Reconsidering European Contributions to Global Justice

Out but Still In

Norway's Approach to Migration and Asylum as a non-EU State

Espen D. H. Olsen

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Abstract

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 (EU). Rather it has structured its connections with European institutions and organisations through membership in the European Economic Area (EEA) and a host of other agreements and accessions to EU policies. It is in this context that this paper addresses Norway's migration policies from the vantage point of three conceptions of global justice. The time period for definitional analysis is recent developments, with a main focus on 2009 to 2016. A relatively recent historical phenomenon to Norway, migration is rapidly becoming an ever more important topic of political debate and policy-making. As any territorial state, Norway is part of the system of states, with effects on the logic of membership and gatekeeping on access to the territory and residence. This system has, however, become more 'porous' with supranational actors such as the EU, international legal obligations, and increased interconnectedness in cultural and economic terms transforming the nation-state. A firm conclusion on the adherence of Norway's migration policy with the three conceptions of justice cannot be provided based on the descriptive definitional work of this paper. If anything, it has shown that there is arguably a tilt toward more adherences with justice as non-domination. Still, in terms of economic migration there is movement in the direction toward justice as impartiality in the equal treatment and non-discrimination principles for EU and EEA citizens. On the other hand, parts of asylum policy clearly stand in the way of realising the notion of reciprocity in the justice as impartiality or mutual recognition.

Keywords

Asylum, economic migration, Europeanisation, migration, Norway

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Introduction

Norway is one of the few European countries that are not members of the European Union (EU). Rather it has structured its connections with European institutions and organisations through membership in the European Economic Area (EEA) and a host of other agreements and accessions to EU policies (Eriksen and Fossum 2015). Moreover, Norway has a long-standing tradition for active internationalism through the United Nations and its many organisations, as well as a forerunner in state-led foreign aid programs for developing countries (Taulbee et al. 2014). There has been considerable consensus in Norwegian society and politics on this line of policy which also has been an integral part of the country's foreign policy. It is in this context that this paper addresses Norway's migration policies from the vantage point of three conceptions of global justice (see Eriksen 2016). The time period for definitional analysis is for the most part recent developments, with a main focus on 2009 to 2016. Such recent developments are analysed as part of policy change over time, thus also taking into account certain previous practices. In terms of sources, the paper relies on primary sources such as legislation, official reports from the Norwegian government and secondary literature. The method is qualitative and interpretive, taking operational definitions to task in search for recent developments, changes and possibly inertia in concepts related to Norwegian migration law, policies and practices. Moreover, this paper is not comparative but rather traces the development of migration practices as a single case study. This is, however, not historical analysis, rather it focuses on different categories of migration such as labour migration, free movement within Europe, and the category of asylum seekers and refugees.

The concept of global justice implies that there are certain conceptions of justice that have a cross-border reach, that is, that they are at play in a polity's external relations. This paper will apply the three theoretical conceptions of justice developed by Eriksen (2016) and utilise these to analyse the justice properties of the migration system in Norway. The three are justice as non-domination, justice as mutual recognition and justice as impartiality. In this paper, there is no description or analysis of Norwegian foreign policy. Yet, conceptions of global justice are relevant as migration concerns trans-border and transnational relations involving individuals, political and legal institutions, states, and ultimately some notion of universal human rights. The different analytical conceptions of global justice build on different operationalisations of aspects such as reasons for action, the rightful claimants of justice, main substantive concern, legal structures and organisational principles of global politics. This paper addresses the extent to which the Norwegian migration system adheres to one or more of these conceptions. The analysis uses the conceptions as heuristics to highlight different main aspects, changes in direction, and broader developments of Norwegian migration policy. Such heuristic analysis is not exhaustive, but the paper covers some main forms of migration, such as asylum and economic migration.

The paper proceeds in the following manner. First, it starts out with a brief historical overview of migration to Norway, with specific focus on migratory waves, policy developments and integration with Europe. Second, it reports on analyses of relevant definitions of concepts related to migration and global justice. In doing so, the paper also highlight some main policies and practices in the migration field with special emphasis on the last two decades. The main onus in this part is put on the link between migration law and principles and state practices as these are visible in returns policies and the use of so-called 'land information'. Fourth, and building on these two analytical moves, the paper attempts to analyse how Norwegian migration policy adheres to the three conceptions of global justice. Finally, I offer some concluding remarks.

Migration to Norway: Brief historical background

Norway is not known as a country of migration, compared to for instance the United States, France, the United Kingdom, or Germany. Until the 1960s, Norway was not marked by any significant flows of migrants. The end of World War II ushered in a new sense of urgency in the creation of an inclusive Norwegian society. In the first decades after the 1945 settlement, a specific form of government emerged in Norway. This would become a historical compromise between labour and capital where the different interests and stakeholders agreed to cooperate pragmatically for the sake of both state-driven economic progress and socio-economic inclusion of all classes in society. The issue of migration was not high on the agenda in this period.

