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The paradoxes of the European migration “emergency”

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Abstract

The current European “migration crisis” occupies a legally ambiguous space between political rhetoric and emergency measures. This analysis examines whether migration flows could actually fall into the classical-conventional definition of “emergency” under the constitutional theory and the subsequent legal-political complications on the European Union democracy. It argues that this migration “emergency” reflects two main paradoxes as it is portrayed as an exceptional and temporally limited phenomenon. Despite these paradoxes, emergency measures are adopted, posing further questions around the European Union democratic deficit. The analysis concludes that in the case of the European “migration crisis” the emergency has become a permanent and paradigmatic form of government.

1. Introduction¹

The concept of migration is closely related to that of emergency. Indeed, the whole architecture of international migration law contributes to the formulation/perpetuation of the interdependence between these notions. While international law has played a significant role in coordinating many aspects of today's life, it lacks a coherent and comprehensive approach, when it comes to the movement of people ([J. RAMJI-NOGALES](#)). The failure to consider migration flows as part of contemporary reality is reflected in the European Union (hereinafter EU) migration policy, which perceives migration as an "emergency" for the EU. The [increased influx of refugees experienced by the EU in 2015](#), as well as [the subsequent population movements that have continued to the present day](#), have been characterized as "crisis" ([PERRE, DE VRIES, RICHARDS, GKLIATI](#)), framed as an "emergency". In this analysis, "crisis" and "emergency" as conditions only partially overlap and they are not used interchangeably. Specifically, a crisis is intended here to be a condition closely associated with deregulation/instability ([GERHARDT](#)), not necessarily an emergency (see para 2). Only certain categories of crises are characterized as emergencies, accompanied by the activation of the corresponding emergency measures, as happened in the case of the migration flows. Conversely, there are conditions other than crises that can qualify as emergencies (e.g. natural disasters). In this analysis, it is not aimed at criticizing the erroneous characterization of the migration flows of 2015 as a crisis ([N. PERRE, M. DE VRIES, H. RICHARDS, M. GKLIATI](#)), but rather at assessing whether it was further appropriately addressed as an "emergency" and subsequently dealt with emergency measures.

The current European migration "emergency" has two interconnected dimensions: the politico-institutional dimension and the sociolinguistic dimension.

The first (politico-institutional) dimension is elucidated by the following examples.

Given the unprecedented influxes of migrants since 2015, EU institutions pinpoint this year as the onset of the "crisis situation" and in May 2015 the [European Agenda on Migration](#) (hereinafter European Agenda) launched as a response. The European Agenda reflects a [primarily emergency-driven approach that breathes throughout the entire document](#). It is notable that the [first implementation package](#) on the European Agenda pertained to the implementation of Article 78 (3) of the Treaty on the Functioning of the European Union, which provides that «In the event of one or more Member States being confronted by an emergency situation characterized by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned» for an emergency relocation of 40,000 asylum

¹ This analysis is based on my contribution and the subsequent discussions at 2024 Migration ADiM Conference "Immigration and Public Power". I am grateful for the constructive feedback received from the participants, which have significantly contributed to the development of this work.

seekers from Italy and Greece. Furthermore, the [second implementation package](#) was also mainly oriented towards addressing the “crisis”.

On the other hand, almost ten years later - and quite recently -, on 10 April 2024, the European Parliament has approved the [Pact on Migration and Asylum](#), a package of major reforms to the EU’s asylum and migration rules, «[a system that manages and normalizes migration in the long term](#)». The [Regulation 2024/1359 addressing situations of crisis and force majeure in the field of migration and asylum](#) is a part of these new rules and establishes three special legal regimes for managing the asylum system in three exceptional situations: (a) mass influx (crisis), (b) instrumentalization (crisis), (c) force majeure, which allow a Member State to derogate temporarily from the standard asylum procedures. It is important to note that the lack of precise delineation regarding the definitions for the exceptional situations, coupled with the extensive margin of appreciation afforded to Member States, creates a context susceptible to the abuse of the provided options and the perpetuation of a permanent state of emergency.

Simultaneously, the second (sociolinguistic) dimension of the migration “emergency” operates in conjunction with the politico-institutional dimension to foster an environment of exceptionalism. In political and media debates, the migrants are construed as a threat to the European “normalcy”, which is depicted as economic security ([D. DAVITTI](#)) and the “[European way of life](#)” in general, revealing that the EU migration policy aims ultimately at maintaining the white domination of the continent and the accumulated wealth which sustains it ([J. REYNOLDS](#)).

