The Shift to Soft Law at Europe Borders: Between Legal Efficiency and Legal Validity

Article *in* Global Jurist · October 2022

DOI: 10.1515/gj-2022-0040

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https://doi.org/10.1515/gj-2022-0040
Published online October 19, 2022

Abstract: In contemporary politics of migration governance, the criterion of legal validity is hindered by legal efficiency. Or parliamentary government before executive governance. This tension between legal efficiency and legal validity can emerge in bilateral soft agreements. The article analyses the EU-Turkey Statement (2016) and the Memorandum of Understanding between Libya and Italy (2017). From these bilateral soft agreements, a turn from legal validity to legal efficiency can be observed. The efficiency criterion, by replacing the one of validity, limits significantly the role of the Parliaments and thus affects the overall institutional balance and the rule of law. The article recognises the geopolitical contingences that determine the adoption of soft law bilateral agreements. However, it suggests reflecting on how legal forms are manipulated to externalise and securitise the borders of Europe by retuning border management from legal efficiency towards legal validity, or in other words from soft to hard law.

Keywords: international agreements, migration policy, soft law, legitimacy, borders, externalisation, constitutionalisation

1 Introduction

In contemporary migration governance, the European Union (EU) and its Member States regularly put in place legal and quasi-legal instruments that allow the externalisation of border responsibilities to third countries. These include Libya, Turkey, Morocco and Niger. Yet, by externalising border management, the border is transformed into a space, determined 'from distance' by EU and national governance structures, in which legal obligations and international responsibilities are blurred. This tension between externalisation border management and legal validity emerges in bilateral migration 'agreements' adopted in the form of soft law (Wessel 2021).

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Soft law agreements represent an important legal approach that can be instrumental for the externalisation of border management to third countries. In fact, this has been done in different settings because soft law instruments possess some critical characteristics that are their informality, fluidity, and hyper-simplified form of adoption. These features permit to design agreements that are able to overcome the institutional balance and the overall rule of law. In particular, this type of instrument is often utilized by the executive to avoid the control of the Parliament (Curtin 2014; Vara 2019). In so doing, it is possible to recognize also in border management a shift from government to governance. Such a shift is part of a broader scheme that considers soft law instruments, and thus governing by governance, more adaptable to the rapid changes of contemporary democracies (Meyer 2016).

The article suggests that these dynamics are exemplified in two European bilateral soft agreements that display the tension between legal efficiency and legal validity. These are the EU-Turkey Statement adopted in 2016 and now under negotiations to be renewed, and the Memorandum of Understanding between Libya and Italy adopted in 2017 and renewed in 2020. From these bilateral soft agreements, a 'legal turn' from legal validity to legal efficiency emerges. In so doing, the efficiency criterion, by replacing the one of validity, limits significantly the role of the Parliaments and thus affects the institutional balance and rule of law. Against this backdrop, the article contends that bilateral soft agreements should be adopted for a limited period of time and the executives with the support of the Parliaments shall devise new solutions in form of hard law that respect the overall institutional balance and human rights obligations.

Legal efficiency requires that the executive pursues an informal and quick negotiation with the third country; the Parliament and civil society had to be excluded from the negotiation in order to speed up the informal procedure; the monitoring and accountability mechanism have to be difficult to exercise in practice. By contrast, legal validity requires a formal and long negotiation between the executive, Parliament and civic society; the respect of the constitutional principles of conferral, institutional balance, transparency, and the overall rule of law; a valid monitoring and accountability mechanism.

Legal efficiency and legal validity can coexist and the decision to use one of the two legal techniques is often a political decision based on a spectrum of geopolitical contingences.

The article suggests that the decision between efficiency and validity has significant consequences on the institutional balance and the overall rule of law. In doing so, the article contributes to the literature on European migration governance, by shedding light on the institutional and constitutional dimensions of European border externalisation.

The article is organized as follows. Section 2 introduces border management externalization in a European perspective. Section 3 explores soft law as a legal technique to externalize border management. Then, Section 4 discusses the tension between legal efficiency and legal validity during the shift to soft law at Europe borders. And finally, Section 5 concludes by suggesting a retuning of European border management from legal efficiency towards legal validity, or in other words from soft to hard law.