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 and beginning of the 1970s, 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, in addition to the Nordic countries, were, Morocco, Turkey, Pakistan, Yugoslavia and other countries in Southern Europe (Brochmann and Kjeldstadli 2008). This trend did, however, dissipate in the 1980s. Then, migration streams turned towards categories of

persons in need of protection: mainly by refugees through the UN refugee quotas and asylum seekers.

Most notably, a main tipping point in Norwegian migration history was the arrival of refugees fleeing the wars and conflicts of the former Yugoslavia. In the period from 1992 and onwards, Norway received around 13 000 migrants from these countries and after some time Bosnians were granted residence rights (Brochmann and Kjeldstadli 2008) . There was much debate on this move by the government, but there was broad consensus in the public and among parties from the centre to the left that this was necessary for humanitarian and moral reasons. This form of granting protection and residence to a collective group, what Brochmann and Kjeldstadli (2008: 255) calls a ‘holistic refugee policy’ did not, however, turn into a general principle of Norwegian migration practice, rather it would be examined on a case-by-case basis. The latest wave of migration to Norway has occurred in the last decade. First, there was an increase in refugees and asylum seekers during and in the aftermath of the wars in Afghanistan and Iraq. Second, in the period from 2014-2016 Norway also saw its share of the increased migration to Europe as a result 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. The debates have centred on issues of integration, cultural practices, religion, as well as on the impact of Norway’s participation in the European asylum system. At the beginning of the refugee crisis, there were calls for a humanitarian approach of more ‘open’ borders. This was, however, an argument heard mostly from the left of the political spectrum. The major parties, including the Labour Party, the Conservatives and the Progress Party all advocated the need for a strict, yet what they call *fair* migration and asylum policy. All these parties agreed for instance on the suspension of the Schengen Agreement in November 2015. There was less agreement, however, on the broader aspects of Norway’s place within the European Asylum System. Labour and the Conservatives favour Norway’s deep participation in EU asylum policy, while the Progress Party exhibit stronger voices of dissent, especially with regard to border controls.¹

It is clear that the context of Norway’s migration policies has changed over the course of the post-war period. Starting out as a moral issue of post-war rebuilding, it soon became one of increased embeddedness within international structures of cooperation. Nordic cooperation and later Europeanisation has clearly marked the Norwegian approach to the issue of migration. It sets Norwegian migration practice somewhere between universal concerns for human rights (such as refugee issues) and particularistic concerns for regional integration (such as Nordic passport union). The increased internationalisation has moreover coincided with the transformation of Europe into a continent of migration, both intra- and extra-European. Norway was not as strongly affected by the early waves of ‘guest worker’ migration as countries like Germany, the

¹ At the time of writing Norway is ruled by a minority coalition government of the Conservative Party and the Progress Party (since 2013). From 2005 to 2013 a majority coalition government was in office comprised of the Labour Party, the Centre Party and the Socialist Left Party.

Netherlands, or Sweden, but has taken its share of intra-European migrants following Eastern enlargement. It is on this rich background of domestic choices and international developments that we can assess Norway's migration practices, and especially new developments in the recent decade. I turn to this practice tracing in the next sections of the paper.

Migration practices: From labour migration and free movement to asylum policies in a Europe-anised context

In the European context, Norway first developed migration policies *outside* the framework of EU policies and legal principles. After entry into the EEA Agreement in 1994, however, Norway has increasingly integrated in European policies and institutions (Bøckman Finstad 2014). Norwegian law on migrants is regulated through different legislative arrangements. Utlendingsloven (The Immigration Act) is the main piece of legislation regulating the entry to national territory of foreigners and their eventual residence there (Norwegian Ministry of Justice and Public Security 2008). There are also certain regulations² that the Government and its Ministries can issue, which 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 and non-discrimination based on nationality. 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.

Labour migration and the EEA dimension

When non-Nordic migrants started to enter Norway in the 1960s, there was no real migration policy in place. There were of course legal instruments in terms of citizenship laws and notions of foreigners and their right to stay on the territory. Yet, labour migrants could relatively easily gain access to Norway. Through work contracts and continued stay, many of these first migrants obtained residence, first temporary, but also after some time permanent residence. This state of affairs was not questioned until the mid-1970s. There is not much research on the societal and cultural reception of these guest workers to Norway, yet there are indications that they were by and large tolerated

² 'Forskrift' in Norwegian.

exactly because these persons and groups were perceived to be ‘guest’ (Eriksen 2002; see also Castles 2006). In this understanding, a guest is not designated to become a permanent resident: she will eventually leave.

