"Institutional uncertainty" as a technique of migration governance. A comparative legal perspective.[1]

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Abstract: Uncertainty can be regarded as one of the most distinctive traits of migration processes. However, uncertainty is not only the result of a congeries of social, demographic and economic factors (including social and cultural uprooting), but sometimes appears also to be the product of governmental laws, policies and practices. Adopting a comparative approach, this paper aims to analyse how, in Europe and beyond, migration policies and laws play a role in fostering systemic and pervasive uncertainty, which permeates migrants' entitlements to rights and therefore affects their agency and life opportunities. Based on the concept of "foreigners' legal status", uncertainty will be explored with reference to: a) the type of legal status; b) the requirements for obtaining and/or withdrawing a legal status; and c) the rights attached to a specific legal status. In order to conduct the analysis, the study will introduce and rely upon a new heuristic framework: that of "institutional uncertainty".

Keywords: Asylum and immigration; foreigners' legal status; Institutional uncertainty; comparative legal analysis

1. Introduction.

Uncertainty – needless to say – is one of the most distinctive traits of migration processes. Migrants often have to go through perilous journeys, endangering their life, but even when they reach their destination on the comfortable seat of a first-class flight, they face an uncertain future and reception in the society of the destination country. Put another way, uncertainty is closely interwoven with the condition of those who migrate.

Uncertainty is also one of the most distinctive traits of our modern era. In our everyday life we struggle to put our chaotic reality into orderly structures, in a desperate attempt to control it[2]. However, there is a profound distance between these human conditions: in the case of migration, uncertainty is not only the result of a congeries of social, demographic and economic factors (including social and

[1] This article is based on a presentation I gave at the RESPOND General Conference "Unpacking the Challenges & Possibilities for Migration Governance", held on 16 – 19 October 2018 at the University of Cambridge. I am grateful to Prof. Veronica Federico, the members of the RESPOND consortium and all the participants for the fruitful debate. I am also indebted to Dr. Elif Durmus, Dr. Matja Zgur and Dr. Lisenne Delgado and the two anonymous referees for their comments. Obviously, the responsibility for the content of this article is mine alone.

[2] Z. Bauman, *Modernità liquida*, Roma/Bari, 2011.

cultural uprooting), but sometimes appears also to be the product of governmental laws, policies and practices. Uncertainty encompasses, in many instances, every stage of national migration systems, from rescue and aid operations to refugee status determination (hereinafter also RSD) and the set of benefits granted to migrants after they have obtained recognition of the right to protection or the issuance of a residence permit.[3]

Adopting a comparative approach, this paper aims to analyse how, in Europe and beyond, migration policies and laws play a role in fostering systemic and pervasive uncertainty, which permeates migrants' entitlements to rights and therefore affects their agency and life opportunities. In order to conduct the analysis, the study will introduce and rely upon a new heuristic framework: that of "institutional uncertainty".

This study fits into a precise analytical niche and conceptual framework.

Over the last few years, the complex and mutual relationship between migration governance and the dynamics and characters of migratory movements has gained more and more attention in migration studies.[4] By devoting their analysis to this aspect, scholars have attempted to grasp the complex factors surrounding the genesis, processes and transformation of migration policies and laws, while revealing how these instruments affect foreigners' identities, life trajectories and rights. Hence, reinvoking his concept of "refugee labelling", Zetter observes that these analyses reveal "how seemingly essential bureaucratic practices to manage the influx of refugees, and thus manage an image, in fact produce highly discriminatory labels designed to mediate the interest of the State to control in-migration".[5]

Adopting this conceptual perspective, scholars have identified a number of strategies enforced by States with the aim of governing migration through containment and control. Processes such as "externalization",[6] "fractioning of the

[3] Migrants stuck in the middle of the Mediterranean sea, under the threat of bad weather and in urgent need of medical care, on board NGO rescue ships to whom permission to anchor at Italian and/or Maltese harbours has been denied for several days. Asylum seekers stuck in reception centres, often without the right to circulate throughout the national territory, waiting for a final decision as to whether they are deemed eligible for protection (and hence may obtain a legal status) or not. Asylum seekers constantly bounced back and forth from one State to another, under the obscure provisions and practices implementing the Dublin III Regulation. Foreigners who turn to Courts (and to the uncertainty of a legal trail) to obtain recognition of fundamental social rights, which the law reserves only to citizens and long-term residents. These images help convey the uncertainty surrounding the legal condition of foreigners.

[4] A. Geddes, *Europe's border relationships and international migration relations*, in 43 *Journal of common market studies* 4, 787 (2005); H. Crawley and D. Skleparis, *Refugees, migrants, neither, both: categorical fetishism and the politics of bounding in Europe's 'migration crisis'*, in 44 *Journal of Ethnic and Migration Studies* 1, 48 (2018); R. Zetter, *More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization*, in 20 *Journal of Refugee Studies* 2, 172 (2007).

[5] R. Zetter, *op.cit*, 184.

[6] B. Frelick, I. M. Kysel, J. Podkul, *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, in 4 *Journal on Migration and Human Security* 4, 190 (2016).

label refugees"[7] and "civic stratification",[8] along with measures based on the "temporariness of protection",[9] "permanent mobility"[10] and the "continuum of refugehood"[11] quite evocatively point at some of the main strategies used by States in governing migration. While acknowledging foreigners' ability to navigate through legal labels and their constraints, these studies stress migrants' condition of subjection versus the State's power to select and restrain access to the national territory, while weakening the rights of those who have already entered the country.

Authors have already explored the role of EU legislation in producing what has been termed a "continuum of precariousness", that is, a "constant threat of removal" experienced by asylum seekers and refugees.[12] The present study aims to extend the scope of these observations and refine their conceptual bases. To this end, this article will provide evidence to support a similar conclusion (the uncertainty in which migrants are embedded is often produced – directly or indirectly – by legislative provisions) by looking at cases and the national experiences of 11 European countries (Austria, Czech Republic, Denmark, Finland, Germany, Greece, Italy, Poland, Sweden, Switzerland, and the United Kingdom), plus Turkey and Lebanon. The analysis will adopt a flexible inductive approach combining secondary literature, legal data and evidence drawn from national reports elaborated within the framework of two H2020 research projects: SIRIUS and RESPOND.[13] The conceptual tool of "institutional uncertainty" will contribute to broadening the picture by going beyond the peculiarities of each national context and the borders of traditional legal labels populating the European *acquis* and national legal landscapes.[14] Although the analysis remains geographically limited to certain European countries (plus Turkey and Lebanon), a similar trend of generalized and prolonged uncertainty has been observed also

[7] R. Zetter, *op.*cit.; C. Costello and E. Hancox, 2015, *The recast Asylum Procedures Directive 2013/32: Caught between the stereotypes of the abusive asylum seeker and the vulnerable refugee*, in V. Chetail, P. De Bruycker and F. Maiani (Eds), *Reforming the Common European Asylum System: the new European Refugee Law*, Boston, 2016.
[8] L. Morris, *Managing migration: civic stratification and migrant's rights*, London, 2002.
[9] R. Zetter, *op.cit*,
[10] O. Giolo, *Migranti. Diritti in bilico?*, in T. Mazzarese (Ed.), *Diritto, tradizioni, traduzioni. La tutela dei diritti nelle società multiculturali*, Torino, 2013, 189.
[11] A. Neylon, *Producing Precariousness: 'Safety Elsewhere' and the Removal of International Protection Status under EU Law*, in 21 *European Journal of Migration and Law* 1, 1 (2019).
[12] *Ibidem*.
[13] For further details see the following webpage: SIRIUS https://www.sirius-project.eu/; RESPOND: https://respondmigration.com/
[14] *Ibidem*, 4.

in other regions of the world, such as Canada and the United States,[15] the Gulf region[16] and South Korea.[17]

The article will focus the analysis on institutional uncertainty, based on a notion whose potential is still underexplored[18] despite its centrality in the regulation of migration: the concept of legal status. This concept, which summarizes Arendt's concept of "the right to have rights", identifies the aggregate of rights and duties attributed to a given person, as a subject of law, in a given community[19].

