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Granting Rights through Illegalisation: EU Citizenship, Contested Social Rights and Actors' Interests in the Belgian Healthcare System

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Although Member states have increasingly relied on welfare policies as remote instruments of EU migration control in the last decade, they often provide additional welfare benefits for 'unwanted' EU citizens than the ones required by supranational law, revealing a gap between restrictive policy aims and actual outcomes. Based on document analysis and semi-structured interviews in Belgium, the paper analyses the plurality of actors' interests and claims on the welfare-EU migration nexus, suggesting that it is in the struggle of these - potentially conflictive - logics that an explanation of policy inconsistency can be found. In doing so, the paper also reveals how the category of 'illegal EU migrants' has been institutionally produced from below, with healthcare providers, welfare bureaucracies and pro-immigrant organisations – rather than 'the State' - taking the lead in that process.

EU citizens are deemed to have extensive residency and social rights when compared to other non-EU migrant groups (Ruhs 2015). According to Directive 2004/38/EC (the so-called Citizenship Directive), all EU citizens have the right to enjoy freedom of movement within the Union and equal treatment with the nationals of a host Member state (MS). However, after an initial period of three months of stay in another MS, during which the host country is not obliged to grant social assistance to those EU citizens who do not qualify as workers, only the right to entry and exit remain unconditional for everyone. On the contrary, the right to continuous residence and to social protection become conditional on regular economic activity (Bauböck 2011).

Awareness that EU citizenship was designated and developed primarily as a tool to facilitate workers' mobility in the single market is by no means new. Since its early

definition, free movement of EU citizens has been conditional upon working status, structuring a hierarchy of mobility-related deservingness to which a stratified framework of social rights is attached. As a result of this, EU migrants' residency and social rights are potentially rendered precarious (Dwyer et al. 2019), particularly in times of permanent austerity and significant unemployment. Since the early 2010s, in fact, several MSs have debated and even introduced restrictions concerning EU migrants' access to social benefits, targeting in particular those who do not qualify as workers and thus may constitute a 'welfare burden' for host MSs (Blauberger and Schmidt 2014; Heindlmaier and Blauberger 2017; Lafleur and Stanek 2017).

Regardless of declared intentions, however, MSs often continue granting social benefits for 'unwanted' EU migrants, suggesting the existence of a gap between restrictive policy aims and actual outcomes (Boswell 2007; Lahav and Guiraudon 2006). In healthcare domain, in particular, several MSs guarantee more than urgent healthcare to EU migrants who neither fulfil the conditions for statutory healthcare coverage in a host MS nor are insured abroad, including Belgium, Greece, Italy, the Netherlands, Poland, Portugal, Spain and Sweden (Lhernould et al. 2010; Author A).

Nevertheless, the issue of policy inconsistency when it comes to EU migrants has received little attention so far. By focusing on the case of Belgium, this paper aims at explaining the apparent contradiction that exists between proclaimed policy aims of limiting intra-EU migration through welfare and inclusive state-funded healthcare benefits for EU migrants with precarious residency status, that is, those EU migrants who do not comply yet/anymore with the conditions for 'lawful residence' according to the Citizenship Directive. To do so, it sheds light on the plurality of actors' interests and claims concerning the provision of healthcare for this category of citizens, suggesting that it is in the struggle of these - potentially conflictive - logics that an

explanation of policy inconsistency can be found. In doing so, the paper also reveals how the category of ‘illegal EU citizens’ has been institutionally produced from below, with healthcare providers, welfare bureaucracies and pro-immigrant organisations – rather than ‘the State’ - taking the lead in that process.

To this end, after presenting the theoretical framework and the methods used to carry out the research, the paper steps into the Belgian system, analysing the specific interests and logics for action of the institutional and non-institutional actors involved in the field. As it will be detailed below, the Belgian system features a puzzling complexity of actors participating in the definition and provision of state-funded healthcare benefits for EU migrants with precarious residency status, including the federal government, sickness funds, healthcare providers, welfare bureaucracies and pro-immigrant organisations.

Moreover, among the MSs vocally calling for stricter controls on EU migration, Belgium stands out as having implemented various restrictive initiatives raising the attention of a vast audience, including the EU Commission, politicians and media of several home MSs (Caldarini 2016; Lafleur and Stanek 2017; Mantu 2017). At the same time, however, it guarantees access to a state-funded, non-contributory social assistance measure aimed at covering an extended basket of health treatments for EU migrants with precarious residency status (Lhernould et al. 2010). In other words, EU migrants who should not qualify for social rights in Belgium due to their residency status according to the Citizenship Directive are nevertheless entitled to additional social assistance benefits than EU law requires, the costs of which are covered by the federal state. How and why can these inclusive measures coexist with the country’s proclaimed objective of stopping (unproductive) EU migration inflows through welfare?

