



UNIVERSITÀ DEGLI STUDI DI NAPOLI "L'Orientale"



Migration and Asylum Policies Systems



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**MIGRATION AND ASYLUM POLICIES
SYSTEMS' NATIONAL
AND SUPRANATIONAL REGIMES**
The General Framework and the Way Forward

Edited by
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PREFACE

GIUSEPPE CATALDI*

This volume collects the proceedings of the Conference that concluded, at the University of Naples L'Orientale (leading partner University), the activities of MAPS (Migration and Asylum Policies Systems. Weaknesses, Shortcomings and Reform Proposals), a network that brought together ten European universities in the execution of the project approved by the EACEA (European Education and Culture Executive Agency) within the Erasmus+ Programme of the European Union Commission.

The activities took place over four years (2018-2022). Therefore, one year longer than planned, due to the Covid 19 pandemic, which slowed down the work and unfortunately prevented, in many cases, the organisation of in-person events. Despite these difficulties, I believe that the satisfaction with the result on the part of the writer, the Network's coordinator, can be considered legitimate. Over the months and years, and within the framework of the meetings, the overall situation in Europe and the individual national systems in the field of migration and asylum have been analysed, exchanging and disseminating, for the benefit of scholars, students, practitioners and policy makers, useful information on the state of the art of the subject and on best practices, reflections and proposals. This took place in particular in the conferences held in the individual partner universities, the proceedings of which were subsequently published. An important added value were the video-recorded lectures, which gave students in particular the opportunity to benefit from the teaching of lecturers and specialists from ten different European universities.

What can be a quick summary of the main conclusions reached by this research group, and which are also largely contained in the writings in this volume? Below, in a very schematic manner, and referring for further study to the proceedings of the conferences held within the Network, we will attempt to indicate them.

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First of all, in the area of migration, it is evident how far the European Union is still from being a federal State, with the weight of Member State governments still prevailing. Indeed, a unanimous conviction emerged in the debate within the Network, namely that in most cases, the difficulties and limitations that the national systems of the EU Member States encounter, at a regulatory and political level (but the issue also concerns, as in the case of North Macedonia, third States that cooperate closely with the Union and its members), are a consequence of the fact that the European Union itself has not yet found a convincing and, above all, unified position on the issue of the migration regime, notwithstanding the Commission President's 2020 State of the Union address, when she said that migration was a European challenge with regard to which "all of Europe must do its part". 'No EU migration deal under our watch', this the first significant statement of the Swedish presidency on 4 January 2023.

Linked to the previous one is the consideration that the 'emergency' approach on the part of the Brussels institutions is not justified and must give way, at last, to a balanced and steady regime that agrees above all with those general principles, in terms of solidarity and human rights, written in block letters in the Treaties. In this regard, another practice that has become widespread and that has emerged in the discussions as being absolutely contrary to the principle of non-discrimination is the utilitarian conception of immigration, through the acceptance of an alien as a 'prize', or by privileging one person over another with the same requirements but with a different qualification, level of education and social class.

It is undeniable that in the search for a balance between humanitarian aspects and the control of the Union's external borders, the EU institutions and the Member States currently favour the latter, especially through a questionable outsourcing and relocation of the management of the migratory phenomenon, as confirmed by the European Parliament's refusal to adopt a motion for a resolution tabled on 21 October 2019 by the Committee on Civil Liberties, Justice and Home Affairs "on search and rescue operations in the Mediterranean", which essentially reaffirmed the need for Member States to respect their obligations under European and international law in this area. Despite being a document lacking in innovative proposals, the proposal was rejected by the Parliament (290 votes against, 288 for and 36 abstentions). Outsourcing the management of migration flows and refugees through agreements with

States with lower human rights standards than the average European country is contrary to the common constitutional traditions of European States and the principles of EU law. The so-called Statement of the EU Member States with Turkey, the agreement between Italy and Libya, the agreement between the United Kingdom and Kenya, commented at length in the writings that follow, are precedents that should absolutely not be followed and forgotten.

Of course, an organic discipline would be needed that also incorporates the reform of the Common European Asylum System (CEAS). Indeed, under the so-called Dublin system, the country of first entry is responsible for the execution of the asylum procedure, which leaves open the question of how the burden of granting asylum is to be shared among EU Member States, problem remained unresolved especially in the face of the rejection (condemned by the Court of Luxembourg) of the quota system by some Eastern European States with reference in particular to the serious humanitarian crisis triggered by the large migration flows in the Eastern and Central Mediterranean in 2015 and 2016.