This analysis posits that the European migration does not conform to the classical-conventional definition of “emergency” of the constitutional theory. Through a comprehensive examination of the concept of emergency, it asserts that the persistent portrayal of the so-called migration “crisis” in this manner exposes two main paradoxes and, ultimately, elevates emergency to a permanent and paradigmatic form of government for individuals governed by this framework (see para 2). This argument not only criticizes the prevailing management of the population movements towards Europe but also contends that the current approach further erodes EU democracy (see para 3).

2. European Migration as “emergency”: a “normal” and permanent “emergency”

“Emergency” is an elastic and ambiguous concept and for this reason it is quite difficult to give an exact definition ([M. NEOCLEOUS](#)). An indicative element of the difficulty of defining this notion is the fact that many legislations do not have a precise legal definition of what constitutes an emergency, while others have no legal definition at all ([A. ZWITTER](#)). Despite the ambiguity, two fundamental characteristics of emergency could be delineated:

Emergency may be considered a situation that is *exceptional* and *temporally limited*². Therefore, this migration “emergency” reflects two main paradoxes regarding its characterization as emergency.

The first paradox arises from the inherently “*exceptional*” nature of the notion of “emergency”. More specifically, the exception consists of a sudden event, outside the ordinary course of events, which could not have been foreseen. Therefore, the notion of “emergency” is contrasted with that of an assumed “normalcy” (i.e. the general rule, the ordinary state of affairs), as two separate phenomena ([O. GROSS](#)). This dichotomy is reflected also in a dichotomy between regular government and exceptional government ([FEREJOHN, PASQUINO](#)). In essence, the exceptional nature of emergency negates any possibility of constructing, in advance, a set of general, objective norms that will cover all future situations ([O. GROSS](#)). As a result, the state is compelled to change its structure in order to effectively resolve the emergency ([ZWITTER](#)) and eventually, restore the normal legal order ([J. FEREJOHN, P. PASQUINO](#)).

An analysis of European migration “emergency” as a stem of coloniality challenges prevailing narratives about the exceptional nature of migration flows. An emergency-driven approach serves as an important link between the contemporary EU migration policies and colonialism revealing that the implementation of emergency measures to racialized populations is not a new phenomenon. In the global colonial context, the state of emergency was linked with race, since it led to the construction of racialized communities to reinforce dominant state apparatuses or create new racial states ([J. REYNOLDS](#)). Meanwhile, the emergency provisions have facilitated the subordination and control of colonized (and racialized) communities through the appropriation of land and resources, as well as the suppression of labor movements ([J. REYNOLDS](#)). The legal technique based on emergency and racialized objectification, first developed in the colonies and then transplanted into international law, now appears in the EU migration policy ([T. SPIJKERBOER, L. ESPINOZA GARRIDO, S. MIESZKOWSKI, B. SPENGLER, J. WEWIOR; E. GUTIÉRREZ-RODRÍGUEZ](#)). Connecting the dots with the colonial legacy, the migration “emergency” of the European postcolony prioritizes the maintenance of (the imaginary of) a coherent white European nation and the relative wealth produced through exploitation and inequality ([J. REYNOLDS](#)).

At the same time, approaching migration as an exceptional phenomenon ignores the systemic nature of the situation. The increase in migration flows across the Mediterranean had been foreseen by migration experts as a result of conflicts and political instability in the countries of origin ([P. C. GATTINARA](#)), while globalization, technological developments, climate change ([B. SPENGLER, L. ESPINOZA GARRIDO, S. MIESZKOWSKI, J. WEWIOR](#)), economic inequalities and demographic change are also key drivers of the current situation ([P. C. GATTINARA](#)). In fact, the European migration “crisis” is mostly an effect of –other- push factors, such as political and economic crises or natural disasters ([O. GROSS](#)) and the

² The elements highlighted by the Author as fundamental characteristics of the emergency resonate with the approaches of Zwitter and Gross

supposed “unpredictability” is nothing more than insufficient preparation on the part of the EU. Even the Court of Justice of the European Union has recognized that there are serious structural shortcomings in the European asylum systems, despite the fact that it upheld the emergency ([C-643/15 & C-647/15](#)).

