For all these reasons, while I am elated and enthusiastically recommend the book to anyone seeking a captivating journey through the history of constitutions, I also feel a twinge of regret for not having had access to such a profound work when I began my teaching career several years ago. As I have mentioned, there is no doubt that my early experiences with young students would have been significantly smoother had I been able to draw upon the vast knowledge contained in this book. Voermans' insights and thorough exploration would have provided invaluable support in my efforts to make complex constitutional concepts clear and engaging for my students.

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Kevin Fredy Hinterberger, **Regularisations of Irregularly Staying Migrants in the EU. A Comparative Legal Analysis of Austria, Germany and Spain**, Nomos Verlagsgesellschaft, Baden-Baden 2023, 398 pages, 32,05 Euro, ISBN: 978-3-7489-1279-8.

Current political debates on migration law in the EU are characterised by a perceived loss of state control over migration matters and the call for effective and efficient management of migration flows. The intuitive way for decision-makers to regain control seems to be a constant emphasis on the need to effectively combat irregular migration by hindering access to Europe in the first place[1] and – especially on member state level – increase efforts to return irregular staying migrants[2]. Within this context, *Kevin Fredy Hinterberger*'s book "Regularisations of Irregularly Staying Migrants in the EU - A Comparative Legal Analysis of Austria, Germany and Spain" provides a refreshingly new perspective by moving the focus from return to regularisation.

From the outset, *Hinterberger* highlights the important and often overlooked fact that just like "legality" and "illegality",[3] the terms "regularity" and "irregularity" in migration law do not refer to pre-legal factual circumstances, but are the result of norms created

1 See the various legislative measures under the EU's New Pact on Asylum and Migration, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life/new-pact-migration-and-asylum_en (last accessed on 7 November 2024); for an assessment of current EU migration policies regarding access to the territory, see *Bast/von Harbou/Wessels*, Human Rights Challenges to European Migration Policy, Baden-Baden 2022, pp. 28-39.

2 We Have to Deport People More Often and Faster, Der Spiegel, https://www.spiegel.de/international/germany/interview-with-german-chancellor-olaf-scholz-we-have-to-deport-people-more-often-and-faster-a-790a033c-a658-4be5-8611-285086d39d38 (last accessed on 7 November 2024).

3 *Tobias Klarmann*, Illegalisierte Migration. Die (De-)Konstruktion migrationsspezifischer Illegalitäten im Unionsrecht, Baden-Baden 2021.

by the state itself (p. 27). Furthermore – and in stark contrast to the public discourse on migration policy –, the author does not focus on irregular entry, as the respective numbers are way lower than often portrayed, with most irregular migrants being so-called visa-overstayers (p. 32). Instead, the core hypothesis of the book is that the most effective way to combat irregular migration is the tool of regularisations as a supplement to current return policies, which have proven to be inefficient (p. 33). This leads to the three subquestions that are addressed in the study: What are the regulations on regularisation in Austrian, German and Spanish immigration law? How and to what extent could regularisation be used to combat irregular stays? And does harmonisation at EU level offer any advantages over domestic rules?

The detailed introduction succeeds at clearly carving out the research interest and convincingly limiting the scope of the book. Here – and throughout the entire volume –, it is very clear how the study contributes to the state of the art and why the author chose to make certain decisions. Methodologically, *Hinterberger* applies a critical-contextual approach, which takes a functional method of comparison as a starting point and adds additional layers by emphasizing both the socio-political context in which norms are situated and – following *Frankenberg* – the potential to use comparison in a hegemony-critical way (pp. 38-42). These methodological considerations show that the comparison is conducted on a firm theoretical basis, which is closely linked to the Critical Legal Studies movement. From this theoretical background stems the decision of the author to take a migrant-centered perspective (pp. 42; 51-52). This statement of positionality is highly valuable for reasons of methodological reflectivity, given the necessarily political nature of migration law.[4] Unfortunately, the relationship between the critical-contextual method of comparison, critical legal theories and the specific power-relations in migration law remain slightly underdeveloped. Thus, it remains unclear how precisely the migrant-centered perspective features in the comparison and how it influences the outcome.

Chapter 1 clarifies the key concepts of the book and provides a definition of the term regularisation which forms the basis for the comparison in the following chapters: "Regularisation is [a] decision by an administrative authority (or a court) which grants irregularly staying migrants a right to stay provided certain minimum requirements are met" (p. 58-59). This chapter is particularly worth reading as it goes far beyond a mere prerequisite to set up the comparison. Instead, the discussions of the various elements of the definition provide remarkable conceptual contributions in their own right. *Hinterberger* meets his objective to propose a definition that serves "to structure and depict a legal phenomenon that has not received sufficient attention in current research" (p. 59) and that "may be used for other (scholarly) studies" (p. 59). The same holds true for the conceptualisation of the right to stay, especially the different nuances of regular and irregular stay and the analysis on how the concept of "toleration" fits into these categories (p. 82). Toleration

4 See *Anuscheh Farahat*, Human Rights and the Political: assessing the Allegation of Human Rights Overreach in Migration Matters, Netherlands Quarterly of Human Rights 40 (2022), p. 199.

of irregular staying migrants – existing as a statutory status in Austria and Germany (p. 80) and as an unregulated *de facto* situation in Spain (p. 228) – does not meet the definition of regularisation, as it (only) suspends deportation without granting a right to stay. While all the concepts presented here are later referred to in the comparative work, this conceptual work is relevant beyond the three jurisdictions analysed in the book and even beyond the context of regularisation.