In addressing this question, the paper aims at contributing to the debates on the welfare-migration nexus and migrant illegality. On the one hand, it engages in the discussion on the existence of potential gaps between restrictive policy aims and actual outcomes by shifting the focus of analysis from immigration policies and international migration to welfare policies and EU migration. On the other hand, it contributes to the literature on migrant illegality by extending the debate to EU citizens and showing how it is not only ‘the State’ and its immigration policies that produce (EU) migrant illegality, but also a plurality of actors who – from different logics and in pursuing different goals – contribute to its institutionalisation from below.

EU Citizenship and Social Rights: Contestation, Inconsistency and Deportability in the Union

Freedom of movement is core to EU migrants’ social rights: without movement, there would be no need for supranational laws to regulate EU citizens’ entitlements to social protection in the territory of another MS. According to the Citizenship Directive, all EU migrants have the right to move and stay in another MS for at least three months, subject only to the condition of not posing a threat to public policy, public security, or public health. During this initial timespan, the host MS is not obliged to grant social assistance benefits to those EU migrants who do not qualify as dependent or self-employed workers (Article 24, Directive 2004/38/EC). Beyond this period, EU migrant workers retain their residency and social rights in the host MS on the same conditions as nationals of that MS. If they do not qualify as workers, they may reside in the host MS provided that they have ‘sufficient economic resources for themselves and their family members not to become a burden on the social assistance system of the host Member State, and have comprehensive sickness insurance cover in the host Member State’ (Article 7, Directive 2004/38/EC). It is only after five years of ‘lawful residence’ in

another MS that EU migrants are unconditionally entitled to all rights accruing to nationals of that MS.

As ‘lawful residence’ is the precondition for welfare entitlements, the theoretical debate on EU migrants’ social rights has been concerned with the ways in which this criterion is regulated by supranational laws, interpreted by the Court of Justice of the European Union, and implemented by MSs (Martinsen and Vollaard 2014; Thym 2015; Carmel, Sojka and Papież 2016). In the last decade, in particular, a great deal has been written about the measures adopted by MSs to restrict access to residency and social rights for distinct categories of EU migrants (Blauberger and Schmidt 2014; Heindlmaier and Blauberger 2017; Mantu and Minderhoud 2017; Bruzelius 2019; Dwyer et al. 2019; Martinsen, Pons Rotger and Sampson Thierry 2019). In doing so, scholars have usually referred to ‘workers’, ‘job-seekers’, ‘students’ and ‘economically inactive EU citizens’ to assess and compare EU migrants’ residency and social rights in a host MS, assuming (legal) administrative categories as a fact rather than contingent and reversible statuses (Maas 2009). In addition, as mentioned above, the current debate on the welfare-EU migration nexus has largely focused on policy restrictions in EU migrants’ welfare entitlements ‘on paper’, paying less attention to potential gaps between MSs’ declared restrictive goals and actual outcomes in this policy domain.

Overlooked by the literature on EU migrants’ social rights, the issue of policy inconsistency has been a key topic for international migration scholars since the early 1990s (Cornelius, Martin and Hollifield 1994). Dealing with gaps between States’ attempts of stopping ‘unwanted’ migration on the one hand, and the actual presence of migrants with irregular status and their (limited but significant) welfare entitlements in destination countries on the other hand, research has highlighted the existence of contradictions and tensions that cut across law, policy and practices in this domain. As

Sébastien Chauvin and Blanca Garcés-Mascareñas (2012; 2014) point out, while national policies are often presented as coherently aiming at excluding migrants with irregular status from the polity, they simultaneously allow for the inclusion of ‘deserving’ illegal residents as well, pointing out States’ structural heterogeneity and to the inevitable tensions and contradictions that emerge from that.

From this perspective, several studies have emphasised the fundamental role of actors such as trade unions, professional organisations, welfare bureaucracies and courts in formally and informally extending social rights of migrants with irregular status (Guiraudon 2002; van der Leun 2006; Castañeda 2013; Ambrosini and van der Leun 2015), interpreting gaps between restrictive policy goals and actual outcomes as deriving from the interplay of the claims, goals and interests of multiple actors that operate at the international, national and local levels.