A main turning point would come in 1975. The Norwegian Parliament passed what later has been called ‘the immigration ban’.³ This did not lead to a complete closure of Norwegian borders. The intention was, first and foremost, to limit labour migration and the growth of a guest worker community. There were certain exemptions for specialists of different professions (for instance physicians, academics or engineers) and there was still a possibility for current resident non-citizens to seek family reunification. Moreover, international conventions on refugee and asylum responsibilities were not set aside. It constituted, however, a signal of a willingness from politicians to deal with migration flows through policy-making. The immigration ban was voted on in a situation where economic growth was in decline and unemployment was on the rise. The initiative for this migration policy came from the left, most specifically organised labour unions. The main argument was the need to safeguard the Norwegian labour market from outside pressure in a time of pressing economic concerns. This was at a time when free movement across borders was still mainly a European idea, not European reality, at least not for the countries in the continent’s periphery. At this time, Norway had just rejected membership of the European Communities in the 1972 referendum, and labour migration was for the most part from third world countries. The immigration ban did not exhibit any clear stance on the European dimension of migration. It was legislated as a national issue to solve domestic problems. It is, however, a clear example of a turn from a more *laissez-faire* type approach to migration to one where issues of inclusion and exclusion came to the fore. Migration became an issue which was not about securing cheap labour in an expanding economy, but also about managing the labour market in an increasingly interdependent world.

The immigration ban was a first attempt to *regulate* entry to Norway in a more coherent manner. The reasons for this policy move were mainly related to political economy, more specifically labour relations and the specific configuration of labour and capital in post-war Norwegian society. Any decision to make entry into state territory is necessarily *exclusionary*. In research on migration, rights, and citizenship such acts of exclusion have been interpreted in different ways. Two opposing views are found from communitarians who justifies exclusion as a right of communities to ultimately choose their own members (Walzer 1983) to cosmopolitan arguments which hold that any physical or legal border between states is arbitrary and therefore unjust (Carens 1987). In reality, the politics of border control and restrictions on migration always straddles the individual/community nexus. In post war-Norway, this had not been a pressing political issue until the mid-1970s. From then on, migration became part of public debate and over time increasingly a question of what kind of political community Norway is and should be.

³ The Norwegian phrase is ‘innvandringsstopp’.

Indeed, this ‘politicisation’ of labour migration remained in place in the ensuing decades. Norway still has a strict regime on migration for economic reasons in this sense. Yet, this applied only for extra-European citizens. After a nearly eventless decade of the 1980s in terms of policy-making in issues related to migration, there would be major turning points in the 1990s and 2000s. In terms of labour migration, these turning points were, however, not fuelled by the need to curtail or enable migration for domestic reasons, but rather as a consequence of Europeanisation of legal frameworks, policy solutions, and individual rights. This is important because Norway is not a member of the EU. Despite the lack of formal membership, the country is ingrained in the institutional and legal system of European integration.

As members of the internal market through the EEA agreement, Norway has to uphold the basic principles of free movement of persons and non-discrimination based on nationality, which are at the core of European integration (Olsen 2014). EU citizens have the right to move freely to Norway in order to work or study. The upshot of this is that Norway through the EEA has become part of the common European labour market where all EU (and EEA citizens) can exercise their right to free movement in order to work in other member states. This has created a new concept of migration where there is a distinction between intra- and extra-EU migrants. In the wake of this, there has been a considerable increase in labour migration from the EU to Norway, most notably from countries in Central- and Eastern Europe (NOU 2011:7: 164).

The status of economic migrants in Norway is determined, then, through two co-existing legal sources. The first is the Immigration Act and the second is European legal principles and policies that have been transposed as Norwegian law as a result of the EEA agreement.⁴ In fact, part of this EU jurisprudence was included in the new Immigration Act from 2009. This is important as there is no general right to economic migration to Norway from non-EEA countries. For an economic migrant to have a right to residence, then, he or she needs to be at least 18 years of age, not take up occupation on terms below those settled by collective agreements, have a standing offer of contract, and hold EU or EEA citizenship. For non-EU/EEA citizens, there can be exceptions based on other international agreements or eligibility in cases where there is no Norwegian workforce available to perform a specific task. The government can also give specific reasons for importing workers from abroad in certain areas. As such, economic migration to Norway is *limited*. The ‘economic migrant’ is increasingly equated with the status of holding EU citizenship or citizenship of one of the three EFTA states that are signatories to the EEA agreement.

This practice of labour or economic migration was arguably strengthened with Eastern enlargement of the EU from 2004-2007. With this enlargement, new EU citizens from Eastern and Central Europe gained access to the Norwegian labour market with the same rights as, say, Swedes. After Eastern enlargement, Poland and Lithuania have

⁴ For a broader overview of the impact of EU law on Norwegian law and politics, see for instance Eriksen and Fossum (2015).

become the countries with most migrants to Norway, surpassing Sweden.⁵ Norway had seen some labour migration especially from Poland before EU enlargement. This is, however, not comparable with the influx of workers and self-employed persons that marked Norway after enlargement.⁶ This new type of migration in numbers was at the beginning not seen as problematic, with some exceptions of calls from labour unions to monitor social dumping and safeguard long-standing collective agreements (Valenta and Strabac 2011). After some time, however, more voices of dissent have emerged, spurring political debate on the consequences of large-scale labour migration.