In the following chapter, *Hinterberger* analyses the competence of the EU concerning irregular migration and regularisation under Art. 79 (2) TFEU. Turning to secondary law, the author points out that Art. 6 (4) of the EU Return Directive not only explicitly envisages regularisation as an alternative to the return of an irregularly staying third-country nationals (p. 96); it can even be argued that said provision provides for a "right to regularisation" in situations of permanent non-returnability (pp. 99-111). Here again, a certain tension surfaces regarding the instrument of toleration as, by definition, toleration is neither regularisation nor return. While the Return Directive in principle allows for the postponement of removal (Art. 9), so-called 'chain-tolerations' ("*Kettenduldungen*") over long periods of time are concerning from the perspective of EU law (pp. 97-98). The author goes on to argue that the EU is competent to enact a hypothetical 'EU Regularisation Directive': The objective to "combat irregular migration" requires reducing the number of irregularly staying migrants by whatever means (p. 113) – an objective that is effectively met through regularisation. While this argument is very convincing, structurally speaking it is not relevant for the comparison of the domestic regulations and therefore could have been shifted to the final chapter of the book where the proposal for an 'EU Regularisation Directive' is discussed in detail (see below).

The following Chapters are dedicated to the comparison of Austrian, German and Spanish law on regularisation. In line with the emphasis on contextual comparison, a significant part of the book (pp. 133-225) provides the necessary context on the respective legal orders, the historical developments of each state's migration law, the different authorities, their competences and systems of judicial review. While these explanations – by their very nature – are not necessarily the most captivating to read, they are nevertheless well written, very detailed and thorough. It is evident that *Hinterberger* handles the context as an integral component of the comparison. Remarkably, all three jurisdictions receive almost exactly equal attention both in space and in level of detail, echoing the author's declared objective "to adopt an (almost) objective position" (p. 47) towards each of them.

The actual comparison of regularisations is conducted in Chapter 4. Instead of presenting separate national reports, the volume chooses an integrated approach, meaning that all different regularisations are categorised, compared and assessed based on their purpose. Additionally, the different forms of regularisation are not just described, but also reviewed in light of their compatibility with the relevant provisions of international law (meaning mostly the ECHR) and EU law. In this regard, *Hinterberger* also manages to organically weave in the jurisprudence of the European courts into the comparison (see e.g. pp. 229; 334). Overall, the integrated approach provides for a very pleasant reading experience,

as it strikes a fine balance between clarity, precision, and readability. The six purposes of regularisation identified are non-returnability (pp. 227-258), social ties (pp. 259-270), family unity (pp. 271-287), vulnerability (pp. 288-318), employment and training (pp. 319-339) and other national interests (pp. 340-350). The analyses of the regularisations for reasons of non-returnability are particularly noteworthy, as they best underline the general argument of the book: Political and public discourse on migration policy frequently refers to the number of irregular staying migrants and the necessity of more effective enforcement of returns. If one, however, acknowledges the fact that a large proportion of this group is non-returnable for legal and/or factual reasons, it becomes clear why regularisation in many cases is the only effective means to tackle irregular stays (see also pp. 245-255).

One key finding of the comparison is that all three member states have differentiated systems of various regularisation provisions. Regularisation therefore is nothing extraordinary but a well-established part of the 'toolbox' of contemporary migration management at national level (p. 358). At the same time, the analysis reveals several obstacles, as the requirements for regularisation are often very difficult to meet in practice, making some of them – for example the Austrian 'residence permit in particularly exceptional cases' practically "near-irrelevant" (p. 352). As a third key insight, the comparison highlights a large degree of fragmentation across the three states (p. 359) with a number of various legal institutes – some more effective in practice than others – that all aim at serving the same purposes listed above.

Finally, and based on these findings, Chapter 5 provides an outlook by proposing an 'EU Regularisation Directive' (pp. 355-367). Without ignoring political realities (p. 356), *Hinterberger* draws conclusions for how regularisation could be harmonised across the EU and what the core content of the necessary regulations should look like based on the insights from the comparison of Austrian, German and Spanish law.

It is highly welcome that this important book, which had previously been released in German,[5] is now available open-access for an even wider audience in an updated English version. It is worth reading not only for the detailed and exhaustive examination of regularisations in the three jurisdictions, but also for the broader conceptual contributions on regularity and irregularity in migration law and for sparking discussions about the future of regularisation as a tool of EU migration policy. Above all, the book serves as a much-needed and timely reminder that when it comes to pursuing an active and efficient policy of migration management, there are other options available besides closing borders, lowering standards, and demanding to return the 'non-returnable'.

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5 *Kevin Fredy Hinterberger*, Regularisierung irregulär aufhältiger Migrantinnen und Migranten. Deutschland, Österreich und Spanien im Rechtsvergleich, Baden-Baden 2020.