as it justifies the increase in border control, identity control and administrative search inside the French national borders.

Several countries have introduced a compulsory form for migrants where they have to declare their respect and adherence to the laws and values of the country. This is the case for Italy, with the 'integration agreement', and France, with the 'Republican Integration Contract', but also other countries such as Germany and Hungary have similar instruments. These documents are accompanied with personalized paths to integration, where the migrants must show their knowledge of documents such as the national Constitution or their commitment to the learning of the national language. Independently from the values embodied in these 'agreements' or 'contract' (a misleading name, given that migrants have no choice but to sign them), they represent a reduced attention to cultural difference and the imposition of supposedly shared national values over migrants. It is nevertheless worth of notice that the value of these documents is mostly symbolic and, for this very reason, particularly insidious, as they contribute to the production and reproduction of the image of migration as a threat to the national identity and something external. This is even more significant if we consider that these documents refer to some fundamental values or rules of the country, but only migrants are required to formally commit to these values and rules. This responds to a shift in the approach towards migration that we can observe in many Member States, where the increase in the restrictions and conditionality clauses for regular migration have been accompanied by a nationalization of the discourse over migration and a resurgence of the theme of national identity. A remarkable case is that of France, where the presidency of Sarkozy has shifted the discussion towards a direct link between migration, integration and national identity with the consolidation of separated competencies in a new ministry created in 2007.

Overall, the enlisted examples show that the opposition between 'the concrete other' and the 'generalized other' is complicated by what we can consider an internal split in 'the concrete other' when dealing with migration policies. A split is created between citizens, being individuals entitled to universal rights, and migrants, being a subject of a state (this also explains the different provisions for the stateless persons). We observed before how the different treatments on the basis of nationalities can produce different sources of tensions for all the conception of justice we are considering. Yet it is worth adding that, independently from these different treatments, a 'generalized other' of the foreigner is created by linking migrants to their national origins. Before they are subjects of rights, migrants are conceived first and foremost

as citizens of other countries. This eliminates the possibility that a 'generalized other' is formed on the basis of the common concrete interests of people of different national origins and cultural formation *vis-à-vis* the hosting country. This implies strong consequences for the European migration system of governance, as it rests in a middle ground between nation states and a supranational political formation. While the European Union seems to replicate the exclusive logic of nation states on migration at a different scale, the possibility of a new path for justice not rooted in the political logic of sovereignty remains open.