

The treatment of irregular migrants during COVID-19: A comparative analysis of Italian and Portuguese responses

Abstract

The aim of the article is to compare two emergency migration legislation adopted in Italy and Portugal. The article attempts to prove the link between integration and law, analyzing the different approaches of Italy and Portugal to the policy problem during the COVID-19 pandemic. As two of the Southern EU Member States with different views on immigration policies, Italy and Portugal represent an interesting case study to investigate. The article benefits from an interdisciplinary approach, addressing the issue, combining both the legal and political literature. Ultimately, the article tries to assess if the current measures are in line with the regularization policies that have been adopted in the past decade. The main finding is that both states tend to pass emergency legislation favoring migrants and granting them equal access to healthcare during the COVID-19 pandemic, assessing the link between law and integration. Further empirical research is desirable.

Keywords: migration, Italy, Portugal, COVID-19, law, integration

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Stosunek do nieregularnych imigrantów w czasie pandemii COVID-19. Analiza porównawcza podejść włoskiego i portugalskiego

Streszczenie

Celem artykułu jest porównanie nadzwyczajnego prawa imigracyjnego przyjętego we Włoszech i Portugalii. W artykule podjęto próbę wskazania zależności między integracją a prawem, opierając się na analizie włoskiego i portugalskiego podejścia do polityki imigracyjnej w czasie pandemii COVID-19. Włochy i Portugalia, dwa południowe państwa członkowskie UE o różnych podejściach do polityki imigracyjnej, stanowią ciekawy problem badawczy. Zastosowano interdyscyplinarne podejście badawcze, które umożliwia wypełnienie celu postawionego przez autorów na podstawie literatury prawnej i politologicznej. W artykule podjęto także próbę oceny, czy obecnie stosowane środki wpisują się w politykę regularyzacji, wdrażaną od dekady. Oceniając powiązania między prawem a integracją, uznano, że w obu państwach zostały przyjęte nadzwyczajne regulacje sprzyjające imigrantom i gwarantujące im równy dostęp do opieki zdrowotnej w czasie pandemii. Wskazane jest prowadzenie dalszych badań empirycznych.

Słowa kluczowe: migracja, Włochy, Portugalia, COVID-19, prawo, integracja

Kody klasyfikacji JEL: K37, I180, I390

Introduction

In Southern European countries, the regularization of irregular migrants has been largely used in the past as an *ex-post* control policy measure, blamed by several scholars as an emergency remedy for the lack of systematic working immigration policies (Baldwin-Edwards, 1998; Finotelli, Sciortino, 2009). Nonetheless, the COVID-19 pandemic and its impact on the essential agricultural chains and elderly homecare led countries such as Portugal and Italy to adopt an unprecedented comprehensive regularization in terms of numbers of people involved and modalities. *Prima facie* similar in the approach, the two legislations may entail not only different bureaucratic implications but also different rationales, as different are the political and the socio-economic environments behind.

In what ways do they differ? Does a different legal framework with diverse levels of integration correspond to a different response in emergency legislation? How do countries react when facing an emergency like a pandemic in terms of migration and integration strategies? Can the law provide the necessary tool for migrants' integration?

These are just a few of the questions that arise from this puzzle. The article will focus on the analysis of Italian and Portuguese emergency legislation on matters of migration during the COVID-19 pandemic. The aim of the article is to analyze how the countries reacted to the emergency situation, assessing whether the responses were in line with the previous legal framework or determined a change.

The article does not discuss the evaluation of policies or legislation in the targeted countries. It analyzes the emergency legislative measures as a response during the COVID-19 pandemic in Italy and Portugal. Due to their different approaches, Italy and Portugal will be treated as units of comparison. If Italy has enacted a restrictive policy towards migration and control of migration fluxes in the past years, Portugal has implemented different programs oriented towards a more inclusive integration of migrants and third-country groups within civil society. Since both countries are from Southern Europe, they are subjected to the same legislative measures that come from the European Union (EU). In this sense, from a strictly legalistic perspective, the EU does not have exclusive competence over immigration (Treaty on the Functioning of the European Union, 2012, Art. 79 and Art. 80). The Member States are left with autonomy over immigration matters, entry requirements, residence standards, and integration measures. The article does not want to make general assumptions in what is an unprecedented and extreme situation like a pandemic. It wants to offer a comparative analysis of the immediate responses in the treatment of migrants by two Southern EU states. Portugal and Italy will be treated as units for our case-study comparison.

