ARTICLES

EXECUTIVE MIGRATION GOVERNANCE AND LAW-MAKING IN THE EUROPEAN UNION: TOWARDS A STATE OF EXCEPTION

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TABLE OF CONTENTS: I. Introduction. – II. The rise of executive migration governance in the EU. – III. Emergency: when soft law creates law. The example of the hotspots. – IV. From emergency to exception: on the abnormal normalisation of executive governance. – V. Conclusion.

ABSTRACT: In the name of effectiveness, European Union (EU) governance has long departed from the traditional approach of governing through law, venturing onto new paths of making and discharging policies across different policy fields. Through new and creative governance, networked governance, and governance through agencies, flexibility and functionalism have become the new paradigms of EU governance. This is particularly striking in the interiors area, including internal security and migration, where the fuzziness of the constitutional framework leaves wide margins to new governance approaches to intervene to "fill the gaps". Failing to achieve harmonization through law (because of the high sovereign sensitivity and politicization), EU governance turned to harmonization through practices, trying to increase trust and boost cooperation on a practical level playing field. While legislative production regulating the core of EU asylum and migration is still scarce (i.e., regulating the substance of migration), hard law provisions mushroom when it comes to empowering agencies, regulating operational cooperation, or harmonizing practices across the EU (i.e., regulating the administration of migration). The actual management of migration occurs then within this latter executive/administrative dimension. Analysing (executive) migration governance in terms of whether it achieved its original intents (effectiveness and depoliticization) would only tell something about its goodness of fit, and little about its goodness. In light of the incessant crises that have hit the EU, this *Article* reflects on the close-to-Schmittian state of exception, that is fuelling an increasingly creative governance in the Union.

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I. INTRODUCTION

The lack of an exhaustive EU legislative framework addressing migration substantively, even in the aftermath of the 2015 migrant crisis, has left ample manoeuvre to the executive to intervene to regulate the area with new governance approaches. The measures proposed by the Commission not only lacked legal determination, perpetrating legal uncertainty at the time of operationalizing common actions, but also side-lined the legislative branch of government by taking on to create new norms that are progressively gaining the force of law.

The first part of the *Article* relies on (new) governance scholarship and retraces the empowerment of the EU executive in the area of migration due to endemic strenuousness in legislative intervention and ensuing gaps in legislation. It moves on to examine how crises exacerbate such dynamics though the example of the hotspot approach proposed, among other measures, by the European Commission to tackle the migration crisis. Based on a distinction between states of emergency and states of exception derived from Carl Schmitt's political philosophy, the *Article* finds that hotspots constitute not only an emergency measure, but also an exceptional measure in Schmittian terms. The last section of the *Article* builds on the hotspot example to make the case of an exercise of (executive) public power that is hardly compatible with the rule of law fundamentals of liberal democracies.

The *Article* concludes with a normative argument that calls for reinforcing (the substance of) political deliberation processes within the legislative branch of government.

II. THE RISE OF EXECUTIVE MIGRATION GOVERNANCE IN THE EU

The intricate institutional architecture of the Area of Freedom, Security and Justice (AFSJ) projects a series of conflicting instances at the background of border management activities, being not only influenced by the tension between supranationalism and intergovernmentalism, but also perturbed by clashing political agendas (e.g. securitization v. civil liberties and global justice) and governance choices (e.g. technocracy v. politically represented management). At intergovernmental level, the different national and subnational interests introduce an additional layer of political complexity, while, at supranational level, the variety of actors involved contribute to an ever-increasing fuzziness of the institutional landscape. Next to Member States with their territorial sovereignty and political independence prerogatives, EU institutions and increasingly EU agencies put forward a wide set of goals, ranging from policy implementation to reformative aims, from community integration and coordination to strategic and diplomatic aspirations.

The institutionalization of border, migration and security cooperation among EU Member States and the creation of a constitutional dimension to the AFSJ exacerbated some trust and cooperation difficulties derived from the sensitivity of the matters at stake. The everlasting tension between integrative fervours and sovereign reservations resulted in an unclear attribution of competences at source and left unanswered the practical question of how to develop a common freedom, security, and justice action, when the core of law-and-order stems directly from the sovereignty – i.e., the exclusive competence and sole responsibility – of the Member States. Competence-allocation issues,[1] amplified by the increase in actors and structures involved, not only create a fuzzy constitutional architecture at source, but also perpetrate legal uncertainty at the time of operationalizing common actions.