The analysis will start off from the conceptualization of "institutional uncertainty", distinguishing it from other concepts which are often employed in migration studies, such as "precariousness", "discretion" or "arbitrary law". The third section will dissect instances and degrees of "institutional uncertainty" revolving around the concept of legal status. Uncertainty will be analysed and explored with reference to: a) the type of legal status; b) the requirements for obtaining and/or withdrawing a legal status; and c) the rights attached to a specific legal status. Finally, the fourth section will address the concept of institutional uncertainty as a tool of migration governance and attempt to highlight some of the meanings and implications surrounding its use.

2. Conceptualizing "institutional uncertainty".

First of all, as regards the categories of uncertainty, a preliminary caution is needed: uncertainty is one of those concepts which do not have a standard legal definition and whose understanding strongly depends on the contexts, purposes and interests at stake.[20] Hence, in the present study the "contextual" meaning of the concept of uncertainty will first be expanded on and evaluated based on a comparison with some of its "close definitional cousins", in particular the concepts of discretion, arbitrariness and precariousness. Secondly, the study will elaborate on the term "institutional" as it relates to "uncertainty", and the elements underlying this terminological marriage, so as to further refine the conceptual tool here proposed.

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[15] See C. Dauvergne, *Irregular migration, State sovereignty and the rule of law*, in V. Chetail and C. Bauloz (Eds), *Research Handbooks in International Law series*, Cheltenham, 2014, 75. See also L. Goldring, C. Berinstein and J. K. Berhard, *Institutionalizing precarious migratory status in Canada*, in 13 *Citizenship Studies* 3, 239 (2009).

[16] N. Lori, *Offshore Citizens. Permanent Temporary Status in the Gulf*, Cambridge, 2019.

[17] R. Udor, Institutionalization of Precarious Legal Status, in 48 Journal of Asian Sociology 2, 199 (2019).

[18] A. Kraler, *The legal status of immigrants and their access to nationality*, in R. Baubock (Eds), *Migration and Citizenship, Legal Status, Rights and Political Participation*, Amsterdam, 2016, 33.

[19] "Status" is a highly debated concept, with a broad range of historical variations reflecting its polysemy and multifaceted nature. The notion of status varies depending on the specific branch of law concerned. See P. Cappellini, *Storie di concetti giuridici*, Turin, 2010, 49.

[20] R.F. Barsky, *Undocumented immigrants in an era of arbitrary law. the fight and the plight of people deemed "illegal"*, London, 2016

The central role of "arbitrariness" and "discretion" in the governance of migration has been acknowledged by several scholars[21] in regards to different levels of government and different actors and law enforcement officials dealing with migrants. Like uncertainty, both these concepts deal with the exercise of public power and its limits. However, unlike the other two, arbitrariness is usually considered to fall outside the realm of the rule of law. In this respect, authors point out that a discretionary decision is taken within the given legal limits, whereas an arbitrary decision breaches those limits, variably resulting in irrationality, illegality and discrimination.[22] The distinction between these two concepts is marked, to the point that, according to scholars, the aim of the administration is to exercise "the discretional power without arbitrariness".[23]

On the other hand, discretion – and the same can be said for uncertainty – operates in a more blurred, grey area. It is acknowledged that discretion, to a given extent, produces positive outcomes. Flexible and general legal formulas are commonly viewed as one of the main tools through which governments address the complexities of our modern reality, including the challenges posed by large movements of migrants and refugees.

Similarly to discretion, and for the same reasons, uncertainty is an essential and "inevitable" concept of the legal order in general.[24] It is a necessary element of a democratic system, being inherently generated by the discretionary spaces in which administrative authorities exercise their legitimate power to take decisions within the limits established by law. However, whereas discretion is usually considered in reference to individual cases and/or individual decision-makers and mostly concerns the implementation of rules, "uncertainty" covers a broader range of circumstances. Indeed uncertainty pertains not only to the everyday practices of individual decision-makers, but also, and particularly, to the way in which laws and policies are conceived, crafted, interpreted and enforced.[25]

This is especially the case when uncertainty manifests itself as "institutional". This adjective conveys the idea that uncertainty radically affects

[21] *Ibidem*; M. Baumgärtel, B. Oomen, E. Durmus, T. Sabchev, S. Miellet, *Strategies of Divergence: Local Authorities, Law and Discretionary Spaces in Migration Governance*, Paper presented at the 16th IMISCOE annual conference in Malmö, 27 June 2019; J. P. Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, in 56 *American University Law Review* 2, 367 (2016).

[22] M. Cuono, P. Mindus, *Verso una teoria del diritto per l'età delle migrazioni di massa. Una tipologia del potere arbitrario*, in *Rivista di filosofia del diritto*, 1, 2018, 11 and 17.

[23] P.L.M. Lucatuorto, *Reasonableness in administrative discretion: formal model*, in 8 *The Journal Jurisprudence* 2, 633 (2010) cited by R. F. Barsky, *Undocumented immigrants in an era of arbitrary law*, 19-20.

[24] K. Hawkins, *The Use of Legal Discretion: Perspectives from Law and Social Science*, in Keith Hawkins, *The Uses of Discretion*, Oxford, 1992, 11.

[25] Against an essentialist concept of "State", often surrounding migration studies (N. Gill, *New State-theoretic approaches to asylum and refugee geographies*, in *Progress in Human Geography*, 34(5) (2010), 626,637), the expression "institutional uncertainty" promotes an all-embracing approach, in which governance is understood as the result not only of laws and policies, but also of the everyday bureaucratic practices whereby such laws and policies are interpreted, implemented and enforced.

migrants' lives in the public sphere and that it does so in a structural and systemic way, shaping the relationship between the State and foreigners. Unlike similar expressions, such as "continuum of precariousness"[26], which emphasise the legal condition of migrants, "institutional uncertainty" regards the complex interplay between the governance of migration, society and migration processes. Without neglecting the "migration governance" perspective and its strategies and tools, the heuristic framework proposed here seeks to put the relationship between States and individuals in the foreground.

The next section aims to understand how this relationship is shaped by using the concept of "legal status".

3. Anatomy of the "institutional uncertainty" affecting foreigners' legal status throughout Europe and beyond.

Generally speaking, the legal status of a person can be defined as his or her legal position or condition, that is, the aggregate of rights and duties attributed to that given person, as a subject of law, in a given community.[27] More precisely, this term specifically refers here to "foreigners and to the rights afforded or denied by the State to individuals residing on its territory".[28] In debates about immigrant integration, the general importance of legal status is increasingly being acknowledged.[29] Research on legal status carried out so far has usually focused on one status group,[30] and only a few empirical analyses distinguish at least dichotomously between legal and illegal status[31] or refugee and economic migrant.[32] This study, by contrast, intends to address the concept of "legal status" in a more comprehensive way, using it to explore the uncertainty affecting the legal status of foreigners in European countries. Undoubtedly, as highlighted by many, the distinction between those with legal status and those without it is extremely salient.[33] However, this distinction can sometimes appear fuzzy and