The article is divided into three main sections. The first section will be dedicated to the review of the literature on migration and integration. It will provide the necessary theoretical tools to analyze the legislative measures. The second section will deal with the analysis of Italian legislation on matters of migration, providing a background framework. Then, it will turn to the investigation of Italy's emergency legislation. The third section will look at the Portuguese migration and integration framework, analyzing how the government reacted to the pandemic. The concluding section will outline the main findings through the comparison of the legislative measures of the two countries.

Migration and integration: a theoretical debate

Assessing the stance of governments on immigration policy is a complex undertaking, and, currently, researchers and policymakers do not often have access to systematic, cross-country comparable measures. There are two main reasons for the lack

of data. On the one hand, conceptualizing migration policy is a challenging exercise (Facchini, Mayda, 2018; Helbling et al., 2013). On the other, the lack of a widely accepted conceptual framework makes it difficult for individual countries to collect information systematically on the policies implemented – which typically involve multifaced dimensions of a foreign-born individual's ability to access and re-settle in the destination country.

Several ongoing projects aim to fill – at least in part – this important gap (Beine et al., 2015; Facchini, Mayda, 2018; Gest et al., 2014). Two sets of questions are relevant for our purpose (especially the second one). The first is aimed at eliciting governments' views on the overall level of immigration. The second focuses instead on countries' policies towards immigration, as reported by their governments (Facchini, Mayda, 2018). Here we come to our crucial question: How do migration policies come about?

A useful conceptual scheme to analyze the migration policy formation process, based on Facchini and Mayda (2010), looks at the immigration policy as the result of the interaction between “policy demand” and “policy supply.” Policymaking needs to consider voters' individual preferences and how these preferences are shaped by the inflows of foreign workers. Both economic and non-economic factors are likely to play a role in shaping public opinion.

These preferences are then aggregated into a policy demand. Various mechanisms have been identified in the literature, ranging from grass-roots movements to political parties to pressure groups (Benhabib, 1996; Facchini, Mayda, 2018; Facchini, Willmann, 2005; Llavador, Solano-García, 2011; Ortega, 2005). On the supply side of migration policies, we need to identify the policymakers' preferences and to understand the details of the institutional setting in which they are introduced. It has been argued that, whereas non-economic drivers have an important and independent effect on individual preferences, economic characteristics play a role in shaping attitudes towards international labor mobility (Boeri et al., 2002; Facchini, Mayda, 2018; Mayda, 2005).

The study of the economic determinants of attitudes towards immigration is based on the income distribution effects of the inflow of foreign workers. These frameworks describe the labor market impact of immigration as depending on the skill composition of the migrants relative to the natives in the destination country. If immigrants are, on average, less skilled than the natives, their presence will hurt unskilled natives and benefit skilled ones. On the other hand, if immigrants are, on average, more skilled than natives, they will benefit the domestic unskilled while hurting the skilled. Individual skill is positively correlated with pro-immigration attitudes in countries where immigrants are unskilled on average, while it is negatively

correlated with pro-immigration attitudes in countries where migrants are generally more skilled than the native population (Mayda, 2005).

The leading Organisation for Economic Co-operation and Development (OECD) destination countries of immigrant flows are usually characterized by large welfare states (Boeri et al., 2002; Facchini, Mayda, 2018), where the public sector redistributes a remarkable portion of national income across individuals. Immigration has a non-negligible impact on public finances, as long as foreign workers both contribute to and benefit from the welfare state. The aggregate net effect of immigration on the welfare state can be either positive or negative, depending on the socio-economic characteristics of immigrants relative to natives.

This discussion so far has focused on the individual-level economic determinants of attitudes towards immigrants. A large literature in sociology and political science has emphasized the role of socio-tropic factors, both economic and non-economic in nature. Views regarding the domestic economy and towards ethnic minorities have a role in affecting individual preferences towards immigration (Citrin et al., 1997). Concerns about cultural homogeneity have been shown to be an important driver of preferences also in Europe (Sides, Citrin, 2007). Similarly, perceptions on the size of the actual inflows of immigrants have been found to be important as well (Blinder, 2015; Sides, Citrin, 2007).