Relying on the literature on illegal migration to understand policy inconsistency when it comes to EU migrants’ social rights may appear striking at first sight. EU citizens enjoying freedom of movement are deemed not to be ‘illegal’ within the Union. If ‘illegality is the product of immigration laws’ (De Genova 2002, 439; Calavita 2005; Paoletti 2010), in the case of EU migrants there is no immigration law formally applying and creating such status.

Nevertheless, the emerging debate on the EU migrants’ ‘deportability’ points out to the existence of such ongoing process. For instance, Kate Hepworth (2012) analyses the construction of Romanian Roma as ‘abject European citizens’ in Italy, a process that occurred not only through the act of expulsion, but through the condition of deportability induced by the threat of expulsion. Likewise, Liz Fakete (2014) identifies similar patterns of open hostility and state-sponsored practices of removal of Roma communities in Southern, Eastern and Western Europe. Shifting the focus to Southern

EU migrants, Jean-Michel Lafleur and Elsa Mescoli (2018) address the experiences of those Italian migrants who received a deportation order after applying for welfare benefits in Belgium, but who were technically not-deportable due to contestations by Italian politicians and media.

Therefore, if we acknowledge the ‘deportability’ of EU migrants, that is, the possibility of being removed from the space of the nation-state, then the very idea of a core difference between EU and non-EU migrants seems to fall apart. As these studies suggest, EU migrant illegality is produced by States not through immigration policies, something unfeasible in a Union without physical borders, but rather through welfare policies, calling for a critical discussion of EU citizenship and the relation between illegality, the law and the welfare state in contemporary Union.

Methods

This paper aims at explaining the apparent gaps that exist between MSs’ proclaimed policy declarations of limiting EU migration through welfare and inclusionary state-funded healthcare benefits for EU migrants with precarious residency status, focusing on the configuration of actors’ interests and logics for action in the Belgian healthcare system.

As mentioned before, Belgium appears an appropriate case for the research purpose. On the one hand, the Belgian healthcare system is composed by a plurality of actors participating in the definition and provision of state-funded social benefits for EU migrants with precarious residency status, including the federal government, sickness funds, healthcare providers, welfare bureaucracies and pro-immigrant organisations. Therefore, it allows for the analysis of different actors’ claims and interests in the welfare-EU migration arena. On the other hand, it emerges as a representative case of policy inconsistency. While having called for – and implemented - stricter controls on

EU migration inflows and EU migrants' welfare entitlements in the last decade, it nevertheless guarantees access to a state-funded, non-contributory social assistance measure (*aide médicale urgente*, AMU) for EU migrants with precarious residency status, which aims at covering an extended basket of health treatments for those EU migrants who should not qualify for residency and social rights according to the Citizenship Directive.

The data presented in this article derives from document analysis and face-to-face, semi-structured interviews conducted with key field actors. Documents analysed include legislative texts, policy documents and administrative guidelines issued at the federal level in the period 2000-2019, publically-available documents issued by sickness funds and civil society organisations that clarify criteria and procedures regulating EU citizens' access to state-funded healthcare benefits, as well as relevant judgments of the Constitutional Court on this issue, which provided detailed information on field actors' positioning and claims on the topic under analysis.

Semi-structured interviews were conducted between February and May 2019 with key field actors. Using different entry points in the field, such as immigrant organisations and the author's own network within the Belgian academic community, face-to-face interviews were conducted with four representatives of CAAMI (*Caisse auxiliaire d'assurance maladie-invalidité*, the Belgian sickness fund responsible for the coordination of social security systems across MSs and for the reimbursement of health treatments in the framework of AMU), twelve social workers in charge of assessing EU migrants' eligibility to AMU at six CPAS (*Centre Public d'Action Sociale*, the welfare offices in Belgium), and two representatives of pro-immigrant organisations (indicated by 'PIO' next to interview excerpts) concerned with social rights issues in general, and healthcare entitlements in particular.

The geographical area in which interviews were conducted includes six Belgian municipalities, among which two in Flanders (indicated by 'F.1' or 'F.2' next to interview excerpts), two in Wallonia (indicated by 'W.1' or 'W.2') and two in the Brussels-Capital region (indicated by 'B.1' or 'B.2'). When inviting actors to participate in the research, a consent form was sent to thoroughly explain them the aim of the research, timing, techniques and the way personal data would have been treated anonymously.

