

# Chapter 4

## National case studies: Terms, definitions and concepts on migration

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### Italy and migration

Italy's approach to migration is again under the spotlight as it has been in past times. It was then confronted with massive amounts of people fleeing their countries and aiming at the EU. Migration is part of Italy's history, though not in the same vein as for other European countries. When countries such as Germany, UK or France were engaged with 'Gastarbeiter' and naturalizing former colonies' citizens, Italy was still largely an emigration country. The progressive shift into an immigration country has been recent. The *Testo Unico*, the key document on migration, was issued in 1998 at the end of a decade when Italy experienced massive inflows of asylum seekers (richiedenti asilo/'profughi') from the former Yugoslavia Republic. Surprisingly, the document only scarcely addressed asylum matters, which instead found

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<sup>27</sup> This chapter directly draws from longer papers elaborated by researchers working on national case studies: Melegh, Vancsó, Mendly, Hunyadi and Vadasi (Hungary), Corvinus University of Budapest; Karamanidou (Greece), Glasgow Caledonian University; Olsen (Norway), ARENA, University of Oslo; Ceccorulli (Italy) and Grappi (France), University of Bologna; Zotti (United Kingdom and Germany), University of Bologna and Catholic University of Milan.

proper treatment more recently with the transposition of European Regulations and Directives. This legislative void is all the more puzzling if one considers that the right of asylum has been fully ingrained in the Italian Constitution as follow:

The Italian juridical system conforms to the norms generally recognized by the international law; The juridical situation of the foreigner is regulated by the law in conformity with norms and international treaties; The foreigner to whom the effective exercise of the democratic freedoms granted by the Italian Constitution is impeded in his country, has the right of asylum in the Republic, according to the conditions established by the law; Extradition of the foreigner for political crimes is not permitted.

(Costituzione della Repubblica Italiana 1947, art. 10)

The timid approach toward asylum has sometimes been accompanied by an assertive approach in the realm of migration, especially as a consequence of more or less artificial 'emergencies' that, albeit not reported in the legislation, have informed important approaches to migration. The 'Bossi-Fini' law of 2002, as maintained by some of its critics, followed a specific philosophy, strongly characterized by the restriction of many rights, from entrance to defence against expulsion, and decisions on asylum matters, running contrary to Article 13 of the Constitution (Zorzella 2002). Similarly, Law Decree 160/2008 has tried to redirect migration policy in unquestionable restrictive terms, by restricting, for example, family reunification opportunities, both with reference to family members and to the economic capacity needed to exercise such right (Pastore 2008). Hence, in the period 2008-2011, the general approach was to associate migration to the preservation of 'public security' (Renoldi e Savio 2008; Zorzella 2011), with a strongly controversial legislative output, (Law n°94 of 2009), establishing the crime of illegal entrance and permanence in the territory of the Republic (Savio 2009). Hence, 'Irregularity', became a crime (Peprino 2009).

### Terms, definitions and concepts: the peculiarities of the Italian case

Even though aimed at regulating migration, the term 'migrant', appears very infrequently in the *Testo Unico*: the most used word is in fact 'foreign/alien' (*straniero*). When the term 'migration' is employed, it is done so in order to assume a specific connotation, such as in the case of 'clandestine immigration' and 'extra-communitarian immigration'.

These are terms which progressively became part of the national jargon on migration to describe respectively irregular immigration and the inflow of persons from outside the then European Community, even though in the public debate, this term often overlaps with an understanding of the EU that predates the 2004 enlargement. While deeply employed in the law and by commentators, the term 'clandestine immigration' has increasingly taken on a negative connotation to refer in particular to the 'illegality' surrounding undocumented migrants entering Italy. Today, the term is scantily used, and essentially only by anti-immigration positions.

In the same vein as the EU's legislation and the legislation of EU's Member States, the term 'asylum seeker' is generally not used, opting for a more neutral 'applicant'. 'International protection' has substituted the restricted reference to 'asylum' to encompass different categories of protection defined by the EU, but also specific to the Italian case (humanitarian protection).

Other terms employed (often for the first time) by the Italian legislation have raised great debate and criticisms by commentators, while allowing an increasingly frequent recourse to the different Courts of the Italian system, both for interpretative and legitimacy purposes. That was the case, for example, with the introduction of Temporary Permanence Centers (Centri di Permanenza Temporanea) for the first time in 1998. The introduction of the centres was motivated by the necessity to better manage expulsions and to conform with other European states, where these centres were already operative (Nascimbene 2001; Einaudi 2007; Di Martino 2014). The centres raised a major debate on the logic and legitimacy of 'administrative detention' (detenzione amministrativa). It is worth to remember that the European Convention on Human Rights envisages the possibility to deprive the liberty of the individual in case of 'the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition' (Art. 5, C.1,f).

The main controversy over the concept was that it allowed for the detention ('trattenimento') of persons even in the absence of a penal crime. The concept implied the restriction of the personal liberty of migrants, and it assumed a peculiar emphasis in Italy as it was in clear contrast with the Constitution (Art.13) (Savio 2015; Caputo 2000), which recites that 'no form of detention, inspection, search nor other

restriction to personal freedom is allowed if not as a consequence of an act motivated by the judiciary authority and only in the cases and the modalities foreseen by the law'. Throughout time, though, these restrictions have been intended as key tools of the migration policy both by their supporters and promoters, as well as by their critics. This has been heightened when even more restrictive understandings of the term have been adopted by centre-right coalitions in 2002 and 2009, and when the possibility of 'holding' persons in open (but also closed) centres has been contemplated for asylum seekers. At the time of writing, and as a result of the increasing security threats to the EU, the Centres for identification and Expulsion have been upgraded anew as key instruments; something which inevitably puts the emphasis on other terms, such as 'detention', 'expulsion', and 'irregular immigration', and seems to re-propose a 'migration-security' nexus.

The word 'centres' is extremely controversial in Italy, as it recalls the idea of people to be kept in specific places and separated from the rest of the community. Along the same lines, it is to be noticed that there is a tension between the concepts of 'trattenimento' and 'accoglienza' as referred to asylum seekers: the Italian legislator has marked a difference between persons in CIE (close structures) and persons in other centres (CARA). As a matter of fact, 'accoglienza' has a slightly less aseptic and more positive flavour than 'reception', the English word used with respect to asylum seekers.

Another concept particularly debated has been that of expulsion, which in the Italian legislation has been articulated in three different terms: push-back ('respingimento'); expulsion with accompaniment to the frontier ('espulsione con accompagnamento alla frontiera'); and administrative expulsion ('espulsione amministrativa'), causing interpretative and practical confusion. The use of these specific terms by the legislator, and the emphasis on coercion, run contrary to a European approach who has firstly prioritized the 'voluntary' character of return. Also, commentators have underlined that insistence on these concepts has been mainly an attempt at emphasizing a specific approach to the handling of migration: a punitive one rather than a regulative one (Casadonte and Di Bari 2002).

The concepts of 'residence contract', 'integration agreement', 'humanitarian protection', and 'humanitarian corridors' are also peculiar to the Italian case, and are discussed below. In fact, the section rests on a

preliminary evaluation of possible dimensions of justice. The term ‘compact’ (‘migration compact’) is also worth mentioning, proposed by Italy as a ‘new approach’ to handle relations with third countries on migration, – a concept that has been endorsed by the European Union discussing the New ‘Partnership Frameworks’ with third countries as ‘Compacts’.

## Observations on the three understandings of justice from the Italian case

### *Justice as non-domination*

While it is difficult at this stage to envisage acts of ‘domination’ embodied in the terms and concepts of the Italian legislation, some elements are worth considering.

For example, by linking the amount of quotas for workers to cooperation on the fight against ‘clandestine immigration’ and on the effective readmission of irregular nationals, Italy has somehow exerted its influence on relations with specific countries through the concept of ‘decreto flussi’ (‘flow decree’). Thus, Italy has discriminated between countries by privileging those with whom effective cooperation on migration management was at play.

While the concept of domination (non-domination) is likely to apply mostly in relations with third countries (of origin and transit), it is worth noticing how the concept of ‘hotspot’ has been perceived as ‘imposed’ in the Italian landscape as a measure to ensure the proper fingerprinting of all migrants, while not taking in due account the fact that most of the migrants arriving in Italy were not eligible for relocation. Furthermore, the strict number of nationalities intrinsic to ‘relocation’ will mean that these migrants will leave Italy, even though these are the most complex cases (Di Filippo 2015, 40). Hence, the introduction of the concept of ‘hotspot’ in the Italian jargon may suggest a case of ‘domination’ from other Member States.

### *Justice as impartiality*

In principle, the law should presuppose ‘impartiality’ (non-discrimination, also with reference to third citizens) as its *raison d’être*. However, traces of ‘discrimination’ are present in the Italian case. Mainly, these traces are embedded in the rights and obligations attached to specific categories of migrants. The same categorization effort does not only serve regulative purposes: additionally, it marks differences be-

tween individuals in terms of their status as rightful claimants of justice. Thus, while respect for fundamental human rights cannot be questioned and should apply to all migrants (*non-refoulement*, right of asylum, right of family life for example), these rights may sometimes be restricted for certain categories of migrants.

A first observation regarding the Italian case is that, in a similar way as in the case of the EU's legislation, permanence and the prospect for a stable or permanent residence in the territory of the Republic allows the granting of more rights. Also, the 'regular' residence of migrants is the precondition for sharing the same civil rights as Italian citizens. This is not to say that regular migrants' rights perfectly match those of Italians, rather that irregularity is a rightless condition (aside from basic human rights such as emergency medical treatment), and that a rightless condition in no way can lead to the prospect of integration into the Italian society and system.

That said, the 'decreto flussi' – the only regular access into the Republic – is in itself discriminatory as it provides the idea that only a certain number of persons is allowed entrance, and that these persons are 'selected' among others. Indeed, there is only limited space left in this concept for an assertive role of migrants as bearer of specific claims (see below on mutual recognition). While it is assessed that regular migrants enjoy more rights than irregular ones, some specifications are worth mentioning as they also are subject to discrimination. First, in the case of specific jobs, preference is given to Italian citizens and those of the European Union. Second, 'the residence contract' introduced by the Bossi-Fini law for dependent workers (but not for EU long-term residents) is a precondition for the issuing of the residence permit, and puts workers in a subjugated position with respect to their employer. Contrary to what the meaning of the word may suggest, 'contract' in fact denotes a term devoid of reciprocity, assuming domination traits (see mutual recognition below) (Zorzella 2011).

While providing a minimum and basic understanding of family members eligible for family reunification, the EU leaves space to Member States for optional positive interpretations. Many commentators have noticed that in Italy, family reunification has been progressively restricted from its initial provision in 1998. In particular due to the Bossi-Fini law and the Law decree 166/2008 leading to a pejorative situation

with respect to other Member States and the *de facto* closure of possible regular access into the Italian territory (Zorzella 2002; Pastore 2008).

Beyond creating confusion, the proliferation in Italy of 'labels' for different centres (CDA, CARA, CIE, hotspot) has opened up space for 'discriminatory' attitudes, as the creation of these centres leads to the establishment of 'a special right for foreigners' (Caputo 2000, 52). As evidenced by Marchetti, asylum seekers collected in different centres 'are divided in groups with different rights and opportunities' (2015, 167), even when the asylum seekers had the same juridical status. The lack of a clear juridical nature for the hotspots seems also to have an impact for rights claim.

On the positive, with respect to the legislation of other Member States, the Italian Republic has tried to approximate the rights shared by persons entitled to refugee status and those entitled of the status of subsidiary protection (5 years is the duration of the residence permit in both cases, topping the rank set by the EU). However, subsidiary protection is still characterized by some restrictions. Also, while humanitarian protection is specific to Italy and is substantiated by the same Italian Constitution, the related residence permit only lasts two years and rights cannot be compared to the other forms of protection (for example, family reunification is not a possibility). As observable from statistics, amid a high degree of rejection of applications for the refugee and subsidiary protection status, the trend has brought with it a greater release of humanitarian protection residence permits.

Finally, the 'right of information' has been particularly underlined in the Italian legislation (also for migrants in CIE), something which complies both with an understanding of justice as 'impartiality' and 'mutual recognition', given that rights as well as obligations deriving from their specific status should be known by every migrant, and given that in principle all migrants (even those in CIE) are informed of their right to apply for international protection, something which may satisfy self-perception criteria. The hotspot approach, though, has been accused of denying migrants this fundamental right by not properly informing them on the possibility to apply for international protection (Zorzella 2015; Morandi and Schiavone 2015).

