



Editorial: Migration in the Time of COVID-19: Comparative Law and Policy Responses

Jaya Ramji-Nogales^{1*} and Iris Goldner Lang²

¹Temple University, Beasley School of Law, Philadelphia, PA, United States, ²University of Zagreb, Faculty of Law, Zagreb, Croatia

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Editorial on the Research Topic

Migration in the Time of COVID-19: Comparative Law and Policy Responses

The Covid-19 pandemic landed in a world grappling with increasing numbers of humans on the move, in response to whom destination states have instituted strict and often harsh border control policies. The pandemic, which has given rise to legitimate public health concerns about the movement of people even domestically, has also been leveraged as a pretext to renege on international legal obligations towards migrants in ways that are not justified by public health guidance. Often located in positions of precarity, migrants test the strength of destination states' humanitarian commitments and the binding nature of international migration law. The pandemic also demonstrated the fragility of EU free movement rules, raising issues of power, solidarity and trust in the system. EU Member States' reintroduction of intra-Schengen border controls, the imposition of travel restrictions, including entry and exit bans, and the closure of external borders towards third countries challenged both the functioning of the EU's internal market and basic values underpinning the Union. This collection offers a comparative study of law and policy around human mobility in the face of the pandemic. Several papers in this collection examine the impact of the pandemic on EU free movement law. Others assess destination states' responses to COVID-19 from the perspective of migration law and policy, and consider how they build upon prior exclusionary regimes, offering suggestions for reform of domestic laws in the wake of the pandemic.

Through the lens of the Covid-19 pandemic, Sirleaf analyzes the intersection of race, migration, and global health. She explains how the pandemic revives colonial imaginaries through the racialization of disease, relying on border closures reminiscent of colonial quarantine regulations used to protect the imperial metropole. Prof. Sirleaf draws a chronological connection between the emergence of the global health regime, the creation of the nation state, and the erection of racial borders. Even under the leadership of the World Health Organization, Prof. Sirleaf explains that global health law and policy are characterized by formal equality but racialization in practice.

Chetail assesses the legality of border closures from the perspective of international human rights law. He argues that blanket entry bans on the ground of public health are illegal under international human rights law, as they cannot be reconciled with the most basic rights of migrants and refugees, including the principle of non-refoulement and access to asylum procedures, the prohibition of collective expulsion, the best interests of the child, and the principle of non-discrimination. Professor Chetail points out that public health and migrants' rights are not mutually exclusive. Quite the opposite, they can reinforce each other within a comprehensive human rights-based approach to health and migration policies, as exemplified by the prohibition on arbitrary detention, which is both a human rights law duty and a necessity measure to avoid contagion in overcrowded detention centers.

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Jane Freedman,
Université Paris 8, France

*Correspondence:

Jaya Ramji-Nogales
jayarn@temple.edu

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Focusing on the case of Canada, Macklin discusses the construction of the idea of “essential” movement, exploring its production, revision, and representation. She sets out three types of essential movement: economic, legal, and political. The first category fits within a restrictionist trend, extending entry rights to foreign workers, seasonal agricultural workers, and some international students, but not to refugees or asylum seekers generally. The last category provides the possibility of contestation, demonstrated through the broadening of the definition of family members in Canada.

Also in Canada, Rehaag et al. draw an insightful historical connection to the Canadian government’s prior use of crises to shape immigration law. The authors remind us that Canadian officials leveraged fears of terrorism in the wake of the September 11, 2001 attacks to secure the Safe Third Country Agreement with the United States, through which most asylum seekers arriving at land ports of entry along Canada’s southern border are returned to the United States to seek asylum there. Similarly, they demonstrate how the Liberal Party used the Covid-19 pandemic to prevent irregular crossings that posed political risks. Both crises enabled Canadian officials to espouse progressive values while keeping out asylum seekers.

Moving to South America, Acosta and Brumat describe the “right to migrate” frame that has characterized the region’s approach to migration in the 21st Century. In particular, they examine the MERCOSUR agreement, through which nearly all South American countries enable free movement, including the right to enter, reside, and work. While some emergency powers were invoked in the face of the Covid-19 pandemic, the MERCOSUR free movement arrangement is still in effect. As is the case elsewhere, migration in South America is characterized by multilevel contestation and accommodation, with legalization as a response to undocumented migration alongside securitization trends.

Freier and Espinoza focus on policy and political responses to the Covid-19 pandemic in Chile and Peru, asking how political discourse shapes the process of inclusion of migrants during the pandemic. The authors describe an increase in immigration and subsequent backlash in the form of legislative projects to exclude migrants that exacerbate socioeconomic vulnerabilities. Through case studies of Venezuelans in Chile and Peru, they discuss the militarization of external and internal borders, the depiction of migrants as disease vectors, and the links drawn between immigration, job loss, and crime.

Turning to the United States, Gilman describes the use of the Covid-19 pandemic as a justification to close the border by hardening existing impediments to asylum, reviving failed proposals, and implementing harsh new policies that are hard to reverse. She explains the rise of territorial exclusion policies that culminated in the Centers for Disease Control orders closing the borders, the extension and expansion of those policies, and the Trump administration’s use of them to expel thousands of unaccompanied children. Prof. Gilman makes the case that these pandemic border closure policies are arbitrary in that they are both over- and under-inclusive, allowing tourists to enter by plane while keeping out asylum seekers at the land borders in violation of international law.

Marouf examines the spread of Covid-19 through crowded and unhygienic US immigration detention facilities. She describes

fragmented detention policies that include delayed testing, transfers, failures to track medically vulnerable detainees, and obstacles in communicating with lawyers.

