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EDITORIAL

The 'hungry beast' of migration control and the future of the superdiverse European migration law

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1. Introduction

In May 2024, the European Council announced that it had just adopted a 'landmark reform' of the Common European Asylum System.[1] The new pact on migration and asylum is supposed to enhance compliance with European Union (EU) law by introducing regulations instead of directives and is, according to the Commission, 'designed to manage and normalise migration for the long term'.[2] Less than half a year after deciding on this 'landmark reform', migration and asylum featured again at the top of the European Council's agenda in October 2024. At the core of the debate this time was the issue of how the EU could 'increase the efficiency of the EU's return system'.[3] The Council 'tasked experts to start exploring innovative ideas related to returns'.[4] Part of this 'exploration' is the idea of introducing 'return hubs' that would further externalise the asylum procedure along the lines of the model pursued by the Italian government in cooperation with Albania.[5] The call for 'tougher laws' and more effective instruments to ensure the return of rejected asylum seekers remains high on the EU's political agenda. The ingenuity of inventing ever more sophisticated instruments at or beyond the EU's external borders seems endless while searching for ever new and more dubious justifications of why all this remains within the limits of human rights and an effective right to protection.

Tough migration laws and rigorous return policies are currently in fashion. In the United States (US), Donald Trump has just won the presidential elections by promising, among other things, to deport irregular migrants and their offspring from the US.[6] Right-wing populists are also gaining ground in Member State governments and parliaments across the EU and – most notably – in the European Parliament, which has long been a bedrock of defending a human rights-based migration policy in the EU. And while the number of deaths at the EU's external borders

[1]Council of Europe, Press Release 14 May 2024 <https://www.consilium.europa.eu/en/press/press-releases/2024/05/14/the-council-adopts-the-eu-s-pact-on-migration-and-asylum/> accessed 14 January 2025.

[2]European Commission, DG Migration and Home Affairs, Pact on Migration and Asylum, 21 May 2024 <https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en> accessed 14 January 2025.

[3]Justice and Home Affairs Council, Main Results 10 October 2024 <https://www.consilium.europa.eu/en/meetings/jha/2024/10/10/> accessed 14 January 2025.

[4]Ibid.

[5]E Wax, 'Von der Leyen Promises More Deportations as EU Veers Right on Migration', Politico, 18 October 2024 <https://www.politico.eu/article/ursula-von-der-leyen-deportations-eu-migration-anti-immigrant-parties-borders-asylum/> accessed 14 January 2025.

[6]M Matza, 'Trump Vows to Use US Military for Mass Deportations', BBC, 18 Nov 2024 <https://www.bbc.com/news/articles/cx2nrg4deyjo> accessed 14 January 2025.

continues to rise,[7] political leaders in many EU countries portray themselves as the last beacon of national self-determination by openly questioning the authority of courts that are protecting migrants' rights[8] or suspending asylum law by reference to 'political instrumentalization' of migrants in the new geopolitical landscape.[9]

All of this does not forebode a bright future for rights-based asylum and migration law. It will require immense energy to defend the status quo against radical nationalist and racist deterioration. What is needed is a rigorous critique of European migration law and practice and its impact on European society (2). This, however, cannot and should not be all. The recent paradigm shift forces us to view migration as a broader reflection of our society's self-image, to go beyond critique, and to develop positive approaches for the European migration society that may help to overcome the defensive mode (3).

2 Defending human rights against all odds

The new pact on asylum and migration poses fundamental challenges to the rule of law and human rights in Europe. In this editorial note, I will just highlight two particularly worrisome developments.