### *Justice as mutual recognition*

The hotspot 'system', 'area', and 'approach' as it has been invariably labelled (suggesting possible interpretations this term may assume), opens more avenues for evaluation with respect to this third concept of justice. On the one hand, by automatically selecting people in clear need of international protection, it seems to recognize the particularly vulnerable situation of some migrants (Syrians, Eritreans and Iraqis) arrived in the last years in Italy, fleeing from wars and conflicts. On the other hand, this approach based on 'nationality', may side-line or postpone the concerns of other possible groups which equally perceive themselves as in need of protection. This consideration, indeed, is extendible to the EU more at large.

Certainly, the Italian legislation is not devoid of terms which entail 'mutual recognition' of migrants. Vulnerable persons are particularly given attention to (important is the recent introduction of victims of trafficking, genital mutilation, persons affected by serious illness, or mental disorders among the list of vulnerable persons (AIDA 2015)). According to the EU legislation, minors and unaccompanied minors (whose detention is prohibited in Italy) are particularly protected categories and their voices have to be taken into account (although in the case of unaccompanied minors Italy still lacks an organic law, which is currently under discussion). Reference to gender has also increased. The concept of 'corridoi umanitari' ('human corridors') is seemingly implying a peculiar attention to the needs of specific vulnerable persons. Humanitarian residence permits refer to specific categories of persons not included in the EU 'international protection' understanding. They are a further attempt to recognize the needs of these migrants, and are released without proper identification documents, documents ascertaining sustenance capabilities, accommodation or sufficient means to return to the origin country (Bonetti 2008) and can be conceded in the absence of a formal request for international protection. Seemingly, the SPRAR system for asylum seekers (the 'second reception tier') has been believed to offer specific attention to the different needs of its hosts (even though, the refugee crisis has seen a large recourse to emergency structures (CAS), that by definition entail emergency measures which cannot take into account the singular exigencies of the persons present in the structures) (see Morandi and Schiavone 2015). Moreover, social protection and emersion programmes are peculiar measures of the Italian case, recognizing the specific needs of



certain migrants, such as victims of trafficking and violence. In particular, a victim does not only obtain a special residence permit, but has also access to emersion programmes (Giammarino 2000, 54).

Finally, the concept of 'integration' is conceived to specifically take into account individuals' peculiarities and identities – in particular to be cherished and promoted in the education system. However, this latter impression seems to be contradicted by another concept, namely that of 'integration agreement'. If in principle the words 'agreement' and 'integration' denote mutual reciprocity and consent (Zorzella 2011), they may in reality, as drafted by the Legislator, look like as an act of 'domination' (or not recognition) of the migrants' identity and peculiarities alongside an act of 'discrimination' (see the second concept of justice above) if one considers that the same agreement is not requested for the Italian citizens (Cuttitta 2016).

## France and migration

As Gérard Noiriel explains, the 'immigrant' is in France a 'republican invention'. It was not until the Third Republic that the concept started to circulate as part of the effort to govern a mobile working population (Noiriel 1988). After the end of the colonial empire, and most remarkably after the independence of Algeria, France had to face the presence of millions of foreigners from the former colonies. The high mobility with these countries gradually introduced a separation between workers, students and trainees, and then linked family reunification to housing and other requirements (Sayad and Gilette 1984). Even after the independence of former colonies, the condition of particular national groups with historical links to France continued to be regulated with specific provisions, which partially waive from the general rule. This experience worked as a precedent for the future laws dealing with migration.

The colonial past resulted also in a geographical stratification between 'metropolitan France' (part of the Schengen space) and the five 'overseas departments' part of the European Union (Guadelupe, Martinique, Guyane, La Réunion and Mayotte), plus other territories included in the Republic. The law on immigration currently in force (CESEDA) considers France as the ensemble of 'metropolitan France', Saint-Pierre-et-Miquelon, Saint-Barthélemy and Saint-Martin (Art. L111-3).

The crisis of the early 1970s marked the beginning of an approach where the release of a permit to stay is strictly related to a labour contract, and the process of regularisation becomes more difficult. By the end of the decade immigration became a major political issue for social and political reasons and the period marked the rise of a new discourse and legislative activism based on the need to control ('maitriser') the fluxes of migrants. During the 1980s, more than 15 laws, dozens of decrees, and more than 200 circulars were emitted – a trend that continued in the 1990s with annual interventions that increased the normative cacophony on immigration. In the same period, the debate polarized around the support for migrants' rights and their right to stay through the regularisation of the 'undocumented' ('sans-papier'), and the effort to fight 'clandestine immigration'. The alternation in government marked several shifts towards the first or the second position until the introduction of more draconian conditions that made it harsher to be a regular migrant in France and acquire nationality through the so-called *loi Pasqua-Debré* (1986, 1993 and 1997).

The general attitude towards migrants shifted between 'integration' and 'assimilation', reflected in the restriction of the *jus soli* from a semi-automatic procedure to something that must be activated and requires formal obligations, floating between the call for more strictness and more humanity. But it is only behind this opposition that we can see an emerging rationality, linking migration to the economic and demographic needs of the country: an utilitarian vision that in the following years would produce a tension between the search of a comprehensive framework to regulate migration, and the adoption of a 'case by case' approach. This tension cuts across the distinction between regular and irregular migration, leading to a growing precarisation of the regular stay. Even when it came to asylum policy, the increase in the number of demands has been coupled with a decrease in the rate of admissions during the period 1970-2000, from 90 per cent to less than 20 per cent (Cornuau and Duzenat, 2008). Behind the declarations, the practical orientation of the state has been a restraint of the conditions for the admissibility and the acceptance of the demand – including the use of subsidiary protection, introduced in 2003 – as a way to recognize the menace to individual freedom, while at the same time recognising lower rights than the refugee status.

The rise of Nicholas Sarkozy as the Minister of the Interior in 2002 and then as President of the Republic in 2007, can be seen both as a turning

point and as a formalization of a tendency already in place. The discourse on the 'chosen immigration' ('immigration choisie') openly affirmed the right of France to decide whom to accept inside its territory, and the goal of increasing a qualified economic migration over familial migration, representing the vast majority of new permits. More recently, a number of reforms have been introduced, following what the Ministry of the Interior defines as 'clear, republican and consensual' principles: namely the improvement of reception of the regular immigrants; the attraction of talents and high qualified foreigners; and the strengthening of the contrast to irregular migration. On the other hand, new incriminations have been introduced for the foreigner who refuses the collection of fingerprints or escapes from a detention centre. In 2004 the adoption of the Code of entry and residence of foreigners and the right to asylum - or CESEDA (Code de l'entrée et du séjour des étrangers et du droit d'asile) - systematized the different laws and provisions in the field into a single text. The CESEDA was lastly reformed in the sections regarding asylum on 23 July 2015, and in the sections relating to the entry and rights of foreigners on 7 March, 2016. Even if the reforms were partly intended to contrast the precarisation of the stay through the generalization of the multiannual permit (*carte pluriannuelle*), this is not likely to happen due to harsher conditions and a stricter control (Gisti et. Al. 2017).

### **Terms, definitions and concepts: peculiarities of the French case**

Recent statistics set the number of foreigners in France up to 4 million and the number of immigrants up to 7.5 million (Bouvier and Coirier 2016). This distinction between the immigrant ('immigré') and the foreigner ('étranger') largely depends on the historic mobility of the people from the former colonies. 'Immigrant' is a concept primarily related to the country of origin of the person and not their actual legal status in France, and is defined as 'a person born foreigner abroad and resident in France'. The concept of 'foreigner' ('étranger') is, on the contrary, referred to the present nationality and legal status of a person. As defined by CESEDA, art. L111-1, the foreigners are 'the people without French nationality, either if they have a foreign nationality or if they don't have a nationality'. Following the law, if a person has multiple nationalities, including the French nationality, he/she is considered as French in France.

Consequently, the CESEDA never refers to 'immigrant', but only to 'foreigners' and widely uses the word 'ressortissant', literally describing a foreign citizen out of his or her own country. The distinction between 'étranger' and 'ressortissant' is relevant as not all foreigners are 'ressortissant', as in the case of the stateless people. The same law refers to 'immigration' in two ways: (i) when it mentions the name of the institutions dealing with the process, and (ii) when mentioning the 'irregular immigration' ('immigration irrégulière'). When dealing with the people without papers, the concept of 'irregularity' is used in reference to a 'situation' ('situation'), such as 'the foreigners in irregular situation' (art. L111-10). The law never uses the word 'clandestine', which is by the way used by branches of the state to describe actions against 'clandestine immigration'. The law uses instead the word 'migrant' when referring to the activity of facilitating the irregular entry and stay in the country: such as the 'illicit traffic of migrants' ('trafic illicite de migrants'); the projects of co-development ('codéveloppement des migrants'); or the help to migrants ('aide aux migrants') (arts. L622-1, L900-1 and L316-1).

The rationale behind the use of 'irregular migration' was explained in 1998 by the commission of enquiry of the French Senate, Masson Balarello, on the issue of regularisation. The commission pointed out that the use of the term 'irregular migration' contradicted the idea – implicit in the term 'sans-papiers' (without papers) used by the growing movement pushing for a mass regularisation of migrants – 'that the concerned persons are 'victims', somehow deprived of a right from the administration, while it concerns foreigners staying irregularly in France' (Masson and Balarello 1998).

Generally speaking, a 'foreigner' is a person who lacks a basic right recognised to French citizens: the right to enter and stay without conditions in France. A foreigner regularly staying in France has the same rights as a French citizen with some exceptions: only the citizens of a EU Member State have the political rights, and only in the local and European elections; only the citizens of a European Union Member State, Norway, Iceland, Lichtenstein, Andorra, Monaco, and Switzerland have access to job positions in the public administration (excluded the so called 'sovereign positions' such as diplomacy, defence etc.); the non EU citizens can access the public administration only for jobs in the field of research and education; social benefits such as health insurance, maternity leave and the likes are recognised depending on the

working position. A foreigner can participate in the social life, including being elected as union representative, but they cannot be elected as members of the 'conseils des prud'hommes', a form of arbitration.

On the side of international protection, two main categories exist in France: the status of refugee and the status of subsidiary protection. The sources of the definition of refugees and recipients of protection are basically three: the French Constitution; the Geneva Convention of 1951; and the UNHCR, while the normative framework is included in the book VII of the CESEDA. The term 'subsidiary' means that this form of protection is recognised only after the evaluation of the criteria, in order to be acknowledged as a refugee. A third category, that does not directly imply a form of protection, but must be included in the picture, is that of 'stateless person'.

The Art. L711-1 of CESEDA states that the quality of refugee 'is recognised to all persons prosecuted in reason of their action in favour of liberty', following the definition of the French constitution, as well as to 'all persons under the mandate of the High Commission of the United Nations for the refugees, art. 6 and 7 of his statute as adopted by the General Assembly of the United Nations the 14 of December 1950', and the persons 'who correspond to the definitions included in the first article of the Geneva convention on the status of refugees of 28 July, 1951'. All these three categories are recipients of the dispositions 'applicable to refugees as for the Geneva convention'. The article L711-2 specifies that the 'reasons of prosecution' are evaluated following the conditions included in the directive 2011/95/UE 13 December 2011, concerning the conditions under which a foreign citizen or a stateless person can be a recipient of international protection. It also specifies that the aspects in relation to gender and sexual orientation are taken into account for definition of social groups; that there must be a direct link between the reasons of persecution and specific acts or the lack of protection; and that it makes no difference if the subjects own the characteristics that motivate the acts of persecution, or these are an assumption of the perpetrator.

The CESEDA describes the conditions to obtain a permit for 'vie privée et familiale' in different articles (see sub-section 6, Arts. L313-11 et seq), considering the family as the nuclear family: namely the couple - including both marriage, cohabiting and the union through PACS (*Pact*

*civil de solidarité*, a civil union which provides also for the same sex unions) – a relation between a parent and their sons.