At input level, although the Union and the Member States share competences in the Area of Freedom, Security and Justice, several aspects of border and migration management are still largely controlled by Member States in an intergovernmental fashion. The legislative architecture of the EU migration policy, in fact, limits shared competence in matters relating to passports, IDs, determination of volumes of admission of third-country nationals, family law with cross-border implications, operational police cooperation,[2] and other areas in which – due to sovereignty implications and political sensitivity – supranationalization is perceived to run contrary to Member States' interests.[3] In addition, the Council retains its prerogatives to adopt measures to ensure administrative cooperation between the relevant departments of the Member States and to issue strategic guidelines relating to legislative and operational planning in the Area of Freedom, Security and Justice,[4] signalling an extensive Member States' presence also in the implementing phases of migration and border control policies. Next to the many aspects pertaining to national law, EU legislation on migration and asylum is also framed by the pre-existing international and European regional law on the subject. Its development is thus bound by both infra-EU and supra-EU legal systems.

[1] For claims and examples of unclear competences see S Carrera, L den Hertog and J Parkin, 'The Peculiar Nature of EU Home Affairs Agencies in Migration Control: Beyond Accountability versus Autonomy?' (2013) European Journal of Migration and Law 337; M Cremona, 'External Unity, Institutional Complexity and Structural Fragmentation: The Evolution of EU External Competence in the AFSJ' in M Telò and A Weyembergh (eds), *Supranational Governance at Stake*. *The EU's External Competences caught between Complexity and Fragmentation* (Routledge 2020).

[2] Arts 77(3), 79(5), 81(3), 87(3) TFEU.

[3] See, e.g., TA Börzel and T Risse, 'From the Euro to the Schengen Crises: European Integration Theories, Politicization, and Identity Politics' (2018) Journal of European Public Policy 83.

[4] TFEU, arts. 68, 74.

All the abovementioned constraints contributed to a scarce substantive legislation in EU asylum and migration.[5] Only few legislative measures adopted at EU level are of a substantive, normative, kind, i.e., introducing or regulating rights, obligations, and interests.[6] Whilst significant (and by some even considered remarkable[7]), these substantive legislative measures appear less substantive if one considers the watering down that they underwent in the Council, which impeded the comprehensive approach intended by the Treaty.[8] Finally, such legislative measures mainly set minimum, baseline, standards and intervene only on recast directives or small sectors of migration,[9] allowing for considerable national discretion in their implementation and leaving many substantive aspects unaddressed. The most recent legislative reform,[10] enacted at the time of writing after a decade long standstill, stepped up the use of legislative tools in the EU's governance of migration and asylum. The reform, however, introduces mainly procedural novelties and leaves again important substantive aspects unaddressed.[11]

While legislative production regulating the core of EU asylum and migration is still scarce (i.e., regulating the substance of migration), provisions mushroom when it comes to empowering agencies, regulating operational cooperation, or harmonizing practices across the EU (i.e., regulating the administration of migration). The actual management of migration occurs then within this latter executive/administrative dimension. Alongside "management legislation", the EU has made ample use of non-legislative, soft law,

[5] See, in addition, a thorough analysis of the dissensus pertaining to asylum and migration that constrains action in these areas in N Trimikliniotis, *Migration and the Refugee Dissensus in Europe: Borders, Security and Austerity* (Routledge 2019).

[6] This is for example the case of the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, and, to a lesser extent, the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

[7] G Menz, 'The promise of the Principal-Agent Approach for Studying EU Migration Policy: The case of External Migration Control' (2015) Comparative European Politics 307, 309.

[8] PJ Cardwell, 'Rethinking Law and New Governance in the European Union: The Case of Migration Management' (2016) ELR 10.

[9] *Ibid.* 10.

[10] Comprised of the legislative measures envisaged in the 2020 Pact on Migration and Asylum, i.e., a new Asylum and Migration Management Regulation, a new Screening Regulation, a new Crisis and Force Majeure Regulation, as well as a recast Asylum Procedures Regulation, and a recast Eurodac Regulation.