First, the EU is increasingly trying to circumvent human rights jurisdiction by introducing legal fictions. Under the new pact, the familiar 'hot spot' approach, which has already failed in the past, becomes the new normal.[10] Migrants are registered, and their identity and potential vulnerability are checked in a screening procedure at the EU's external borders. According to Article 6 of the Screening Regulation,[11] migrants are not allowed to enter the territory of a Member State during this screening procedure. Thus, while these migrants are actually on EU Member State soil, they legally remain outside this territory. Given that screening can also be conducted in alternative locations within the territory of a Member State,[12] it is not unlikely that special non-entry zones will emerge throughout the EU.[13] This fiction is not just an administrative curiosity but has a significant impact. Freedom of movement, as enshrined in Article 2 (1) Additional Protocol 4 to the European Convention on Human Rights (ECHR) and Article 12 (1) of the International Covenant on Civil and Political Rights (ICCPR), depends on lawful presence in a country. Moreover, preventing unauthorised entry is an explicit ground for deprivation of liberty under Article 5 (1) (f) ECHR. The fiction of non-entry, therefore, allows Member States to circumvent human rights responsibility and facilitates detention. At least the newly introduced fundamental rights monitoring mechanism gives some hope that respect for other human rights is properly monitored during this procedure.

[7]Migration Data Portal <https://www.migrationdataportal.org/themes/migrant-deaths-and-disappearances> accessed 14 January 2025.

[8]See the quote by Matteo Salvini in N Morucci, 'Nuovo stop al protocollo Italia–Albania. Dietrofront per altri sette migranti, i giudici di Roma chiamano in causa la Corte UE', EU News 11 Nov 2024 <https://www.eunews.it/2024/11/11/esperimento-albania-fallimento-rimpatri/> accessed 14 January 2025.

[9]N Vinocur, C Caulcutt and E Wax, 'Poland Wins After EU Backs its Proposed Asylum Ban for Russia, Belarus', Politico 17 October 2024 <https://www.politico.eu/article/poland-prime-minister-donald-tusk-eu-asylum-ban-russia-belarus-migration-security/> accessed 14 January 2025.

[10]V Chetail and M Ferolla Vallandro do Valle, 'The Asylum Procedure Regulation and the Erosion of Refugee's Rights', EU Migration Law Blog 23 May 2024 <https://eumigrationlawblog.eu/the-asylum-procedure-regulation-and-the-erosion-of-refugees-rights/> accessed 14 January 2025.

[11]Reg. (EU) 2024/1356 of the European Parliament and the Council of 14 May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, OJ L 1/28 (22 May 2024) (Screening Regulation).

[12]Art 7 (1) of the Screening Regulation (n 11).

[13]L Jakuleviciene, 'EU Screening Regulation: closing gaps in border control while opening new protection challenges?' EU Migration Law Blog 28 June 2024 <https://eumigrationlawblog.eu/eu-screening-regulation-closing-gaps-in-border-control-while-opening-new-protection-challenges/> accessed 14 January 2025.

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The fiction of non-entry continues in the second step of the asylum procedure, the border procedure.[14] The border procedure will become mandatory in many cases, particularly when the applicant has misled the authorities about their identity, poses a security threat or comes from a country for which the recognition rate for international protection is 20 per cent or lower.[15] Throughout the screening and the border procedure, migrants have to reside 'at or in proximity to the border' or 'in other designated locations' within a Member State's territory.[16] Although the border procedure applies 'following apprehension in connection with an unauthorised crossing of the external border'[17] the border procedure will also apply beyond the border regions. It also applies where a border procedure is continued in a new Member State after the migrant has been transferred to the responsible Member State in the context of the new solidarity mechanism. Hence, the detention of migrants will likely become the default option. While some locations where migrants are accommodated during the screening and border procedures might not fulfil the threshold to qualify as detention legally, they will – in any event – restrict personal liberty and freedom of movement. It will be crucial for the European courts to take the guarantees in Article 8 ECHR seriously in such situations.

Second, rather than normalising migration, as the Commission promises, the new pact normalises the state of exception, thereby framing migration as a threat and anomaly. The new crisis regulation[18] portrays migration primarily as an inter-governmental phenomenon and disregards migrants' agency to a large extent. It defines a crisis as a situation of mass arrival or a situation 'where a third country or a hostile non-state actor encourages or facilitates the movement of third-country nationals or stateless persons to the external borders or to a Member State, with the aim of destabilising the Union or a Member State'.[19] In such instances, Member States are allowed, following a Council decision, to derogate from a number of procedural rules. They may extend the time limit for registrations[20] and the duration of border procedures and with it of (quasi-)detention of asylum seekers.[21] Moreover, they may – exceptionally – already decide on the merits during the border procedure regarding all applicants from a country with a recognition rate of 50 per cent or lower.[22] This further accelerates the asylum procedure and makes access to legal remedies ever more challenging. The Regulation emphasises the importance of adhering to 'the basic principles of the right to asylum and the principle of non-refoulement'[23] when applying exceptions. However, limiting these principles to just 'basic' principles raises concerns about the full recognition of these rights in cases of mass arrivals or crises. Both developments show how the EU attempts to evade responsibility for human rights while framing migration in association to crisis situations and understanding it as a threat rather than as a normality.