Actors' Logics in the Belgian Healthcare System: an Institutional Map

Entitlement to healthcare in Belgium is based on the principle of social insurance with no selection of risk, meaning that it depends on people's actual or past professional activity while sickness funds cannot discriminate people according to their health status. People who cannot be insured in a sickness fund and who lack sufficient economic resources, however, can apply for state-funded non-contributory welfare schemes. When it comes to migrants, however, residency status represents an additional criterion to be evaluated in the process of granting such benefits.

For what specifically concerns EU citizens, those residing in the country for more than three months and less than five years according to the Citizenship Directive but who do not have sufficient resources to deal with their medical needs may be granted an in-cash medical aid (*aide médicale*). Nevertheless, when residency conditions are not fulfilled yet (EU migrants pending for a decision about their residency application) or not fulfilled anymore (when the residency application is rejected or when the residency right is removed), EU migrants are entitled to the before mentioned AMU.

This in-kind scheme allows the person benefitting from almost the same healthcare coverage as Belgian nationals, including any preventive and curative care

(Royal Decree 12 December 1996), for which the federal government assumes the role of a sickness fund in reimbursing hospitals and health professionals for the treatments provided to EU migrants with precarious residency status, whose compliance with eligibility criteria (i.e. no lawful residence; lack of sufficient economic resources; lack of health insurance abroad) is assessed by CPAS.

Therefore, precarious EU migrants - who should not be entitled to welfare benefits in Belgium due to their residency status and who have been vocally targeted by the federal government's restrictive measures in the last decade - are nevertheless entitled to additional non-contributory healthcare benefits than EU law requires. To explain this apparent contradiction, it is therefore important to address the claims and interests of the multiple actors directly involved in the definition and provision of AMU for this category of EU citizens, namely the federal government, sickness funds and private/public healthcare providers, welfare bureaucracies and pro-immigrant organisations.

Federal Government: Immigration Control in a Closed Welfare System

The selective inclusion or exclusion of migrants in countries' welfare services has been identified as a key tool of post-entry migration control (Bommes and Geddes 2000; Ataç and Rosenberg 2018). Limiting social rights according to immigration status is interpreted as an instrument used by national governments to prevent unwanted migrants entering – or at least settling – in the country. From this perspective, therefore, migration control is not limited to border control, but rather it is extended to welfare institutions, which are in charge of deterring and detecting migration inflows 'from within' (van der Leun 2006).

While this literature has traditionally focused on restrictions in non-EU migrants' social rights, similar dynamics are increasingly taking shape in relation to EU

citizens, for which traditional instruments of border control cannot be an option within the Union. As mentioned before, this trend has become highly visible in Belgium, particularly when the 2008 Great Recession deployed its dramatic social consequences, in concomitance with the lifting of transitional measures delaying the free admission of Central and Eastern EU workers into country's labour market. In this context, political elites have increasingly described EU migrants as competing downwards with native citizens and as 'welfare shoppers' (EMN 2012). As expressed in a Ministerial deliberation issued on 2011 (Ministry for Social Integration, Deliberation No. 11/044 of June 7, 2011, 4-5),

the Ministry for Social Integration is aware of the fact that, after obtaining their Annex 19 [certifying a residency application from a EU migrant], certain people go to CPAS and are granted social aid, [meaning that] they do not actually comply with the residency criteria they declare they do. [...] Therefore, it is important that the Immigration Office could dispose of data from CPAS about social aid granted to these people in order to deny them the document attesting their right to residence.

Accordingly, in the years 2009-2011 the federal government adopted several deliberations allowing the automatic exchange of information between the social security apparatus and the national Immigration Office to detect 'economically inactive EU citizens' applying for social assistance benefits and to serve them with a deportation order (Lafleur and Stanek 2017). Then, on January 2012, a new provision was introduced in Law of July 8, 1976 regulating the activities of CPAS. Transposing Article 24 of the Citizenship Directive, the new measure provided that all EU migrants who did not qualify as workers had not right to social assistance for the first three months after the residency application, while for jobseekers this exclusion extended until they obtained a job (Article 12, Law of January 19, 2012). In detailing such

restriction, the Ministry of Social Integration explicitly included AMU among the measures these EU migrants had to be excluded from (Ministry of Social Integration, Circular letter of March 28, 2012).