Box and Wadhia discuss community lawyering responses to Trump’s immigration policies, describing how their prior approaches prepared their immigration clinic for the Covid-19 pandemic. They describe a three-part strategy that includes community outreach and education, policy products for institutional clients, and legal support in individual cases. Working from the starting point that “no document should be viewed as too simple or too basic for a legislative lawyer,” the authors discuss how their clinic supported the community in the face of visa suspensions, border closures, and immigration processing stops and delays.

Kritzman-Amir discusses the Israeli government’s response to the pandemic. She describes the government’s use of uncodified and therefore volatile immigration policy to welcome Jewish immigrants while treating others as labor market contributors rather than human beings. Prof. Kritzman-Amir discusses not only entry restrictions for migrant workers but also strict monitoring of these workers in disregard of their rights to privacy, freedom of movement and autonomy. She places the Covid-19 pandemic in the context of the constitutional crisis in Israel, and the interim government’s excessive reliance on emergency regulation. In this situation, she lauds the High Court’s decision to protect asylum seekers while wondering whether these positive developments will be lasting.

Turning to the EU, Davies questions whether the pandemic has introduced a new phase in EU law in which national fears have become a more legitimate justification for restricting movement, or whether the pandemic will be treated as so exceptional as to be beyond law, and thus not a precedent. He explains that, when imposing border restrictions during the pandemic, EU Member States’ governments followed not only scientific advice, but also public opinion, contrary to what EU law generally allows. Professor Davies points out that this approach could be seen as a defeat for EU law as traditionally conceived and as a triumph of local preferences for symbolic security and closure over scientific standards and law. Alternatively, it can be argued that the EU Court of Justice’s emphasis on exclusively objective justifications for measures is unrealistic and excessively strict.

Guild points out that in the first phase of the pandemic EU Member States did not do much to coordinate their actions aimed at the protection of public health. Member States’ border control reflex took priority over the EU cooperation on public health, leading to inconsistency in the field. Professor Guild concludes that this incoherence reveals the differences in opinion among EU public health ministries and indicates a failure by Member States to mainstream cooperation as an EU duty. The new proposal to establish a European Health Union may be considered bold by EU constitutionalists but it may be the best way forward to protect public health.

De Bruycker warns that the public health exception in EU migration law could in the future become increasingly important with the appearance of new viruses. He explains that the EU system of multi-level governance, which made it impossible for the European Commission to organize the necessary inter-state

cooperation, was responsible for the Member States' failure to coordinate their actions. Professor De Bruycker lays out the main lessons that can be drawn from the pandemic, among them the need to revise the Schengen Borders Code by adding public health as one of the reasons to permit the introduction of internal border controls.

de Lange examines COVID-19 migration policy measures for international students and graduate job searchers, finding huge disparities and insecurities regarding their migration status. Professor de Lange identifies three main patterns of response to COVID-19: one of continuing welcome and facilitation of international students to remain, seen in the cases of Canada and France; a blocking attitude, seen in the US; and an ambiguous policy seen in Australia and the Netherlands. Based on these findings, she concludes that the COVID-19 crisis has shown that in some countries of destination, international students and graduates, although high-skilled, and 'home-trained', are not treated as belonging to the country of destination, but as high-skilled guest workers, disposed of in times of crisis.

Mantu asserts that the EU's internal market priority during the pandemic was to safeguard its economy by enforcing mobility rights, without ensuring protection of workers' rights. She explains this statement by discussing the case of Romania, which at the same time discouraged return of its diaspora—by relying on border closures and quarantine/isolation—and encouraged emigration, without safeguarding the rights of migrant workers and protecting public health.

Roksandić et al. explore the ways the pandemic influenced migration policy and practices in Croatia, by examining the treatment of migrants on the Western Balkans Route. The authors examine to what degree COVID-19 impacted migrants' access to services, in particular healthcare, and whether facilities for migrants and asylum seekers in Croatia have appropriate healthcare standards. They conclude that Croatian authorities seem to be aware that only an inclusive public health and socio-economic response will help suppress the virus, but do not appear to understand that an effective response to COVID-19 and the protection of human rights of people on the move are not mutually exclusive. They highlight the need for an independent monitoring mechanism that would investigate allegations of pushbacks.

Jakobson and Kalev demonstrate that the COVID-19 crisis can induce a permanent labor migration policy change by discussing the case of Estonia. The authors explain that the pandemic

enabled anti-immigrant parties to take charge of the Estonian immigration policy and to move Estonia towards a more restrictive labor migration agenda. However, the crisis did not affect all sectors alike. Sectors in which migrant labor is standard in Eastern Europe, such as construction, industry or farming, were not negatively affected.

The papers in this collection, offering a broad range of case studies, present some common themes around migration law and policy responses to the COVID-19 pandemic. We see the pandemic used as a pretext or justification for responses that would not otherwise be viewed as legitimate. Underlying some of these actions are racism towards and/or scapegoating of migrants. While asylum seekers are often excluded, labor migrants are permitted to enter, but their rights are left behind, creating a disposable work force (and in some cases, we see even disposable students). There are numerous examples of widespread failures of planning, coordination, and cooperation within and across states in response to the pandemic, which also reveals the shortcomings in our legal systems and triggers legal changes that are still unfolding. From this perspective, the pandemic can be viewed as an opportunity to adjust our legal and policy frameworks for the better and make them more resilient to future public health and fundamental rights challenges. The case studies provide examples of contestation and accommodation, and the hope that mechanisms can be designed that will produce migration law and policies that are aligned with both human rights and public health.

AUTHOR CONTRIBUTIONS

All authors listed have made a substantial, direct, and intellectual contribution to the work and approved it for publication.

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