[26] A. Neylon, *Producing Precariousness: 'Safety Elsewhere' and the Removal of International Protection Status under EU Law, in European Journal of Migration and Law*, cit.
[27] For the stipulative definition offered in this study, which possesses a strong "relational quality" see P. Rescigno, *Situazione e status nell'esperienza del diritto*, in *Riv. dir. civ.*, I, 1973, 211; F. Gazzoni, *Manuale di diritto privato*, Napoli, 1996, 70.
[28] J. Sohn, *How legal status contributes to differential integration opportunities*, in 2 *Migration Studies* 3, 369 and 371 (2014).
[29] *Ibidem*; A. Kraler, *op.cit.*, D. S. Massey, K. Bartley, *The changing legal status distribution of immigrants: a Caution*, in 39 *International Migration Review*, 469 (2005). F. Meissner, *Legal status diversity: regulating to control and everyday contingencies*, in 44 Journal of Ethnic and Migration Studies 2, 287 (2018).
[30] On refugees with insecure status see, among others, C. Menjıvar, *Liminal Legality: Salvadoran and Guatemalan Immigrants' Lives in the United States*, in 111 *American Journal of Sociology* 4, 999 (2006).
[31] N. Sigona, *'I have too much baggage': the impacts of legal status on the social worlds of irregular migrants*, in 20 *Social Anthropology* 1, 50 (2012).
[32] R. Zetter, *op.cit.*; H. Crawley and D. Skleparis, *op.cit.*
[33] C. Costello, *The human rights of migrants and refugees in European Law*, Oxford, 2016, especially 63 f.

inadequate to portray the grey area, the legal limbo in which migrants often languish.[34] By looking at entire "legal status systems" governing migration regulation, this paper aims to question the very logic upon which foreigners' rights rely.

Migration is a "complex issue requiring a complex approach".[35] In this vein, scholars point out that migration laws are often the result of competing interests and conflicting pressures coming from an ample range of actors, such as human rights organizations, employers, political parties and voters.[36] Furthermore, a multiplicity of entities are involved in the circuits of governance and migration.[37] In such a context of "multiple objectives and competing political agendas of various interest groups",[38] as observed by many, incoherence and inconsistency could be regarded as inherent and intrinsic features of migration legal landscapes.

However, the picture of the migration legal landscapes characterizing European countries contradicts this explanation. In the migration domain, uncertainty often does not serve to instil a dose of flexibility and efficiency into the system in the face of complexity and competing interests, in line with the principle of subsidiarity; nor is uncertainty always an unintended consequence, the result of States' inability to govern a complex phenomenon.[39] Alongside these interpretations, further explanations can be advanced, where uncertainty itself can be seen as a technique of migration governance. In this light, for instance, scholars acutely observe that uncertainty can constitute a tool through which the State attempts to defer the management of migration to sub-national layers of government, thereby devolving its responsibility.[40] Paradoxically, from a rights-based perspective, the same tool can be regarded as the way through which States reclaim their legitimacy and their power over foreigners. Mechanisms of selection, construction and implementation of foreigners' legal status contributes to making migration regulation "the last bastion of State sovereignty".[41]

[34] See for instance Menjivar, who uses the concept of "liminal legality" to describe the condition of Salvadorans holding a temporary protective status (2006).
[35] P. Scholten, *Mainstreaming versus alienation: conceptualising the role of complexity in migration and diversity policymaking*, in 46 *Journal of Ethnic and Migration Studies 1*, 108 and 111. (2020).
[36] M. Czaika, H. de Haas, *The effectiveness of immigration policies*, in 39 *Population and Development Review* 3, 487 (2013).
[37] Indeed, in most countries, all tiers of government (from the national to the local) are involved in the "multilevel" and subsidiary-based management of migration flows with different, often overlapping, competences. Furthermore, the management of migration sometimes also involves other relevant actors, such as third sector organizations and private companies, the Courts and also EU and UN agencies. See, amongst others, R. Zapata Barrero, T. Caponio, P. Scholten, *Theorizing the 'local turn' in a multi-level governance framework of analysis: a case study in immigrant policies*, in 83 *International review of Administrative Science* 2, 241 (2017).
[38] M. Czaika and H. de Haas,*op.cit.*, 504.
[39] P. Scholten, *op.cit.*, 108; S. Castles, *Why Migration Policies Fail*, in 27 *Ethnic and Racial Studies* 2, 205 (2004).
[40] T. Caponio, T. Cappiali, *Italian Migration Policies in Times of Crisis: The Policy Gap Reconsidered*, in 23 *South European Society and Politics* 1, 115 (2018).
[41] C. Dauvergne, *op.cit.*, 80.

Authors have pointed out an ample range of legal statuses among foreign nationals[42] which strongly differ from one another. Some legal statuses are more desirable than others, in the light of circumstances such as the number of rights linked to a specific status or the extent of its stability, its permanent or temporary quality. The proliferation and fragmentation of foreigners' legal statuses create a hierarchy among migrants: a "civic stratification".[43] National legal status "regimes" rely upon specific choices undertaken by each legal system with reference to: a) different kinds of legal statuses granted to migrants; b) criteria which the migrant has to fulfil in order to obtain a specific legal status; and c) rights and duties related to this status.

As the overview below is going to illustrate, hypertrophic and continuously changing legislations, legal voids and huge discretionary spaces left and created by gaps in the law, the multiplicity of immigration channels and the obscurity surrounding the requirements to gain access to them (or the circumstances under which a legal status may be withdrawn), as well as the lack of transparency and predictability as to the number and scope of the rights and obligations assigned to each type of residence permit, make it difficult for migrants to control their legal status. From this perspective, legal statuses can be regarded as borders[44] which migrants attempt to overcome, to navigate through, in search of better opportunities and more rights. Institutional uncertainty makes this legal journey extremely arduous[45].

a) Uncertainty about the types of legal status.

The difficulty of mapping, in a coherent and consistent way, the plethora of legal statuses which can be attributed to migrants may result from, among other things, confusing, unstable or incomplete legal frameworks.

In most of the countries examined, the legal frameworks governing migration and asylum are extremely complex and hypertrophic. The national legislation of each country has been changed continuously and not necessarily coherently. In the UK, 12 Acts of Parliament regulating immigration issues have been approved in the last 20 years.[46] In Italy, the Consolidated Law on Immigration is the result of fragmentary legislative provisions, which undermine internal consistency and effectiveness. The very same complexity and rapid evolution is also apparent in the legal frameworks of Greece, the Czech Republic,

[42] L. Morris, *Managing migration: civic stratification and migrant's rights*, London, 2002; D. S. Massey and K. Bartley, *op.cit.*
[43] L. Morris, *op.cit.*, 19.
[44] P. Cuttitta, *Segnali di confine. Il controllo dell'immigrazione nel mondo-frontiera*, Milano, 2007, 52.
[45] See A. Triandafyllidou, *The Migration Archipelago: Social Navigation and Migrant Agency*, in *International Migration*, 1 (2018).
[46] C. Hirst, N. Atto, *United Kingdom - Country Report: Legal and Policy Framework of Migration Governance*, 2018, 27, https://respondmigration.com/wp-blog/2018/8/1/comparative-report-legal-and-policy-framework-of-migration-governance-pclyw-ydmzj-bzdbn-sc548-ncfcp-5a657.

Denmark, Germany and Austria. Concerning the latter, Josipovic and Reeger report: "the Aliens Act was created in 1992 as a follow-up to the former Aliens Police Act and merged together with the Residence Act in 1997 – only to be separated again into the Foreign Police Act (FPG) and Settlement and Residence Act (NAG), which form the legal basis of current provisions since 2005."[47] In Demark, from 2002 to 2011, the Aliens Act, one of the main laws regulating immigration, was changed 57 times – and since 2015, more than 85 times.[48]

To add further complexity, in most of the countries analysed, acts of primary legislation only provide a general framework; immigration issues are de facto regulated in detail and implemented through congeries of acts of secondary legislation (by-laws, regulations, ministerial circulars, administrative rules, etc).