To justify this new measure, the federal government revealed a double yet converging rationale. On the one hand, it called upon the first dimension of the welfare-migration nexus, interpreting the new measure as a tool to safeguard its welfare state's boundaries. Accordingly, it appealed to reasons of 'general interests' aimed at achieving equilibrium between EU migrants' residency rights and 'the need to preserve the general level of social protection in our territory', considering that EU citizens 'can benefit from the welfare state of their home country.' (Council of Ministries, justification to the amendment; Constitutional Court, sentence No. 95/2014, 13). In the government's perspective, social protection was thus deeply related to national sovereignty and societal membership, which demarcate the 'community of legitimate receives of welfare state benefits' (Geddes 2003, 150). When discussing about the motivations for limiting EU migrants' social rights, in fact, the federal government clearly invoked the relationship between the welfare state and its (contributing) members:

Next to public order, public safety or public health [as provided by the Citizenship Directive], another interest of MSs should be considered, that is, the possibility to finance their welfare regimes: due to migration inflows, a disequilibrium could appear between the degree at which certain people contribute in the financing of the welfare state and the degree at which certain people benefit from the advantages of this system (Council of Ministries, justification to the amendment; Constitutional Court, sentence No. 95/2014, 43).

On the other hand, it explicitly interpreted this restriction as a remote instrument of migration control, primarily intended to deter certain intra-EU inflows. Conceiving its

welfare system as a magnet for unwanted immigration, the decision to lower – or rather erase - the level of state-funded healthcare coverage for precarious EU migrants was seen as tool to reduce Belgium's 'attractiveness': '*because* our rules are softer than the ones of our neighbour EU countries, we are currently confronted with a massive influx of EU citizens to our territory' (Council of Ministries, justification to the amendment; Constitutional Court, sentence No. 95/2014, 43). Starting from this assumption, a restriction in welfare entitlements was the logical response to deter unwanted intra-EU migrants to enter the country: limited rights would reduce EU citizens' willingness and possibility to move and settle in Belgium.

Healthcare Providers: Economic Interests in the Intra-EU (Un)Coordinated System

Insurance constitutes the key entitlement principle in the Belgian system, according to which individuals pay for covering their present and future healthcare needs depending on their actual or past professional activity (Gerken and Merkur 2010). Although prohibiting selection of risk, healthcare is conceived as a service to be paid for in the market, in which a consumer (via the sickness fund s/he is affiliated to) will eventually pay the provider in exchange for a treatment received. Those not entitled to work-related insurance can purchase individual insurance coverage or, in the case they lack sufficient economic resources, they can apply for state-funded social assistance schemes. In the case of EU migrants with precarious residency status and non-EU migrants with irregular status, they are only entitled to AMU, through which hospitals and health practitioners are compensated by the federal government for the treatments provided to these patients. Bearing in mind the founding principle and funding mechanisms of the Belgian healthcare regime, the 2012 restrictive measure would have implied that healthcare providers would not be reimbursed anymore from the federal

government for the services provided to EU migrants with precarious residency status due to the exclusion of this group from AMU.

Several empirical studies have emphasised the role of healthcare providers in claiming for extensive healthcare rights for migrants (Ambrosini 2015; Dwyer 2015), portraying them as actors who seek to open healthcare trajectories for migrants with irregular status (Fernández-Kelly 2012; Marrow 2012) thanks to ‘a deep rooting of humanism in the minds of pragmatic health professionals’ (Dauvrin et al. 2012, 6). Far from any humanitarian or professional principle, however, the main argument behind the opposition of healthcare providers against the 2012 federal provision was grounded on pure economic considerations.

Taking the new measure to the Constitutional Court in 2012, representatives of health practitioners and hospitals pointed out that the new measure created a ‘financial damage’ for their constituency, which ran ‘the risk of being not reimbursed for the treatments provided to EU migrants during their first three months of residence in the country’ (healthcare providers, opposition to the amendment; Constitutional Court, sentence No. 95/2014, 15). Likewise, they highlighted the potential discrimination that the measure would create ‘between healthcare providers providing treatments for non-EU migrants with irregular status [whose treatments would have continued to be reimbursed by the government under AMU] and these EU migrants’, in respect of which treatments would remain unpaid (healthcare providers, opposition to the amendment; Constitutional Court, sentence No. 95/2014, 16).

As a matter of fact, despite EU migrants who do not qualify as workers should demonstrate having sickness coverage during their stay in another MS according to the Citizenship Directive, interviews with representatives of CAAMI revealed quite a different story. Accordingly, among the almost 4,000 requests for information send by

CAAMI in 2018 on the insurance status of EU migrants to their home MSs, only 1,600 resulted in a positive response (i.e. the person is insured in her/his home country), allowing for the transfer of invoices from the Belgian system to the competent insurance body of the home MS. In the remaining cases, responses were negative (meaning that the person is not insured in her/his home country) or never provided by the competent authority of the home MS. In addition, response time to CAAMI's requests for information varied largely among MSs, between a minimum of two weeks for the Netherlands to a maximum of nine months for France.