2 Border Management Externalisation

Borders are not only instruments to obstruct global migration flows but are rather emerging as instruments to articulate global migration flows (De Genova 2013). The ultimate aim of the actors involved in bordering is to monitor, differentiate and manage migration flows to respond to the political insecurity attached to such mobility (Bigo 2012). Moreover, in these processes of bordering it is possible to recognize other two significant transformation: a process of 'delocalization of the border' (Walters 2006) and of 'disaggregation of border functions' (Bigo 2012).

The EU and some Member States have developed a complex system of national and international institutions motivated by the ultimate objective to reinforce the control of European borders in order to diminish the arrival of migrants and the death at the borders (Steinhilper and Gruijters 2018). The EU and some Member States are 'stretching the border' until North Africa and Turkey to reinforce their external border (Casas, Corrubias and Pickles 2010).

Moreover, the EU designed a system that does not give access to most migrants to what Spijkerboer (2018) calls 'global mobility infrastructure'. The complexity of the migration management system transforms the borders of extra-EU neighbouring countries in spaces in which the EU and its Member States exercise state agency on both the neighbouring state and on migrants blocked in these countries (Agnew 2018). Thus, the border is transformed into a space, determined 'from distance' by national and EU governance structures, in which legal validity and international responsibilities are blurred (Moreno-Lax 2018).

These processes are part of a wider transformation particularly evident in the European contest of 'control from distance' (Bialasiewicz 2012) or 'contactless responsibility' (Giuffré and Moreno-Lax 2019). Hence, the actors involved in migration management aim at moving the control activities to third countries through a series of legal and quasi-legal instruments that are part of externalization policies (Moreno-Lax and Lemberg-Petersen 2019). By pursuing an externalization policy, states put in place soft law instruments to construct a securitized border through 'securitizing practices' (Campesi 2018) or 'border induced

displacement'(Moreno-Lax and Lemberg-Petersen 2019). On the one hand, the EU in the last 20 years has developed a legal and quasi-legal framework that encompasses directives, regulations, and bilateral and multilateral agreements with third countries. On the other hand, the policy framework was based on the concept of 'integrated border management' (IBM) characterised by the participation of different national and supranational actors and agencies (Campesi 2018).

In 1992, before the EU gained competence in this area, James Hateway sets out for the first time the characteristics of the *non-entrée* migration policies (Hathaway 1992). Over the last 30 years, affluent countries have pursued *non-entrée* policies that aimed at limiting the arrivals of migrants on their territory (Frelick, Kysel, and Podkul 2016; Zaiotti 2016). These deterrence policies occurred in the territory, or under the jurisdiction, of the home state or transit country (Gammeltoft-Hansen and Hathaway 2014). In so doing, affluent states aimed at externalizing migrants' management to third countries such as Turkey and Libya (Gammeltoft-Hansen and Tan 2017). As Benhabib (2020) suggests,

> [..] states are increasingly implementing deterritorialization tactics to avoid triggering international human rights obligations including excising land in an attempt to shrink territorial jurisdiction (78).

These transformations became evident in light of the so-called 'Migration Crisis' (De Genova, Mezzadra, and Pickles 2015) of 2015 during which it appeared evident to the EU and its Member States the need to reinforce border control as a response (Jeandesboz and Pallister-Wilkins 2016). To do so, the European Council during the Valletta Summit (2015) formalised at the political level a restrictive migration management policy focussed on borders.[1] More recently, the European Commission New Pact for Migration and Asylum continued to follow what Moreno-Lax (2018) called the ''rescue-through-interdiction/rescue-without-protection paradigm'' that has developed since 2006. By doing so, EU and national law and policy have been characterized by a tension between commitment to protection and deflection of protection of migrants in their home and transit countries (Tsourdi and Costello 2021).

The deflection of protection is obtained through externalization by soft law (Gammeltoft-Hansen 2018). The specific features of such instruments hypersimplified form of adoption and informality contributed to create a situation of legal uncertainty. The commitment to protect migrants' human rights is enshrined in EU treaties and in Member States' national constitutions. However, the management approach developed in Europe of 'control from distance' makes it very difficult to uphold in practice.