A remarkable attempt at identifying the effect of the several factors defining preferences is represented by Card, Dustmann, and Preston (2012). They find that compositional amenities are more important than economic drivers in explaining overall attitudes towards immigration. At the same time, economic concerns are found to be more important in determining whether immigrants are perceived to have a positive impact on the host country's economy.

Once economic and non-economic determinants are assessed, which is the migration policy chosen by a stylized democracy? In one of the first theoretical contributions to migration policy literature, Benhabib (1996) considers the human (physical) capital requirements that would be imposed on potential immigrants by an income-maximizing society under majority voting. Both natives and immigrants are endowed with labor and capital, and the distribution of the latter in both native and (potential) immigrant populations are known. An alternative solution has been proposed by Ortega (2005). The author explores the trade-off between the short-term economic impact of immigration and its medium to long-term political effect. The median voter model is useful to understand the process of aggregation of individual preferences into migration policy, but it is unlikely effective in capturing the complexity of the political process in current democratic societies. In particular, there is substantial anecdotal evidence suggesting that interest groups

representing specific subsets of society have been very actively involved in shaping policy towards immigration.

To study formally the role exercised by pressure groups in shaping policy in the international factor mobility field, different models have been developed. Using a one-good multiple factors framework, Facchini and Willmann (2005) find that policies depend on both whether a production factor is represented or not by a lobby and on the degree of substitutability/complementarity between domestic and imported factors. Casarico, Facchini, and Frattini (2018) investigated how to tackle the presence of undocumented residents in the host country. They developed a simple random matching model, in which the decision to introduce an amnesty is the result of a comparison between the benefits introduced by the legalization by promoting a better labor market matching and the costs represented by extending access to the host country welfare benefits to newly legalized migrants.

The article explores the relations between the law and integration. Building on the already explored studies on integration, it assumes a functional meaning of the legal instruments for integration (Groenendijk, 2004; Murphy, 2013). Law “defines the framework within which integration does or does not happen by regulating the legal and social conditions of migrants’ everyday lives” (Murphy, 2013: 51). Non-citizens groups are extremely dependent on the rights granted by the legal system of the recipient state, facilitating or restricting the integration process through administrative and legal procedures. Legal status determines integration, even when the intention of the legal instrument was not towards integration per se (Murphy, 2013). Differences in the legal status between citizens and non-citizens can strengthen social discrimination, emphasizing stereotypes that contribute to the marginalization of non-citizen groups (Hofinger, 1998; Murphy, 2013). Policies on different aspects of the non-citizens seem, therefore, all linked to the integration process. Entry requirements, residence, and family reunification represent evidence of the integration through the law (Murphy, 2013).

Testing the relations between law and integration, the article aims at enriching and expanding the field of application of Murphy’s (2013) argument. In this sense, it analyzes the relations between integration and the law, taking the issue of the treatment of migrants during the COVID-19 pandemic in Italy and Portugal as an example. Nonetheless, the article does not want to engage with the issue of integration in a wider sense. It assumes that the relations between law and integration is given and takes the legal response to COVID-19 in migration matters as an example. In particular, the article gives an overview of the pre-COVID-19 legislation on migration in Italy and Portugal and then assesses whether exceptional circumstances like a pandemic can alter a state’s legislation on migration. The article starts with the

analysis of national legislation, using primary and secondary sources. In particular, the European Commission website on integration (European Commission, 2020a) has been used as the main tool for this research, together with a combination of national and international sources.

Italy and the legal treatment of migrants

Due to its central position in the Mediterranean, Italy has always been affected by migratory fluxes. Despite its strong past as an emigration country, Italy became an attractive arrival state after the 1980s (European Commission, 2019b).