The European Commission finally acknowledged in the "Proposal for a Regulation on Asylum and Migration Management" adopted on 23 September 2020 that solidarity has been lacking. Anyway, despite its highly controversial nature, the centrality of the entry criterion remains in this new "Pact on Asylum and Migration" (as defined by the Commission), whose Art. 21(1) reproduces Art. 13(1) of the Dublin III Regulation. The Commission's remedy for imbalances is essentially left to the so-called "solidarity mechanisms". These mechanisms should operate according to a complex procedure (Art. 47-49), and States are not obliged to offer their contributions in terms of relocations, but are free to combine relocations with other contributions (capacity building, support to operations, cooperation with third States) in accordance with their distribution key. The Commission would constitute a "solidarity pool", taking into account the contributions offered by the Member States. Although these proposed changes seem to merit a mild positive assessment, it is obvious that the Pact is, as usual, the result of an effort to combine the positions of the EU Mediterranean States with those of their European partners, in an effort of Realpolitik.

Other important points have emerged in discussions during these difficult years, marked first by the management of landings in the central Mediterranean and transit via the 'Balkan route', then by the health emergency due to Covid 19, and finally by the war in Ukraine. First of

all, that the distinction between refugee and economic migrant is very difficult as well as questionable, and could only be valid if a legal order has nevertheless established possibilities and procedures for legal immigration. In the present situation the reification of irregular border crossing into a criminal activity is a legislative choice contrary to the sense of humanity and values of the so-called 'first world', and the issue of force carried out by border police against migrants seeking to cross borders irregularly is the biggest human rights challenge at the EU's external borders.

Concerning in particular the subject of refugees, it is worth mentioning two important aspects. Firstly, the difficulty of including in the definition provided by the 1951 Convention the new figure, so significant and unfortunately destined to become increasingly important, of the 'environmental refugee'. Secondly, the debate on the customary value, and therefore beyond the 1951 Convention, of the principle of 'non-refoulement'. This value now appears to be established in practice, but it is interesting on this point to read prof. Hathaway's contrary opinion as well as prof. Goodwin-Gill's response, in the writings contained here.

Returning to the issue of Ukraine, surely the decision of the European Union of March 2022 which applied the directive on temporary protection, an emergency mechanism applicable in cases of massive influxes of people and aimed at providing immediate and collective protection (i.e. without the need to examine individual applications) to displaced persons who cannot return to their country of origin, can be described as historic. Rights include residence, access to the labour market and housing, medical care and access to education for children. The evaluation of this initiative can only be positive, except to point out that this is the first time that such a decision has been taken, despite the fact that the directive dates back to 2001. Beyond the political discretion that must undoubtedly be recognised, are we sure that there have not been occasions so far that would have required similar treatment? The fear is then that a 'competition among desperate people' may be triggered, i.e. that it will be forgotten that under international law States have an obligation to recognise (and not grant) refugee status to all those who are entitled to it, regardless of nationality. Unfortunately, we are already witnessing the attitude of countries which, depending on whether or not they sympathise with Ukraine's cause, either create a 'fast track' for its citizens or, on the contrary, relegate them to the last place among those destined to receive them. In either case we are faced with a blatant violation of the rules on the subject.

One definitely positive aspect that emerges from the analysis carried out by the Network participants is the fundamental role of guarantee played, in an independent manner, by the domestic and supranational judiciary. The hope is that this role, so well exemplified in the judgment of the French Conseil constitutionnel of 6 July 2018 on the constitutional value of the principle of fraternity, or in the judgments of the Italian tribunals that denied the legitimacy of the ‘closed ports’ policy, will continue to guide and censure governmental choices.

To conclude, we cannot remain silent on the point that the problem of migration by sea remains a challenge for the EU and for all European States, not only those that border the Mediterranean, a litmus test of the degree of cooperation between States among themselves and between States and the Brussels institutions, and of the degree of civilisation of the Continent. It is intolerable that this sea continues to be the graveyard of those who try to improve their fate.

* * * * *

I feel it is my duty to conclude this brief introduction with some thanks. First of all, to the European Commission and its agency EACEA, which believed in this project and allowed it to take place through the Erasmus+ Programme. Secondly, I want to thank all my colleagues who, with enthusiasm, passion, dedication and competence, have supported me in this adventure. First of all, all the research groups from the ten partner universities, who also participated in the organisational effort, and then the distinguished guests who animated the scientific meetings. As far as this volume and the conference whose papers are reproduced here are concerned, special thanks go to Ana Nikodinska Krstevska, who, in addition to having contributed in an extraordinary manner to the overall success of this project, agreed to chair one of the sessions, and to Peter Hilpold, who assisted me in the editing of the proceedings and who did his utmost to obtain high quality papers and presentations, as can be seen from just reading the table of contents.

Lastly, my sincere thanks to my team of collaborators, and in particular to Marianna Pace, for the project phase, to Noemi Corbelli, for her administrative assistance, to Anna Fazzini, for the responsibility she assumed in relation to the recorded lectures, and to Giuliana Doria, for her tutorship of the project and for collaborating in finalising the text of this volume.