## Observations on the three understandings of justice from the French case

### *Justice as non-domination*

France is a powerful funding member of the EU and it is safe to say that its relation with the communitarian decision is performed in full autonomy. The compliance of France with the EU regulation comes together with the process of joint elaboration of these rules. The fact that France's borders are mainly internal to the Schengen space keeps the state relatively distant from the main point of crisis of the last years. Nevertheless, the situation in Calais, where a bottleneck is created to stop migrants who wants to reach UK, and in Ventimiglia, where a similar bottleneck is created on the Italian side of the border to stop migrants who want to reach France, reveal how the distinction between external and internal borders in the EU is somehow misleading. If we consider the relocation system developed by the EU, France formally committed itself to receiving its quota, but the slow implementation of the whole project is making this commitment too difficult to assess.

On the other hand, France has historical and more recent bilateral relations with many third countries. An overview of the agreements signed with these countries reveals a more complex situation. Here we can note that the rise of a discourse based on co-development has produced a situation where the political and the economic advantage of France towards the concerned third countries is used as a leverage to impose France's own priorities. In particular, France has used this advantage to control irregular migration and govern mobility in a more efficient manner for its economic system. This point is particularly evident in the way bilateral agreements make development aids and the possibility to include avenues for workers of a specific country contingent upon the commitment to readmit expelled migrants and to strengthen the control over irregular migration (Panizzon 2013).

This sheds light on the fact that the relation of domination or no-domination between countries is grounded in a mutual relation of domination between these countries and the mobile population.

### *Justice as impartiality*

France has strong commitments to international law, affirmed in the CESEDA and in all the procedures regarding migration and asylum. The observations and limits concerning the international regime of protection of migrants and asylum seekers can thus be applied to France. Nevertheless, at least two dimensions point out a relevant specific position by France; namely, the definition of the list of labour shortages, and the list of 'safe countries' compiled by OFPRA (Office for the Protection of Refugees and Stateless Persons). The definition of labour shortages responds to the priorities adopted by the EU's strategy to promote growth and employment within the context of the Europe 2020 strategy. The very reforms towards the 'chosen immigration' can be considered as part of the effort by France as a Member State to attract talent and skills 'with a sectorial approach to legal migration and flexible admission mechanisms which respond to each State's priorities' (EMN 2015: 8). Following these needs, the possibility for a foreigner to get a work permit in France depends upon two conditions: first, the definition of the specific occupations open depending on his nationality and, second, the employment situation criterion. In terms of justice, it is difficult to connect this kind of procedure with a cosmopolitan idea and even less with 'impartiality', unless we define 'impartiality' as a technical parameter for the efficiency of the labour market.

The definition of 'safe countries' opens up a different set of problems. In fact, it opposes the principle of 'impartiality' as it imposes the national identity before any other consideration of the individual condition or danger of the concerned foreigner, allowing for speed rejection of the demand of asylum. The national list of 'safe countries', first introduced with the reform of 2003, first released in 2005 and lastly amended in 2015, has been criticised for accumulating on the EU lists following considerations that are difficult to discern. It is possible to note a certain correspondence between the list of 'safe countries' and some of the major sources of application in recent years, such as Kosovo and Albania. The number of included countries - 16 - may seem both too low and too high. In any case, it is difficult to relate this list with some form of generally applicable impartiality.

### *Justice as mutual recognition*

The French state has progressively introduced normative instruments to insure the integration of foreign nationals into the value system of

the 'République'. The 'Contract d'intégration républicaine' (CIR, introduced with the reform of CESEDA of 24 July 2006, in substitution of the 'Contract d'accueil et intégration') includes the obligation for the applicant not only to comply with the French law, but also 'to respect the key values of French society and Republic'. In order to explain this passage of CIR, the French ministry of the Interior has drafted a document titled 'Living in France'. The document starts with the explanation of the 'key values of French Society and Republic' and states that 'France is synonymous with fundamental values to which the French are very attached' and that 'living in France means having rights as well as obligations' (General Directorate for Foreign Nationals in France 2016, 5). Independently from the values enlisted in this document, the mere existence of CIR should be understood as a lack of mutual recognition as it reflects a solution to the long debate over multiculturalism in the name of the supremacy of the 'République'.

A second and more general tension regarding mutual recognition is present concerning the fact that migrants are always considered as subject of a state. As the discourse on the 'chosen immigration' clearly shows, the main focus of the French policy on migration is to affirm this field as a state prerogative and interest. Even the compliance with international obligations comes as an indirect consequence of the French state engagement with the international community and its membership in the European Union. What is clear is that the French state, as a sovereign state, recognises the claim by foreign individuals of moving and living in its own territory only as a specific segment of labour force or a specific class of vulnerable people. This implies strong consequences for the European migration system, as it rests in a middle ground between being rooted in nation states and a supranational political formation. While the European Union seems to replicate the logic of nation states when it comes to migration at a different scale, critics such as the French philosopher Etienne Balibar suggested that Europe, as a hybrid entity, should open new paths for justice that are not rooted in the political logic of sovereignty (Balibar 2001; 2016).

## Germany and migration

For decades, German policymakers and public dialogue perpetuated the perception that Germany was not a country of immigration, even as it was becoming one of the world's top destinations (second only to the United States in recent years). Since the early 2000s, Germany has undergone a profound policy shift toward recognizing its status and



becoming a country that emphasizes the integration of newcomers and the recruitment of skilled labour migrants. This approach to immigration and immigrants has been tested, however, amid the massive humanitarian inflows that began in 2015, which have stoked heated debate.

The current conceptual paradigm underlying the legal and institutional framework of the national migration system is the one that emerged in the early 2000s, when Germany suited up to embrace – despite reluctances, enduring inconsistencies and ongoing debates – its new identity as a country of immigration and integration. The country's previous self-depiction was one that denied immigration and integration as part of its identity, despite the millions of *Gastarbeiter*, mostly unskilled labourers from Italy, Turkey, Spain, and Greece, that arrived in the economic boom years between 1955 and 1973. The 1970s economic slowdown as well as the partially unexpected inflow of asylum seekers in the 80s and ethnic Germans in the 90s are the main reasons of this stance.

### Terms, definitions and concepts: the peculiarities of the German case

The complexity of German authorities' approach to migration is reflected in the diverse range of only partially overlapping, if not potentially contrasting, concepts to be found in official sources – a complexity that is only enhanced by a public debate not always able or willing to keep up with subtleties. For instance, *Migration* and *Migranten* are essentially socio-scientific notions rather than technical terms pertaining to the German *Aufenthaltsrecht* (residence law), yet they occur in legal sources quite frequently, also as an effect of German policymakers' participation in wider debates aimed at defining notions and targeting vested biases recurring in common and specialist parlance (Beauftragte der Bundesregierung für Migration, Flüchtlinge und Integration 2014; Senge 2015; European Commission 2012). More relevant, although not specifically defined in legal terms, is the concept of *Zuwanderung* – translated in the EMN-glossary as migration – which refers to the actual flow of people entering the country from abroad. The legal use of the term – after which the immigration law currently in force (*Zuwanderungsgesetz*) is named – is relevant because it implies

the legal distinction between regular and irregular entry in the country.<sup>28</sup> More specifically, *Zuwanderung* entails the authoritative regulation of the movement of people leaving their homeland (*Heimat*) through the enforcement of entry requirements – that is, the active governmental management of a policy issue. This notion therefore differs from the ostensibly ‘neutral’ notion of migration – although even the scientific term *Migranten* can come to unwarrantedly singling out ‘special groups’, such as poor families with non-German backgrounds in need of social assistance. The use of the concept of *Einwanderung* – the willing relocation of people moving to a foreign country in need of additional population for demographic, economic, cultural or any other kind of reasons (Germany as *Einwanderungsland*) is highly indicative of the underlying political conflict over the Germany’s general stance toward migration.

Though virtually irrelevant in lexical terms, the linguistic difference between *Zuwanderung* – implicitly referring to unwanted and uncontrolled entry and the governance thereof – and *Einwanderung* – which entails permanent establishment and social integration – has been a crucial point of the debate over a new immigration act in Germany since the choice of either term would elicit a completely different perspective on the matter at issue. Oddly enough, the EMN translates *Einwanderung* as irregular immigration (European Commission 2012). However, the very difference between insiders/citizens and outsiders/aliens is to some extent strained by categories like that of *Spätaussiedler* (repatriated ethnic Germans) – German nationals (*Volkszugehörige*) from the successor states of the former Soviet Union and other Eastern European states, who have established their stay permanently in Germany by means of a special admission procedure. *Spätaussiedler*’s special entitlement to naturalization (*Einbürgerung*) emphasizes even more Germany’s conditional and differentiated approach to citizenship as a means to integration. The meaning of *Volkszugehörige* has been adapted several times, especially with regard to the importance of German linguistic proficiency. The language tests carried out since 1996 required the acquisition of German language skills through family mediation. Since 2013, knowledge acquired elsewhere has also been allowed, which has led to a growth in the circle of poten-

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<sup>28</sup> The term *erlaubt* (allowed) is also used. Referring to resolution 1509 (2006) of the Parliamentary Assembly of the Council of Europe, the term ‘illegal’ is preferred when referring to a status or process, whereas the term ‘irregular’ is preferred when referring to a person (Council 2006)

tial returnees. The German Constitution, Art. 116, also refer to *Statusdeutscher* (As-if-German) or German without German citizenship, i.e. refugees or expellees of German nationality or as their spouse or descendant in the territory of the German Reich according to the situation of 31 December 1937. Moreover, the *Bundesvertriebenengesetzes* granted special rights to the exiled and refugees in order to favour the naturalization of Jews who had to flee during the Third Reich's rule or had been left outside of the post-WWII German national borders.

Unsurprisingly, over the last few years, asylum policy and legislation have also been at the centre of intense public debates, often fuelled by more or less genuine conceptual misunderstandings. To this regard, the notion of *Wirtschaftsflüchtlinge* (economic refugee) is notable. This category includes anybody who enters the country irregularly and then applies as asylum seekers, although their motivation is to improve their living conditions, and not to escape persecution in their country of origin. The concept's negative connotation, as well as the openly unwarranted bridging of the distinction between migration and asylum, express quite effectively the tensions agitating the German society and a certain intolerance of nuances. Among the sources of disagreement and misperceptions is the variance of the legal grounds for the status of refugee (*Flüchtlinge*) can be granted to asylum seekers (*Asylbewerber*, *Asylsuchende*, the term *Asylant* is also in use, mostly with a derogatory connotation). Apart from the international instruments the country is signatory to, protection of the right to asylum in Germany is also guaranteed by the Constitution (Deutsche Bundestag 1949, 16a), although concretely the latter plays a subordinate role compared to the safeguard granted through the Geneva Convention (every year, only one to two per cent of asylum seekers receive protection based on the Constitution).

Moreover, the Federal Office for Migration and Refugees (BAMF), the Ministry of the Interior's agency in charge of asylum procedures, also

assesses whether applicants meet the requirements for subsidiary protection<sup>29</sup> and temporary suspensions of deportations<sup>30</sup>, or because their repatriation is technically impossible, but are eventually going to have to leave the country. Failed asylum seekers (*abgelehnte Asylbewerber*) – with no claim to any form of protection and no pending appeal – are requested to leave Germany within a week if the application is rejected because manifestly unfounded or immaterial, 30 day in all other cases. A failure to comply normally results in deportation (*Abschiebung*). This is therefore legally different from the notion of *Zurückweisung* (rejection at the border) – which correspond to border control practices executed in places (basically airports) that are conceived as lying virtually outside of the German territory – since, in this case, the incoming alien does not even come to the asylum application. This is also part of the crackdown on asylum seekers and migration launched by the government in 2016, at least in part as an effect of the widespread reprisal against the alleged ‘loss of control’ of the country’s borders. If a deportation order is not immediately enforceable, detention pending deportation (*Abschiebungsgewahrsam*) of asylum seekers is legally possible. *Land*-level authorities – the states foreigners’ registration offices (*Ausländerbehörden*) and administrative courts are in charge of deportations and actual repatriations (as well as the issuing or withholding of residence permits and inspections enforcement).

## Observations on the three understandings of justice from the German case

### *Justice as non-domination*

As it can be argued, the compliance of migration-related concepts and norms with a notion of justice as ‘inter-governmental fairness’ is troubled by Germany’s somewhat ambivalent foreign policy identity. The foreign policy identity has been wavering more and more conspicuously between a post-World World II repute as a non-threatening, highly reliable partner on the one hand and the (domestic as well as

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<sup>29</sup> The protection afforded to a third-country national or to a stateless person who does not fulfil the conditions for recognition as a refugee but who has provided sound grounds for the assumption that returning to her/his country of origin or, in the case of a stateless person, to the country of her/his previous habitual residence would in fact be liable to cause serious harm according to Article 15, and that Articles 17(1) and (2) is not applicable and that s(he) cannot benefit from the protection of that country.