Italy's legal framework on migration is a fairly complicated one. The main legal instrument that disciplines immigration is the legislative decree 286/1998 (*Testo Unico Delle Disposizioni Concernenti La Disciplina Dell'immigrazione e Norme Sulla Condizione Dello Straniero*, 1998). The decree has been modified a few times (see *Modifica Alla Normativa in Materia Di Immigrazione e Di Asilo*, 2002; *Disposizioni in Materia Di Sicurezza Pubblica*, 2009), applying a more restrictive approach towards entry requirements and rules related to regular and irregular migrations. The Immigration Act is mainly focused on regulating labor and the entrance of migrants. Nonetheless, there are other instruments that relate to the issue of migration in the Italian legal framework. One of the most controversial measures is the "safety decree" (*Disposizioni Urgent in Materia Di Protezione Internazionale e Immigrazione, Sicurezza Pubblica, Nonche' Misure per La Funzionalita' Del Ministero Dell'interno e l'organizzazione e Il Funzionamento Dell'Agenzia Nazionale per l'amministrazione e La Destinazione Dei Beni Sequestrati e Confiscati Alla Criminalita' Organizzata*, 2018; *Disposizioni Urgenti in Materia Di Ordine e Sicurezza Pubblica*, 2019).

The first security decree has been at the center of the political debate in Italy for its restriction on access to the country and approval of the residence permits. Nonetheless, the Italian Constitutional Court has released a press release on a provision of Law Decree No. 113/2018 that prevents asylum-seekers from registering with the Italian Registry Office (Press Office of the Constitutional Court, 2020). Even though the decision has not been released yet, the press office declared that the Italian Constitutional judges found the contested provision unconstitutional, according to Art. 3 of the Italian Constitution for two main reasons. The Court declared that the provision is "intrinsically irrational," as it is not in line with the main aims and principles of the Law Decree. Then, the judges found that the provision "gives rise to an unreasonable difference in treatment, because it unjustifiably hinders asylum seekers' access to the services to which they are entitled" (Press Office of the Constitutional Court, 2020).

Italian legislative framework is mostly focused on regulating migration flows and labor. Nonetheless, there have been some attempts towards integration. Initially, immigration was regulated through administrative and bureaucratic instruments (European Commission, 2019b). The first real policy instrument was the three-year Document of Migration Policy Planning (Documento Programmatico Triennale) (Approvazione Del Documento Programmatico Relativo Alla Politica Dell'immigrazione e Degli Stranieri Nel Territorio Dello Stato, a Norma Dell'art. 3 Della Legge 6 Marzo 1998, n. 40, 1998) that identified key measures and actions to take. It takes legal legitimacy from Art. 3 of Legislative Decree No. 286/1998. Nonetheless, since 2007 the Italian government ceased to plan and regulate in advance the migration fluxes with this document (Italian Government, 2020). Indeed, the integration policy is delegated to regional governments, which have autonomy in planning and implementing programs and actions (European Commission, 2019b).

The Italian legal framework seems to be oriented towards the integration of the migrant and the third country groups in matters of labor.

Italian emergency legislation at the times of the COVID-19 pandemic

In recent decades, European Migration Policies tended to use regularization solely for humanitarian policies in the Northern countries and to grant unauthorized workers legal status at a large scale among the Mediterranean members, in the face of increasing migration from North and Sub-Saharan Africa (Brick, 2011; Orrenius, Zavodny, 2016). In Italy, the issue of informal workers employed in the food chain matched with the historical problem of illicit intermediation and severe labor exploitation, often driven by criminal groups and employers known as *caporali* (Jinkang, 2019).

The matter which was originally addressed in previous legislation (Disposizioni in Materia Di Contrasto Ai Fenomeni Del Lavoro Nero, Dello Sfruttamento Del Lavoro in Agricoltura e Di Riallineamento Retributivo Nel Settore Agricolo, 2016), assumed new and multi-faceted complications in light of the sudden epidemic crisis. Since COVID-19 hit the Italian territory, regularization for undocumented migrants was considered fundamental not only to protect migrant workers' rights but also to prevent them from contagion. In addition, the increasing lack of farmworkers in the Italian fields caused growing pressure on the efficiency and continuous refurbishment of agri-food chains, determining preliminary disruptions in the logistics and distribution systems (FAO, 2020a; 2020b).

Regularization was proposed for irregular migrant farmworkers to prevent potential food shortages and increasing concerns of national health security. National farmers' organizations, as well as retailers, urged the government about labor shortages,

especially for East European and African workers, who constitute a remarkable component of the migrant labor force in the agricultural sector (Palumbo, 2020).