To cope with this situation of (un)coordination between national welfare systems in the Union, the pragmatic solution adopted by the federal government while pending for a response from the home MSs until 2012 was to cover healthcare costs of the treatments provided to these EU migrants through AMU. As a representative of CAAMI simply contended, 'At the end, the ultimate, fundamental question for us is: who pays for that treatment?' (interview CAAMI).

To the same extent, once taking into account these dynamics, it becomes clear why healthcare providers claimed against and brought a judicial action against the 2012 restriction. As a consequence of that policy change, the treatments provided to these EU migrants by Belgian healthcare providers would have remained unpaid without the intervention of the federal government through AMU. In presenting their argument, in fact, they contended that the federal government justified the measure for reasons of 'general interest', but it 'did not consider the actual [financial] interests of its healthcare providers' in the EU social security arena. From their economic perspective, 'the only people affected by the 2012 amendment are not EU citizens and their family members, but healthcare providers and hospitals who are professionally obliged to care for these

people without getting reimbursed' (healthcare providers, opposition to the amendment; Constitutional Court, sentence No. 95/2014, 16).

Pro-Immigrant Organisations and Welfare Bureaucracies: Human Dignity for (Deserving) EU 'Sans-Papiers'

'Right' represents one of the most frequent concepts mobilised in the arguments presented by pro-immigrant organisations contesting the 2012 federal restriction. Invoking human rights principles, they claimed the new provision would infringe national laws, and specifically Articles 10 and 11 of the Belgian Constitution setting the principles of equality and non-discrimination before the law, and Article 23 on 'the right of everyone to lead a life in keeping with human dignity'. Likewise, they referred to international obligations signed by Belgium, including the 1966 International Covenant on Economic, Social and Cultural Rights and the 1961 European Social Charter.^{2,3}

The role of professional and pro-immigrant organisations in the contestation and change of restrictive immigration policies is a well-known phenomenon (Geddes 2003; Castañeda 2013; Ambrosini 2015; Ambrosini and van der Leun 2015), as it is the role of welfare bureaucracies in bending restrictive laws in favour of vulnerable migrant groups (Guiraudon 2002; Björngren Cuadra and Staaf 2014; Borrelli and Lindberg 2018). Invoking principles of human rights (migrants as human beings who are therefore entitled to fundamental rights), social justice (migrants as members of a disadvantaged population), or humanitarianism (migrants as vulnerable people in need of care), these actors may shape the course of action established by decision-makers through multiple venues, advocating for migrants' rights and providing services to the most vulnerable ones, including migrants with irregular status.

As confirmed by the case under analysis, soon after EU migrants who did not comply with residency requirements set by the Citizenship Directive were forced into precariousness via the 2012 measure, local pro-immigrant organisations engaged in judicialising the issue. To start with, they pointed out the lack of data confirming the ‘massive influx’ and ‘unreasonable burden’ arguments presented by the federal government to legitimate the 2012 restriction, repeatedly – yet (unsurprisingly) unsuccessfully - calling the federal government to prove its argument.

Then, grounding their claims on human-rights principles, representatives of pro-immigrant organisations highlighted the discriminating nature of the 2012 federal provision, converging with the self-interest claims of healthcare providers but grounding it on a human-rights perspective. From their standpoint, in fact, the new measure introduced a discrimination between non-EU migrants staying irregularly in the country, entitled to AMU, and ‘certain categories of EU citizens who are irregularly living in the country’, excluded from AMU (pro-immigrant organisations, opposition to the amendment; Constitutional Court, sentence No. 95/2014, 13).

Accordingly, Article 1 of the 1976 Law on CPAS states that ‘everyone has the right to social aid’ to ‘lead a life in keeping with human dignity’, the latter being a State prerogative enshrined in Article 23 of the Belgian Constitution. When it comes to foreign citizens with irregular status, the 1976 Law delimits social aid to AMU, which is granted by CPAS after assessing applicants’ eligibility status. This evaluation is based on three criteria, namely territoriality (the applicant has her/his effective residence on the territory of CPAS), lack of coverage (nobody else can cover healthcare costs for the applicant and she/he has not a valid sickness insurance in her/his home country), and indigence status (no financial capacity of the applicant to pay for her/his healthcare). Evidently, nationality is not mentioned among such criteria. As clearly explained by one

of the welfare bureaucrats participating in the research, ‘we do not distinguish between European *sans-papiers* and *sans-papiers* from third countries. A *sans-papiers* is a *sans-papiers*, it’s the same thing.’ (interview CPAS-W.2). Not conceived by any official law or administrative document, therefore, the existence of ‘irregular EU migrants’ – and their – limited but important – social rights in Belgium was a taken-for-granted fact in the discourses and practices pro-immigrant organisations and welfare bureaucrats operating at the front-line of the welfare system.