<sup>30</sup> *Duldung*, literally ‘toleration’, is not a residence title; those who are granted one (*Geduldete*) are tolerated for international or humanitarian reasons or for the protection of the interests of the Federal Republic of Germany (§ 60a (1) Aufenthaltsgesetz).

international) expectations of a more assertive role, better suited to the country's interests, capabilities and status on the other. This inherent tension manifests itself most clearly within the European Union, where a balance between formal equality with fellow Member States and the country's *de facto* leading role seems increasingly hard to strike.

As far as formal definitions and policy instruments are concerned, the very preference for the *Zuvanderung* concept can be regarded as conducive to domination outcomes, inasmuch as it involves the supremacy of domestic public authorities managing immigrants through more or less strict governmental strategies, while also indirectly – but deliberately – influencing their relative home countries. What seems to be implied here is a unilateral exertion of pressure at the expenses of the mutual relationship inherent in a notion that emphasizes long-term integration rather than an effective response to an emergency. As for intra-EU relations, possible evidence of dominance may be found in the German government's inherently unfair demand that the countries lying along the Union's external borders act strictly in accordance with the terms of the Dublin III System – that is, that they bear the brunt of the migration wave, with virtually no extra support from other Member States. On the other hand, the unilateral suspension of the Dublin III System in September 2015, which triggered Central Europe governments' allegations of 'moral imperialism' is worth a mention. Apart from any considerations about the EU asylum policy's structural flaws and the poor performance of national reception systems, what matters here is that the German government's request appears untenable in terms of a genuinely 'Westphalian' notion of justice, as it wittingly overlooks the concrete conditions faced by Southern Europe countries. In this sense, the opportunity to resort to effective means like the quasi-extraterritorial fast-track asylum procedure carried out in the transit areas of major German airports creates an objective normative advantage for countries with no (sensitive) external border. In this sense, the respect of justice as non-domination requires more than the mere compliance with the principle of formal equality and mutual recognitions among nation-states, but also presupposes the 'diplomatic' ability to manage the inevitable differences in power and material conditions.

### *Justice as impartiality*

While Germany's conceptual and legal frameworks tend to comply to a considerable extent with universal criteria of justice focused solely on the claims of individuals *as such*, they also continue to be bounded

by nation-specific considerations, for reasons that largely complement those discussed with reference to justice as non-domination. The very existence of forms of 'quasi-citizenships' based on ethnic identities and/or historical backgrounds (ethnic German repatriates, Jewish immigrants) generates a discriminatory effect in terms of access to international protection and naturalization on migrants. As far as economic migration is concerned, compliance with the universalistic *jus soli* principle coexists with rules that request relinquishing the applicant's original citizenship in order to access the naturalization process. Moreover, specific measures have been taken to select labour force with the purpose of addressing skills gaps (*Fachkräftemangel*) – see the implementation of the EU Blue Card system for highly qualified persons, which ensures a faster access to permanent residence. Significantly, the same rationale has been successfully applied to free movement of labour within the EU, creating an advantageous transfer of skilled workers from Southern Europe. Even when it comes to asylum, the application of universal rules has a number of conditions attached. Though they conform quite effectively to the rule of law and are relatively safe from the executive's exclusive control, Germany's criteria and procedures to grant protection to asylum seekers prove to be no less sensitive to contingent concerns than cosmopolitan inspiration. Notably, Germany's current asylum system was made possible by the so-called 1993 *Asylkompromiss* – a constitutional change to tighten the hitherto generous condition to access to the status of refugees in the wake of the 1980s increase in the inflows of asylum seekers, mainly from Yugoslavia, Romania and Bulgaria.

Significantly, the concept of 'safe country' is not only at variance, as a criterion by which to assess asylum applications, with the pre-eminence of individual over nationality-related concerns maintained by a notion of justice as impartiality, but it also periodically updated based on contingent considerations about the economic and political feasibility of Germany's asylum policy. Another aspect that makes the German asylum legislation less consistent with cosmopolitan values are the distinctive sets of safeguards granted by different forms of international protection. Far from being a merely technical issue, the differences between the possible grounds based on which protection is actually granted have become a political case since the executive's attempt in 2016 to curtail the number of incoming *Ausländer* (foreigners) granting a larger share of asylum seekers subsidiary protection instead of the 'full' status of refugee. The measure was expected to discourage new arrivals, as subsidiary protection, while excluding deportation,

also comes with a two-year ban on the refugee's family reunification and a speed up deportation process for those not provided with a permanent right to remain. The government's crackdown on migration has resulted in a string of successful appeals before Germany's administrative courts, which have ruled full protection for 90 percent of the claimants. Accordingly, national courts can be regarded as effective subsidiary enforcers of impartiality principles, attesting to the idea that the 'checks and balances' at work within Germany's institutional setting is functional to the advancement of justice as impartiality. But it also relates in a problematic way to the goal of promoting collective (supranational) institutions as default modes to pursue this notion of justice.

### *Justice as mutual recognition*

Few aspects of Germany's migration-related conceptual and legal frameworks seem to fulfil the criterion according to which specific individual and collective identities are to be addressed *per se* and not in relation to concerns about resources – which instead emerge as a relatively high, albeit variable, priority of the country's migration policies, as seen above. Admittedly, Germany's migration system includes well-structured, nationally standardised integration courses (which may become mandatory under certain circumstances) primarily destined for migrants with long-term residence plans in order to support them in integrating into the economic, cultural and social life. Significantly, specific integration courses have been designed for special target groups: immigrants with additional advancement needs (e.g. parents, women, and youths). The federal government's commitment toward this goal is confirmed by the 'Integration bill' submitted a few months ago, aimed at launching a 'two-way process that would foster integration while expecting incomers to do their bit' (The Federal Government 2016). One particular aspect consistent with the notion of justice as mutual recognition is the role assigned to state-level entities, such as local Foreigners Authorities, which are responsible for issuing residence titles and are the primary location for questions regarding residency and taking up employment, creating more favourable condition to a genuine dialogue. The role of the *Länder's* registration offices, responsible for administering deportations, and state courts, usually in charge of asylum seekers' appeals is also significant. It was these authorities that ruled out deportations to Afghanistan, pending new security reports, despite the agreement signed by the EU and strongly advocated for by the federal government.

## United Kingdom and migration

The legislation regulating immigration and asylum in the UK is a relatively complicated patchwork of Acts of Parliament and statutory instruments – executive orders of subordinate legislations (e.g. the Immigration Rules) expanding on and clarifying the framework of immigration law. These have been emended at a very high rate over the past decades, in order to keep abreast with the massive changes occurred in this policy area. Although the United Kingdom has received immigrants for centuries, the country has traditionally been a net exporter of people; only from the mid-1980s did the United Kingdom become a country of immigration. The 1990s differs markedly because of high levels of net immigration, a surge generated in large part by sustained economic growth. Since 2004, immigration levels have been boosted by an extraordinary wave of mobility from Eastern European countries, particularly Poland, whose citizens have free movement and labour rights following the European Union enlargement. The recent refugee crisis only added to an already very high level of public anxiety about immigration, fuelled by media attention. This has ultimately led to significant changes not only in the political agenda of traditional and new parties, but also in the very conceptual framework underlying the common notions of what is right and what is wrong regarding a forceful phenomenon as migration.

### Terms, definitions and concepts: peculiarities of the UK case

The United Kingdom's law offers no unambiguous and practicable definition of 'migrant' or 'immigrant' ('Foreign', for the purposes of the Control of Immigration means 'non-Commonwealth' to 1998 and 'non-Commonwealth' and 'non-EEA' from 1999). The distinction between those who have the 'right to abode' in the UK and those who have not is crucial. The stock of migrants who are not entitled to reside in the UK, either because they have never had a legal residence permit or because they have overstayed their time-limited permit or who are legally resident but breaching the conditions attached to their immigration status, are often referred to as 'illegal immigrants'. The terminology 'irregular (im)migrant'/'migrant in an irregular situation' has come into use because it better covers the diversity of deviations from the law whilst avoiding any problematic moral statement (Düvell 2014). The Immigration Act 1971 Section 24(1)(a) defines 'illegal entry' as the offence of knowingly entering the United Kingdom in breach of



a deportation order or without leave. For the offence to be committed, a person must *knowingly* enter in breach of a deportation order or without leave (UK Legislation 1971). Labour migration involves people coming to the UK for the purpose of paid work – i.e. whose primary reason for migrating or legal permission to enter the UK is for employment.

An ‘economic migrant’ is not a legal classification, but rather an umbrella term for a wide array of people that move from one country to another to advance their economic and professional prospects. In the UK’s public discourse, what is meant by ‘economic migrant’ – often with a derogatory connotation if not a xenophobic twist – is a person who has left his/her own country and seeks by lawful or unlawful means to find employment – i.e. for ‘personal convenience’ possibly at the expenses of local workers – in another country (Althaus 2016). Consider for example how the purportedly right-wing British think-tank Migration Watch states that ‘[i]n the majority of cases the unsuccessful asylum seeker is, in fact, an economic migrant who has tried to take advantage of the asylum system in the absence of any other available means of obtaining lawful entry into the United Kingdom. This conclusion is reinforced when one considers that most asylum seekers are young men. Furthermore, many of them have paid huge sums of money to people traffickers to bring them to the UK’ (Migration Watch UK 2006). The British Government also makes use of the term ‘migrant worker’ as formulated in the UN Convention on the Protection of the Rights of all Migrant Workers and Members of their Family to designate a person engaged in a remunerated activity in a state of which he or she is not a national (Office of the High Commissioner for Human Rights 1990; Department for Business Innovation & Skills, 2015). The UK, like most countries with advanced economies, has specific policies in place to facilitate the mobility of highly skilled professionals and investors into its respective national economy. The most desirable migrants are identified as expatriates (‘expats’). Restriction and selection of labour, education and investment immigration is pursued through the implementation of the 5 Tier Points Based System (which implicitly differentiates the concept of labour immigrant).

Someone who has received a positive decision on his or her asylum claim from the Home Office, or has had a successful appeal, is issued documents confirming his/her status as a refugee (UK Government 2012, art. 334). Successful applicants gain support not only for themselves but also for their ‘dependents’ regardless of their immigration

status (who can be a husband/wife/civil partner, an unmarried couple (if living together for more than 2 of the last 3 years), a child under 18, or a member of the household who is over 18 and is in need of care and attention due to disability). If the Home Office considers that a person does not qualify for asylum, but is still in need of international protection, he/she may be granted Humanitarian Protection.

The Home Office has the power to hold individuals in detention when exercising immigration control. Asylum seekers and other migrants can be detained for administrative purposes – typically to establish their identities, or to facilitate their immigration claims resolution and/or their removals. Although detention is not a criminal procedure, observers frequently point to the prison-like features of immigration detention in the UK, including both architectural similarities and ‘conceptual parities,’ which make it arguably a form of punishment even if officially it is not recognized as such. Decisions on asylum and human rights claims made in the UK are made by the UK Border Agency, which is an agency of the Home Office. In order to become an asylum applicant and be recognised as a refugee in Britain, migrants need to be on UK territory (so, strictly speaking the migrants in Calais are neither refugees or asylum seekers from a UK legal perspective – at least as long as they remain in French territory). The safe country of origin concept is provided by British legislation (Nationality Immigration and Asylum Act (UK Government 2002, 94)). States are designated safe by order of the Secretary of State for the Home Office. The Secretary of State may make such an order where they are satisfied that ‘there is in general in that State or part no serious risk of persecution of persons entitled to reside’ there, and that removal there ‘will not in general contravene’ the ECHR. The UK participates in EU and bilateral readmissions agreements, and has memoranda of understanding for the return of nationals found illegally in the UK.

The term ‘deportation’ applies to people and their children whose removal from the country is deemed ‘conducive to the public good’ by the Secretary of State. Deportation can also be recommended by a court in connection with a conviction of a criminal offence that carries a prison term. Administrative removals (or just ‘removals’) refers to a larger set of cases involving the enforced removal of non-citizens who have either entered the country illegally or deceptively, stayed in the country longer than their visa permitted, or otherwise violated the con-

ditions of their leave to remain in the UK. Voluntary departures involve people against whom enforced removal has been initiated. (The term 'voluntary' describes the method of departure rather than the choice of whether or not to depart).