[11] E.g., the situation of irregular migrants, or the situation in the hotspots. Note also that many other legislative proposals are stalemated or have stranded.

measures such as tools, guidelines, blueprints, pilots projects and the like. It is noted that "in recent years the Commission has put forward only very few concrete legislative proposals and even when migration is seen as a "crisis", the response has not been a legislative one".[12] In the name of effectiveness, EU governance has departed from the traditional approach of governing through law, venturing onto new paths of making and discharging policies across different policy fields. Through new forms of governance, networked governance, and governance through agencies,[13] flexibility and functionalism have become the new paradigms of EU governance, chiefly when justified as responses to crises.[14] This is particularly striking in the interiors area, including internal security and migration, where the fuzziness of the constitutional framework leaves wide margins to new governance approaches to intervene to fill the gaps.[15]

What consequences does this have? How can we evaluate the EU's "executive lawmaking" in the area of migration?[16] One immediate answer is to assess it against the intent behind its creation. Forms of governance that are less reliant on traditional law-making are generally considered desirable because they allow for flexibility and prompt responses to functional needs, less politically loaded decision-making and greater effectiveness. For instance, EU agencies were established with the declared aim of separating the technical/bureaucratic/regulatory decision-making from the central executive/political dimension. But analysing (executive) migration governance in terms of whether it achieved effectiveness and de-politicization would only tell something about its goodness

[12] PJ Cardwell, 'Rethinking Law and New Governance in the European Union: The Case of Migration Management' cit. 10.

[13] R Dehousse, *The "Community Method": Obstinate or Obsolete?* (Palgrave Macmillan, 2011). For evidence of this in the area of asylum and migration, see: E Tsourdi, 'Beyond the 'Migration Crisis': The evolving role of EU agencies in the administrative governance of the asylum and external border control policies' in P Slominski, J Pollak (eds), *The Role of EU Agencies in the Eurozone and Migration Crisis: Impact and Future Challenges* (Springer International Publishing 2020). L Karamanidou and B Kasparek, 'Fundamental Rights, Accountability and Transparency in European Governance of Migration: The Case of the European Border and Coast Guard Agency Frontex' (Respond Working Paper 59-2020). See also focused studies on soft law in the area of migration (among many: P Slominski and F Trauner, 'Reforming me softly–how soft law has changed EU return policy since the migration crisis' (2021) West European Politics 93. M Reviglio, 'The shift to soft law at Europe borders: Between legal efficiency and legal validity' (2023) Global Jurist, 23. F Casolari, 'The unbearable lightness of soft law: on the European Union's recourse to informal instruments in the fight against irregular immigration' in F Ippolito, G Borzoni, and F Casolari (eds), *Bilateral Relations in the Mediterranean* (Edward Elgar Publishing 2020).

[14] V Moreno-Lax, 'Crisis as (Asylum) Governance: The Evolving Normalisation of Non-Access to Protection in the EU' (Queen Mary Law Research Paper 423-2024) forthcoming in European Papers, as part of a Special Section on Schengen and European Borders.

[15] J Scott and D M Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union' (2002) ELJ 1.

[16] J Rossi, 'State Executive Lawmaking in Crisis' (2006) Duke Law Journal 237. Z Payvand Ahdout, 'Enforcement Lawmaking and Judicial Review' (2022) Harvard Law Review 937.

of fit, and little about its goodness. The latter is assessed below against the European liberal democratic orthodoxy.

III. Emergency: when soft law creates law. The example of the hotspots

In the wake of the 2015 migrant crisis, the European Commission published the European Agenda on Migration, proposing a set of short and long-term measures to address the shortcomings of the common European migration policy. Most measures were on non-legislative kind. Among these, the Commission envisioned the setting up of "a new 'Hotspot' approach, where the European Asylum Support Office, Frontex and Europol will work on the ground with frontline Member States to swiftly identify, register and fingerprint incoming migrants. [...] Those claiming asylum will be immediately channelled into an asylum procedure where EASO support teams will help to process asylum cases as quickly as possible. For those not in need of protection, Frontex will help Member States by coordinating the return of irregular migrants. Europol and Eurojust will assist the host Member State with investigations to dismantle the smuggling and trafficking networks".[17] Conceived as an *immediate* response, the hotspots were regarded as a measure that would step up the application of existing legislation on asylum-seekers and irregular migrants' fingerprinting, i.e., the Eurodac Regulation.[18] Nine years later, at the time of writing, we know that the scope of the hotspots has extended well beyond that of *swift* fingerprinting and funnelling.