Especially two issues have been at the forefront of the debate on intra-European migrants in Norway. Firstly, there has been considerable debate on how such migration affects working conditions, possibly undermines collective agreements, and exacerbates processes of social dumping (Eldring et al. 2012). Migrants from Central and Eastern Europe are often low-skilled workers or they offer services such as construction or domestic cleaning, to name some sectors of the economy. The construction sector is clearly marked by this new immigration to Norway, with pressure on prices and consequently wage structures. Such challenges have particularly been raised by political parties on the left and labour unions.

Secondly, the issue of social rights that follow from the exercise of free movement has been debated and problematised, first from political parties on the right and later from parties across the political spectrum. Free movement rights are at the core of EU citizenship (Olsen 2012). This becomes a transnational rights status with 'bite' as it gives extensive rights to EU (and EEA) citizens in and *from* the country in which they work and reside. Social and economic rights are at the forefront in this EU rights register. What does this mean in practice and how has it been perceived in Norwegian migration discourse? These rights extend to the family of the rights holder. A consequence of this is that workers with legal residence in Norway have access to extensive social benefits that are purely residence-based, and not linked for instance to occupation status or is savings-based. In Norway there is, for instance, a basic and universal child allowance accorded to all families, as well as a 'cash stipend' for families with small children who do not get a place in state-funded day care. These basic economic benefits are, however, *portable*; this is at the gist of the debate on intra-European migration and welfare state benefits. The portability means that someone who works in Norway has a right to such benefits although his or her family *does not* reside in Norway. This creates a situation of so-called 'welfare benefit export' that is now widely questioned by many political actors in Norway. A public commission⁷ (NOU 2011:7) – the so-called Brochmann Commission

⁵ In 2017, there were 9 7196 Poles, 37 638 Lithuanians, and 36 315 Swedes registered in official statistics, see Sandnes (2017).

⁶ The number of migrants from Eastern European member states of the EU increased from 2528 in 2004 to 19946 in 2014, see Thorsdalen (2016).

⁷ Public commissions are government-mandated expert and stakeholder bodies that in part lay the ground for new policy-making in Norway. For an overview of the Norwegian system, see Tellmann (2016).

– on the future of the ‘Norwegian’ model in the age of migration focused on these issues and have become a central reference point in welfare state politics. The Brochmann Commission highlighted a need for closer scrutiny of the short- and long-term consequences of welfare benefits payments to recipients outside of Norway. The commission showed that most of these benefits were paid to recipients in the Nordic countries and Western Europe (ibid: 255), but still highlighted the potential for a significant increase in such payments as a consequence of free movement of persons in the EEA. This was followed up in a second commission led by Grete Brochmann (NOU 2017:2) on long-term consequences of migration on Norwegian society. Again, the report highlighted that the relative public expenditure on migration is not very high. Yet, the commission did point out that the idea that access to rights should in some way be ‘earned’ before they can be redeemed is gaining traction in Norway.

The status of EU or EEA citizens gives added traction to this right to have rights based on residence. Europeans from the EU/EEA area who work and reside in Norway have at the outset the same set of rights as Norwegians when these fall under the remit of the EEA Agreement. It is interesting, then, that the questioning of the short- and long-term *sustainability* of certain flat-rate welfare benefits to EEA citizens and their families do not discuss this. Politically, there may be good and prudential reasons for some restrictions on the portability of such rights, but is this viable legally? To hinder the portability of welfare rights could be categorised as an impediment on free movement and discrimination based on nationality. In other words, rights and how these are interpreted in an internationalised and Europeanised context is at the core of these issues of labour migration.

Asylum policies, institutions, and practices in a European migration ‘system’

Asylum and refugee policies are complex. They link to human rights principles and international legal conventions but are also part of political debate in most European countries. These policies relate to individuals, but also to groups and in the end are a reflection of what kind of political community a state has, especially in the case of so-called ‘receiving’ states. The question of asylum relates to the issue of *rights*. There is an inherent right to apply for asylum in another state than that of one’s citizenship on different grounds. In Norway, the Immigration Act is an important piece of legislation also in the field of asylum and refugees. Unlike economic or labour migrants, asylum seekers and refugees make claims to special circumstances and the need for protection as the main grounds for immigration to a new country.

The asylum application process is comprised of a two-tier system: i) Processing of asylum application, ii) Appeals on decisions of the initial asylum application. In legal terms, Norway has an asylum process that is within the parameters of both the national constitution and international legal obligations. Clearly, the tendency in recent years has gone in the direction of a more restrictive practice in terms of granting protection. This

policy change started with the former centre-left government in 2008 and has been continued by the current right-wing government (November 2015).⁸ This restrictive agenda on migration and asylum was in many ways a culmination of the increased attention to migration among political parties and in public debates. It is clear that the tide has turned on migration in Norway since the 1990s, not the least as the major parties such as the Conservatives and the Labour Party have changed stance as a consequence of the rise of the largely migration-sceptic Progress Party.