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1 European Council Action Plan 11-12 November 2015, *The Valletta Summit for Migration*. Available at https://www.consilium.europa.eu/media/21839/action_plan_en.pdf.

By externalising to Turkey and Libya the management of migration, the EU institutions and some of its Member States developed a system of contactless responsibility in which legal obligations are contested (Giuffrè and Moreno-Lax 2019). According to Giuffrè and Moreno-Lax (2019) responsibility arises '' […] (1) in situations of complicity; (2) through direction and control of the acts of third countries; and (3) independently, through actions attributable directly to them'' (101). Both the EU and Italy developed the political and legal conditions to avoid direct responsibilities prefigured by international and human rights law.

3 Bilateral 'Soft' Agreements

The use of soft law instruments to address EU and Member States external and internal relations is not a new phenomenon (Slominski and Trauner 2021; Terpan 2015). The increase use of soft law in the last 50 years is because states deal with more complex issues and technical problems (Ott 2021). This shift from hard law to soft law is a choice of form that often depends by political circumstances (Guznam 2005; Guzman and Meyer 2010). The reasons for such a compromise between efficiency and validity can be recognized in relation to the process at both EU and at national level toward a new type of governance in migration management (Cardwell 2018). This new governance uses different tools that operate outside legislative frameworks and often to address specific 'migration emergencies' (Ramji-Nogales 2017). This idea of governance developed in international relations (Smouts 1998) and political economy (Walters 2004) is now common feature of European migration governance (Pécoud 2020). This shift from hard law toward a multitude of soft instruments brings about two consequences. First, the enforceability of these new instruments is more intricate than hard law (Cardwell 2018). Second, in relation to migrants' rights, this new governance might complicate the appeal of migrants to national or European courts (Vara 2019).

Before identifying the limits of bilateral soft agreements is necessary to introduce the fundamental characteristics that exemplify an act of soft law. The term soft law (Klabbers 1996; Robilant 2006) can be considered a simplification (Chinkin 1989) once to include a diverse number of acts that have no binding legal effect for their form (Baxter 1980), but they have legal and political effects of great practical importance. Some negative effects of soft law have been recognised by Robilant (2006) that argued, ''[..] soft law tools often prove deficient as to implementation and effectiveness, at times triggering unpredicted and counterproductive effects'' (552). Moreover, as noted by Charlesworth (2012) in the context of international law, the use of soft law can have some antidemocratic outcomes because undermines the role of the parliaments as elected representatives of the

demos. It follows that the use of soft law in migration management is critical and poses important challenges for the protection of migrants fundamental rights and for the overall rule of law.

Bilateral soft agreements between countries are often adopted in the form of memoranda of understanding. This type of instrument is characterized by an informal negotiation and by a hyper-simplified form of adoption. They are used in particular circumstances to avoid the normally long processes that prefigure a parliamentary passage. While, a 'proper' international agreement prefigures the active participation of the Parliament that shall authorise by law the ratification of such international agreement in line with the constitutional and institutional principle of separation of powers (Algostino 2017; Wessel 2021). On the other hand, EU institutions can adopt bilateral soft agreements in the form of informal soft law acts as press conferences release, minutes and joint statements (De Witte and Smulders 2018). These informal acts cannot be found in the official journal yet legal scholars have characterised them as non-binding acts that do have some kind of legal effects (Snyder 1994).

Bilateral soft agreements are indeed the domain of the executive branch of government (Guzman 2005). In particular, these agreements are adopted when the executive wants to speed up the procedure and when it is potentially lacking legislative support (Guzman 2005). These kinds of agreements do not have to follow the ordinary legislative procedure but can overcome the procedure by adopting an executive type of agreement often in 'simplified form'. In particular, at EU level despite the important changes after the adoption of the Lisbon Treaty (Oliveira Martins and Strange 2019; Papagianni 2013) that empowered the European Parliament that was given powers of 'codecision' over migration policy (Hampshire 2016) and the European Court of Justice jurisdiction was extended on migration and asylum matters (Acosta Arcarazo and Geddes 2013). Yet the position of the Parliament *vis à vis* the Commission and the Council is still critical (Eckes 2014; Servent 2014; Vara 2018). This type of procedure prefigures a form of governance rather than government because it circumvents the control of the Parliament thus affecting the overall institutional balance (Vara 2019). In fact, the exclusion of the Parliament is problematic since its participation appears to be the key point in ensuring both transparency and legitimacy to the procedure.