This labyrinthine and fast-changing legislation opens up ample spaces of discretion, and hinders a clear and reliable picture of the range of legal statuses provided by law. In Italy, for instance, the Consolidated Immigration Law contains more than 40 different foreigner legal statuses (linked to an equal number of residence permits). The same complexity can also be seen in the UK's immigration policy and its "points-based system" (PBS), a comprehensive system based on the accumulation of points across different categories (e.g. level of English language proficiency or the amount of savings), which determines the success of foreign visa applications.[49] Constructed with the aim of injecting greater order and transparency into the national migration system, the PBS has turned out instead to be a complex and expensive mechanism, which has widened the scope for discretion afforded to the authorities.[50] This system "is also subject to rapid change, with work visa categories regularly being established and discontinued, reflecting the Government's attempts to both limit immigration, and be responsive to employer demands to have the skilled employees they need".[51]

The lack of clarity and predictability has two main consequences, among others: it reduces migrants' ability to move from one legal status to another, as well as to emerge from an irregular status. Migrants face obstacles in their attempt

[47] I. Josipovic, U. Reeger, *Austria - Country Report: Legal and Policy Framework of Migration Governance*, 2018, 80, https://respondmigration.com/wp-blog/2018/5/1/201802-austria-country-report-legal-and-policy-framework-of-migration-governance?rq=austria.
[48] M. Pace, S. Sen, L. Bjerre, *Denmark*, in V. Federico (Eds), *Legal Barriers and Enablers. SIRIUS WP2 Report*, 2018, 129 and 142, www.sirius-project.eu/sites/default/files/attachments/WP2_D2.2.pdf.
[49] The PBS currently represents the main system under which a visa may be granted. It comprises five tiers, only four of which are active – Tier 1 includes investor, entrepreneur and exceptional talent visas; Tier 2 includes skilled worker visas; Tier 4 includes student visas, Tier 5 includes temporary worker visas. Family visas instead fall outside the PBS.
[50] C. Hirst, N. Atto, *op.cit.*, 52. Concerning these features of the PBS system, the authors explain that "the guidance on Tier 2 visas is 75 pages long", while "fees for applications lodged outside the UK range from £244 for a Tier 5 Temporary Worker visa to £1,623 for a Tier 1 (Investor) visa" (p. 52). On this subject, see also F. Calò, T. Montgomery, S. Baglioni, O. Biosca, D. Bomark, *United Kingdom*, in V. Federico (Ed.), *Legal Barriers and Enablers SIRIUS WP2 Report*, 2018, 439, 463, available at https://www.sirius-project.eu/sites/default/files/attachments/WP2_D2.2.pdf.
[51] C. Hirst, N. Atto, *op.cit.*, 52.

to climb the hierarchy of "civic stratification" in order to benefit from a larger range of rights. Furthermore, when migrants no longer fulfil the requirements set for a certain residence permit, the legal system offers few possibilities for remaining in the country with a regular status.

In this respect, the institutional uncertainty characterizing migration regimes seems to contribute to creating irregularity, instead of reducing it. There is a sort of "downward ramp" leading toward a condition of non-legality.[52] This tendency shown by national legal frameworks (and the way in which they are enforced by national authorities) is even boosted by the EU. In this respect, the duties of "negative mutual recognition" are quite revealing, since they "amplify the notion of 'illegality' to be binding throughout the EU, precluding entry to the entire territory".[53]

Beyond these cases, there are circumstances in which migrants may find themselves deprived of a legal status: for a more or less prolonged period of time, their legal conditions, hence their entitlement to rights, is not regulated by law. These "no-rights statuses" result from legal loopholes which mainly concern the vulnerable position of asylum applicants or refugees. A case in point is Lebanon, where, due also to the fact that the country did not sign the 1951 Geneva Convention, a comprehensive framework to regulate the presence and the entitlements of refugees and asylum seekers still does not exist. On 31 December 2014, following the adoption of the so-called "October Policy", Syrians were admitted into Lebanon only as migrant workers or under the so called "humanitarian exception". However, both these statuses have proven *de facto* almost impossible for Syrians to access. Indeed, on the one hand, the "humanitarian exception" was restricted to "unaccompanied and/or separated children with a parent already registered in Lebanon, persons living with disabilities with a parent already registered in Lebanon, persons with urgent medical needs for whom treatment in Syria is unavailable, and persons who will be resettled in third countries". On the other hand, regularization based on work was extremely hard to obtain in practice, due to bureaucratic requirements (such as a valid passport and entry form) which were difficult for displaced people to meet and increased residency fees they were unlikely to be able to afford. A wide margin of discretion enjoyed by the authorities reportedly further complicated the possibility of obtaining a legal status. Meanwhile, the Syrians already registered with UNHCR could not regularize their legal status and were obliged to sign a 'pledge not to work', thus remaining excluded from the Lebanese labour market. In 2016 the pledge not to work was replaced by a "pledge to abide by Lebanese laws" and in 2017 residency fees were waived for Syrians who wanted to regularize their status. Nevertheless, to date, the situation remains highly critical, with about 76% of Syrians reportedly being without legal status. As a result, a vast number of Syrians are stuck in a legal limbo, with no access to basic rights and social

[52] The condition of illegality is made and unmade by law. C. Costello, *The human rights of migrants and refugees in European law*, Oxford, 2016, 64 f.
[53] *Ibidem*, 102.

services, such as healthcare. This condition of legal uncertainty is automatically transmitted to children, who are born into statelessness. Moreover, Syrians without legal status are subjected to a high risk of exploitation and/or abuse.[54]

European countries offer some revealing cases as well. Quite interestingly, the most blatant forms of legal uncertainty are imposed on newly arrived immigrants or those caught immediately at the border. One example of this is the "no-rights status" to which newly arrived asylum applicants are subjected in Austria. Immediately upon arrival, pending the admissibility procedure, asylum applicants receive a "procedure card", meaning that their stay in Austria is "tolerated" and this "toleration" only applies to the district of the reception centre, from which migrants are not allowed to move. The violation of the district's borders is punished as an administrative offence and, in some cases, may lead to detention.[55]

Another indicative case can be found in Hungary. As of March 2017, asylum seekers may only submit their application in a transit zone[56] where they have to remain for the whole duration of the procedure,[57] without being issued a permit authorizing their stay in the territory of Hungary. Emblematically, the Hungarian government has named the transit zone a "no man's land", arguing that it is not part of Hungarian territory, thus putting migrants' legal status under severe threat. Following this pattern, for instance, the Hungarian government has denied that push-backs of migrants in the transit zone can be qualified as forced returns. In 2017, the European Court of Human Rights ruled that confinements in transit zones are tantamount to unlawful detention.[58] However, in 2019, this decision was controversially overruled by the Grand Chamber, which stated that the restriction of asylum seekers' liberty in transit zones did not amount to a deprivation of liberty under Article 5 of the ECHR.[59]

[54] A. Jagarnathsingh, *Lebanon - Country Report: Legal and Policy Framework of Migration Governance*, 2018, 27, available at http://uu.diva-portal.org/smash/get/diva2:1248413/FULLTEXT01.pdf.
[55] I. Josipovic, U. Reeger, *Austria - Country Report*, cit., 31.
[56] 80/J (1) of Act LXXX of 2007 on Asylum (hereinafter: Asylum Act).
[57] 9 80/J (5) of the Asylum Act.
[58] ECHR, *Ilias and Ahmed v. Hungary*, 47287/15, 14-3-2017.
[59] Indeed, according to the Court, asylum applicants' liberty was restricted in transit zones. However, this had to be connected to the processing of asylum claims, as "the situation of an individual applying for entry and waiting for a short period for the verification of his or her right to enter cannot be described as deprivation of liberty". Furthermore, the Court found that asylum applicants were free to move and reach other countries, such as Serbia, without being subjecting to a threat to their life. Indeed, although recognizing that "it is probable that the applicants had no legal right to enter Serbia", the Court maintained that "Serbia was bound at the relevant time by a readmission agreement concluded with the European Union"(para. 238) and by the Geneva Convention (para. 241), and that applicants had the practical and de facto possibility to reach Serbia on their own (para. 238 ff.). In the same judgment the Court found that Hungary had violated Art. 3 of the ECHR for having failed to assess asylum applicants' risks of inhumane and degrading treatment in the case of return to Serbia. An internal contradiction and incoherence was highlighted with reference to these two parts of the decision. On this subject see V. Stoyanova, Ilias and Ahmed v. Hungary (Eur. Ct. H.R.). International Legal Materials, 59(3), 495-553, who stresses "On the one hand, the Court ruled

b) Uncertainty about the conditions for acquiring and losing a certain legal status.