## Observations on the three understandings of justice from the UK case

### *Justice as non-domination*

Arguably, the basic 'negative' conception informed by the idea of justice as non-domination is the most discernible in the definitions and sets of relevant norms underlying the UK's migration policy. British norms and operationalized concepts seem to be directed to large extent against arbitrary interference and the subordination to others, favouring the rule of law and counter-majoritarian institutions – as the judiciary's power to assess the liability of every public authority (political and administrative) established through the Human Rights Act 1998. The purpose of holding in check the power of individuals and non-state groups is at least in principle pursued through the protection of the right of irregular immigrants, especially when employed not *qua* immigrants but as part of the country's population. On the other hand, this purpose inherently at variance with that of preventing and eradicating irregular ('illegal') situations – see the new 2015 measures against landlords renting to irregular migrants – which can still be associated with non-domination through the role of the government as gatekeeper on the membership to the 'body politic', watching over a plain field where all insiders enjoy the same 'right to have right' that comes with citizenship (or, at least, border clearance).

As for non-domination within the international context, the British government's conceptual framework appears quite consistent with a Westphalian notion of justice – that is, a procedural rather than a substantial idea of justice, one in which the role of global institutions is to foster deliberation and promote common practical reasons rather than sanction non-compliance in a legal fashion. In this perspective, the way migration is defined and regulated is contingent on national interests – first of all security interests. Accordingly, freedom of movement and hospitality duties could be rightly constrained or conditioned based on the primary goal of national security. The decision not to be automatically bound by measures taken under the Schengen acquis (but to retain a right to opt-in) can be regarded as being in line with this practical

conception of justice – although it put a strain on the on the strong principle of equality that ‘qualifies’ strict non-domination among the EU Member States. As long as the natural configuration of the country offered a better and less intrusive way to prevent illegal immigration than other measures, such as Schengen’s, it was reasonable – therefore right – to stick to national norms and the respective concepts. Migration laws and, even more so, border control rules have rested on an ever-stronger notion of ‘territoriality’, which in turn hinges on the UK being an island (UK Government 2014). Arguably, this seems to have relieved the UK’s public authorities, compared to continental Europe’s, from conceptualising immigration an inherently global issue, to be reckoned with through novel mind-sets and institutional tools.

Potential and actual infringements of the principle of non-domination are to be found in the EU readmission agreements and the bilateral memoranda of understanding for irregular migrants the UK partakes to, owing to asymmetries in the parties’ bargaining power. However, any specific measure aimed at curtailing migration can end up being perceived by other countries’ government as unfair treatment of their national abroad (as in the case with India and the British government’s and the scrapping of post-study work visa). The post-Brexit UK’s goal of retaining access to the EU internal market while dismissing the freedom of movement (and of migration) of EU citizens can also be regarded as an attempt to dominate relationships with former EU fellow members.

### *Justice as impartiality*

Looking at the UK’s regulatory approach of migration and asylum, a major source of potential and actual infringements of the principle of impartiality – hinging on the idea of general/universal rights of individuals and collective entities – is the role assigned to Immigration Rules as a source of law, which attest to the post-statutory phase of the UK’s immigration policy (Cerna and Wietholtz 2011, 204). While a part of the British legal order – being *de jure* statutory instruments and having been able to curb the Parliament’s sway – Immigration Rules are in fact non-legislated ‘rules of practice’, not bound to be abstract or general, as required instead of statutory law. This has allowed the Home Office to regulate a great many aspects of the British immigration policy at its complete discretion. Being extremely flexible tools for the ‘loophole-closing’ and ‘fine-tuning’ that has characterised the British legislative approach, Immigration Rules have been very much at odds

with the principles of justice as impartiality. Moreover, unlike in other countries, the latter have been put under considerable strain by policy instruments designed to select immigrants based on their professional qualification in order to fill gaps in the national labour market such as the 5 Tier Point System, which provides for 'fast track' procedures for highly qualified migrants, sponsorship systems, et cetera.

Also the concept of 'safe countries of origin' (defined in Nationality Immigration and Asylum Act (UK Government 2002, 94)) may be inconsistent with the principles underlying impartiality, at least to the extent that its use is prompted by the desire to speed up the processing of asylum seekers' applications, rather than ascertaining – in a virtually unbiased and selfless manner – that 'there is in general in that State (*of origin*) or part no serious risk of persecution of persons entitled to reside' there, and that removal there 'will not in general contravene' the European Convention on Human Rights (in this case there also seems to be a merely instrumental implementation of the ECHR). On the other hand, regardless of a tendency to criminalize irregular immigration, a series of measures – i.e. the direct enforceability of the ECHR via the Human Rights Act 1998 – have also provided for an effective protection in the UK of the universal rights of immigrants despite their irregular status. The UK ensures quite effectively that the basic rights of irregular immigrants cannot be violated in the enforcement of immigration laws and the implementation of measures to control migration, also when it comes to the delicate issue of deportation.

### *Justice as mutual recognition*

The declared goal of the Immigration Act 2014's – as stated by the then home secretary May – to 'create a really hostile environment for illegal immigrants' may well be regarded as a token of the UK's conceptual and legislative attitude toward mutual recognition concerning migration (Travis 2013). Another publicized goal of recent years' migration laws and policy measures is quite revealing: the so-called 'net migration-target', i.e. the intent to reduce net migration to the UK from EU and non-EU countries from hundreds to tens of thousands per year (Sims 2016). Both purposes reveal a marked 'managerial' underlying stance according to which migrants (as well as asylum seekers) seem to be primarily conceived of as a policy issue, to be managed with governmental tools as effectively and in line with overarching national in-

terests as possible. As one can see, such an approach is only marginally based on aspects like 'dialogue' and 'reciprocity', as it rather assumes the policy object to be essentially passive.

This is confirmed, among others, by the rationale of the UK's naturalization's rule. Not unlike in other countries, foreigners that wish to become British citizens have to demonstrate to know and be able to join values and principles, history and culture as well as the law of the UK, besides mastering the English language and being willing to get involved in the community life. The process, however, is not designed as a voluntary adhesion to fundamental features of the British citizenship premised on the mutual recognition of the recipient political community (represented by the public authority) on the one hand and the citizen-to-be on the other. Instead, the process resembles much more a bureaucratic scrutiny of requirements by the UK Visa Bureau – and basically the same goes for the ascertainment of the commitment to the country preliminary to the grant or refusal of Indefinite Leave to Remain or temporary visa. In this sense, the different requirements applied to people from inside the European Economic Area appear just the entailment of specific bureaucratic conditions rather than the acknowledgment of actual identifying aspects.

This is also in line with the process of 'normalisation' undergone by the UK's national identity, which over the last three decades has been progressively rationalised through the removal of special rights and conditions to abode formerly assigned to specific categories of people based on their ties to the British Empire and then the Commonwealth, and a widespread negative evaluation of the multicultural integration strategy's results (Platt and Platt 2013). A certain UK disinclination to justice as mutual recognition can also be detected, as regarding asylum, in the British legal system of the third-country system, which further exempts the Home Office from the obligation of dealing with a number of asylum requests, shifting the burden on the countries of 'safe arrival' unilaterally designed by the Home Office. Moreover, unlike with repatriations to the country of origin, the return to third safe countries cannot be appealed to by asylum seekers. Although the same 'buck-passing' is to be found within Dublin III System too, at least in principle this can be thought of as the undesired outcome of a structurally flawed (but still value-laden) common policy, whereas the functional equivalent implemented by the UK government permits to

avoid any 'significant' encounter with the asylum applicant without so much as the admittedly faulty 'peer pressure' operating within the EU.

## Greece and migration

Greece is a relatively 'new' country of immigration since it was transformed into a country of transit and settlement in the 1990s (Gropas and Triandafyllidou 2007; Kasimis 2012). Until then it was predominantly a country of emigration. Although small numbers of immigrants arrived in Greece in the 1970s and 1980s, significant numbers of migrants from the former Soviet Union republics and Balkan countries settled in Greece following political and economic unrest after the collapse of communist regimes. These flows also included ethnically Greek returning migrants, such as members of the Greek minority in Albania and Greek post-civil war refugees in Eastern European communist states (Gropas and Triandafyllidou 2007). In addition, because of its geographical position, Greece is a main point of entry to the European Union for migrants from Asian, Middle Eastern and African countries fleeing armed conflict and political and economic instability (Triandafyllidou and Maroukis 2012), recently including Syrian refugees displaced by the Syrian conflict (UNHCR 2016a).

Several legislative instruments were introduced to address the new dynamics of migration. Law 1975 of 1991 was a first attempt to regulate the entry and residence and was followed by law 2910 in 2001. Both laws were predominantly focused on controlling entry and considered economic migration as temporary. These tendencies are also evident in Law 3386 of 2005 which, however, attempted to provide for long-term residence and integration (Baldwin-Edwards 2009; Triandafyllidou 2009). Nevertheless, migrants faced significant difficulties in maintaining legal status because of strict provisions on entry and residence and work permits and administrative inadequacies (Triandafyllidou 2009; Maroukis 2013). As a result, four regularisation programs took place between 1997 and 2007 (Baldwin-Edwards 2009). The provisions of Law 3386/2005, subsequent amendments and other laws transposing EU directives – for instance on family reunification and long term residence status – were codified in Law 4251/2014 (Government Gazette 2005; 2014).

The first law specifically on refugee protection was introduced in 1996. It established normal and accelerated procedures and introduced the concepts of manifestly unfounded applications and safe third-country

in line with developments in EU soft law. The Europeanisation of refugee and asylum law accelerated in the late 2000s with the transposition of the Dublin Regulation (2003) and the Reception (2007), Procedures (2008) and Qualifications (2008) directives. Following widespread criticisms on the country's asylum and reception systems, Law 3907/2011 introduced significant reforms – establishing the Asylum and First Reception Services – and transposed the Returns Directive (Government Gazette 2011). In 2016, Law 4375/2016 introduced amendments to the asylum and reception systems aimed at facilitating the implementation of the EU-Turkey agreement (Government Gazette 2016).

Greece has also ratified key international and regional human rights instruments – including the Geneva Convention, the Universal Declaration of Human Rights, International Covenant of Social, Economic and Cultural Rights, International Covenant on Civil and Political Rights – which safeguard the human rights of migrants. In addition, the Greek Constitution prohibits the 'extradition of aliens prosecuted for their action as freedom-fighters' and guarantees the 'protection of their life, honour and liberty' of every person in Greek territory 'irrespective of nationality, race or language and of religious or political beliefs' (Hellenic Parliament 2001, Art 5, para. 2). It also guarantees equal access to social security for all persons working in Greece. Overall, the Greek legal framework largely conforms to international and regional legal standards, although specific definitions and categories diverge on occasion.

### **Terms, definitions and concepts: the peculiarities of the Greek case**

The term 'migrant' is not used in Greek law. Current law uses the terms: 'foreign national' ('allodapos'), defined as 'natural person who does not have Greek nationality or is stateless'; 'third-country national', defined as 'any natural person who is not a Greek national or the national of any other EU Member State'; and 'EU national', defined as 'any person who is a national of an EU Member State' (Government Gazette 2005; 2014). Similarly, while the term 'illegal immigrant' – 'lathrometanasths' or 'paranomos metanastis' – is not used in Greek law, the term 'illegal immigration' ('paranomi metanastefsi') occasionally is (EMN 2014). With reference to illegality, the law distinguishes between third-country nationals who 'reside legally' on the one hand and those who or 'reside illegally' or have 'entered illegally'. However, the terms 'migrant', 'economic migrant', 'economic migration' and 'illegal immigration' has been used in official documents such as reports



submitted to UN or EU bodies, press releases by the government and ministries and parliamentary debates.