By implementing a bilateral soft agreement, the executive power can evade the parliamentary *ex-ante* and *ex-post* control that may identify some criticism in the agreement (Vara 2018). The *ex-ante* control enables the negotiations on norms and values and the deliberation between political actors. While, the *ex-post* control refers to the exercise of the Parliament on the effects of the bilateral soft agreement. In particular, it raises issues on the accountability and the standard of reviewability (Petropoulou Ionescu and Eliantonio 2021). Further, transparency of the

negotiation represents a precondition for democratic legitimacy of soft instruments (Borrás and Conzelmann 2007; Gatti 2022). It can be understood as the access to information during all the stages of negotiation and the publicity of decision-making processes (Leino 2017).

Yet the reasons for concluding bilateral soft agreements are more diverse. First, these kinds of soft law agreements in migration law do possess some features that rend preferable their adoption: flexibility and promptness (d'Aspremont 2008). A good example of this are the Mobility Partnerships between the EU and third countries (Tittel-Mosser 2020). Second, it may simply be that the third country does not want to undertake binding obligations that can create an important economic and political leverage for the EU and its Member States. A good example of this are the Readmission Agreements with third countries (Cassarino 2007; Slominski and Trauner 2021). In fact, often destination countries design these instruments because third countries are strongly pushing for soft law non-binding agreements to avoid any structural and long-term commitment that would request a much longer procedure of negotiation and adoption (Tsourdi and Costello 2021). In the cases of Turkey and Libya, it is important that these are soft law commitments which both parties can threaten to terminate at any time (Boyle 1999).

4 European Borders between Legal Efficiency and Legal Validity

Usually, legal validity comes before legal efficiency or put it in another way words legal forms before political substance. Yet by many years, in particular in migration management, we are observing a shift from legal validity to legal efficiency (Triandafyllidou and Dimitriade 2014). Legal efficiency as noted by Irti (2014), ''implies the functionality of an organism, capable of producing the expected results'' (92). Triandafyllidou and Dimitriade (2014) suggest that,

> '' […] efficiency is more oriented towards successfully deterring unauthorised entry (or at least ensuring apprehension and return) and protection of vulnerable groups (asylum seekers and even irregular migrants) risks falling through the cracks of a deter-and-fence-off policy'' (25).

An efficient legal procedure does not have to respect the formal requirements of hard law procedures. This shift is part of a wider transformation that considers the contemporary challenges violent and rapid, and that cannot be overcome with traditional instruments of government (García Andrade 2016, 2018). In fact, we are moving from the government of phenomena to its governance. In doing so, some of the 'old fashioned' prefiguration's of our constitutions and treaties are becoming too

slow and formal that we shall embrace a governance approach. It seems that with the idea of migration governance the process of ordering things is being affected by multiple actors with fuzzy and overlapping competences that aim at addressing migration challenges in the most efficient and pragmatic way (Pécoud 2020).

For a bilateral migration agreement to be efficient it should comply with a number of conditions: (1) the form has to be 'soft'; (2) it has to be an executive initiative often in simplified form; (3) the negotiation has to be informal, quick and often secret; (4) the Parliament and the civil society have to be ousted off from the procedure; (5) monitoring and accountability mechanism have to be limited. This shift from legal validity to legal efficiency proves to be an important 'legal turn' that enables the externalization and securitization of European borders. In these new parameters of normativity substance substitutes form and in turn the category of efficiency replaces the one of validity.

These dynamics are displayed in both the EU-Turkey Statement and the Memorandum of Understanding between Libya and Italy. The former is an act of EU institutions or of Member States depending on the views of the General Court (Gatti and Ott 2019). The latter is a bilateral soft agreement between two countries in 'simplified form' (Reviglio 2020). Yet both soft agreements display a 'legal turn' from validity to efficiency. In so doing, the efficiency criterion, by replacing the one of validity, limits significantly the role of the Parliaments and thus affects the institutional balance and rule of law. Moreover, this turn to efficiency permitted to externalise to Turkey and Libya the containment of migration flows (Tsourdi and Costello 2021) by following policies of 'control from distance' (Bialasiewicz 2012) and of 'contactless responsibility' (Giuffré and Moreno-Lax 2019).