Art. 103 of Law decree 34/2020 aims to “ensure adequate levels of individual and collective health protection” in light of the epidemic emergency and to “facilitate the emergence of irregular employment relationships” (Misure Urgenti in Materia Di Salute, Sostegno al Lavoro e All'economia, Nonche' Di Politiche Sociali Connesse All'emergenza Epidemiologica Da COVID-19, 2020). It applies only to specific and named sectors: agriculture, livestock, animal husbandry, fisheries, aquaculture, and related activities, as well as care and domestic work.

Two channels are established. The first one gives employers the chance to conclude a fixed-term employment contract with foreign nationals currently present on the national territory or, alternatively, to declare the existence of an irregular employment relationship with Italian citizens or foreign nationals. Foreign citizens shall have entered the Italian territory before March 8, 2020, and must not have left the country afterwards. If they are undocumented migrants, the provision provides them with a residence permit for work reasons.

The second channel allows foreign citizens with a residence permit expiring after October 31, 2019, to apply for a temporary residence permit lasting six months. Migrants had to present in Italy on March 8, 2020, and they have to provide evidence of previous work experience in one of the eligible sectors before October 31, 2019. If a person finds a job in any of such sectors within six months, the temporary permit can be converted into a residence permit for work reasons.

The Portuguese paradigm: an integration-oriented legal framework

According to the European Commission (2019a), Portugal became a migration recipient country in the 1980s with the arrival of citizens of its former colonies. During the past two decades, there has been an increase in migration from Asian and Eastern European countries. The Portuguese Immigration and Border Service (Serviço de Estrangeiros e Fronteiras, hereinafter SEF) claims that in 2019 the country had 590,348 third country nationals. This figure was subjected to an increase of 22.91% from the previous year (SEFSTAT, 2020).

The Portuguese main legal instrument on matters of immigration is the 2007 Portuguese Aliens Act (2007). The Act approves the legal framework of entry, permanence, exit, and removal of foreigners into and out of the national territory. In 2017 the Act received five amendments (Lei de Estrangeiros, 2017). It is a legal instrument

through which Portugal transposed the European Directives on third-country nationals (Lei de Estrangeiros, 2017).

The most interesting instruments contained in the Portuguese legal framework are three documents that deal with the integration law. Portugal issued its first Plan for Immigrant Integration (Plano para a Integração dos Imigrantes) in 2007 (European Commission, 2019a; Resolução Do Conselho de Ministros n.º 63-A/2007, 2007). The Plan was meant to settle guidelines with its 122 measures to facilitate the complete integration of migrants in Portuguese civil society. Three years later, the Plan was updated (II Plan for the Integration of Immigrants (PII), 2010), stressing the importance of positive relations between migrants and the population.

In 2015 the Portuguese government issued the 5-year Strategic Plan for Migration (2015). This document mandates the quality of services provided to migrants and non-citizen groups in the country. It implements 106 measures, evaluated through 201 indicators (Strategic Plan for Migration, 2015). These 106 measures are divided into five main political priority axes: Immigrant Integration Policies; Policies to promote the integration of new national; Coordinating policies of migration flows; Policies strengthening the legality and quality of migration services; Policies to foster the monitoring and support of the return of national emigrant citizens.

The first axis objectives are to improve and strengthen the measures that have been enacted through the previous instruments. In particular, the measures of the first axis are devoted to the improvement of cultural and religious diversity, together with an attention towards social mobility, employment policy, and access to a common citizenship. The second axis aims at promoting integration and inclusion of the “new nationals,” specifically the second generation of immigrants or those people who had access to Portuguese nationality, through policy and legislative actions in education, the labor market, vocational training, civic and political participation, digital inclusion, entrepreneurship, and training. The third axis deals with the promotion of Portugal as a migratory destination. In particular, it focuses on the actions for better management of migratory flows, developing and strengthening policies and instruments to attract qualified human capital. The objective of the fourth axis relates to the improvement of migration policies, strengthening the dialogue between public and private entities, the monitoring of potential migrants, the entry procedures, and quality culture, and good practice in the issuing of migration service. The fifth axis relates to the actions and programs that promote and support the return from abroad of Portuguese citizens.