Referring to the absence of ‘any objective justification for establishing this difference of treatment’ between non-EU and EU migrants with irregular status (pro-immigrant organisations, opposition to the amendment; Constitutional Court, sentence No. 95/2014, 13), pro-immigrant organisations also referred to these citizens’ willingness to work and settle in the country, framing them as deserving beneficiaries of state support.

In the Law on CPAS, we affirm that everyone living in Belgium has the right to social aid. People who are staying here on a temporary basis, they are not entitled to such right, as they are considered do not actually living here, they are the so-called ‘tourists’. On the contrary, EU citizens who apply for residency, *whether they obtain it or not*, they come here to stay, they actually live here, they want to remain here and work here. So they should be entitled to AMU at least (interview PIO-B).

Hence, ‘irregular but deserving’ EU citizens were interpreted as ‘victims’ of the system, shifting the blame for illegality from the individual to structural distortions homeland and abroad. From the perspective of pro-immigrant organisations, ‘illegal EU migrants’ often did work in Belgium, they were contributing members of the society. However, the employment conditions they were subject to did not allow them regularising their residency and insurance statuses (interview PIO-B).

Similarly, welfare bureaucrats working at CPAS particularly supported the right to AMU for certain illegal EU migrants, that is, those who settled in Belgium on a long-term perspective and worked in demanding and low-paid jobs without formal job contracts. As a social worker pointed out, ‘Theft, drug dealing... that’s a real minority. The majority of them are exploited in the construction sector, or work at local markets, or as care workers.’ (interview CPAS-W.1). From this standpoint, precarious working conditions made it impossible for these EU citizens to affiliate in a Belgian sickness fund (interview CPAS-W.2), while portability of healthcare entitlements was limited at the origin of their migratory project, particularly in the case of citizens coming from to Eastern MS (interview CPAS-F.2). In their narratives, these EU migrants would have preferred not to migrate, or they would have complied with rules on portability of healthcare entitlements, if only their home country had allowed that. As claimed by one of the interviewees, ‘they have nothing down there, there is nothing to transfer, so they enjoy the right of freedom of movement. Everyone would do that.’ (interview CPAS-F.2).

Granting Rights through Illegalisation: Outcomes of a ‘Schizophrenic Welfare State’

The Belgian system features a puzzling complexity of actors with multiple interests and claims when it comes to social rights of EU migrants with precarious residency status. While the federal government relied on welfare to enforce EU migration control, healthcare providers invoked their legitimate interest of being paid for the treatments provided. In between, welfare bureaucracies carried out their protective function of guaranteeing ‘human dignity’ for vulnerable individuals, under the support of pro-immigrant organisations upholding human-rights principles. Ultimately, each actor reveals a different conceptualisation of healthcare: as a tool to delimit the legitimate

members of the polity while stopping unwanted intra-EU movers, for the federal government; as a service to be paid for, for healthcare providers; as a right to live a life of dignity, for pro-immigrant organisations and welfare bureaucracies. It is in the struggle of these logics – in ideal terms and at the seats of courtrooms – that the roots of a ‘schizophrenic welfare state’ (Lafluer and Mescoli 2018, 489) come to light.

By attempting to use welfare as a remote instrument of intra-EU migration control to detect certain EU migration inflows, in fact, the federal government found itself faced with an unintended result, that is, the obligation to grant social rights to the most unwanted EU migrants, the ‘illegal’ ones. Two years after the submission of the two appeals by healthcare providers and pro-immigrant organisations respectively, in fact, the Constitutional Court invalidated the 2012 federal restriction excluding EU migrants with precarious residency status from AMU.

Accepting the argument made by pro-immigrant organisations, the Court affirmed that ‘there is not reasonable justification for the difference in treatment between EU and non-EU citizens staying illegally in the country’ (Constitutional Court, sentence No. 95/2014, 54). In detailing its decision, it argued that it cannot be excluded that some EU citizens living in Belgium have neither a Belgian insurance nor healthcare coverage from their home country. In these cases, therefore, they violate the conditions set by the Citizenship Directive for staying and lawfully residing in another MS. In doing so, therefore, the Court grounded its decision on a real-life evidence, yet often neglected in legal texts: EU citizens do not complying with residency criteria defined by supranational laws – and thus those who are supposed to go back home – often do not. Not only.