It is not within the remits of this paper to make a legal assessment of the justifiability of this policy change seen against existing international legal frameworks. A look at the statistics shows that from 2010 to 2015, the percentage of applications granted increased from 51 per cent to 75 per cent (Larsen et al. 2015). One explanation for this may be that the more restrictive policy has resulted in less so-called ‘groundless’ applications in Norway than before. In the Immigration Act, the main international obligations that are referred to are the principle of non-refoulement taken from the 1951 Geneva Convention, as well as the extensive impact that the transposition into national law of the Dublin Regulation has on rules regarding asylum seekers and the processing of applications.

Norway is part of the European Asylum System after entering an association agreement to the Schengen Area in 1996 and operatively integrated from 2001. Equally important, Norway became part of the Dublin System in 2001, with the latest Dublin Regulation (the so-called Dublin III) transposed as Norwegian law from 2014. This Europeanisation of Norwegian migration policy has been supported by all governments since the mid-1990s, albeit with some dissenting voices especially on the left. This was especially the case when Norway made its first move of becoming Europeanised in this area with association and later membership in the Schengen Area. Some argued at the time that this would lead to Norway becoming part in a burgeoning ‘Fortress Europe’ where internal mobility was ‘traded in’ for stronger control on extra-European migration to European territory (Mathiesen 2000). As time has passed, the participation in the EU asylum system has become accepted and tolerated by most political parties and actors, yet with new critique of free movement and diminished border control coming from, for instance, the Progress Party. Despite such criticism, there is no possibilities in the near future of new coalitions that could end Norway’s participation in the asylum system of the EU. The reason for this is that the strong integration with the EU despite non-membership is a deep cleavage in the Norwegian political system. Coalitions on both sides of the political spectrum are marked by this cleavage. This has led to a political stalemate where the status quo is preferred over change, both in terms of Norway’s membership status and strong participation as a non-member (Fossum 2010).

In this sense, Norway is fully committed to the main principles of EU asylum law and politics as this has been developed since the Maastricht Treaty (1992). Foremost, this means that Norway adheres to the principle of ‘first country’ and is committed to return

⁸ The so-called ‘asylum settlement’ was in the end supported by all parties in the Norwegian Parliament, with the exception of the Socialist Left Party and the Green Party.

asylum seekers to the European country where they were first registered for the handling of their asylum applications. It can be therefore said that Norway's migration policies as well as concept of the 'migrant' have become Europeanised in the last two decades (see NOU 2012:2). In this sense, the status of a non-EU state is at the outset not legally relevant as Norway has committed to implement EU asylum policies. Indeed, in replying to the latest round of policy developments in the EU to finally institute a Common European Asylum System (CEAS), the Norwegian Government in 2016 maintained its intention to support this development. Of course, this leaves Norway dependent on the EU in legal terms, yet without due political influence in the policy-making of this legislation.

This does not mean that asylum policies and practices are not publicly debated in Norway. On the contrary, such issues are high on the political agenda. The status of non-accompanied minors, for example, has received increased attention in Norway in recent years. Moreover, media attention has made the public more aware of their predicament. The multi-party asylum settlement in the Norwegian Parliament further removed the so-called 'reasonableness' clause of previous policies. This clause meant to maintain that returns of asylum seekers would be reasonable and safe. For instance, this clause was devised so that returns could not be effectuated if there was danger of further *internal* displacement of the person *after* return.

Another example is recent debates in Norway on whether countries such as Somalia and Afghanistan can be deemed 'safe countries'. At the time of writing (November 2017) both these countries are considered as safe countries, with Somalia is the latest to be included on the list. The debate on these issues has centred mainly around the issue of un-accompanied minors and their status when they reach adult age, that is 18 years. The government has decided to effectuate such returns despite the fact that several national and international NGO's such as Norwegian Association for Asylum Seekers (NOAS) have strong reservations concerning the security situation, for instance in Afghanistan with special emphasis on the Kabul region (Sæther et al. 2016). The returns are also in accordance with the recent agreement between the EU and the Afghan government on the handling of 'irregular migration' to European territory from Afghanistan (EEAS 2017). This is, moreover, in line with the Norwegian government's stance to support and aid the EU-Turkey Agreement on migrants (Ministry of Foreign Affairs 2017).

The 'politicisation' of asylum debates have, however, been 'counteracted' by a clear trend toward *depoliticisation* of the asylum *process* in terms of procedures and institutions involved. As seen before, since the 1990s, there has been significant discursive and policy changes on migration in general. In the most significant turn in 2001, the Norwegian Parliament decided to overhaul the migration policy, especially in terms of how applications and appeals are handled in cases of asylum and family reunification. The Norwegian Directorate of Immigration (UDI)⁹ retained the role of first instance decisions on such applications. A new, independent government body called The

⁹ 'Utlendingsdirektoratet' in Norwegian.