While endorsing the proposed actions, the European Council prompted the Commission to draw up "a roadmap on the *legal*, financial and operational aspects of these facilities",[19] signalling its awareness of the legal and policy vacuum in which the hotspots project was taking shape. Subsequent policy documents[20] by the Commission intervened to regulate the details of the functioning of the hotspots that were being set up in Greece and Italy. Hotspots were loosely inscribed under the legal framework of the relocation scheme established pursuant to art. 78(3) TFEU (allowing for provisional measures tackling migration-related emergencies), but it was not proposed to develop a self-standing legal instrument that would comprehensively regulate their functioning. The table below illustrates how far from the legislative level the hotspot approach was introduced.

[17] Communication COM(2015) 240 final from the Commission of 13 May 2015 to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European Agenda on Migration, p. 6.

[18] Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac'.

[19] European Council Conclusions of 25-26 June 2015.

[20] "Explanatory Note" sent by Commissioner Avramopoulos to Justice and Home Affairs Ministers on 15 July 2015 www.statewatch.org, summarised in Communication COM/2015/0490 final from the Commission of 23 September 2015 to the European Parliament, the European Council and the Council on Managing the refugee crisis: immediate operational, budgetary and legal measures under the European Agenda on Migration, Annex II.

	EU treaties					No link
	Secondary legislation					Only ex-post mentioning
→ Hard law	(non-legally binding) Politically binding policy documents (e.g., Council conclusions)		European Council Conclusions of 25-26 June 2015			
Soft law ←	(non-legally binding) General policy documents (e.g., green papers, agendas, etc.) and specific soft law (e.g., guidelines, handbooks, etc.)	2015 Agenda on Migration by European Commission			Commission Communication on managing the refugee crisis of 29 September 2015	
	Unofficial documents (e.g., inter-institutional correspondence)			Explanatory Note by JHA Commissioner of 15 July 2015		

TABLE 1. Positioning of the hotspots in a simplified classification of EU hard to soft law instruments.

These policy documents outlined that "an external border section should be considered to be a "hotspot" for the *limited period of time* during which the *emergency or crisis* situation subsists and during which the support of the "hotspot" approach is *necessary*".[21] The hotspots –established on the request of the hosting Member State and coordinated by an EU regional task force – would provide frontline Member States with operational support in the form of:

1. Registration and screening of irregular migrants by Frontex;

2. Debriefing of migrants (supported by Frontex) for criminal analysis (supported by Europol);

3. Stepping up investigations, information and intelligence exchange on facilitation of irregular transit and stay within the EU, as well as secondary movements;

4. Asylum support, in line with the joint processing concept;

5. Coordination of the return of migrants (supported by Frontex);

6. Interpretation.[22]

The Commission purported to base such activities on existing secondary legislation: fingerprinting according to the Eurodac Regulation; asylum support based on another emergency measure, i.e., the relocation scheme (adopted by the Council as a binding Decision based on art. 78(3) TFEU), and CEAS legislation; EU agencies' operational support

[21] Explanatory note cit.

[22] *Ibid.*

according to their respective governing legislation. On the ground, however, the hotspots could not function as a sum of the whole of the actors involved, operating according to their existing mandates. Soon after their set up, the fuzziness of the hotspots' regulatory framework gave rise to a number of legal (and political) issues, including the insufficiency of procedural safeguards and redress mechanisms, the lack of human rights-related incident reporting and predefined remedial procedures, as well as the unclear mandate delimitation of the participating entities which exacerbated responsibility, accountability and legitimacy issues.

The hotspots were a new concept, posing new challenges and thus necessitating new solutions. These, however, did not come in the form of legislative adjustments to the new reality, but as yet more collating and patch working functional responses. For instance, the 2016 European Agenda on Security expanded the scope of the hotspots from emergency mechanisms through which the EU would fight migrant smuggling and contain unauthorized secondary movements to structural checkpoints aimed at crime prevention and fighting. As envisaged by the Commission, the hotspot workflow would need to include "integrated and systematic security checks" aimed at identifying individuals posing a (terrorist) threat to EU security, i.e., physical and databases checks and, in some cases, through interviews and internet and social media.[23] Another change in the scope of the hotspots came with the infamous EU-Turkey Statement of March 2016. To implement its new return policy, the Commission called for a reconfiguration of the Greek hotspots "with the current focus on registration and screening before swift transfer to the mainland replaced by the objective of implementing returns to Turkey".[24] By the end of 2016, just a year after their establishment, the official language depicting the hotspots turned from humanitarian reception centres to detention and crime prevention facilities.