Nonetheless, during the adoption and the implementation of these agreements, in some cases, the legal validity of the agreement was not in line with the rule of law and with human rights obligations.[2] The consequences of the 'softening' of bilateral agreements from a legal perspective challenges fundamental constitutional principles of liberal democracies such as: transparency of the negotiations and further publication of the agreement; the legal basis and the procedure; the institutional balance with particular tension in the role of the Parliament (Ott 2021).

To address the so-called 'Migration Crisis' of 2015, the EU and its Member States have conceived different solutions (García Andrade 2013; Oliveira Martins and Strange 2019; Papagianni 2015). Among those the EU-Turkey Statement represents the most controversial. The bilateral soft agreement between the EU and Turkey has been adopted by a Statement of the European Council in the form of a press

2 Human rights protection and the EU external migration policy European Parliament resolution of 19 May 2021 on human rights protection and the EU external migration policy (2020/2116(INI)).

release[3] without following the ordinary procedure as provided by article 77 and 78 of the TFEU (Costello 2016; Peers 2016). The agreement contains different provisions. First, it is expected that all new irregular migrants who have made the crossing from Turkey to the Greek islands will be repatriated to Turkey from 20 March 2016. Second, the costs of the repatriation operations are to be understood as borne by the EU. Third, the Statement provides for a commitment by Turkey to adopt ''any measures necessary to avoid new sea or land routes of irregular migration'' to the EU.[4] Fourth, it is expected to be accelerated the disbursement by the EU of the EUR 3 billion funding allocated under the Refugee Facility. Once these resources are exhausted, ''and on condition that the above commitments are met'', the EU will mobilize additional funding from the facility for a further EUR 3 billion.[5]

By adopting this bilateral soft agreement the European Council as limited the prerogatives of the European Parliament that represents an organ of control that has to participate in the procedure as provided by article 218 of the TFEU (García Andrade 2018). Gatti and Ott (2019) suggest that the Statement has to be ascribed to the EU – and not to the Member States, as the EU General Court established in the joined cases NF, NG, and NM.[6] The first objective of the Statement was to reduce the number of migrants entering from Turkey to Greece. Once this decrease in numbers was achieved the agreement prefigured a voluntary humanitarian admission scheme with Turkey (Arribas 2016). Nevertheless, it is difficult to consider Turkey a first country of asylum or safe third country (Arribas 2016).

The political result was obtained, but it come with some legal ambiguities due to the nature of bilateral soft agreements. First, it needs to be examined how far these bilateral soft law measures have to follow the constitutional principles of conferral, institutional balance, transparency, and the overall rule of law (Peters 2011). Second, to maintain and respect the institutional balance, the European Parliament needs to follow its treaty prerogatives by monitoring and contributing to the overall coherence and consistency of EU external relations (Ott 2021). Thus, despite having significant political effects the Statement does not comply with many principles of EU law. Moreover, the incapacity of the EU to act as a valid monitor body to assess the correct applications of the Statement and of the

3 EU-Turkey Statement of 18 March 2016, in European Council Press Release 144/16 of 18 March 2016. Available at http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/.

4 EU-Turkey Statement of 18 March 2016, in European Council Press Release 144/16 of 18 March 2016. Available at http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/.

5 Ibid.

6 See on this T-192/6 *NF v European Council*, ECLI:EU:T:2017:128; T-193/16; *NG v European Council*, ECLI:EU:T:2017:129; T-257/16; *NM v European Council* ECLI:EU:T:2017:130.

conditions of migrants trapped in Turkey either in reception centres that were transformed in removal centres[7] or in very low-paid jobs in the Turkish garment and manufactory industries.[8]

Despite the legal ambiguities just described, the Statement has being negotiated without prefiguring any serious change. In fact, as pointed out in a letter of several civil society associations,

> After five years of sustained human rights violations, it is time to guarantee that the management and governance of EU-designed, funded and co-piloted sites are in line with fundamental rights and democratic accountability according to EU standards.[9]

Further, the active participation of the European Parliament in the renewal process was limited. In fact, while many criticisms were made by civil society, academics and practitioners the *modus operandi* remained unchallenged. In doing so, the main aim of the European Council was to maintain the overall system developed in the aftermath of the so called 'Migration Crisis' of 2015 to decrease the number of arrivals in Europe. Once again, the Statement was negotiated by following a principle of legal efficiency that has the merit to circumvent important principles of institutional balance and of the overall rule of law.

