Book Review

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Regularisations of Irregularly Staying Migrants in the EU
by: Kevin Fredy Hinterberger
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Regularisations of Irregularly Staying Migrants in the EU, the first book of Kevin Fredy Hinterberger, was an unexpected journey into the art of legal comparison. When the book opened with the EU's commitment to 'combat' and 'fight' irregular migration, I had not expected to be knee-deep in thick description and critical legal scholarship by page forty. In transversing this epistemological terrain, Hinterberger has proven himself as both a meticulous and creative legal scholar. The EU policy goal to 'combat' irregular migration is revealed throughout the book to be the normative cornerstone on which Hinterberger's main argument rests – regularisation is a more effective means than return to achieve the policy goal of 'combatting' irregular migration and should be harmonised at the EU level. The introductory chapter lays out the main argument and methodology, thereafter, Part I (Chapters 1 and 2) lays out the conceptual framework for the book. Chapter 1 develops a working *legal* definition of regularisation and establishes the six-part typology of regularisation on which Part II is based; and Chapter 2 builds the case for EU competence to legislate in the area of regularisation. The heart of the book is Part II, in which the author conducts a 'critical-contextual' comparison of Austrian, German and Spanish law on regularisation. Hinterberger emphasises that this is not a side-by-side analysis of national reports, but a functional analysis of what different types of government actions can be considered 'regularisations' and the categorisations therein. Based on the analysis in Parts I and II, Hinterberger is able in Part III to lay out a strong and nuanced proposal for an EU Regularisations Directive.

The 'critical-contextual approach' methodology employed in this book is worth highlighting for its potential use in any endeavour of legal comparison. This methodology is rooted in functionalism in that it 'compares norms in their function as solutions to particular problems'. While remaining true to the functionalist commitment to the purpose of a law, the author takes a turn away from functionalism and its presumption of similarity of foreign legal norms. Instead, this text follows the work of Günter Frankenberg who emphasised that foreign law should not only be seen as similar or different, but that a law must be understood within its historical, economic and political context (Frankenberger, 2019). Hinterberger's resulting 'contextualisation' was clearly developed, however, it was more difficult to pick out from this methodological

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description the ways that this methodology is also 'critical'. Hinterberger suggests that 'critical-contextual comparison may be used as a hegemony-critical approach and applied to analyse how different concepts are interpreted differently in different contexts'. While Part II does indeed successfully show the way different regularisation purposes are applied in different national contexts, this analysis is not overtly 'hegemony critical'. Though Hinterberger's overarching argument that regularisation is an effective means to 'combat' irregular migration, could be said to be critical of the current EU approach, this is nonetheless consistent with the functionalist comparison that solves social problems with legal solutions, an approach of which Hinterberger is also critical. The lightness of critique does not hinder the success of the methodology – where this book shines is in its contextual comparison and the conceptual development that flows from that analysis.

One of the gaps that this text fills is the lack of legal conceptualisation of regularisation in Europe. Part I will be of great interest to legal scholars of irregular migration and the rights of irregular migrants. The text goes beyond the broad understanding from political science that regularisation either is a 'mechanism', or a 'programme', instead offering a conceptualisation rooted in the nuance of national legal practice. Hinterberger notes that the most recent comparative analysis of regularisation in the EU is 20 years old and there is no legal definition of regularisation that is anchored in the national law of EU Member States. From his comparative review, Hinterberger proposes a four-element working legal definition of regularisation as consisting of:

1 irregular staying migrants

2 granting a right to stay

3 by means of a decision (of an administrative authority or in a subsequent court decision)

4 subject to the satisfaction of minimum requirements.

The text then offers that there are six different purposes for regularisation, which can be extrapolated from the three different national environments under examination. The first four purposes are compelled by international and EU law:

1 non-returnability

2 social ties

3 family unity

4 vulnerability.

The latter two categories are described as purposes of national law and national interest:

5 employment and training

6 other national interests.

By creating this typology of regularisation, Hinterberger is able to make a functional organisation through which to conduct his comparative work. In doing so, he looks not only at what the law says, but what the law (or lack thereof) is doing.