The second paradox is related to the *temporally limited* nature of “emergency”.

- (a) An emergency is supposed to be *concrete*, which means that it has a precisely defined beginning and end ([A. ZWITTER](#)). A common starting point for the migration “emergency” across EU cannot be identified, as some Member States had declared a (national) state of emergency many years earlier, placing the onset of the “crisis” at an earlier time (e.g. [Italy, Lampedusa Crisis, 2011](#)). Even if the beginning was identified in 2015, when the start of the “migration crisis” is determined, its end could not be predefined.
- (b) An emergency is supposed to be *urgent*, which implies a need for prompt action. Undoubtedly, the arrival of people on European shores is a tangible issue that requires immediate management. Nevertheless, a new procedural approach to migration law is necessary: an appropriately designed legal system that treats migration flows as a phenomenon that must be anticipated and regulated in a way that reflects a range of reasons for cross-border movement and offers safe and lawful means of movement ([J. RAMJI-NOGALES](#)).
- (c) An emergency is supposed to be *temporary*, depicting brief period. Passing the tenth year of the European migration “emergency”, it could definitely not be considered a brief period of time.

In view of the above-mentioned paradoxes, it is revealed that the population movements towards Europe in recent years do not fall into the classical-conventional definition of “emergency” of the constitutional theory and its continuous portrayal as such, both in politico-institutional and sociolinguistic terms, ultimately elevates emergency to a permanent and paradigmatic form of government for individuals subject to this regime.

3. European Migration as “Emergency”: Questions about the EU democratic deficit

In light of this, using a legal arsenal of emergency measures to manage the migratory flows has been anything but obvious. By choosing the route of “emergency”, the widely recognized criticism on the impact of its invocation on democracy supply further questions to the discussion about the [EU democratic deficit](#).

On the one hand, emergency politics at the European level is largely unregulated, since there is no comprehensive legislation, in the logic of the domestic “emergency constitutions” ([KREUDER-SONNEN](#)), providing an institutionally and temporally limited “state of emergency” for the sole purpose of preserving the *status quo ante*. As a result, even in cases of “emergency”, such as the European migration “emergency”, when further safeguards are

required, the political authority is –as per usual- diffused across multiple levels of governance, among technocratic, non-majoritarian bodies. A salient example is the adoption of provisional measures in case of sudden inflow of nationals of third countries, under Article 78 (3) of the Treaty on the Functioning of the European Union, as mentioned above, which falls within the competence of the Council, on a proposal from the Commission, while the Parliament assumes a clearly consulting role. Consequently, a fragmentary approach of situations characterized as “emergencies”, assigned to democratically deficient institutions leaves permanent marks on the EU’s authority structures that –further- undermine its democratic legitimacy ([C. KREUDER-SONNEN](#)).

On the other hand, the dispersal of the invocation of the “emergency” between the EU institutions and the Member States raises risks of accountability. For instance, the new Crisis and force majeure Regulation, [despite being part of a set of measures that purportedly aims to ensure a common EU framework of migration](#), affords an excessively broad margin of appreciation to the Member States. Therefore, the process is marked by the fact that the Member States exert uneven power in shaping the EU migration policy ([G. CAMPESI](#)). The migration “emergency” seems to be unfolded through complex, multi-level institutional dynamics, both national and supranational. These intricate institutional and political relationships between the EU and the Member States also frustrate a migration policy, which could be scrutinized.

4. Concluding Remarks

This analysis has examined the classical-conventional definition of “emergency” of the constitutional theory in the context of European migration, highlighting the legal-political complications emerged regarding the EU democratic deficit. The European migration “emergency” is based on the fictitious dichotomy between emergency and normalcy, even though it creates permanent emergency conditions for those to whom it applies. Although the misuse of emergency law poses a potential threat to many populations in Europe, “emergency” has become a paradigmatic form of government targeting migrants, where different sets of rules address different populations through racialized mechanisms. Similar to colonial regimes, this “normal”, permanent state of emergency for the non-citizens serves to maintain the white dominance and the exclusionary preservation of wealth. Thereby, it reveals the instability of the EU legal order. Looking at this paradoxical migration “emergency” as an echo of colonial governance and its unregulated invocation provides an insight for analyzing the European migration policy and, subsequently, the new package of reforms to the EU’s migration rules and its future implementation.

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