From a political point of view, the Italian government, with the Memorandum, has obtained the results it sought. There was, in fact, a very significant decrease in landings on Italian shores.[10] Despite these political results, the Italian government is proving to be legally responsible of the inhumane treatments that are reserved to migrants in Libyan detention centres as confirmed in the recent judgment of the Tribunal of Trapani.[11]

According to the reports of international organizations and NGOs operating in Libya, a disturbing reality emerges, made up of torture, sexual violence, blackmail

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7 Asylum Information Database, *Turkey: Country Report*. Available at https://www.asylumineurope.org/reports/country/turkey.

8 Business Human Rights, *Syrian Workers in Turkey's Garment Industry: Looking Back, Moving Forward*. Available at https://www.business-humanrights.org/sites/default/files/documents/turkey%20report.pdf.

9 Caritas Europa, Amnesty International, DRC, Oxfam, Human rights Watch, Greek Council for refugees, IRC, RRE, "Five years after the EU-Turkey Statement, European Civil Society demands an end to containment and deterrence at the EU's External Borders", 18 March 2021. Available at https://oxfam.app.box.com/v/JointCSOLetter18March2021.

10 Italian Minister of Interior, *Sbarchi e accoglienza dei migranti tutti i dati*, 10 September 2018. Available at http://www.interno.gov.it/sites/default/files/cruscotto_giornaliero_10-09-2018.pdf.

11 Judgment of the Tribunal of Trapani, 23 May 2019. Original judgment available in Italian at https://archiviodpc.dirittopenaleuomo.org/upload/4095-sentenza-gip-trapani-con-omissis.pdf.

and very difficult living conditions.[12] As Dunja Mijatović (2020) – Commissioner for Human Rights – has urged,

> I therefore call on the Italian government to urgently suspend the co-operation activities in place with the Libyan Coast Guard that impact, directly or indirectly, on the return of persons intercepted at sea to Libya until clear guarantees of human rights compliance are in place. They should also postpone any additional support to the Libyan Coast Guard until the latter can ensure respect for human rights.[13]

Despite all these accusations the Italian government renewed the Memorandum of Understanding with Libya without any substantial change on 2 February 2020.[14]

According to the article 80 of the Italian Constitution "The Parliament shall authorise by law the ratification of such international treaties if have a political nature, require arbitration or a legal settlement, entail change of borders, spending or new legislation".[15] Clearly, the article prefigures it the participation of the Parliament in ordinary law procedures to exercise its protective function over the executive. In fact, the two powers have to share the negotiation and stipulation of international acts (Cassese 1979). On the one hand, the intervention of the Parliament, evokes popular sovereignty (article 1 of the Constitution) exercised through the mediation of representation. On the other hand, a fundamental principle of constitutionalism, such as the separation of powers. Thus, a failure to comply with the provisions of article 80 of the Italian Constitution represents a violation which directly reverberates on article 1 of the Italian Constitution (Algostino 2017).

In light of what has been said, various elements emerge that may call into question the material effectiveness of the two bilateral soft agreements. It shall be clear that to assess the legal validity and the material effectiveness of soft law instruments is difficult. The informality of the procedures prefigured for these

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12 United Nations Support Mission in Libya and Office of the High Commissioner for Human Rights, *Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya*, December 18, 2018, Available at https://unsmil.unmissions.org/sites/default/files/libya-migration-report-18dec2018.pdf; Amnesty International, *Libya's Dark Web of Collusion*, 2018, Available at https://www.amnesty.org/download/Documents/MDE1975612017ENGLISH.PDF.

13 'Commissioner calls on the Italian government to suspend the co-operation activities in place with the Libyan Coast Guard that impact on the return of persons intercepted at sea to Libya', January 31, 2020. Available at https://www.coe.int/en/web/commissioner/-/ommissioner-calls-on-the-italian-government-to-suspend-the-co-operation-activities-in-place-with-the-libyan-coast-guard-that-impact-on-the-return-of-p.