3 Beyond critique – towards a positive vision for Europe's migration society

The EU's current approach to migration and asylum undermines migrants' agency and jeopardises a rights-based perspective. Applying tough laws at the borders and against migrants,

[14]Art 43 (2) Reg. (EU) 2024/1348 of the European Parliament and the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, OJ L 1/76 (22 May 2024) (APR).

[15]Art 42 (1) (c), (f), (j) and Art 45 (1) of the APR (n 14).

[16]Art 54 (1) APR (n 14) and Art 8 (1) Screening Regulation (n 11).

[17]Art 43 (1) (b) APR (n 14).

[18]Reg (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 OJ L 1/24 (22 May 2024) (Crisis Regulation).

[19]Art 1 (4) (b) Crisis Regulation (n 18).

[20]Art 10 (1) Crisis Regulation (n 18).

[21]Art 11 (1) Crisis Regulation (n 18).

[22]Art 11 (4) Crisis Regulation (n 18).

[23]Art 11 (10) Crisis Regulation (n 18).

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however, also affects democratic and open societies on the inside.[24] Migration law reflects society's self-understanding. Restrictions on the rule of law and relativisation of human rights may soon spill over to other parts of society.[25] Note that the above-mentioned new rules not only put international human rights at risk. They also threaten fundamental rights enshrined in the EU Charter of Fundamental Rights and the constitutions of most if not all of its Member States. And the spill-over will likely not stop here: What has just been invented for unwanted migrants may soon be applied to other societal groups and minorities that the majority wishes to exclude from the territory, the social security system or even the political system. Such practices of distinction and exclusion undermine the foundational structure and promise of human rights as universal rights and risk turning them into a shallow add-on that, at best, conserves the status quo but does not allow for inclusion and equal protection. What is more, such a vision of migration law and our society benefits right-wing populists more than anything else. They will perceive their opinions as officially validated and confirmed by a policy emphasising exclusion and containment rather than prioritising migrants' protection and agency. This type of policy ignores the complexity of migration decisions and feeds the illusion of complete control over migration flows. The already foreseeable failure of the new rules to fully control migration movements to and in the EU will evoke further frustration and mistrust and exacerbate the sentiments of loss of control in large parts of society. In this sense, migration governance is a 'hungry beast' that requires ever more control and ever tougher regulation. It is, therefore, crucial to recognise that public opinion and collective sentiments do not just exist. Rather, they are created and shaped by the way that politicians, lawyers, and the media frame them in public discourse and law.

Today, we urgently need a positive vision for our society as a migration society. We need to develop a joint vision of how we want to live, who we want to be in this society, and what fundamental principles should guide this process. This vision forces us to move beyond the defensive mode of critique and engage in an interactive process. A crucial technique of the nationalist movements is to detach our societies from the atrocities and outrageous inequalities in the world that are portrayed as unrelated to our lifestyles. This dissociation from the world 'outside' is one of the core promises of radical nationalism. Such detachment results in radical self-centeredness. This is illustrated by the almost complete neglect of the perspective of countries of origin and transit. Lip service is regularly paid to cooperative negotiations. However, the underlying power asymmetries result in a migration policy that still often builds on the assumption that the EU can pick and choose talents in the rest of the world while ignoring the risk of 'brain drain' in the countries of origin and using the countries surrounding it as buffer zones for unwanted migration. To counter this self-centred narrative, we need to (re-)connect ourselves and our societies to this world 'outside'. On an academic and political level, this would require us to link migration governance with matters of inclusion, equality and transnational power asymmetries. As citizens, it forces us to combine critique with solidaristic action. We need to create opportunities for interaction with newcomers at home and with their societies of origin and confront the consequences of our politics and lifestyles on the rest of the world. This may enable us to view the issue of migration in a broader context of inequality and power asymmetry.[26] The objective should be to gain a deeper understanding of the political economy of migration law. How do opportunities to migrate depend on economic resources? How does migration law perpetuate or exploit inequality globally and domestically? How are challenges of inclusion and sentiments of fear in migration societies conditioned by inequality, precariousness and impoverishment? This