The definitions of 'refugee' 'refugee status' and 'subsidiary protection' are identical to those in the Geneva Convention and EU directives on qualification and procedures (Government Gazette 2013; 2016). The terms 'applicant for international protection' or 'applicant for asylum' – are used in law to signify asylum seekers (Government Gazette 2016, Art. 34; 2014, Art. 2; 2010, Art. 2). Other legal definitions and categories in domestic law – such as 'safe third-country' 'return' 'family reunification' 'unaccompanied minors' – generally transpose their equivalents from EU legal instruments. There are, however, occasional differences between domestic and EU legal norms. For instance, when Law 3907/2011 transposed the Returns directive, migrants 'apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border' (European Parliament and Council 2008, Art. 2, par. 2a; Government Gazette 2011, Art. 17 par 2a) were excluded from its remit. The text of the directive leaves the choice to include migrants apprehended at the border to the discretion of member states (European Parliament and Council 2008, Art 2). Similarly, there is no list of designated safe third countries in Greek law.

Migration has generally been a controversial issue in Greece. The use of the terms 'illegal immigrant' and 'illegal immigration' is particularly significant in the Greek context since it has framed media and public debates on migration since the 1990s (Karamanidou 2016; Pavlou 2009). Their widespread use constructed migration as a predominantly negative phenomenon, associated with criminality and social threat. The significance of 'illegality' is also evident in legislation which prioritises control and deterrence over refugee protection or long-term integration. For instance, migrants entering the country in an unauthorised manner are labelled as 'illegal' upon entry to Greek territory in accordance to the provisions of Law 3386/2005, even if they intent to apply for asylum. As will be discussed further on, this has significant consequences for migrants' rights.

Another significant feature of the Greek legal framework concerns disparities in terms of rights attached to different legal categories. While essential human rights are generally guaranteed, socio-economic and civil right are dependent both on legal status and employment. This

often results in markedly different arrangements in relation to rights attached to different statuses. Recognised refugees, for instance, are given the full range of rights prescribed by the Qualifications directive. Third-country nationals generally have access to socio-economic rights, but it is legal residence and employment that guarantees most welfare entitlements (Government Gazette 2014; Maroukis 2013). In contrast, undocumented migrants are only entitled to emergency healthcare and use of public services relating to matters such as voluntary return and renewal of residence permits (Government Gazette 2005, Art. 82; 2014, Art. 26).

Key controversies relating to legislation between 2009 and 2016 concerned citizenship, violence against migrants, and more recently on the Syrian refugee crisis and the EU-Turkey agreement. In 2010, the government introduced law 3838/2010 which facilitated the granting of citizenship to migrants and granted the right to vote in local elections. The law challenged dominant exclusionary perceptions of ethnic citizenship, which was opposed by right-wing parties, and eventually declared unconstitutional by the Greek Supreme Court. Incidents of violence against migrants, linked to the extreme right party of Golden Dawn, highlighted the shortcomings of anti-discrimination legislation and attracted widespread criticism by human rights organisation (Council of Europe 2013). The adoption of the hotspot approach in 2015, the EU-Turkey agreement and the introduction of Law 4375/2016 brought on significant and controversial changes to the country's asylum laws, most notably in relation to the application of the concept of 'safe third-country', detention of migrants in need of international protection in closed Reception and Identification Centres and their return to Turkey.

## Observations on the three understandings of justice from the Greek case

### *Justice as non-domination*

If justice as non-domination is conceptually located in relations between EU member states on the one hand and third countries on the other, it appears difficult to relate to the Greek context. There is little evidence that the Greek state has imposed migration-related measures on third states as an independent actor. For example, while Greece has bilateral readmission agreements with neighbouring states such as

Turkey, most are EU-wide ones (EMN 2014). A more pertinent approach would consider the extent to which Greek legal frameworks and practices are dominated by the European Union and other member states. The Europeanisation of domestic migration and asylum laws and harmonisation with EU legislative developments is an outcome of the country's membership, but it has not always served its interests nor safeguarded migrants' human rights. The Dublin Regulation, for example, exacerbated pressures on already weak asylum and reception systems (Karamanidou and Schuster 2012; McDonough and Tsourdi 2012) before the suspension of returns to Greece following the *MSS v Belgium and Greece* judgement of the European Court of Human Rights and the EC-4/11 and EC-411/10 judgments of the European Court of Justice.

The management of the 2015 refugee crisis further illustrated these tensions. The hotspot approach and the EU-Turkey agreement resulted in migrants being contained in Greece in order to facilitate return to Turkey and placed disproportionate pressures on the Greek border control, asylum and reception systems (AI 2016a; ECRE 2016a). At the same time, policies aimed at alleviating pressure in Greece, such as support by EASO and FRONTEX personnel, relocations of asylum seekers to other EU states and financial assistance have proved insufficient in addressing the challenges posed by the intensity of refugee and migration flows (AI 2016a). It is thus questionable whether the hotspot approach and the EU-Turkey agreement adhere to the principle of non-domination, since they do not appear to take into account the interests of the Greek state.

### *Justice as impartiality*

The principle of justice as impartiality suggests that human rights norms are applied to all migrants equitably and requires states to avoid causing harm in the sense of putting migrants in situations where their basic human rights are violated (Eriksen 2016). Serious harm, defined as facing the death penalty or execution, torture or inhuman or degrading treatment or punishment, or serious and individual threat by indiscriminate violence in international or internal armed conflict, is a key concept in both European and Greek law (Council 2014(a), Art. 15; Government Gazette 2013, Art. 2). The Greek legal order, however, gives rise to several categorisations that appear not to adhere to the principle of impartiality and that are likely to expose migrants to serious harm.

First, the designation of migrants as 'illegal' upon entry, while rooted in law, risks causing harm to migrants because of potential exclusion from the asylum procedure and the possibility of refoulement to a country with insufficient protection safeguards. By being labelled 'illegal', migrants are placed under the remit of the provisions of Law 3386/2005 on unauthorised entry, which allow for their detention and return. If entering through the Greek-Turkish borders, the Readmission Agreement between the two countries allows the Greek authorities to initiate the immediate return to Turkey (Government Gazette 2002). While the implementation of the Readmission Agreement has not been successful (EMN 2014), the legal context it established has allowed for practices of both informal and formal return mainly to Turkey (AI 2010a; 2014). In addition, labelling migrants entering Greece as 'illegal' rendered access to the asylum procedure problematic because it excludes them at the point of entry from legal provisions on reception and asylum procedures.

Second, access to the asylum procedure and international protection was further complicated by considering Turkey a 'first country of asylum' for Syrian nationals and 'safe third-country' for migrants of other nationalities following the EU-Turkey agreement (UNHCR 2016b). On this basis, most applications by Syrian, Afghani and Iraqi nationals have been declared inadmissible (Greek Asylum Service 2016a; ECRE 2016) and not examined in their substance. The blanket application of the safe third-country concept contradicts the requirement for individual assessment of the circumstances of each application (ECRE 2016b; UNHCR 2016b) and increases the risk of refoulement. There are also serious doubts on whether Turkey is in practice a safe country, given that instances of chain-refoulement to unsafe countries of origin or transit have been recorded both before and after the EU-Turkey agreement (AI 2010b; 2016b). Therefore the application of the 'safe third-country' concept increases the risk of harm and thus may not adhere to conceptions of justice as impartiality.

Third, recognition rates in Greece have been historically very low in comparison to the EU average, despite an increase after the establishment of the Asylum Service in June 2013. For instance, recognition rate in 2012 was 0.8 percent compared to the EU average of 25 percent and in 2014 14 percent compared to 33 percent (European Stability Initiative 2015; Greek Asylum Service 2016a). Given that the Common European Asylum System entails the harmonisation of both definitions

and procedures for examining and deciding on asylum applications, the significantly lower recognition rate in Greece suggests that legal categories are interpreted in a more restrictive manner than other in other member states and therefore not compatible with the principle of impartiality. It could further suggest a degree of arbitrariness (Eriksen 2016) contrary to conceptions of justice as non-domination.

Fourth, domestic law on occasion accords rights in a manner that does not adhere to the principles of equality and impartiality. For instance, legally resident third-country nationals and recognised refugees are eligible for family reunification, but recipients of subsidiary and temporary protection and humanitarian status are not (Kasapi 2016). Refugees can also be unified with a broader range of family members than legally resident third-country nationals, even if this only applies for three months following recognition (Government Gazette 2008; 2014). Similarly, unaccompanied minors with refugee status have full access to mainstream education, while those in detention do not. Further, domestic law differentiates between ethnically Greek migrants ('omogeneis') and non-ethnically Greek foreign nationals. For instance, spouses of 'omogeneis' entering Greece through the family reunification procedure can obtain a residence permit for five years compared to the maximum of three years proscribed for long-term residents (Government Gazette 2014, Art. 71, 81). These arrangements suggest that access to human rights is not equal or impartial, but negotiated by legal definitions as well as by nationality and migrant status (Morris 2012).

### *Justice as mutual recognition*

Greek legislation on asylum and immigration recognises, to an extent, the specific identities of migrants through the category of 'vulnerable groups'. This category includes unaccompanied minors, persons who have a disability or an incurable or serious illness, the elderly, women in pregnancy or having recently given birth, single parents with minor children, victims of torture, rape or other serious forms of psychological, physical or sexual violence or exploitation, victims of trafficking in human beings, and persons with a post-traumatic disorder, in particular survivors and relatives of victims of ship-wrecks, a sub-category added in Law 4375/2016. In relation to reception, individual belonging to vulnerable groups are entitled to special care, socio-psychological support and medical treatment (Government Gazette 2007; 2011; 2016, Art. 14). In the case of hotspots, the Director of Reception and Identifi-

cation centres can transfer unaccompanied minors and those belonging to a vulnerable group to a Reception and identification Centre located inland or to other appropriate structures (Government Gazette 2016, Art. 15). In addition, asylum applications by individuals belonging to vulnerable groups should be examined by priority, and caseworkers conducting interviews should have training on the specialised needs of women, children, and victims of violence and torture who apply for asylum (Government Gazette 2016, Art. 52). Women applicants, in particular, can request to be interviewed by women caseworkers and with the aid of female interpreters (Government Gazette 2016, Art. 52).

However, other legal categories and definitions interfere with the recognition of specific identities and vulnerabilities. While the transposed Procedures Directives of 2005 and 2013 state that the detention of asylum seekers should be exceptional and advise against the detention of unaccompanied minors and pregnant women (Government Gazette 2016, Art. 46) the blanket application of illegality upon entry to Greek territory and provisions relating to hotspots have allowed for the detention of vulnerable groups (FRA 2011; AI 2016). Similarly, the detention of individual belonging to vulnerable groups under return procedures is permitted (Government Gazette 2011). In addition, the application of the safe third countries concept can be interpreted as challenging conceptions of justice as mutual recognition, since Turkey is considered safe without regard to the specific identities and experiences of individual asylum seekers.

A further arrangement that runs counter to justice as mutual recognition concerns the selection of asylum applicants for relocation is made on the basis of nationality. Currently, only nationals from Burundi, Eritrea, Mozambique, Bahrain, Bhutan, Qatar, Syria and Yemen are eligible for relocation (Asylum Service 2016b). However, selection on this basis ignores the specific circumstances and identities that might render applicants of other nationalities eligible for international protection.

Lastly, while the concept of integration may entail the recognition of the migrants' specific identities in other national contexts, in Greek law it is conceptualised primarily as a process of socio-economic participation and familiarisation with Greek culture, history and language (Government Gazette 2014). As such, there is little in law to suggest conformity with the principle of mutual recognition.

## Hungary and migration

After the fall of the socialist system in Hungary, the first legal change was to quicken up the return of Hungarians living in the West who had left the country, or even those who may have lost citizenship due to restrictive policies (Hungarian National Assembly 1989). The Hungarian government assumed that the returning migrants were ethnically Hungarian and refugees of repressive of political systems. Hungary joined the Geneva Convention with geographic limitations in 1989. Also Hungary received larger number of 'refugees' from neighbouring countries, notably Romania, who crossed the border illegally and asked for asylum in Hungary due to ethnic and political repression in the sending country. Legislation had to be changed in 1993 by the effect of the war in Yugoslavia (from 1991) as the number of immigrants, asylum seekers radically increased and the regulations in practice failed to manage the situation. In 1993 the Act on the Entry, Residence and Settlement of Foreigners in Hungary or 'Aliens' Act' (Hungarian National Assembly 1993b) came into force to tighten the 1989 law. Finally, in 1998 an Act on Asylum entered into force (Hungarian National Assembly 1997), which ended the geographical limitations for refugees and specified the three categories of refugees applying to the Hungarian case with different procedures and rights.