14 'Migranti. Prorogato il controverso memorandum Italia-Libia, le associazioni protestano', Avvenire, 3 February 2020. Available at https://www.avvenire.it/attualita/pagine/rinnovato-memorandum-italia-libia.

15 Article 80 of the Italian Constitution. Available at https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

kinds of agreements complicates significantly the exercise. Further, the lack of monitoring prefigured in these agreements paves the way for abuses and situations of rightlessness (Mann 2018).

In the case of the Statement it is difficult to assess the validity of an instrument that it is not binding and does not prefigure any guarantee for the migrants involved in the pushback from Greece to Turkey. In this light, also from Turkey, it emerges a disturbing picture in which the EU finances Turkey that is not a 'safe country', given the extensively documented dysfunctional asylum system and the existing inequalities in access to protection (Peers and Roman 2016). For instance, Amnesty International reported that Turkey forcibly returned around 30 Afghans, after having forced them to sign "voluntary return" papers (Carrera and Guild 2016). The Statement does not mitigate the concern for the protection of migrants, notably because it does not put in place effective monitoring of Turkish commitments in the asylum field and in the reception of migrants (Peers 2016).

In the example of the Memorandum its spatial and temporal validity is difficult to trace because for example, the treatment conditions in Libyan detention centres are not recognised. In fact, if for validity of the Memorandum we mean its legitimacy, we have two problems. The first concerns the production of the law and thus the procedure followed in the simplified form in the form of soft law. The second concerns the application and observance of the rules contained in the Memorandum that according to reports by international organizations and NGOs presented above would demonstrate how it is a material ineffectiveness of the Memorandum.[16]

Overall, the two bilateral soft agreements represent important instances of the shift to soft law at Europe borders. In both cases, the aim of the executives was to pursue an informal and quick negotiation with the third country. Second, the Parliament and civil society had to be excluded from the negotiation in order to speed up the informal procedure. And third, to design an efficient agreement the monitoring and accountability mechanism have to be difficult to exercise in practice. In doing so, the protection of migrant's human rights is weak and at time characterized by hypocrisy (Greenhil 2016).

Indeed, there are reasons that suggest that in some geopolitical contingences soft law agreements represent the only possible solution to overcome 'migration emergencies'. This attitude is confirmed in the European Commission analysis of the Statement that is regarded as a ''game changer'' that ''had immediate and tangible results''.[17] However, if we follow the 'emergency' narrative (Huysmans

16 Judgment of the Tribunal of Trapani, 23 May 2019. Original judgment available in Italian at https://archiviodpc.dirittopenaleuomo.org/upload/4095-sentenza-gip-trapani-con-omissis.pdf.

17 European Commission. 'EU-Turkey Statement three years on', March 2019. Available at https://ec.europa.eu/home-affairs/system/files/2019-03/20190318_eu-turkey-three-years-on_en.pdf.

2000) developed in these years as a permanent 'state of exception' (Agamben 1998) it will become very difficult to respect the values enshrined in the EU treaties and European constitutions.

In other words, bilateral migration soft agreements should be adopted for a limited period of time. Meanwhile, during the period of the 'migration emergency', the executive with the support of the Parliament shall devise new solutions in form of hard law that respect the overall institutional balance and human rights obligations. In fact, as suggested by Wessel (2021), ''Perhaps one of the main advantages of hard international agreements is that it is absolutely clear that they are to be concluded within the procedural and substantive boundaries of EU law'' (81). In doing so, hard international agreements can be designed respecting the concept of legal validity and foreseeing instruments to strenghten the legitimacy and accountability of the bilateral soft agreement.

By contrast, the two bilateral soft law agreements, despite the numerous problems in their implementation, are renewed or negotiated without the involvement of the Parliament and of the civil society. It is critical that in the case of the Memorandum after three years from the adoption it has been renewed without any serious change. It is disturbing that in three years it was not possible to identity alternative solutions and to have a fruitful discussion between power of the state with the support of EU institutions. The situation in Turkey presents similar dynamics that indicate that probably the political substance of the Statement will remain unchallenged in the near future.