[24]V Heins, F Wolff and H Mauern, *Geschlossene Grenzen als Gefahr für die offene Gesellschaft* (Suhrkamp 2023).

[25]A Bossow, 'Europe's Faustian Bargain', Verfassungsblog 1 October 2023 <https://verfassungsblog.de/europes-faustian-bargain/> accessed 14 January 2025.

[26]On this link L Ypi, 'Borders of Class: Migration and Citizenship in the Capitalist State' 32 (2018) Ethics & International Affairs 141.

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would link global and transnational power asymmetries and re-focus our debates about integration capacities on re-distributive questions.

The focus on migration as a risk and a potential threat also prevents us from realising the opportunities that migration creates in our society. Europe's society is characterised by an enormous diversity, which we may call 'superdiversity'.[27] Such diversity is a condition of contemporary societies characterised by diversification of global migration combined with demographic and social diversity.[28] It is not about a certain amount of diversity or an entire loss of 'consensual' social meanings and practices, but rather a form of social complexity. As the number of elements in a system increases and diversifies, so do the modes of interdependence and interaction.[29] This is particularly true for European society as envisaged in Article 2 TEU.[30] By definition, this society is a migration society, and by definition, it is a complex society with multiple cultures and systems of meaning. Embracing migration could teach us to live together in a way that respects differences while also fostering a sense of social unity and cohesion that allows for plurality. As a first step, this would require us to rethink our concept of integration. Rather than focusing on the integration of migrants in an allegedly cohesive host society, integration policy should recognise the enormous diversity of Europe's society. Such diversity in migration societies demands modes of inclusion that build on mutual interaction and recognition rather than on unidirectional adaptation. If open societies and defenders of human rights universality want to get ahead of the debate about migration issues, it is time to take distributional matters in migration seriously and to use the condition of superdiversity to develop a new interactive model of inclusion.

4 In this issue

Francesca Strumia continues the theme of the relation between migration and a community's self-understanding in the context of EU free movement law. Rather than concentrating – as is more common – on the duties of the host state towards immigrants, she reflects on the duties of the home state towards its own citizen–migrants abroad. From there, she engages with social contract theory to consider the relation between citizen–migrants and citizen–settlers, and the reflexive nature of states' concerns for the transnational interests of their own citizen–migrants and their obligations toward non-citizen migrants. Free movement, she concludes, thus prompts the sovereign state to embrace cosmopolitan obligations towards others 'from within'.

Airbnb and other short-term rental platforms have been transforming life in cities in profound ways, none of them particularly welcome from the point of view of local residents who either find themselves walking around unlivable towns to a soundtrack of carry-ons dragged over cobbled streets, or are priced out of their neighbourhoods altogether. Kramer traces the efforts by Amsterdam local authorities over a decade to get a grip on the short-term rental market to make a compelling point about the way that EU Law structures urban conflict over housing and tourism in the context of platformisation. Prohibited or deterred by EU Law to effectively regulate the upstream market (the platforms), city councils directed their attentions downstream, imposing ineffective and cumbersome obligations on the actual 'hosts'. This fragmented and localized downstream regulation of short-term rentals, in turn, prompted some form of cooperation by the platforms and, ultimately, corrective European legislation in the form of the Short-Term Rental Regulation.

Sjåfjell and Cornell have a semi-permanent wtaf-moment in their analysis of the science-business-policy interfaces in global sustainability policy. It is here, in the process of quantification,

[27] S Vertovec, *Superdiversity: Migration and Social Complexity* (Routledge 2023).
[28] Ibid., 87–120.
[29] Ibid., 163.
[30] A von Bogdandy, *The Emergence of European Society Through Public Law* (Oxford University Press 2024).