The analysis in Part II, Chapter 3, addresses the particular national contexts, organised around the national law of three EU countries (Austria, Germany, and Spain). Then, in Chapter 4, the discussion cuts across national examples and organises according

to the six purposes of regularisation. The discussion in Part II is a rich 'integrated' analysis, to use the author's term, of the possibilities for regularisation in each national environment. An interesting example that illustrates the usefulness of the contextual analysis is the Spanish practice of *de facto* toleration. This falls within the regularisation purpose of 'non-returnability', which encompasses both toleration ('*duldung*' in Austria and Germany), and non-returnability under Article 3 of the European Convention of Human Rights. 'Toleration' in Austria and Germany is statutory and in Spain is non-statutory or *de facto*. There is no single definition for 'toleration' but must be understood within each of the national contexts. Toleration in Spain refers to different unregulated factual scenarios where irregular presence is tolerated. In one factual scenario, a foreigner is issued a fine for irregular presence accompanied by an expectation that the irregularly staying foreigner will either voluntarily depart or regularise within a prescribed period. In another scenario, irregular presence is tolerated due to the impossibility of removal, for example, due to the receipt of unemployment benefits received after a residence permit expires. Hinterberger shows the reader how these different *de facto* tolerations should be understood within the Spanish national context. The state offers access to social benefits for irregularly staying migrants and less onerous requirements to eventually acquire residence than in Austria and Germany. Thus, 'toleration' in the Spanish context, though outside of the law, is accompanied by access to rights and appears to be a step toward regularisation. It is through comparison with statutory 'toleration' in the Austrian and German context, that a practice of *de facto* toleration in the Spanish context is revealed as part of a national context of regularisation. The contextual integrated approach also reveals where a regularisation system is lacking (or where a supranational/EU system is lacking, as Hinterberger will latter point out).

Hinterberger's key contribution from this book is his proposal for an EU Regularisation Directive in Part III, Chapter 5. The creation of this Directive is supported by his argumentation from Chapter 2 that the EU has competence to legislate in this area under the Treaty on the Functioning of the European Union (TFEU) Article 79(2)(a) and (b). The proposal is offered as a supplement to current EU policy on return, manifested in the EU Returns Directive. An EU Regularisation Directive would fill the gap in EU policy by harmonising national policies on 'immigration from within', a term Hinterberger borrows from Bast (2012). Following the six-part typology of regularisation, the creation of such a directive should follow two phases. In the first, the international standards compelling regularisation are harmonised. In the second, policy options are provided for regularisation based on national interest. The author acknowledges that this is likely not the political moment for passage of such a directive, but nonetheless puts forward the proposal as the core content for such a Directive emerges as a solution to an EU policy problem of ineffectively 'combatting' irregular migration.

Following this final recommendation, *Regularisations of Irregularly Staying Migrants in the EU* succeeds in engaging with EU law to propose novel and workable policy solutions. While this book is described as taking a 'migrant-centred' approach, the book was truly framed around EU and member state law. Hinterberger makes multiple references to the 'migrant-centred' approach without fully explaining the limits or results of such a concept. At one point, this approach is defined as "looking at the relevant legal and non-legal approaches through the lens of migrants, thus the perspective shifts from the state to the migrants" (p.51). However, this is not a book on irregular migrant perspectives, or legal consciousness, which often involves empirical data collection by

social legal scholars, such as that taken by Kox (2024) in her recent book *Unraveling Anauthorized Migrants' Legal Consciousness Processes*. Indeed, taking the perspective of the migrant would likely reveal many different ways of negotiating '*de facto* toleration' than cannot be seen when only looking in and around the legal system. My sense was that Hinterberger's 'migrant-centred' approach is linked to his critique – it is a way of interpreting the law in a compelling and sound way that does not default to or privilege the state's imperative to exclude. Hinterberger has convincingly argued that if the EU is serious about combatting irregular migration, a solution lies in the regularisation of irregular presence. The argument is presented using the tools and grammar of EU and national law to such an extent that it becomes difficult to locate the critique therein, but I do think it is there. I hope to hear more from Hinterberger in the future on what his 'migrant-centred' approach entails and how he will operationalise this in future studies. In the meantime, fellow scholars of migration law, comparative law, and social scientists focused on irregular migration and regularisation have much to gain from this linguistic and legal translation feat. Hinterberger's book has contextually explained three legal systems of regularisation for the English-speaking world and in doing so made a novel contribution to our understanding of European regularisation law.

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