Uncertainty about the requirements to be fulfilled in order to obtain a certain legal status mainly affects the international protection domain, and more precisely, the process through which a migrant is assigned refugee status.

The "hotspot approach" is quite indicative of this tendency. In Greece, as of 20 March 2016, following the EU-Turkey Statement, hotspots were turned into closed detention centres, where new arrivals were confined, waiting for removal to Turkey if they did not seek asylum or their application was rejected. In 2017, the practice of detention was replaced by a blanket geographical limitation, requiring migrants to remain on the island on which they were placed and to reside at the hotspot centre. Waiting periods may last up to 1 year, during which asylum applicants suffer not only from substandard conditions, but also from uncertainty about their status and their future.[60]

Further uncertainty also derives from a lack of clear and comprehensive legal frameworks. In Italy, new arrivals are stuck in hotspot facilities for long periods, sometimes subjected to "de facto" detention for several weeks.[61] This limitation of liberty and the lack of a law regulating it, raises serious questions of constitutional legitimacy in view of the guarantees under Article 13 of the Italian Constitution.[62] Hence, as pointed out by the Council for the Judiciary,[63] as well as

that since the applicants would not be exposed to a direct risk in Serbia, they were not detained in the transit zone in Hungary. On the other hand, it found that Hungary had violated Article 3 of the ECHR since it did not conduct a proper assessment of the risks that the applicants could face if they were to return to Serbia" (496).

[60] AIDA, *Country Report: Greece*, 2018, available at www.asylumineurope.org/reports/country/greece ; E. Guild, C. Costello, V. Moreno-Lax, *Implementation of the 2015 Council Decisions establishing provisional protection for the benefit of Italy and Greece. European Parliament*, LIBE Committee, 2017.

[61] Chamber Inquiry Committee on the system of reception, identification and expulsion, on the condition of detention and on pledged financial resources, *Final Report*, 2016, *http://www.camera.it/_dati/leg17/lavori/documentiparlamentari/IndiceETesti/022bis/006/INTERO.pdf ;* Chamber Inquiry Committee on the system of reception, identification and expulsion, on the condition of detention and on pledged financial resources, *Report on the system of identification and first reception within the "hotspots" centres*, 2016, *http://documenti.camera.it/apps/nuovosito/Documenti/DocumentiParlamentari/parser.asp?idLegislatura=17&categoria=022bis&tipologiaDoc=documento&numero=008&doc=intero*.

[62] Indeed, hotspots in Italy are currently regulated only through standard operating procedures published in 2015 (SOPs - available at www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/hotspots_sops_-_english_version.pdf) while a detailed regulation of operations conducted in hotspots is still lacking at the legislative level. Only recently, Law No. 47/2017 introduced an explicit reference to hotspots, without providing, however, a clear and standardised procedure. See also D. Neville, S. SY, A. Rigon, *On the frontline: the hotspot approach to managing migration*, European Parliament's Policy Department for Citizen's Rights and Constitutional Affairs, 2016, available at www.europarl.europa.eu/RegData/etudes/STUD/2016/556942/IPOL_STU(2016)556942_EN.pdf

[63] Consiglio Superiore della Magistratura, *Parere, richiesto dal Ministro della Giustizia, ai sensi dell'art. 10 della legge 24 marzo 1958, n. 195, sul testo del decreto legge 17 febbraio 2017, n. 13*

ASGI (Association for Legal Studies on Immigration) and Magistratura Democratica,[64] the problem of a legal basis remains open, with a high fragmentation of the practices applied across hotspot facilities, which have contributed to creating and sustaining a condition of prolonged and generalized legal uncertainty in respect of applicants' entitlement to protection and their rights.[65]

Uncertainty may also affect the conditions which determine the withdrawal of a legal status. Denmark offers a paradigmatic example. In February 2019, the government passed a new immigration bill announcing a 'paradigm shift' from integration to repatriation for refugees. Indeed, Law L140 substantially amends residence rules, allowing permit renewals only when conditions in the home countries are deemed unsafe. Following the reform, the degree of integration into Danish society has ceased to have any relevance when it comes to allowing the stay of international protection holders. It is difficult to predict the concrete effects of this paradigm shift. However, the message conveyed by the law is clear: refugees' stay in Denmark should only be temporary. Even if a softer agenda on migration were adopted by the new government, the idea that refugees will *not* become permanent residents has been recently reiterated by the new Prime Minister, Mette Frederiksen: "When you are a refugee and come to Denmark, you can be granted our protection. But when there's peace, you must go home" she stated.[66]

In other circumstances, uncertainty is intrinsically intertwined with the way in which legal status has been constructed and designed by national legislations.

concernente: "Disposizioni urgenti per l'accelerazione dei procedimenti in materia di protezione internazionale, nonché per il contrasto dell'immigrazione illegale", 2017, available at www.csm.it//documents/21768/41479/parere+sul+dl+13+del+2017+relativo+ai+procedimenti+in+materia+di+protezione+internazionale+(delibera+del+15+marzo+2017)/d5c25710-1d74-a9d4-6fdf-07b2e8c3d06d

[64] ASGI and Magistratura democratica, *Decreto legge 17 febbraio 2017, n. 13 (Disposizioni urgenti per l'accelerazione dei procedimenti in materia di protezione internazionale, nonché per il contrasto dell'immigrazione illegale)*, 2017, http://www.magistraturademocratica.it/mdem/upy/farticolo/md_asgi_dl_13_2017.pdf

[65] Office of the High Commissioner of Human Rights, *Italy's migrant hotspot centres raise legal questions*, 2016, available at www.ohchr.org/EN/NewsEvents/Pages/LegalQuestionsOverHotspots.aspx.

[66] E. Wallis, *Denmark's new government softens line on migration*, 8 July 2019, on www.infomigrants.net/en/post/18031/denmark-s-new-government-softens-line-on-migration. However, on this subject see the case regarding the revocation of or refusal to grant refugee status on grounds of national security. Decision of the CJEU,14 May 2019, *M and Others v Commissaire général aux réfugiés et aux apatrides* available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CJ0391#t-ECR_62016CJ0391_EN_01-E0001 . According to the reasoning of the Court, the revocation of refugee status does not automatically amount to revocation of the rights granted under the 1951 Geneva Convention, by which the EU is bound (indeed the formal recognition of "refugee status" is something different from being a "refugee" according to Article 1(A) of the Geneva Convention). As result, an individual who loses refugee status and the residence permit associated with it will continue to enjoy the rights recognised by the Geneva Convention and can thus continue to reside in the country on another legal basis.