During the EU pre-accession period, national rules and legislations on migration were adapted in order to harmonize with EU legislations and norms. The 2001 Act on the Entry and Residence of Foreigners (Hungarian National Assembly 2001) which was the legal basis of the free movement of EU citizens in Hungary, divided the legal status of immigrants into EU citizens and third-country nationals. In 2004 joining the EU both regulations and the institutional system of migration issues were transformed. In 2007 Hungary joined the Schengen Zone and thus complete freedom of movement was introduced. In the same period Hungary also introduced complete freedom of employment for EEA citizens. At the same time (between 1999 and 2011) Hungary introduced a special system for people in EU countries and Third Countries with historical and ethnic ties for gaining special privileges in migration and gaining citizenship outside the border of Hungary.

### Terms, definitions and concepts: peculiarities of the Hungarian case

The Hungarian legal documents do not refer to 'migrants', but to persons with varying specific legal status allowing several forms of

longer-term residence. The usage of the more international notion of 'migrant' ('migráns') has only gained momentum in non-legal discourses (public and media discourses) in the wake of the 'migration crisis' of Europe. The Hungarian legal system defines the main types of migration ('bevándorlás') in reference to the EU legislation. In addition, it intends to provide exclusive rights to third-country and EU nationals with Hungarian background. Four main types of migrants are recognized in the Hungarian law: the asylum seekers and beneficiaries of international protection (Hungarian National Assembly 2007c), the EEA citizens (Hungarian National Assembly 2007a, act I), and the third-country citizens, except asylum seekers (Hungarian National Assembly 2007b), and the 'Hungarians abroad' (co-ethnic Hungarians living outside of the country).

The Hungarian legal system uses the term 'illegal migration/migrants' instead of 'irregular', but it does not refer to 'legal' or 'regular migration/migrants'; here the focus of the related acts is on the process of permissions and visas. Hungary follows different treatments in terms of rights according to categories of legal immigrants.

A residence permit in Hungary is provided on *humanitarian grounds* for various reasons: for a person recognized as a stateless person or as an exile (beneficiary of tolerated stay - 'befogadott'); for any third-country national who has applied to the refugee authority for asylum or for subsidiary form of protection or temporary protection; any third-country national who was born in the territory of Hungary who has fallen from the custody of his/her guardian having custody according to Hungarian law, as well as unaccompanied minors. Moreover, residence permit is granted on humanitarian grounds to third-country nationals who cooperate with the law enforcement authorities in fighting crime, in addition to those who have been subjected to particularly exploitative working conditions, or to third-country national minors who were employed illegally without a valid residence permit or other authorization for stay.

Particularly interesting seems to be the understanding of family members for family reunification purposes, although there is a difference/between those who enjoy the right of free movement (EEA nationals and their family members) and third-country nationals. In the latter case, the definition of 'family member' refers to the spouse, the minor child in common with his/her spouse, the minor child of



his/her spouse (also including adopted child in both cases). Nevertheless, even dependent parent(s), sibling(s) or other direct relative(s) may be granted residence permit for family reunification purposes if he/she is unable to care for him/herself due to his/her health status. In case of refugee's family members (that also includes the parent of a minor refugee) the above-mentioned kinships are recognized even in the lack of documentation proving the family relationship, except for the marriage with the spouse which must have occurred prior to the arrival of the refugee. The validity of the residence permit issued for family reunification could not be longer than the residence permit of the sponsor. In the case of EEA nationals, the definition is even wider. In addition to the above-mentioned groups, it also refers to civil partners and to 'those who have been granted residence by the authority as family members' (Hungarian National Assembly 2007a, Art. 2, par. bh). Unaccompanied minors, a particularly vulnerable category, may never be detained. In case of an unaccompanied minor whose application was rejected, besides the fundamental guarantees for non-refoulement return may not be implemented except for family reunification or (public) institutional care, which is provided in the country of origin. If this condition is not met, only the unaccompanied minors receive a humanitarian residence permit.

The Hungarian legal system distinguishes four types of protection which are concerned with Refugee status in the EU law. These are the refugee ('menekült'), the beneficiary of subsidiary protection ('oltalmazott'), the beneficiary of temporary protection ('menedékes'), and tolerated stay ('befogadott'). Of particular interest, the 'tolerated stay' is granted for 'a foreigner not complying with the criteria for recognition as refugee or beneficiary of subsidiary protection but, in the event of his/her return to the country of origin, s/he would be exposed to a risk of persecution for reasons of race, religion, ethnicity, membership of a particular social group or a political opinion or to behaviour' (Hungarian National Assembly 2007c, Section 25/A). The refugee authority recognizes somebody as a person with tolerated stay if the prohibition of refoulement has been established in the immigration procedures, or the application for asylum has been rejected, but the prohibition of refoulement has been established.

Before 2010 the Hungarian immigration policy on beneficiaries of international protection was rather permissive concerning obligations or optional provisions stemming from EU law. From 2010 onward the

Hungarian legislation has become steadily stricter. Within the framework of EU directives of the Common European Asylum System, it means that Hungary transposed mainly the stricter rules from the *Acquis*, such as asylum detention that was introduced in 2013. The person granted refugee status, or subsidiary protection, receives a national identity card (not a residence permit), and the refugee/subsidiary protection status has to be revised every three years. The Immigration and Asylum Office (IAO) is responsible for the asylum procedure, and the integration of the beneficiaries of international protection. Nevertheless, the IAO is also the immigration authority, not only the asylum authority. This centralized administration means a unified application of law on the one hand, but it also means that the local authorities have no role in the process.

The basic rights, benefits and material conditions are the same for both 'regular' applicants and those who are put under asylum detention (Hungarian National Assembly 2013, Section 89). Furthermore, in line with the EU Directive, detention should be a last resort. Still, in practice in Hungary, (asylum) 'detention became a key element in the Government's policy of deterrence', UNHCR observed (UNHCR 2016c). The difference regarding the right to the provided benefits lies between those who are indigent (in case of first-time applicants, the reception with all the benefits is free of charge) and those who are not, or later proven to have concealed their financial possibilities (they either have to pay or refund later). Since 2015, applicants, who are not in detention, are also entitled to join the Hungarian public work programme (Hungarian National Assembly 2015a). Furthermore, after nine months, asylum-seekers may work under the general conditions applying to foreigners.

Reception of asylum applicants is organized around three types of facilities: reception centres ('befogadó állomás'), community shelters ('közösségi szállás') and guarded asylum reception (detention) centres ('menekültügyi őrzött befogadóközpont'). The possibility of private accommodation is also given but is in practice atypical. The Asylum Act also identifies persons with special needs: 'unaccompanied children or vulnerable persons, in particular, minor, elderly, disabled persons, pregnant women, single parents raising minor children or persons suffering from torture, rape or any other grave form of psychological, physical or sexual violence' (Hungarian National Assembly 2007c). Persons under these categories are provided special treatment throughout the whole process. Those, who do not apply for asylum

and enter Hungarian territory illegally, or who overstayed and lack appropriate documents, are dealt with by the aliens policing authorities (See Hungarian National Assembly 2007b; and Hungarian Government 2007). They are treated separately both when it comes to process and detention facilities (alien policing detention centres).

As the number of asylum-seekers started to increase significantly in Hungary in the middle of 2015, the reception system underwent some important changes. Simultaneously to completing the border fence and sealing the green border, the Government introduced the so called 'transit zones'. These zones were established at the southern border of Hungary (in Tompa, Röszke, Beremend, and Letenye, the latter two at the Hungarian-Croatian border did not operate). In the transit zones, asylum and immigration authorities, and the security services are present. This is where applicants for asylum are registered, and primary interviews are conducted. In case of applicants who do not belong to any of the vulnerable groups, a specific accelerated procedure, the so-called border procedure, is conducted. Transit zone resembles the hotspots in its functioning (accelerated procedure and all its possible shortcomings). As from the summer of 2015, with daily arrivals reaching 6 or even 11 thousand people, the authorities established temporary facilities - sometimes also referred to as 'transit zones', which may have caused confusion - in the capital (at, and in the proximity of, main railway stations) throughout the summer period until September.

After having established it in 2010 and following the criticism of UNHCR and the European Commission, the Hungarian asylum authority ceased to apply the 'safe third-country' concept in 2012. The situation became more controversial when the Hungarian government, struggling with the inflow of asylum-seekers in the summer of 2015, went further in codifying this policy by publishing the list in a decree (Hungarian Government 2015b), that named the safe third countries. The list included: all EU Member States, EU candidate countries (except Turkey, which was added to the list later, in Government Decree 63/2016, following the EU-Turkey deal - (Hungarian Government 2016)), Member States of the European Economic Area, US States that do not have the death penalty, Switzerland, Bosnia-Herzegovina, Kosovo, Canada, Australia, and New Zealand.

In September 2015, struggling with the management of the situation, Hungary was also offered 'hotspot assistance' by the Commission,

which was, turned down by the government shortly after (Hungarian Government 2015a). Behind this move were two basic convictions: first, that Hungary is not a 'frontline state' in the sense that asylum-seekers reach its territory only after having already been in another EU Member State, namely Italy or Greece (this can be important when it comes to executing transfers based on the Dublin Regulations). Second, that migration should not be simply 'handled', it should be stopped. According to government officials, the whole hotspot system design builds on an opposing conviction, with different relocation and resettlement options, and with setting up the hotspots themselves within the territory of the EU.

An interesting point on the understanding or misunderstanding of differences between resettlement and relocation happened on February 2016, when the prime minister announced that Hungary should hold a referendum on whether the country should accept the proposed mandatory quotas of 'settling' (the expression he used was not 'relocation' or 'resettlement', but 'settling' or 'settlement'). The aim of the referendum was to contest the obligatory distribution of asylum applications, (mis)interpreted by the referendum and the government as a mandatory relocation system. As we can see, the EU decision in 2015 was about 'relocation' and the translation of the referendum question into English used the word 'resettlement'. However, the question was about future obligatory settling/settlement or, more precisely, forced settlement. As everyday people - even the media - do not have knowledge or experience about the differences between the two concepts (or even three: 'relocation', 'resettlement' and 'settlement') - nor is it defined in any Hungarian legal documents, the goals and effects of the EU decision about relocation or resettlement could easily be misunderstood.

## Observations on the three understandings of justice from the Hungarian case

### *Justice as non-domination*

In the case of Hungary, the problem of dominance appears basically on two territories of legal and institutional arrangements. On the one hand, the problem is given by some arbitrary actions, procedures and arrangements of the Hungarian state for limiting access to international protection by third-country nationals. On the other hand, we find arbitrary actions of the Hungarian state introducing extraterritorial naturalization without consulting the concerned states, such as the

procedures and arrangements concerning third-country nationals with historical-ethnic ties to Hungary.

In the first case, the Hungarian state gave way to, and engaged in, dominating practices vis-à-vis individuals and third states alike by actions, such as making amendments to existing law in Act CXL of 2015 (which included the criminalization of the 'crossing of the border closure') (Hungarian National Assembly 2015b), the legally questionable implementation of the accelerated border procedure (violation of human rights), and the introduction of a state of exception in case of crisis situation caused by mass immigration, or bringing in new legal arrangements, such as the concept and listing of safe third countries. Along with this, the state managed to effectively exclude some 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. Act CXL of 2015 is also noteworthy because of the introduction of the concept of 'crisis situation caused by mass immigration', a kind of state of exception in the Agambenian sense, in which legal guarantees of non-domination may be suspended, allowing the government to use exceptional measures, and disregard important laws. Also Hungary is trying to block the return of asylum seekers to Hungary within the Dublin system.

Concerning the second category of dominance, as of Act XLIV of 2010, ethnic Hungarians can be naturalized on preferential terms (Hungarian National Assembly 2010). This act was aimed at the unification of the Hungarian nation in its symbolic sense, including those ethnic Hungarians who have been excluded since the Treaty of Trianon (1920), which after World War I, distributed two thirds of the historic Hungarian territories among the neighbouring countries. The highly political decision was contested among these countries, specifically for those prohibiting dual citizenship, and thus caused tensions in the bilateral diplomatic relationships.