Immigration Appeals Board (UNE)¹⁰ was formed to serve as a body for appeals. In this sense, I would argue that Norway ‘depoliticised’ decision-making on individual cases in the migration field. Previously, the Ministry in charge could overturn decisions made by the UDI. The decision process on applications on asylum and family reunification is now handled by these government agencies based on existing laws. Changes in practices needs first to be decided on in the political process and cannot be instituted on a case-to-case basis by political authorities. In other words, migration policies and practices in Norway are no longer ‘political’, but rather determined by technocratic and administrative rules and institutions.

In the last years, the process of asylum decisions has, then, arguably become ‘streamlined’. It has been detached from political decision-making and rather become the subject of what can be called ‘agencification’. After the interview conducted by UDI, the case goes back to the case officer for review. In this part of the process, the case officer can utilise information on the country of origin from LANDINFO. LANDINFO is a prime example of depoliticised asylum practice and was put into operation from 2005. This independent unit within the foreigner administration has as its main task to provide information that can be used by the other agencies and units of the administration that deal with case decisions. The tasks of LANDINFO is to act as an independent government unit with task of providing information on typical sending countries. This information is, then, used by the agencies deciding on asylum applications and appeals, most notably with regard to the safety of return. LANDINFO regularly publishes reports on the security situation and political status of sending countries as well as on significant regions within them. It can further provide reports on religious and ethnic minorities and their status in specific countries.¹¹

The establishment of LANDINFO in 2005 was not subject to much political or public debate. Yet, it is arguably a very significant turning point in Norwegian asylum practices. This development cannot be traced back to a direct push for Europeanisation as such, however, its clearly depoliticizing traits are well within the bounds of the efforts of the recent decade to streamline an asylum system perceived as inefficient and taxing both politically and economically for the EU member states. Interestingly for the purposes of understanding practices, the methods utilised by LANDINFO are *directly* related to different guidelines emanating from EU-related sources. In the chapter on ‘methods and critical sources’ on its website, LANDINFO mentions guidelines from the Commission (European Union 2010), EU-supported networks of ‘country origin institutions’ (European Union 2008), and the European Asylum Support Office (EASO 2012). In other words, the Norwegian asylum system ties directly in with European-level efforts at providing benchmarks for sound and effective handling of asylum applications. While the basic rules and *legal* parameters of asylum practice regarding *individual* cases are

¹⁰ ‘Utlendingsnemnda’ in Norwegian.

¹¹ A recent report is for instance on the status of Jehova’s Witnesses in Russia.

based on political decisions in the Norwegian Parliament and the government, *administrative* best practices are closely tied to processes at the international level.

The latest turn of events in migration and Norwegian society and politics came with the so-called refugee crisis. Between 2014 and 2016 there was a marked increase in the number of refugees and asylum seekers that entered Norwegian territory. In 2014, the authorities registered 11 480 asylum applications, with a very significant increase to 31 145 in 2016. This development led to an overburdening of the migration apparatus and extraordinary measures had to be taken to register and accommodate the increased number of refugees. Moreover, the influx came from new areas in the Middle East as well as through new refugee routes, such as the one through Russia to the Northern Norwegian border crossing of Storskog. Part of the government's response was to temporarily suspend the free border regime of the Schengen agreement by reinstating border controls. This decision made by the government in November 2015 was taken after similar decisions by the Danish and Swedish governments, hence highlighting the strong interconnectedness and transnational character of migration issues in contemporary Norway. The Minister of Justice, Anders Anundsen from the Progress Party, explained that '[t]his is a measure to gain better control of the influx of refugees' (Norwegian Ministry of Justice and Public Security 2015). The Minister moreover explained the measure as part of an effort to pursue '[...] a strict and fair asylum policy' (ibid.). For 2017 the statistics show, however, a very sharp decrease in the number of applications to only 3460, the lowest number since 1997 (Norwegian Ministry of Justice and Public Security 2017).

In the last two decades, the main thrust of Norwegian migration policy since 1975 has been strengthened, that is, with the emphasis of no open borders in terms of economic migration. A more restrictive migration system is visible in a new regime for handling migrants who arrive in Norway and the processing of their applications, say for asylum, residence permits or family reunification. In the latest development from November 2015, the majority of the Parliament reached a compromise on Norwegian asylum policy where the aim was to tighten the rules for asylum and family reunification, while cases involving children was to be treated more leniently according to the parties of the compromise. The migration issue is high on the political agenda and often debated with relation both to the integration of immigrants and the 'sustainability' of the expansive Norwegian welfare system (see Olsen 2018).