This is the case of national protection residence permits.[67] The national protection status is meant to provide a complementary form of protection to third country nationals who do not qualify for international protection, but cannot be removed from the country. The grounds for granting this non-harmonized status vary a great deal across EU Member States, ranging from the principle of *non-refoulement* to humanitarian reasons and to climate disasters in the country of origin.[68] However, the forms of protection provided are conceived as temporary and exceptional. Very short-term residence permits, with documents frequently valid for only a few months, and a lower level of rights afforded are often associated with the attribution of this particular status. This is the case, for instance, as regards Turkish "conditional refugee protection", which is granted to foreigners who qualify for refugee status, but come from a non-EU country. Beneficiaries of this status are entitled to a short stay (1 year) and a smaller set of rights than beneficiaries of refugee and subsidiary protection status. In particular, the right to family reunification is excluded together with "the prospect of long-term legal integration into Turkey".[69] Freedom of movement as well is restricted in the case of holders of "conditional refugee" status, who are required to reside in specific provinces and to regularly report to local authorities. Beneficiaries of this legal status are supposed to stay in Turkey temporarily pending resettlement in a third country. However, in practice, due to the decreasing quotas of safe third countries, refugees under conditional refugee status stay in Turkey for a long time and remain "in limbo".[70]

National protection statuses are also subjected to frequent legislative changes. Between 2010 and 2018, reforms introduced in 13 EU Member States radically amended or abolished this form of protection.[71]

Furthermore, ample discretionary decision-making often affects the granting of a status, also because of the wording used in legislative provisions regulating national forms of protection, which in many cases is generic and

[67] With reference to the USA legal system, see N. Lori, *Offshore Citizens. Permanent Temporary Status in the Gulf*, which mentions the temporary protection status in the United States; the author clarifies that "TPS is not asylum because it is explicitly designed to not be an avenue for permanent residency" (45). Indeed, "The law explicitly precludes TPS holders from adjusting to lawful permanent residence (LPR) status: Immigration and Naturalization Act, § 244(h). Individuals who are on TPS may qualify for asylum – but by law one may apply for asylum only within the individual's first year in the United States. Because asylum processing is lengthy and cumbersome, immigration judges and applicants alike often opt for TPS despite its limitations" (45, note 10).

[68] For further details see EMN, *Comparative overview of national protection statutes in the EU and Norway*, EMN Synthesis Report for the EMN Study 2019, 2020, 5 ff, available at https://ec.europa.eu/home-affairs/content/emn-study-comparative-overview-national-protection-statuses-eu-and-norway_en.

[69] AIDA, *Country Report: Turkey*, 2018, 97, available at www.asylumineurope.org/reports/country/turkey

[70] E. Cetin, N. O. Ozturk, N. E. Gokalp Aras and Z. Sahin Mencutek, *Turkey: Country Report: Legal and Policy Framework of Migration Governance*, http://uu.diva-portal.org/smash/get/diva2:1248427/FULLTEXT02.pdf , 2018, 682.

[71] EMN, *Comparative overview of national protection statutes in the EU and Norway*, cit., 41.

vague.[72] Clear examples of such indeterminacy are, for instance, the "serious reasons of a humanitarian nature" that must exist in order to obtain humanitarian protection in Italy (before the significant reform of 2018);[73] the "exceptional compassionate circumstances" set as a condition for obtaining discretionary leave to remain in the UK;[74] the existence of "considerable concrete danger to his/her life, limb or liberty" in the destination country which has to be proven in order for the national ban on deportation to be issued in Germany;[75] the aim "to protect the foreigner or secure a vital national interest", based upon which the asylum is granted in Poland.[76]

These examples trigger reflection upon legal status and its salience within the management of migration. In national legal systems, when it comes to the room for maneouvre in creating or modifying the substance of different legal statuses, international protection occupies one end of the spectrum. In fact, in the light of the international legal framework (and first and foremost the Geneva Convention), little margin is left for States to determine the requirements necessary to obtain this status and the legal treatment attached to it. Immigration

[72] Ibidem, p. 14 ff. See also P. Pannia, V. Federico, A. Terlizzi and S. D'Amato, *Comparative Report Legal & Policy Framework of Migration Governance*, 2018, 54 f. available at http://uu.diva-portal.org/smash/get/diva2:1255350/FULLTEXT01.pdf.

[73] This was the reading of Art. 5, Legislative Decree No. 286/1998. Indeed in 2018, following the introduction of the Salvini Decree (N. 113/2018), the humanitarian protection regime was significantly reformed and replaced with a new set of statuses and grounds entitling to protection: (a) "special protection", grounded on the principle of non-refoulement; b) severe medical issues; c) environmental disasters; d) acts of particular civic value; e) "special cases" targeting victims of trafficking, labour exploitation and domestic violence. The reform resulted in a substantial reduction in the legal guarantees provided to persons in need of protection.

[74] The "discretionary leave" is a form of permission to live in the UK granted by the Home Office outside of the rules to foreigners who do not qualify for international or humanitarian protection. The granting of discretionary leave encompasses a wide range of exceptional circumstances, such as situations of severe illness when return would constitute inhuman or degrading treatment under Art. 3 of the ECHR and situations involving victims of trafficking or unaccompanied foreign minors who do not qualify for other statuses of protection and cannot be returned to their country of origin. The duration of stay granted depends on the individual case, but generally does not exceed 30 months. The discretionary leave was set out in policy guidance, available here https://www.gov.uk/government/publications/granting-discretionary-leave.

[75] Under Section 60 V and VII of the Act on Residence, deportation is prohibited under the terms of the European Convention on Human Rights or when the foreigner is at risk of "substantial concrete danger to his/her life and limb or liberty" (E. Chemin, S. Hess, A. K. Nagel, B. Kasparek, V. Hänsel, M. Jakubowski, *Germany - Country Report: Legal and Policy Framework of Migration Governance*, 2018, 161, available at http://uu.diva-portal.org/smash/get/diva2:1248277/FULLTEXT01.pdf). In practice, this form of protection is often granted on health grounds and beneficiaries are entitled to a residence permit of at least one year (AIDA, *Country Report: Germany*, 2018, 47, available at https://www.asylumineurope.org/reports/country/germany)

[76] Art. 90 of the Law on Protection. This particular form of national protection has been granted, for instance, to Ukrainians with Polish roots fleeing the military conflict in Western Ukraine (M. Szulecka, M. Pachocka and K. Sobczak-Szelc, *Poland - Country Report: Legal and Policy Framework of Migration Governance*, 2018, 18, available at http://uu.diva-portal.org/smash/get/diva2:1248415/FULLTEXT02.pdf).

on economic grounds can be placed at the opposite end of the spectrum, as the power to select people who are entitled to enter and stay on socioeconomic grounds lies with the State.[77]

Through the progressive erosion of legal guarantees surrounding the crucial stage of acquisition and withdrawal of international protection status, States attempt to limit access to international protection status, over which they may exercise less control.

c) Uncertainty about the rights attached to a certain legal status.

Finally, institutional uncertainty also affects the set of rights attached to foreigners' legal statuses, which are abruptly downgraded or suspended by new pieces of legislation while becoming more and more subjected to the discretion of public authorities.

In Sweden, beneficiaries of subsidiary protection who applied for asylum after 24 November 2015 were fully excluded from the right to family reunification. This was one of the controversial dictates of the Temporary Law approved by the Swedish government in 2016 with the explicit aim of making Sweden a less attractive destination for asylum applicants.[78] The legislative provision in question raised a number of concerns as to its compatibility with basic fundamental rights, such as the right to non-discrimination and the right to family life enshrined in the ECHR.[79] In 2019, the Temporary law was extended until 2021, but the ban on family reunification for beneficiaries of subsidiary protection was removed.

Similar provisions were approved also in Germany, where the right to family reunification has been suspended for beneficiaries of subsidiary protection who were granted the status between 17 March 2017 and July 2018. Since 2018, the right to family reunification has been significantly eroded. A cap of 1000 family visas per month has been imposed by the amended Residence Act (Sections 36a and 104(13)). Furthermore, family reunification applications have to be supported

[77] C. Joppke, *Selecting by origin: ethnic migration in the liberal State*, Harvard, 2005; Sohn, *op.cit.*, 372.

[78] Government Offices of Sweden, *Government proposes measures to create respite for Swedish refugee reception*, 24.11.2015, available at https://www.government.se/articles/2015/11/governmentproposes-measures-to-create-respite-for-swedish-refugee-reception/.