As a way to understand that, we have to be aware that this situation was partially produced in a context where states are formally equal partners, but practically are in complex, and highly unequal relationship with each other even in terms of being integrated into migratory global flows. Without a deeper analysis of the frustrations this caused, we can safely assume that the recent Hungarian rhetoric and policy of dominance is not just a factor of political will, but also structural processes behind. The Orbán

government's address of this issue – for the first time since Hungary's accession – has been verbally hostile against the EU 'dominance' since its 2010 inauguration. The 'migration crisis' provided an excellent opportunity for further criticisms of the incorrect policies invented and enforced by EU bureaucrats. The most conspicuous issue was the 'forced settlement quota'. Interpreting policies laid down in the Council Decision 2015/1523 (Council 2015b) as arbitrary interference in Hungarian sovereignty, the government brought 'external domination' directly in the middle of the question. Nonetheless, we have to be aware that the Hungarian position within the EU also holds the risk of being dominated by other actors who have vastly different institutionalized practices and historical migratory processes than that of Hungary who has been both an emigrant and has just received migrants from neighbouring countries.

### *Justice as impartiality*

The principle of impartiality is endangered in various ways in Hungary, most notably in: i) The lack of integrated view on the various categories of migrants in migration policy documents and the lack of the implementation of any complex strategy of integration of migrants; ii) The establishment a four pillar system which contains various hierarchies and priorities with differential procedures among and within categories of migrants. In Hungary until September 2013 there was no governmental Migration Strategy - which could have provided some normative principle to the various categories of migrants. Although its adoption could be considered positive, there were also some critical aspects from the point of view of impartiality:

1. It could not integrate all the processes of migration, most importantly immigration and emigration which could have given a basic impartial perspective of handling together the rights of outgoing 'Hungarians' and incoming 'foreigners'.
2. The document promised the construction of a universal perspective for an integration strategy for all migrants but this has not been adopted ever since.
3. The migration strategy stated that Hungary supports and facilitates all forms of legal migration, although official communication of the government from 2015 blatantly contradicts this principle.
4. Lack of monitoring and evaluation of the strategy.

(UNHRC 2016d)

The Hungarian institutional system is built on four, hierarchical pillars (Melegh 2016). The state clearly aims at the priority to ensure full rights to Hungarian minorities living outside the country. There are certain privileges, the most important one is that Hungary provides full citizenship for those who can prove that he/she had a Hungarian ancestor born in the territory of (historical) Hungary (Hungarian National Assembly 2010). Another pillar of the policy is the category of EU and EEA citizens benefiting from free movement (of persons and labour) based on the EU law. The third pillar is the third-country nationals who are treated in accordance with EU policies/legislation with regards to third-country nationals. The fourth pillar refers to those seeking international protection and/or crossing the borders of Hungary in an irregular manner whose rights were strictly tightened in 2015 and 2016 as an answer to the migration crisis. The hierarchical treatment of the different 'types' is a sign of the lack of impartial treatment.

### *Justice as mutual recognition*

Justice as mutual recognition refers mainly to integration policies and the recognition of cultural and social diversity. Three areas where justice as mutual recognition is clearly in danger are: i) The unequal access to nationality and thus the preferential treatment which reduces the institutional capacities toward immigrants without historic-ethnic ties to Hungary; ii) The unequal recognition of migrants who do not form an accepted 'historical minority' which enjoy certain legal and cultural support having that status; iii) The lack of institutionalized recognition of cultural diversity.

With regard to the access to nationality the key problem is not the preferential treatment of certain groups, but the withdrawal the institutional capacities handling the application for nationality of other migrants. Since 2011 the Hungarian government has channelled most of its institutional resources helping the privileged group while resources has been dramatically reduced for the other groups. The *EEA migrants* enjoy the social and political rights that come with EEA citizenship (Melegh and Feischmidt 2013). The formation in the early 1990's of a privileged zone of 'Europeans' as a governmental priority with a 'club logic' is reinforced with the appearance of increasing number Hungarian emigrants directed mainly to EEA countries since 2004 (Melegh 2016). As said, the *co-ethnic Hungarians* originating from EU and non-EU Member States have favourable conditions at all levels of the immigration process. Howsoever, these special treatments of mutual

recognition are not out of political aspiration since it entitles national level voting rights for them. The mutual recognition of immigrants with *ethnic backgrounds of historical minorities* is more favourable than other TCNs because they could have well established autonomy on a local governmental level and organizations which facilitate their socio-cultural recognition and integration. At the same time they enjoy preferential treatment in accessing local and national media and various forms of cultural funds. They also enjoy certain privileges of political representation on a national level. However, the other *TCN groups* receive no institutionalized support such as language and vocational training, or housing support.

The mutual recognition as regards to cultural diversity is institutionalized only in a limited way. There is a clear hierarchy of general recognition of diverse cultural origins and identities. The Hungarian government is maintaining a repressive and assimilatory discourse of building a homogeneous nation. These homogenization efforts are also related to the structure of the historical migration processes Hungary has been experiencing.

## Norway and migration

Norway is a somewhat exceptional country in Europe in political terms. It is one of the few European countries that are not members of the European Union. Rather it has structured its connections with European institutions and organizations through membership in the European Economic Area (EEA) and a host of other agreements and accessions to EU policies. Moreover, Norway has a long-standing tradition for active internationalism through the United Nations and its many organizations, as well as a forerunner in state-led foreign aid programs for developing countries. There has been considerable consensus in Norwegian society and politics on this line of policy which has also been an integral part of the country's foreign policy.

The issue of migration was not high on the agenda in the first two decades of post-war politics and institution-building, perhaps not so surprising as Norway for a long time was a country of emigration rather than one of immigration. In institutional terms, Norway was a signatory to both the United Nations Declaration on Human Rights (1948) and the Refugee Convention (1951). In this sense, Norway institutionalised basic principles such as the right to apply for asylum and non-refoulement, that is the right not to be returned to country of origin in



cases of serious threats to life or freedom. Moreover, the regulation of foreigners and access to Norwegian territory was part of the budding Nordic cooperation of the 1950s. Through the signing of the Nordic Passport Union (1952) with the other Nordic partners (Denmark, Finland, Iceland, and Sweden) Norway instituted passport-free travel in the region. In other words, Norwegian migration politics at this time did distinguish not only between citizens and non-citizens, but also accorded a special status to Nordic citizens through free movement across regional borders.

Toward the end of the 1960s Norway started to see an increase in migration. This happened conjunctively with a larger European trend of increased labour migration both internally in Europe as well as from countries outside Europe (Messina 2007). This new wave of migrants was almost exclusively labour migration to low-skilled jobs. The main sending countries of migrants to Norway were Pakistan, Turkey, Yugoslavia and other countries in Southern Europe (Kjelstadli, Tjelmeland and Brochmann 2003). This wave of migrants was welcomed as there was a surplus of jobs in Norway's budding oil economy. Nevertheless, after some years, labour unions and political actors argued for the need to curtail and regulate labour migration to protect the labour market for Norwegians. Thus, in 1975 Norway instituted a halt to open labour migration ('innvandringsstopp').

In the 1980s and 1990s, then, migration to Norway was mainly by refugees through the UN refugee quotas and asylum seekers. The Balkan War ushered in new migrants from that part of Europe, while in the latest wave of migration there was an increase in refugees and asylum seekers during and in the aftermath of the wars in Afghanistan and Iraq. Moreover, in the period from 2014-2016 Norway also saw its share of the increased migration to Europe on the back of the Syrian civil war and increased geopolitical tensions in the Middle East. This latest development led to extensive debates on asylum policies, reception of asylum seekers, and the future of integration policies.

Overall, Norway's approach to migration has been law-based, partly based on international conventions and on domestic laws covering different aspects to access to Norwegian territory. The territorial notion to migration has been strong. The Immigration Act focuses in this sense much on territorial access. Nevertheless, there has been a tendency in recent years toward a more comprehensive approach. This

means that access, integration once residence is established, and citizenship policy has been seen as part of one more coherent policy field.

### Terms, definitions and concepts: the peculiarities of the Norwegian case

Norwegian law on migrants is regulated through different legislative arrangements. The Immigration Act (Utlendingsloven 2016) is the main piece of legislation which regulates the entry to national territory of foreigners and their eventual residence there. There are also certain regulations ('forskrift') that the Government and its Ministries can issue that do not need to go through the legislative process, but need to be in accordance with existing law. Finally, Norwegian migration law exists in a context of European law as well as human rights conventions and other international treaties. As an EEA member, Norway is bound by the EU treaties where these apply. In the case of migration, this has specific consequences for labour and economic migration to Norway due to the rights attached to free movement. Moreover, Norway has decided to take part in the Schengen system of passport-free travel in Europe as well as the Dublin system on asylum applications. The European Convention on Human Rights and other more specific human rights codes have also been part of Norwegian law since 1999. The domestic laws and principles on migration are, then, bound by these pieces and principles of international and supranational legislation.

While clearly regulating migration, the Immigration Act does, however, not make use of the term 'migrant', rather it is based on the word 'foreigner' (utlending) which is also part of the very title of the law. The term 'migrant' is, then, not clearly defined as such in the Immigration Act, yet the law regulates a host of different aspects of migration to Norway. The law defines a foreigner as anyone who is *not* a Norwegian citizen. The law stipulates in order to give the grounds for regulation and controlling access and exit from Norwegian territory and the stay of foreigners. Crucially, the law states that this should be in accordance with Norwegian migration policy and international obligations. In other words, the law is not standing on its own: it needs to be seen in accordance with broader policy-making. Moreover, the law clearly states that it is to facilitate *legal* movement across national borders. In this sense, the law defines a migrant as someone who enters Norwegian territory legally. From this follows that Norwegian migration law is focused on legal migrants and legal migration. There is no self-standing law on 'illegals'. Rather, the main law on migrants and

foreigners gives the rules and regulations under which different categories of migrants can have access to Norwegian territory and following this take up residence, first temporary and then possibly permanent.

## Observations on the three understandings of justice from the Norwegian case

### *Justice as non-domination*

It is obvious that Norwegian asylum policy as it has been defined in this report is at least close to the least demanding conception of justice, that is, justice as non-domination. A main principle in the legal definitions of asylum seekers and refugees is that the categories for protection should be clear. Moreover, there is clearly an effort in the legislation to avoid arbitrary decisions that may harm some individuals more than others. The more demanding conceptions also fall by the wayside when we look at state-to-state relations in asylum affairs. This is for instance the case when Norway decides on so-called safe countries for returning migrants and failed asylum seekers. This is clearly not a system where mutual recognition or impartiality is of significance. Norway decides on safe countries based on information from LANDINFO which is an independent government agency. While the recommendations from LANDINFO rely on an array of sources, safe country decisions have been disputed, both by the UN High Commissioner for Refugees (Crouch 2016) or by official representatives of sending states such as Afghanistan (Berglund 2016) In this sense, Norway seemingly does not adhere to the reciprocity which forms the core of the justice as mutual recognition as it can be doubted whether it has sought to '(...) establish cooperative arrangements and active dialogues with affected parties in order to determine what would be the right or best thing to do in any given circumstance' (Eriksen 2016, 20).

### *Justice as impartiality and justice as mutual recognition*

Given Norway's increasingly strong interconnectedness with the EU and EU legal principles, one can argue that its migration law in part approximates a notion of justice as impartiality. Economic migrants in Norway are basically EU or EEA citizens who exercise their rights under EU law. Rights to free movement and the principle of non-discrimination based on nationality are part of the Norwegian migration regime. There is no 'universal' right to economic immigration to Norway: it is limited to EU and EEA citizens. In this sense, in terms of economic migrants, we cannot deem this too close to a notion of justice as

mutual recognition in a *global* sense. It is a territorial extension of rights to the transnational realm, where the notion of national belonging is less prevalent for rights attribution. While transnational, it is, however, still limited only to *European* citizens. Arguably, this transnationality falls somewhere between the first two notions of justice as non-domination or impartiality. Clearly, the principle of non-discrimination based on nationality rests on an understanding of a negative freedom where, for instance, a worker should be exempt from arbitrary disadvantage in the labour market as a result of their nationality. Yet, it is also clear that this does not extend to a cosmopolitan law for all in a universal sense which would be a requirement to meet the basic precepts of justice as impartiality. The definition of economic migrants in Norway, through the 'EEA connection' is quasi-cosmopolitan in its extension of rights to non-citizens with EU citizenship or nationality in an EEA country, yet falls short of universality in a true cosmopolitan sense. Rights as economic migrants in this Europeanized setting are not human rights: they are transnational rights which extend the territorial remit of rights considerably.