The Norwegian migration system and the three conceptions of justice

Norwegian migration policy is as those of most nation states based on a strong territorial logic. The admission and access of foreigners to state territory is premised on a notion of the state as a gatekeeper on membership. This is in fact migration practice at its most vivid. Regulating access has concrete consequences, both for the individual migrant and

for the receiving society. Walzer gives a useful definition of access to membership and how this is regulated by nation states in the system of states:

[...] we who are already members do the choosing, in accordance with our own understanding of what membership means in our community and of what sort of community we want to have. Membership as a social good is constituted by our understanding... and then we are in charge of its distribution.

Walzer (1983: 32)

This is in some sense, then, based on a notion of membership and access to territory as something *exclusive*. In such a view, Norwegian migration policy is closer to justice as non-domination than the other two notions. The criteria for access to the territory and ultimately for accessing citizenship through membership are to be the same for any foreigner and migrant. Moreover, there is a general 'right to have rights' also for migrants under Norwegian law. This principle means that if it is not specified in law, *legal* resident migrants hold the same rights and have the same duties as Norwegian citizens. This is, then, not a relationship based on reciprocal rights between equals. It is rather law-based equality with the possibility of 'reasoned' or reasonable inequality based on an idea of citizenship as the only full access to the whole catalogue of rights given by domestic law. In other words, it can be said to adhere to an effort to avoid arbitrary practices of this inequality, as the differences in rights should be legitimate and law-based. Such a law-based system for regulation entry to the territory of the state is common for democratic nation states.

In reality, however, such a system can be marked by different kinds of practices in the decision-making on entry and residence. A continuum from political to technocratic can be used as an image of this situation. This is important to notice, as decisions on migration in terms of entry, first to the territory, second to residence, and third to citizenship, are political at the core. Entry is a social good distributed by a concrete political community. In some states, then, decisions on certain forms of entry are political (for instance in the Parliament), while in others, politics decides on the rules which are then put into *practice* by non-political actors (such as bureaucracies and government agencies) (see e.g. Janoski 2010). As will be highlighted in the remainder of this paper, Norway has increasingly programmed migration decision at the technocratic end of said continuum.

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 (Olsen 2014). Rights settlements are not confined to the national level alone as in the classical understanding of justice in the modern state system which underpins the notion of justice as non-domination. Rather, the rights of individuals who are EU or EEA citizens on the domestic level in Norway are subject to not only the national system of rights, but also supranational rules and principles. Rights to free movement and the principle of non-discrimination based on nationality are, then, part of the Norwegian migration regime. This system goes beyond a system where states

are the primary claimants of justice. Individual citizens as Europeans can make claims against the Norwegian state based on EU-wide legal principles. Yet, 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 close to a notion of justice as mutual recognition. 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 *EU* 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 transnational 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 more demanding precepts of justice as impartiality.

This paper has not highlighted any lack of respect for basic human rights and the Norwegian state adheres to its obligations under European treaties and agreements. Yet, it is at best ‘bounded’ adherence to an idea of 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 Europeanised setting are not human rights: they are transnational rights which extend the territorial remit of rights considerably. This is not theory, it is indeed embedded in everyday practices of migration law and politics. EU citizens have rights to free movement, which exempts them from traditional border practices. They are not subjected to demands at the borders, such as showing passports or exhibiting proof of right to entry through visas. Migrants of other categories (economic, refugees, asylum seekers, etc.) are subjected to much more rigorous border regimes. In practice, these undergo different kinds of screening and identity verifications depending on their status on entry to Norway. This is no different in Norway than other European states, especially since Norway is part of both the Schengen and Dublin systems of migration control.

The issue of justice conceptions in the field of asylum seekers and refugees arguably puts the question of human rights to the forefront. The right to apply for asylum is indeed a human right that cannot be violated. Any individual can make a claim to persecution and lodge an application for political asylum in another country. This country, then, has to comply with this human right, and make an assessment on the veracity of the claim and make a decision. Norway is a modern state based on democratic principles and the rule of law. All three conceptions have a notion of democratic rule of law at the core. But, which one fits better with Norwegian asylum and refugee policy? Asylum seekers and refugees are per definition in an asymmetrical relation with the receiving state and its citizens in terms of resources and rights. This is, however, the case for every territorial nation state. Discussing the adherence of a country’s asylum policy with the different conceptions of justice should, therefore, focus on the individual-state relationship, as

well as broader issues of legality, equality, and due process. Such issues can further not be properly understood without also taking practices into account.