[79] This normative provision was considered uncompliant with the human rights international framework by a decision of 2018 of the Migration Court of Appeal, concerning the right of a child to be reunited with his family. See on this AIDA, *Country Report: Sweden*, 2019, 88, file:///C:/Users/paola/Downloads/aida_se_2019update.pdf

by "humanitarian grounds".[80] In addition to the legislative restrictions, the right to family reunification is hampered by complicated and lengthy procedures.[81]

Legislation introduced in Denmark in 2016 restricted the right to family reunification of foreigners with temporary protection status by requiring them, among other things, to wait three years before applying.[82] Furthermore, the new law L140 allows the ministry of Immigration and Integration to impose a limit on the number of family reunifications in the event that "asylum applications 'increase significantly over a short period', – without specifying what a significant increase would mean".[83] Meanwhile, complicated bureaucratic procedures and the caseload of immigration services result in waiting times of up to two years, which severely affects the actual enjoyment of the right to reunite with family members.[84]

Similarly, in Greece, due to persistent administrative shortcomings, in 2018 only a few refugees were able to initiate a procedure for family reunification.[85] Moreover, in a highly symbolic way, the Minister of Labour and Social Affairs of the newly (August 2019) installed Greek government cancelled a circular concerning the issuance of social security numbers (AMKA) to migrants, refugees, asylum seekers, unaccompanied refugee children and non-EU nationals. As commentators have observed, the circular "actually codified a law passed under

[80] See on this AIDA, *Country Report: Germany*, 2020, 140 – 141, available at https://www.asylumineurope.org/reports/country/germany . Humanitarian grounds mentioned by law are the following: "1. Long duration of separation of family members, 2. Separation of families with at least one (minor) unmarried child, 3. Serious risks to life, limb or personal freedom of a family member living abroad, 4. Serious illness, need for care or serious disabilities of a family member living abroad". The law also takes into account the welfare of children and evidence of integration such as knowledge of language. Furthermore, family reunification applications may be submitted only on behalf of "members of the immediate family" (spouses, registered partners, minor unmarried children or parents of unaccompanied children)".

[81] Ibidem

[82] See E. Cochran Bech, K. Borevi and P. Mouritsen, *A 'civic turn' in Scandinavian family migration policies? Comparing Denmark, Norway and Sweden*, in *Comparative Migration Studies*, 5(7), (2017) 9; as reported by the authors, access to family reunification is granted or denied on the basis of such criteria as knowledge of the language, economic resources, age, the applicant's domestic violence record and "attachment to country". The national protection system of Denmark, which opted out of the CEAS, includes a temporary protection status, which is granted to individuals recognized as being in need of protection under the Danish Aliens Act, Article 7 (3) due to a situation of severe instability and indiscriminate violence in their countries of origin (see European database on asylum law, *Denmark. Country profile*, 1.2.2018, available at https://www.asylumlawdatabase.eu/en/content/country-profile-denmark).

[83] FRA (Fundamental Rights Agency), *Migration: Key fundamental rights concerns - Quarterly bulletin 2*, 2019, 4, available at. https://fra.europa.eu/en/publication/2019/migration-overviews-may-

[84] M. C. Bendixen, *New restrictions for refugees in the Finance Act*, in *Refugees Welcome*, January 29 2019, available at http://refugees.dk/en/news/2018/december/new-restrictions-for-refugees-in-the-finance-act-2019/ .

[85] Council of Europe Commissioner for Human Rights, *Report of the Commissioner for Human Rights of the Council of Europe Dunja Mijatović following her visit to Greece from 25 to 29 June 2018*, 6 November 2018, available at https://reliefweb.int/report/greece/report-commissioner-human-rights-council-europe-dunja-mijatovi-following-her-visit

the New Democracy government in 2009".[86] In any case, this measure makes it difficult for foreigners to obtain access to social rights, as the AMKA is essential in order to benefit from services in the health, education and labour realms. A very similar provision was approved by the Italian government in 2018, when 'Security Decree' No. 113/2018 stipulated that asylum applicants would no longer be allowed enrolment in the Civil Registry or eligible to obtain a residence card (Art. 13). This had serious implications for the recognition of social rights and benefits, as well as making it very difficult or, sometimes, even impossible, for asylum seekers to open a bank account or get a driving licence. In July 2020 the Italian Constitutional Court declared Art. 13 to be unconstitutional because of its incompatibility with the principle of equality and "equal social dignity" enshrined in Art. 3 of the Constitution.[87] With reference to the latter point, one of the lines of argumentation of constitutional illegitimacy raised by the Tribunal of Milan (which referred the case) is evocative. The first instance Court highlighted that denying asylum applicants' enrolment in the Civil Registry was tantamount to marginalizing and "confining them to a social and legal nowhere". This circumstance prevented them from developing their personality in a free and dignified way and participating in the cultural, social and economic life of the community, which is considered a crucial stage of the integration process according to the Italian legislator (Art. 4 of the Consolidated Law on Immigration).

Access to social services and benefits has also been restricted in other countries. In Austria, the fragmentation of competences among different layers of government transformed the migration domain into a battleground between the opposing political forces in control at the federal level (the government and its SPÖ-led social ministry) and in the ÖVP-led provinces, responsible for providing social aid, such as the Needs-Based Minimum Benefit, a service for persons without reasonable subsistence. These political tensions triggered a wave of restrictive measures. Social allowances were cut in the provinces of Tyrol and Vorarlberg. The same also occurred in Upper Austria, Lower Austria and Burgenland, where upper household limits were reduced and the provision of aid was tied to the length of residence. In 2018, the Constitutional Court annulled these provisions (decision G 136/2017), which went against the very aim of the Needs-Based Minimum Benefit, which was to fulfil the social needs of persons without means of subsistence. However, the rulings of the Constitutional Court

[86] Z. Lefkofridi and C. Sevasti, *The symbolism of the new Greek government*, in *LSE EUROPP Blog*, August 5 2019, available at https://blogs.lse.ac.uk/europpblog/2019/08/05/the-symbolism-of-the-new-greek-government/

[87] Decision n. 186/2020 of the Italian Constitutional Court. The press release of the decision is available in English at the following page: https://www.cortecostituzionale.it/documenti/download/pdf/request_20200803143349.pdf , which clarifies that "given the scope and consequences of the provision, including in terms of social stigma – a stigma that is expressed not only symbolically by the asylum seekers' inability to obtain identity cards – in this case, the violation of the principle of equality enshrined in Article 3 of the Constitution also infringes upon the principle of 'equal social dignity'".

do not always perform a counter-majoritarian role. In 2017, a controversial measure, approved in Lower Austria, which excluded beneficiaries of subsidiary protection from the enjoyment of social services was declared lawful by the Court, amid concerns about its discriminatory nature (E 3287/2016).

As these cases suggest, courts also contribute to fueling the structural and pervasive uncertainty surrounding foreigners' status. Indeed, though turning to courts has undoubtedly represented one of the most frequent and successful strategies for protecting migrants' rights, judicial rulings may also result in a further fragmentation and atomization of guarantees. The case of foreigners' entitlement to social assistance in Italy is indicative. Law No. 388/2000 (Budgetary Law) restricts access to social welfare allowances to EU long-term residence permit holders. On several occasions, the Constitutional Court has declared that the limitation is unreasonable.[88] However, since the Court has declared the unconstitutionality only of specific provisions in relation to certain rights, Italian legislation still maintains a distinction between long-term residents (with an EU long-term residence permit) and migrants who have a short-term permit (one or two years), who are denied a number of social welfare allowances, such as the maternity allowances and childbirth allowances. With reference to the latter, a substantial body of case law of merit courts has extended this right also to foreigners holding a residence permit for work reasons[89]. This means, however, that those who cannot reach the judicial arena are excluded from some social rights and unlawfully discriminated against.

4. Some provisional concluding remarks: institutional uncertainty, State sovereignty and domination.

[88] See the following decision of the Italian Constitutional: n. 306/2008; n. 11/2009; No. 187/2010; n. 329/2011; n. 40/2013; No. 22/2015; n. 230/2015.