Geopolitical dynamics affect severely the possibility to draft hard international agreements with clear boundaries of EU and national law. This is a clear limitation of hard law agreements that paves the way for more efficient soft law agreements (Cardwell 2013). Yet these contingences can be recognised during a 'migration emergency' but cannot be accepted after more than three years of significant human rights abuses at Europe's borders.

5 Conclusion

The shift to soft law was developed to address the challenges posed by the so called 'Migration Crisis' of 2015. These agreements, is argued, are more adaptable to rapid changes of contemporary democracies and are able to address 'migration emergencies' in a more rapid and decisive way. However, the implementation of soft law agreements poses some problems in relation to the production of the law and to the political and judicial monitoring of its implementation. It seems that the legal efficiency of the agreement represents a more important criterion than the legal validity of the production and implementation of the agreement. The government

of such complex phenomena through hard law is too static and slow. Instead, governance instruments in the form of soft law are more streamlined with the political objective: the decrease of arrivals in Europe. This tension between legal efficiency and legal validity materializes in the EU-Turkey Statement and the Memorandum between Libya and Italy.

The Statement presents procedural problems due to is soft law form that creates the condition for contactless responsibility by avoiding any of direct contact between the rights holders and duty bearers (Besson 2012; Giuffré and Moreno-Lax 2019). Moreover, some of the conditions for the implementation of the Statement do not guarantee protection of migrants. In fact, EU funds a country that is not a 'safe', given its extensively dysfunctional asylum system and the existing inequalities in access to protection. These conditions worsen the protection of migrants, there the Statement does not prefigure an effective monitoring of Turkish commitments in the asylum field and in the reception of refugee and migrants. Yet overall the Statement achieved the results it sought the block of arrivals in Europe thus its efficiency remained intact. Nonetheless, its legal validity is more difficult to assess both for the procedure of adoption of the Statement but also for the lack of a substantial monitoring of the conditions of the migrants in Turkey detention centres (Carrera and Guild 2016).

The human rights violations in Libya are reported by numerous reports. Yet Italy and the EU continue to be responsible for financing detention centers and search and rescue operation to the Libyan coastguard by consciously ignoring the consequences for the migrants that are brought back to detention centers in Libya (Carrera and Guild 2016; Cusumano and Pattison 2018). In doing so, the conditions set out in the Memorandum in particular the protection of human rights of migrants are materially not effective. In fact, as pointed out by the recent judgment of the Tribunal of Trapani, Italy by handing to the Libyan coastguard the migrants are in practice committing a collective pushback of migrants in a state that is not considered safe by most international organizations.[18] One can therefore speak, reasonably, of an occurrence of material non-effectivity and of complicity for the participation in another state wrongful act by providing aid and assistance to Libya (Dastyari and Hirsch 2019; Guild 2022; Moreno-Lax, Ghezelbash, and Klein 2019).

From both bilateral soft agreements discussed in the article it emerges that their legal efficiency, at least of a certain mainstream vision of migration policy, which had as its main objective the reduction of arrivals to Europe, remains intact. The efficiency criterion requires that (1) the form has to be 'soft'; (2) it has to be an executive initiative often in simplified form; (3) the negotiation has to be informal,

18 Judgment of the Tribunal of Trapani, 23 May 2019. Original judgment available in Italian at https://archiviodpc.dirittopenaleuomo.org/upload/4095-sentenza-gip-trapani-con-omissis.pdf.

quick and often secret; (4) the Parliament and the civil society have to be ousted off from the procedure; (5) monitoring and accountability mechanism have to be limited. These are the conditions to negotiate, adopt and implement bilateral soft agreements that aim at externalising and securitising the borders of Europe legally efficiently.

In any case the article suggests reflecting on how legal forms are manipulated to externalise and securitise the borders of Europe by retuning border management from legal efficiency towards legal validity, or in other words from soft to hard law. To do so, it is important on the one hand to identify normative transformations that can guarantee a critical participation of the Parliaments and of the civil society. On the other hand, overcoming the permanent state of 'Migration Crisis' – developed in these years – by shifting from 'normative hypocrisy' to 'normative responsibility' to respect the European institutional and constitutional traditions.

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