The Strategic Plan is clear evidence of the use of the legal instrument as a way of fostering integration. Portuguese legislation has tried to develop a system that facilitates the integration of non-citizen groups in the country's community. Prioritizing

areas like culture, language, education, and employment, and professional qualification, certainly contributes to the promotion of integration in civil society. Exemplary instruments are voluntary language courses that are promoted by governmental bodies (Alto Comissariado para as Migrações, 2020; European Commission, 2019a). They are mostly focused on language learning and civic education. Even though participation in the courses is voluntary, a certificate of language proficiency issued by a qualified institution is needed to apply for citizenship or permanent residence (European Commission, 2019a).

Through the promotion of numerous actions and projects, Portugal's legal framework on migration seems to facilitate and encourage integration.

Portugal's emergency legislation in response to the COVID-19 pandemic

The attention to migrants during the COVID-19 pandemic led the Portuguese government to issue specific measures in the three different groups of regions in which the country was divided for the contingency of the virus. The High Commission for Migration released information in eight different languages (Arabic, Bengali, English, French, Hindi, Mandarin, Nepalese, Romanian, and Russian) (European Commission, 2020b).

An important measure was to simplify the renewal procedure for the residence permit. Through Order No. 5793-A/2020(2020), the government allowed a simplified procedure for the renewal of residence permits to facilitate pending applications at the SEF. The order introduced the possibility of processing documents without being physically present at the SEF office. The procedure will be held online or via postal service. Nonetheless, the main measure adopted was taken through Order No. 3863-B/2020. The government declared that third country citizens and asylum seekers that have pending residence applications are entitled to keep the rights (Determina Que a Gestão Dos Atendimentos e Agendamentos Seja Feita de Forma a Garantir Inequivocamente Os Direitos de Todos Os Cidadãos Estrangeiros Com Processos Pendentes No Serviço de Estrangeiros e Fronteiras, No Âmbito Do COVID 19, 2020). This measure entails that applicants maintain their access to healthcare, employment, social support benefits, and housing during the entire procedure.

The relevance of these measures is evident. The government granted citizenship rights to people that have pending residence applications. The rationale behind this measure is the will to give the same access to healthcare, employment, and special assistance to every person residing in the country's territory. Indeed, this

measure well integrates itself within the Portuguese legal framework on migrations. Order No. 3863-B/2020 seems to be the natural pursuit of the country's integration strategy towards migrants and third-country groups.

Conclusion

The article examined the emergency legislations related to the migration of Italy and Portugal during the COVID-19 pandemic. The first part of the article provided a review of previous studies on migration and integration in European countries. Through its revision of the literature, the article highlighted the strict connection of the law and integration. It proved the link between law and integration with the analysis of Italian and Portuguese emergency legislations.

The Italian and Portuguese legal frameworks in matters of migration are evidently different. The Italian system seems to be more focused on restricting access to the territory and regulating regular and irregular migratory fluxes. Integration measures are oriented towards the labor market. In this sense, the emergency legislation that the Italian government issued is in line with the previous measures. Focusing mostly on the regularization of workers, the response to the COVID-19 pandemic does not seem to provide additional integration in other fields. Nonetheless, through the regularization of workers, these measures provided health assistance and rights to irregular working migrants. It can be affirmed that Italian emergency legislation on migration is a promising step towards a more meaningful integration.

The Portuguese system is clearly more inclusive and integration-oriented than the Italian one. Therefore, the emergency measures that the Portuguese government adopted are not surprising. The attention to all the people who have pending applications for residence permits grants, *de facto*, citizens-like rights.

The main finding of the article is that both states approved emergency legislation that is in favor of migrants, granting them the same access to the healthcare system during the emergency caused by the COVID-19 pandemic, assessing the link between the law and integration. Nonetheless, the emergency legislation did not expand the integration of areas. They both provided migrants with a more secure position in the healthcare system.

Aware of the limitations in terms of availability of the data, timeframe, and choice of the case studies, it seems reasonable to claim that the emergency legislation on matters related to migrants issued during the COVID-19 pandemic contains favorable measures towards third-country groups, granting access to healthcare, and recognizing the same rights as the citizens.

Further studies on this topic are encouraged. The finding of the article is just the starting point for further research on the link between the law, integration, and the way these relations have been impacted by the COVID-19 pandemic. Nonetheless, it is believed that more precise empirical and theoretical studies can be conducted once the emergency status is finally over.

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