[89] These Courts applied the principle of equal treatment between nationals of third countries and nationals of the Member States where they reside, as enshrined with regard to the branch of social security by point (e) of Article 12(1) of Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State. The Italian Constitutional Court considered a referral from the Court of Cassation questioning the constitutionality of the rule stipulating that the eligibility of third-country nationals for the childbirth allowance and the maternity allowance is conditional upon the holding of an EU long-term residence permit. The Court decided to refer to the European Court of Justice for a preliminary ruling concerning the direct applicability of Article 12 of Directive 2011/98/EU (order No. 182 of 2020). For further details see https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/EN_Ordinanza_182_2020_Sciarra.pdf . Meanwhile, the draft 2019-2020 European Law bill (No. 2670), currently passing through Parliament, includes amendments, among others, to art. 41 of the Consolidated Law on Immigration (Legislative Decree No. 286/98). According to Art. 2 (1 ter) of the bill, foreigners holding a residence permit for work reasons shall enjoy equal treatment with nationals with regard to family allowances. The bill is available here: https://documenti.camera.it/leg18/pdl/pdf/leg.18.pdl.camera.2670.18PDL0115510.pdf

Some constitutional lawyers describe migration law as a "special branch of law", where traditional principles of the rule of law and historic achievements of constitutional law seem to disappear.[90] This paper aimed to unravel this "quasi-state of exception" affecting foreigners' status in many instances, time periods and regions, by looking at the uncertainty characterizing their legal conditions. What emerges is a complex tangle of factors, which cannot be ascribed solely to governments' failures to address the complexity of migration, or to the multiplicity of entities and competing interests involved. Uncertainty should also be regarded as the intended consequence of a legislation which endorses an authoritarian over a rights-based approach. As has emerged from the overview illustrated above, a lack of stability and predictability often characterizes migration law. This factor (together with gaps in the law and the way in which these spaces are concretely filled) emphasizes how uncertainty structurally permeates the system of foreigners' legal statuses and leads to their variability, multiplicity and temporariness. In the migration domain, rather than guaranteeing predictability, unity, rationality, and coherence, laws often create uncertainty, instability and discrimination. It is in this sense that uncertainty becomes "institutional".

This can be partly explained by the very logic underlying the concept of "legal status", which is considered the main heuristic unit of migration regulation. Indeed, the notion of "status", historically conceived to legally represent the unequal order of corporations and classes, is currently used as "a practical tool able to create or maintain discriminations and spaces of special law".[91] A high fragmentation of rights and statuses characterizes the modern era. This does not necessarily represent a dysfunction of the system, or worse, a violation of the principle of equality or of the rule of law.[92] As the "struggles for recognition" have demonstrated, special laws can be demanded by people in order to protect and promote their cultural, religious and ethnic diversity. Special laws can constitute a legal technique through which the State guarantees "equality in difference".[93] However, this reasoning applies only if some conditions are fulfilled, such as, first of all, the consent of the recipients of these pieces of law.[94] In the migration domain, by contrast, this requirement can hardly be met, given that foreigners are mostly excluded from the democratic process. Furthermore, the institutional uncertainty surrounding types, requirements and rights tied to legal statuses may also preclude foreigners from resorting to other channels, such as the judicial one.

[90] M. Savino, *Lo straniero nella giurisprudenza costituzionale: tra cittadinanza e territorialità*, in *Quaderni costituzionali* 1, 2017, 1.
[91] G. Cianferotti, *Il concetto di status nella scienza giuridica del Novecento*, Milano, 2013, 2 who mentions P. Rescigno, *Status. Teoria Generale*, Enciclopedia Giuridica, XXX, Roma, 1993, 3.
[92] J. Raz, *The authority of law: essays on law and morality*, Oxford, 1979, 210.
[93] In the modern era, the concept of "status" serves to maintain or construct inequalities and special rights grounded on a multiplicity of reasons which include not only privileges, but also claims of protection. G. Alpa, *Status e capacità. La costruzione giuridica delle differenze individuali*, Bari, 1993.
[94] According to G. Alpa, *Status e capacità*, cit., the differentiation introduced with status can be legitimate if conceived as self-differentiation (206-207).

Indeed, frequent changes in rules, together with vague, imprecise laws can prevent foreigners from knowing what the law is, causing them to lose their voice. Like other global tendencies characterizing migration governance, such as "externalization" or the growing recourse to informal acts, such as informal agreements, communications, standard operational procedures and circulars,[95] institutional uncertainty confines foreigners to "no-rights spaces". Indeed, these mechanisms may *de facto* neutralize judicial intervention and contribute to shaping and reinforcing a "special legal status" of migrants, where basic human rights and procedural guarantees are increasingly replaced by a system of contingent measures and exceptions.

As it has done historically, the concept of "legal status" applied in migration law crystallizes and institutionalizes inequality. Against a "rights-based legal system", this notion serves to introduce a-priori limitations and restrictions to categories of people, and by doing this, it serves the State's interest in reinforcing its sovereignty, exercising its selective power to decide who may enter and who may not and with which entitlements, and in reclaiming its legitimacy. In the migration realm, the tension between authority and liberties is still open and far from being resolved. The concept of "institutional uncertainty" contributes to unveiling this anachronistic asymmetry and form of domination. Indeed, the relationship between the sovereign State and foreigners is based on a function-based approach: through the "legal status system", the State selects foreigners' rights, which are not meant to protect individual spheres of liberties, but rather to fulfil national contingent interests of a symbolic, political or economic nature. This results in a system of blanket inequality.

Meanwhile, in this context, the debated question about who belongs to the community remains unanswered. Through "institutional uncertainty", States make and unmake the physical and spiritual borders of the community, depriving foreigners of a clear place within the society and of a definite perspective on when and how they will be able to belong to the community.[96]

A final caveat is necessary. It would be misleading to conceive of the present study as supportive of the classic ideal of "legal(istic) certainty". The claim against institutional uncertainty is not aimed at restoring the reductionist and mythological paradigm of an "Olympic State",[97] which presents itself and its rules as a rational, clear, autarchic system. On the contrary, by illustrating and delving into the conceptual patterns of "institutional uncertainty", this article stresses the

[95] A. Algostino, *L'esternalizzazione soft delle frontiere e il naufragio della Costituzione*, in *Costituzionalismo.it*, 1, 2017, 139; I. Gjergji, *Sulla governance delle migrazioni.Sociologia dell'underworld del comando globale*, Milan, 2016.

[96] This aspect somehow mirrors the arbitrariness of the citizenship-attribution process and of its excluding nature. See P. Mindus, *Cittadini e no. Forme e funzioni dell'inclusione e dell'esclusione*, Firenze, 2014. The author mentions the phenomenon of statelessness, which can manifest itself not only "de jure", but also "de facto", as in cases of individuals who are left without a citizen status or, to an even greater extent, individuals who are left without any legal status at all, such as undocumented people (156 f.).

[97] G. Palombella, *Dopo la certezza: il diritto in equilibrio tra giustizia e democrazia*, Bari, 2006. See also P. Grossi, *Mitologie giuridiche della modernità*, Milano, 2007.

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need to (re-)affirm some of the most fundamental principles of the rule of law, such as the predictability, public disclosure and stability of rules: in other words, to increase equality and justice within legal systems, also in the migration domain. It is urgent to reassess the nexus between foreigners and the State, tying it to a strong rights-based, bilateral approach.[98]

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[98] On this subject see G. Palombella, *Il Rule of Law. Argomenti di una teoria (giuridica) istituzionale*, in *Sociologia del diritto*, 1, 2009, 27. According to the author, the rule of law "concerns the ability of legal institutions to prevent the legal system from becoming a mere instrument of domination, a malleable tool in the hands of those who detain political power".