Governing through uncertainty?
Migration law and governance in a comparative perspective

di Ginevra Cerrina Feroni, Veronica Federico, Renato Ibrido[•]

Certainty and predictability are two basic defining features of the law per se, and of the principle of the rule of law. This entails that laws, and the legal framework they are part of, should satisfy the requirements of clarity, stability, and intelligibility. Legal certainty and predictability do not demand for absolute steadiness and reluctancy to change; but rather for a balance between stability and flexibility, and for a reasonable marge of discretion in their application to accommodate societal needs.

These fundamental elements of the rule of law are something that law students become familiar with since the very beginning of their university career. Nonetheless, law and decision-makers frequently overlook these very same basic defining features, so that legal complexity, inconsistency and unclearness too often characterise specific legal fields. Migration law is one of these fields. Here, certainty and predictability are jeopardised firstly by the frequent (and not necessarily coherent) changes migration law constantly undergoes throughout Europe. In the past three decades, migration has become a very sensitive political battlefield and each new government is prone to use it as flagship policy-domain. Intelligibility and consistency are, therefore at risk. Secondly, in several jurisdictions the executive has enjoyed quasi-plenipotentiary powers in the field of migration, to de detriment of the legislative and of the classical notion of the separation of powers. Immigration issues are de facto regulated in detail and

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implemented by a congeries of acts of secondary legislation (by-laws, regulations, ministerial circulars, administrative rules, etc), rather than by proper acts of Parliament. In addition to the erosion of the possibility for democratic scrutiny carried out by Parliament, this creates quite a complex intertwin of rules, which is further exacerbated by the presence of both European laws (mainly directives, but also regulations) and international treaties and customary laws. Thirdly, national migration governance systems are often characterised by the coexistence of a multiplicity of actors (all tiers of government, from the national to the local; the third sector and private companies; courts and also EU and UN agencies) with different, often overlapping, competences. As adequate mechanisms of coordination are often missing, this variety of actors ends up undermining the uniformity of the implementation of the rules as well as the evenness of practices and often results widening the discretionary power of each single office and officer involved in the migration governance system. Therefore, part of the uncertainty permeating migration governance is due to the very nature and structure of migration law, part to its implementation. The articles of the special issue discuss both, contributing to the scholar debate by providing diverse insights and different approaches to the analysis of uncertainty in migration law and governance.

Over a hundred years ago, Roscoe Pound – one of the "founding fathers" of the American legal realism – wrote his famous essay "*Law in Books and Law in Action*". The goal of Roscoe Pound was to focus attention on the role of law, not just as it exists in the legislative acts or textbooks, but as it is actually applied *in* society e *by* the society. As discussed above, migration law is a privileged terrain where to measure the gap between the two -law in books and law in action-, in order to understand whether this gap is responsible for the breach of certainty and predictability that may undermine the respect of the rule of law. Taking inspiration from Pound's classical suggestion, our special issue explores the structural lack of certainty which affects migration law, focusing on the following research questions: Which are the consequences of this uncertainty in terms of legal coherence, migration governance, institutional effectiveness and migrants, asylum applicants and refugees' choices? How does precariousness influence migrants' trajectories of life? How does uncertainty affect the society as a whole and the entire legal system? Can uncertainty be regarded as a "governance strategy" and/or as a tool of migration containment and control? Which are the fundamental reasons of uncertainty?

There are neither simple nor univocal responses. Building on diverse case-studies (from the discussion of the Global Compact as source of law to the comparative analysis of institutional uncertainty in migration governance in Europe; from the analysis of "solidarity crime" to the insight on the enforcement of the law criminalising irregular immigration in France and Italy; from the discussion of the cases-study of the Italian and Turkish immigration governance to the analysis of statelessness and the (in)coherence between the approaches of EU and its Member States, to end with limits of the EU external action), the

special issue provides the reader a critical overview on how uncertainty permeates migration law and governance.

This kaleidoscope of approaches offers useful insights to identify patterns of explanations for uncertainty and for its impact on the rule of law, the guarantee of fundamental rights and for the capacity of contemporary democratic states to provide a sound governance to the phenomenon of migration.

The special issue starts with an article which analyses how, in Europe and beyond, migration policies and laws play a role in fostering systemic and pervasive uncertainty. Grounding her analysis on data from a number of European and extra European cases, Paola Pannia explores uncertainty through the discussion of the notion of legal status, making reference to the types of legal status provided for by the different jurisdictions, the requirements for obtaining and/or withdrawing a legal status and the rights attached to a specific legal status.