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risk-assessment and target-setting, that they find 'sustainability' is being reduced to a series of itemised checklists for business. From an understanding of sustainability as a 'safe and just' space, they call instead for a conceptualisation of corporate sustainability as business contributing to mitigating planetary biophysical pressures and securing social foundations worldwide.

Autonomy and equality in contract law have found a precarious equilibrium in the protection of consumers buying stuff. But how does this equilibrium hold up in digital markets where it is experiences and emotions that are acquired and traded, where it is non-economic interests that need protection? Vanessa Mak goes through European and national private law structures and rationales to find ways of redefining the meaning of 'equality' in contract law.

What is EU competition law for? Should it protect consumer welfare even if it is achieved through anti-competitive processes? Should it encourage market integration even if it means consumers are less well off? Should it be used to bust trade unions and collective bargaining? What if environmentally sound practices turn out to be anti-competitive? What if the abuse of a dominant position consists not of raising prices but of breaching users' privacy? These questions matter, and have produced libraries full of scholarly endeavor. Iacovides and Stylianou weigh in on these matters empirically: they study the Commission's decisional practice, Court judgements and AG Opinions, and officialdom in the form of Commissioner speeches to see what is (and what is not) considered a 'goal' of EU competition law. They narrow down the list of 'new' candidates to sustainability, labour rights, and privacy, and find that, of these, only the first can seriously be considered to have entered competition law.

The Dialogue and Debate section opens with an essay by Buser on global supply chain regulation, focusing on the Corporate Sustainability Due Diligence Directive which entered into force this summer. The article articulates two main lines of seemingly contradictory critique – the obvious 'it is not enough' line and the equally obvious objections of 'regulatory imperialism' – and takes them both very seriously. The compromise he carefully advocates privileges greater participation, integrates measures to mitigate impacts on self-determination, specifies the obligations imposed on corporations regarding climate change, and envisages a decentralized and diversified enforcement regime.

Hiltunen politely but forcefully takes issue with much of the burgeoning legal scholarship on the digital economy. Illustrated by the frequent use of 'lawlessness' and the 'wild west', this scholarship sees technology advancing ever more rapidly and 'escaping' legal constraints. In a leap of faith in law as social engineering, these gaps then can and must be filled with better legal constraints. To counter this dominant strand, Hiltunen calls for more attention to the existing modern socio-technical order and, especially, to the ways that pre-existing law and regulation have constituted the structures that have allowed the digital economy to develop the way it has, with all its grotesque inequalities of power.

We are very happy to publish a debate between Jan Komárek on the one hand and Alexander Somek and Elizabeth Paar on the other. We very much hope that more passionate exchanges will follow. The present debate revolves around the key implications of Somek and Paar's Europe's Political Constitution', which was published last year (issue 3 of volume 2). Komarék emphasizes his strong view that the purpose of legal scholarship, and also of EU legal scholarship, is and should be the pursuit of knowledge, something which sits uneasily with the type and style of writing characteristic of blogs and social media. He deplores that many regard such media as 'proper' conduits of the EU legal scholar conversation. And he regrets that Somek and Paar failed to oppose such trend, and instead seem to be normalising it. In their turn, Somek and Paar find puzzling Komarék's views, not only on account of his reliance on Stanley Fish, who they argue is not a natural advocate of a rendering of legal knowledge as objective knowledge, but also due to the odd omission of Kelsen's enterprise (as is well known, aimed at producing pure legal knowledge) in Komárek's argument. A clear sign of the acceleration of time is that the two pieces

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make repeated reference to Twitter, which has not only changed its denomination in the meantime, but seems to have entered its final decline, not least thanks to the flamboyant management of the enterprise by its present main shareholder.

The issue concludes with a review essay by Mark Gilbert on two major new tomes on European integration history. It is a beautiful essay reinforcing EH Carr's famous metaphor, calling on students of European integration to walk around the mountain of European integration a little more and in wider circles, to improve the view. It is also the rare review essay that is all the better for its honest admission of skipping a chapter (that would be the one with cross-tab correlations and logistic regression analysis).

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