The moment at which they refer to the welfare system, their right to reside in the country can be removed [...] and they may receive a deportation order. [...]. Consequently, their situation does not fundamentally differ from the one of illegal

third-country nationals in the Kingdom (Constitutional Court, sentence No. 95/2014, 52).

Starting from this consideration, the Constitutional Court sentenced that EU citizens pending for a residency decision or during their irregular stay in the country have to be equated to illegal non-EU migrants in both the risks deriving therefrom (refusal/removal of residency rights and consequent deportation order), and in their – limited – welfare entitlements (to AMU). Hence, while the federal government used welfare to create precarious EU migrants, the Constitutional Court used the status of ‘illegal EU migrants’ in order to grant them welfare rights. In other words, it is by turning EU migrants with precarious residency status into ‘illegal (EU) migrants’ that it recognised them as rightful owners of healthcare entitlements.

Along this process, it replicated the arguments - and labels - provided for by healthcare providers, pro-immigrant organisations and welfare bureaucracies, which grounded their claims - different in rationales but converging in goals - on the same conceptualisation of EU citizens with precarious residency status as ‘illegal EU migrants’. As it emerges, therefore, it is not only ‘the State’ and its immigration policies that produce migrant illegality, as the literature often contends (Ataç and Rosenberg 2019). Rather, as this study suggests, a plurality of actors, including courts, street-level bureaucracies, welfare providers and pro-immigrant organisations, may become agents, if not initiators, in the everyday production of illegality, contributing and legitimating - unwittingly or not – to its institutionalisation from below through their claims, discourses and everyday practices.

Nevertheless, as contends, ‘any act that constructs individuals’ legal identities has political implications’ (Coutin 1983, 89). And while it is true that EU migrants with precarious residency status have been granted entitlement to social rights through this

process, this does not imply that they have been recognised as legitimate members of the polity. The potential social and political implications of the production of such status in Belgium, and within the Union as a whole, call for a critical discussion of EU citizenship and the relation between illegality, the law and the welfare state in contemporary Union.

Conclusions

Although EU migrants are often conceived to have extensive residency and social rights within the EU, since the 2008 economic crisis several MSs have debated and introduced restrictions in their access to social protection. In a Union without physical borders, national governments have increasingly relied on welfare policies to control – and limit – unwanted intra-EU migration. As this and previous studies showed, however, MSs often continue providing welfare services for unwanted EU migrants, revealing a gap between restrictive policy aims and actual outcomes.

By engaging in the discussion on policy inconsistency while shifting the focus from immigration policies and international migration to welfare policies and intra-EU migration, the paper has analysed the claims of the multiple actors involved in the field and their specific interests and logics for action when it comes to EU migrants' healthcare rights, contending that it is in the ideal and actual struggle of these logics that policy may originate.

While analysing this struggle, the paper has also traced the process through which EU migrants with precarious residency status have been entitled to inclusive social assistance measures. Bringing together the different but converging claims of healthcare providers, welfare bureaucracies and pro-immigrant organisations, the Constitutional Court recognised 'illegal EU migrants' as rightful owners of – limited yet important - welfare entitlements on equal grounds to non-EU migrants with irregular

status. Regardless of the non-existence of such a category in supranational laws and in contrast with the federal government, which never referred to such a label, these actors ultimately became agents in production of (EU) migrant illegality, contributing from below to its institutionalisation.

Dealing with policy inconsistency and (EU) migrant illegality, the paper ultimately sought to problematise juridical conceptions of EU citizenship and its associated rights. De Genova (2002, 439) claimed that ‘there is nothing matter-of-fact about the “illegality” of undocumented migrants.’ Reversing his statement, this paper contends that there is nothing matter-of-fact about EU migrants’ ‘legality’ and social rights in contemporary Europe. In doing so, it calls for a deeper understanding of the – potentially unexpected – processes through which EU migrants’ statuses are produced and their social and political implications for individuals and the Union as a whole.

Endnotes

1. Specifically, the right of everyone to social security (Article 9), to an adequate standard of living (Article 10), and to enjoy the highest attainable standard of physical and mental health (Article 12).
2. Specifically, Part I, on the right of everyone to enjoy the highest possible standard of health (Point 11), the right of everyone without adequate resources to social and medical assistance (Point 13), and on the right of everyone to benefit from social welfare services (Point 14).

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