The asymmetries between "migration law in books" and "migration law in action" are accentuated by the expansion of the role of the soft law sources, that is quasi-legal instruments which do not have legally binding force but able to "guide" the behaviours of rules' followers. Against this background, Ginevra Cerrina Feroni and Andrea Cardone question the nature of the Global Compact for Safe, Orderly and Regular Migration (GCM). Although devoid of binding force, this document has indeed contributed to develop the customary international law as authoritative expression of an *opinio iuris ac necessitatis*. Indeed, even though the provisions of the GCM are not formulated in such a manner as to be interpreted as a sufficiently clear, unambiguous and detailed basis for expressing binding legal obligations, they may generate legal effects on a number of levels. Beyond the issue of the hierarchy of the sources of law, this ambivalent nature of the GCM does not contribute to enhance governance and legal certainty in the field of migration.

The role of the soft law instruments is also stressed by Elif Çetin with regard to the Turkey's strategies of management of the Syrians under temporary protection. The author highlights that the so-called EU-Turkey statement of 2016 has created an additional layer of structural uncertainty due to the difficulties arising from its implementation. Moreover, it further contributes to the lack of clarity on the application of human rights standards to vulnerable irregular migrants.

The second national case-study of the special issue is the Italian one. Cecilia Corsi maintains that, behind an inflexible semblance, some portions of legislation regarding the condition of foreigners are so detached from the reality of migratory dynamics that they favour, *de facto*, illegality and even the violation of fundamental rights. Migration law is the typical example of a domain that upholds logics of political rhetoric rather than of good government. This is best exemplified by the rules governing entry for work reasons and the rules governing the asylum which become emblematic examples of the contradictions pervading contemporary Italian immigration policies.

From country-studies, the special issue turns to the critical analysis of specific aspects and topics, in a comparative dimension, which provide a series of paradigmatic examples of the complexity of migration law field and of its uneven enforcement.

In the intricate landscape of migration law and governance, the article of Mechthild Roos points to the importance of fundamental national values to shape legal frameworks and policies, despite the process of Europeanisation. With regard to the specific field of healthcare, the attempt to "reconnect" texts and contexts is, therefore, according to the author, influenced by the different normative understandings of health, that is to say as human right, legal standard or social benefit. Looking at the topic through the lens of the concept of "national values", the article discusses how the health-care policies and regulations in Germany and Sweden are shaped by national conceptions of the fundaments of society, as well as the roles and responsibilities attributed to state actors and individuals.

The tension between legal text and reality characterizes also the criminalisation of irregular entry and stay. As Matilde Rosina argues in her comparison between France and Italy, the law criminalising irregular migration has been characterised by highly uneven enforcement in the two countries. Here, the causes of uncertainty can be related to both legal and political aspects, and, ultimately, to the problematic nature of the criminalisation of irregular migration itself.

Another contested aspect of the contemporary trends in national legislation on immigration lies in the attempt to criminalize the activities of volunteers, activists and members of civil society organizations engaged in the context of land and maritime European borders. Grounding the analysis on three cases, Juan Pablo Aris Escarcena discusses the concept of "solidarity crimes", framing the legal prosecutions against humanitarian actors as a technique within the broader process of spectacularizing migration control for political purposes.

Finally, the special issue approaches two aspects pertaining to the European Union involvement in migration governance.

Oleksandra Zmiyenko underlines the ambiguity of the European Union competence system related to the regulation of the statelessness and the (in)coherence between the approaches of EU and its Member States. Building her argument on the comparative analysis of four legal systems: Germany, Italy, Hungary and Poland, the author maintains that, in spite of an apparent lack of EU competences in the field of nationality, there are both international obligations and a legal basis which empowers the EU to take an active role in addressing statelessness. Therefore, action is required from both the EU and its Member States to guarantee sufficient level of protection and to secure legal certainty for *de jure* stateless individuals, who otherwise will remain invisible.

Finally, the uncertainty related to the coexistence of national and supranational dimensions is addressed by Sara Poli. The article focuses on the EU resettlement programmes and the EU-Turkey statement and to the various

initiatives taken by the EU to support the return of people held in detention centres in Libya, to understand if these initiatives contribute providing legal certainty to asylum applicants and migrants who are the target of the EU efforts. Unfortunately, the measures discussed fall short their stated aim.

Ginevra Cerrina Feroni
Dipartimento di Scienze Giuridiche
Università degli studi di Firenze
ginevra.cerrinaferoni@unifi.it

Veronica Federico
Dipartimento di Scienze Giuridiche
Università degli studi di Firenze
veronica.federico@unifi.it

Renato Ibrido
Dipartimento di Scienze Giuridiche
Università degli studi di Firenze
renato.ibrido@unifi.it

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