In this sense, it is obvious that Norwegian asylum policy as it has been defined in this paper falls somewhere between two conceptions of justice: non-domination and impartiality. 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, which point in the direction of a notion of impartiality, where the rightful claimants of justice are individual human beings. Yet, there is also a tendency in Norwegian migration practices to put the onus on territorial control, thus adhering to some form of state-centred non-domination. The more rights-based conceptions also fall by the wayside when we look at state-to-state relations and practices 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, in practice, clearly not a system where mutual recognition or impartiality trumps the state logic. The concept of justice as mutual recognition demands a clear onus on the receiving state to evaluate the specific individual needs of the migrant.¹² There is no evidence that the individual is funnelled out of the Norwegian migration system, yet in a critical perspective, some issues point toward a more 'collectivist' thinking in dealing with migration. Norwegian asylum practice has in the issue of return gone down the 'collective' route by focusing on making clear that certain countries are safe for *all* migrants that originate from them. The Norwegian authorities decide on safe countries based on information from LANDINFO which is an independent government agency. The recommendations from LANDINFO rely on an array of sources such as information from state institutions, international organisations, and the media (see LANDINFO 2017: 1). Safe country decisions have been disputed both by the UN High Commissioner for Refugees (Crouch 2016) and by official representatives of sending states such as Afghanistan (News in English 2016).

It is interesting, then, that LANDINFO highlights the uncertainty of sources and the potential lack of information, for instance in parts of Afghanistan (LANDINFO 2017: 1-2). In some reports, such as the one cited here, LANDINFO moreover acknowledges that the source material may be lacking in certain areas (*ibid.*). It also highlights that some sources of information may be skewed as certain actors have a need to maintain a certain image or projection to other actors. Nevertheless, in *practice*, such reservations on the data material upon which a technocratic agency like LANDINFO bases their decisions, do not seem to stand in the way of making decisions with far-reaching consequences for migrants. Afghanistan is deemed safe for return of migrants who have not been granted asylum or temporary residence in Norway. Politically, the Norwegian Government and the Parliament (Stortinget) have passed laws and regulations in recent years to tighten up asylum practice, most notably to decrease the number of asylum applications that are granted. From documents and LANDINFO's own information we cannot extrapolate that this is reflected in technocratic decisions as such. Yet, from the results of this policy

¹² I thank Sonia Lucarelli for making this point clear to me.

shift, it is relatively clear that asylum practices have become more attentive to broader policy goals, than the asylum seeker herself, thus foregoing any strong adherence to justice as mutual recognition. This puts a dent in any interpretation of Norway approaching anything other than a statist-oriented conception of justice in asylum issues. Some may even argue that the system of LANDINFO is unjust from the standpoint of the individual migrant as it funnels out the ethics of migration that could be a stronger part of a *political* debate on, say, safe countries than what is the case when it is delegated to independent bureaucrats.

Norway seemingly does not adhere to the reciprocity principle, which forms the core of the conception of justice as mutual recognition as it can be doubted whether Norway 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). Such a conclusion on adherence with conceptions of justice should of course be read with the caveat that more in-depth research is needed for a more thorough scrutiny of the Norwegian asylum *system*. Still, the analysis of certain practices in this paper has provided a skeleton of descriptions on which further analysis and research can be developed.

Concluding remarks

In this paper, different definitions related to Norwegian migration, asylum, and refugee policy have been discussed. A relatively recent historical phenomenon to Norway, migration is rapidly becoming an ever more important topic of political debate and policy-making. As any territorial state, Norway is part of the system of states, with effects on the logic of membership and gatekeeping on access to the territory and residence. This system has, however, become more 'porous' with supranational actors such as the EU, international legal obligations, and increased interconnectedness in cultural and economic terms transforming the nation state.

The analysis has highlighted a Norwegian migration system that has become increasingly complex in terms of 'insiders' and 'outsiders' as a result of the Europeanisation process from the 1990s onwards. Despite an immigration ban from 1975, there is considerable economic migration to Norway due to the principle of free movement and non-discrimination in EU and EEA law. Parallel to this thrust of Europeanisation through individual rights, Norway has also become increasingly integrated into the European asylum system through implementation of both the Schengen Agreement and the Dublin Regulation. In addition, this paper has highlighted how decision-making bodies and governmental agencies take heed of European best practices in the execution of Norwegian (and European) asylum rules. This was especially visible in the technocracy of providing information on safe country decisions for the return of migrants. The analysis argued for a certain form of 'agencification' in this sense, where ethical issues of migration are funnelled out in a turn toward a more bureaucratic form of asylum processing. Such rule-oriented migration practices are not unjust at the outset,

but opens up a discussion of whether individual cases become submerged under ‘groups’ or ‘collectives’ in for instance return policies, as these become based on country reports. On these issues, however, more comprehensive research will be required, based on multiple data streams. In this sense, Norwegian migration practice straddles the analytical divide between different conceptions of justice. The territorial logic of migration control necessarily points toward justice as non-domination. Still, in terms of economic migration there is a movement in the direction toward justice as impartiality in the equal treatment and non-discrimination principles for EU and EEA citizens. On the other hand, parts of asylum policy clearly stand in the way of realizing the more demanding notion of reciprocity in the justice as impartiality or mutual recognition.

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