

DIRITTI COMPARATI

Comparare i diritti fondamentali in Europa

KOTZUR, MOYA, SÖZEN, ROMANO (EDS.), *THE EXTERNAL DIMENSION OF EU MIGRATION AND ASYLUM POLICIES*, NOMOS, BADEN-BADEN, 2020, 353 PP.

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This book is the result of a natural collaboration between researchers from different European universities, which was supported by the German Academic Exchange Service (DAAD). The term *natural* seems adequate because the book addresses one of the main challenges for the EU and its Member States, and most certainly for European citizens: migration and fundamental rights of migrants. Indeed, if the European Union is to become a democratic organisation, then the *europäische Öffentlichkeit* (Häberle, 1999) is called upon to discuss common critical matters beyond national borders. Academic debate and its conclusions are a pillar of the European public sphere, and hence the relevance of this publication.

The book is divided into one introductory chapter and three parts. Part one deals with the evolution and features of the external dimension of migration and asylum; part two focuses on the relationship with four neighbouring countries and regions (Turkey, Libya, the Balkans and Morocco); part three regards new strategies and challenges.

In their introductory chapter, Markus Kotzur and Leonard Amaru Feil call for a *normative* approach to the management of migration. They argue

that conflicts “should not be subjected to the free play of political forces”, which may sound provocative but only reflects the continuing tension between the principle of democracy and the principle of legal certainty. While the need for a normative approach to migration is easy to share, it could also be seen as a conclusion rather than a starting point. Human rights, at least those embodied in treaties and constitutions, are indeed normative: in Europe they were theoretically placed at the heart of state power after 1945. Therefore, if human rights are at risk in many kinds of migrations, then we should conclude that such human rights are not just *useful* to manage migration, but *ineluctable* in a constitutional space –which Member States already *are*, and the EU *aims* to become. The chapter, however, does not challenge this view, but rather seeks to persuade the reader that human rights are capable of solving many of the problems linked with migration. Moreover, the two authors advance other thought-provoking ideas to enhance “flexible solidarity”, such as a refugee-quotas system inspired by emission trading rules.

Beyond this introductory chapter, the book touches upon many of the open challenges in migration matters.

On a general approach to migration, a number of the authors criticise the fact that migration is mainly viewed in terms of security (Morticelli, or Conte and Savazzi), while others emphasise the neglect of a much-needed humanitarian approach (Romano, Gatta).

In this regard, the book explores two different causes of vulnerability, whether arising from individual reasons (persons at risk in their current location) or from certain problematic locations (external borders and the notorious “hotspots”). To address the first kind of vulnerability, Romano proposes to make a far more ambitious use of humanitarian visas and resettlement policies. It might be added that such policies could help lower the number of mass arrivals to the EU’s external borders and improve safety during the journey, thus reducing the overall risks for migrants.

Hotspots, in turn, are asylum processing centres at external borders. They consist of a camp, an administrative complex, and sometimes also a detention facility for migrants that are to be removed. According to

Ziebritzki and based on statements by the Fundamental Rights Agency of the EU, the hotspot approach *inherently* leads to a risk of fundamental rights violations. This author criticises that hotspots were initially intended as a temporary mechanism, which, however, appears to have turned permanent. Among the many risks derived from the hotspot approach, the author analyses two of them: the risk of deportation to a non-safe third country (which eventually could result in *refoulement*) and the risk of inhuman or degrading treatment in the reception phase. Both risks are characterised as “widespread” and “inherent” to the regulatory framework. In her chapter, the author even goes on to elaborate on the potential of EU public liability law as a means to assert the responsibility of the Union for violations of individual rights in refugee camps (this aspect is referred to below).

External borders in general are examined in the book from different angles. They are critical because it is only at external borders that international protection under EU law may be requested (Romano). However, as Elbasani and Šelo Šabić report, European migration policies have pushed migrants to use more dangerous and irregular channels in the Balkans (and elsewhere). Moreover, European States have sought to remove borders from the eyes of their citizens, as Candelmo denounces. To that end, two kinds of strategies have been launched –with disparate effects. On the one hand, certain unilateral measures have been rejected by the ECtHR: the Spanish notion of “operational border” (that even the Grand Chamber’s ruling in [N.D. and N.T.](#) rejected) or the interceptions at sea and subsequent deliveries of migrants to other authorities or territories ([Hirsi Jamaa](#), [Sharifi](#), or [Khlaifia](#)). On the other hand, collective financial and political arrangements with neighbouring States –that the book interestingly calls “the EU’s gatekeepers” – have managed to circumvent the supervision of Courts.

This is precisely one of the main warning calls in the book. Indeed, Sözen and Heimrich criticise the reluctance of the EU’s General Court to examine the EU-Turkey Statement for the reason that it was formally concluded by Member States’ Chiefs of State or Government –and not by the Union. Beyond the ECJ, the other European “constitutional” court (the ECtHR) has

examined whether certain aspects of border control were acceptable under the Convention –to no satisfactory result in the *N.D. and N.T.* case. The book focuses on EU law and, therefore, does not address the ECtHR's case law in depth. It is however meaningful to remind that the Grand Chamber in Strasbourg denied any responsibility of the Spanish authorities in the handling of returned migrants by Moroccan security forces. Moreover, immediate removals at the Melilla border fence were accepted despite the lack of every procedural caution, thus [making the fence a no-rights area for migrants](#).

The problem of justiciability is linked with the attribution of responsibility. It has been discussed whether accountability for human rights violations of migrants should regard Member States or rather the EU itself. Ziebritzki's study of EU liability law is a commendable step in this respect. Member States, nevertheless, remain in control of decisive aspects, as Fernández Rojo illustrates in his study of the new European Border and Coast Guard's administrative governance. Sözen and Heimrich's chapter, in turn, reminds that the General Court refused to analyse the EU-Turkey Statement with the argument that it had been concluded between the Member States and not the EU. Therefore, the question of *who is accountable* seems far from settled –as the complex allocation of power in the EU might have announced.

Another major concern comes from the growing use of soft law. Soft law often fills the gaps that may derive from the lack of binding international agreements: for instance, resettlement policies are based on soft law developed by the UNHCR (Romano). Moreover, soft law can leave room for a useful flexibility benefitting one or more of the parties in such an informal agreement. But there is a downside to the use of soft law when human rights are at stake. As Donaire Villa's chapter illustrates, European States have linked cooperation funds to the outsourcing of migratory control to third countries, thus avoiding the publicity required for adopting international treaties as such. Sözen and Heimrich share this view concerning the EU-Turkey Statement. Finally, Pretto criticises the (soft, but effective) imposition of a normative system on neighbouring countries, rather than adopting a *non-colonialist* perspective of human

rights and development, if we are to follow Salvatore Bonfiglio's insightful recommendations (as reviewed in this [blog](#)). These few examples reveal how soft law can become a way of escape for States to elude their responsibilities.

The last aspect concerns the financial dimension of the external policies on migration. In this regard, Conte and Savazzi empirically confirm that EU policies indeed place a growing emphasis on border control, security and the return of irregular immigrants, and criticise that migrants are not a priority in the EU's external policies.

And yet, as emphasised at the beginning of this review, international human rights law is not an optional set of rules. Its scope is not limited to traditional hard law instruments, either domestic or international. Nor does it exclude aliens. From this perspective, we could, together with the authors of the book, call for Governments and the EU to reconsider migration policies and fulfil their legal obligations concerning the fundamental rights of migrants.