The concept of "hotspot" was included in subsequent migration and asylum related legislation, starting with the 2016 amendment of the Frontex Regulation.[25] However, a legal characterization of the hotspot still lacks. The hotspots are only vaguely 'defined' in Frontex Regulation as area of cooperation and management of disproportionate migration,[26] leaving wide margins of manoeuvre to repurpose the hotspots and redefine the procedures

[23] Communication COM(2016) 230 final from the Commission of 20 April 2016 to the European Parliament, the European Council and the Council delivering on the European Agenda on Security to fight against terrorism and pave the way towards an effective and genuine Security Union.

[24] Communication COM/2016/0166 final from the Commission of 16 March 2016 to the European Parliament, the European Council and the Council. Next operational steps in EU-Turkey cooperation in the field of migration. See commentary by European Council for Refugees and Exiles (ECRE), 'The implementation of the hotspots in Italy and Greece. A study' (2016).

[25] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard.

[26] Now Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard, art. 2(23): "hotspot area' means an area created at the request of the host Member State in which the host Member State, the Commission, relevant Union

governing them. It signals however a worrying trend whereby the soft law elaboration of legal norms by the executive later gains binding force.[27] Inserting the word "hotspots" in EU legislation *ex post* without delineating the legal rules regulating such centres achieves only to crystallise their existence, to acknowledge their legal reality, while leaving them void of any (legal) determination. This creates problems when trying to navigate the myriad of overlapping national, European, and international law provisions that interweave in individual cases in the hotspots, and forces to reflect on the *need* of having a comprehensive legal determination of the hotspots and their functioning. After all, the hotspots were set up with flexibility, immediateness and functionality in mind, and certainly, they did contribute to achieving some of the envisioned objectives (large-scale fingerprinting, relocation –although relatively unsuccessful, return). Originally a form of soft-law, the hotspot approach has also contributed to create law.[28] For instance, building on the hotspot experience, Italian law introduced the concept of "crisis points" in 2017,[29] starting to regulate (from 2018) the conditions for detention of migrants therein.[30] Until then, detention was arbitrary and unconstitutional.[31] The experience of the hotspots also informed the newly adopted Screening Regulation.[32]

The need for legal determination of the hotspot approach at EU level stems from the fact that it regulates constitutionally guaranteed interests –or in EU terminology, interests protected by primary law – or rights under international law. It has been remarked that international refugee law leaves "little room for manoeuvre and make use of the flexibility of modes of new governance. This view of what law should be accomplishing to meet the Treaty goals means that there is no "gap" to be filled by new governance or "shadow" of

agencies and participating Member States cooperate, with the aim of managing an existing or potential disproportionate migratory challenge characterised by a significant increase in the number of migrants arriving at the external borders'.

[27] PJ Cardwell, 'Rethinking Law and New Governance in the European Union: The Case of Migration Management' cit. 18. J Scott, 'In Legal Limbo: Post-legislative Guidance as a Challenge for European Administrative Law' (2011) CML Rev 330. C F Sabel and J Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU' (2008) ELJ 274-5.

[28] See similar reflections by V Moreno-Lax, 'The Informalisation of the External Dimension of EU Asylum Policy: the Hard Implications of Soft Law' in E Tsourdi and P De Bruycker (eds), *Research Handbook on EU Migration and Asylum Law* (Edward Elgar Publishing 2022).

[29] Consolidated Act on Immigration (TUI) of Italy, as amended by Law 46/2017.

[30] Decree Law 113/2018 of Italy.

[31] ECRE, 'The implementation of the hotspots in Italy and Greece. A study' cit. 13 . Might not be unconstitutional anymore but still not fully compliant with the principle of legality as it leaves it to ministerial decrees to determine the structures and modalities of detention, see: Associazione per gli Studi Giuridici sull'Immigrazione, 'Country Report: Hotspots' (31 May 2023) asylumineurope.org

[32] Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14 May 2024 introducing the screening of third-country nationals at the external borders.

legislation to step in if alternative means are not found".[33] Yet, the hotspots *de facto* intervene in migrants' liberty of movement.[34] Detention might me functional and/or necessary, but it cannot derive from executive discretion, as only a *legal* norm can regulate or restrict fundamental rights. Such basic principle is recognised also under EU law:

"Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".[35]

The provision is not only underlined by the principle of legality, which requires laws limiting individual rights and freedoms to be certain, i.e., to have a proper legal basis and clear legal effects, but also introduces a reservation to legislation,[36] as it is foreseen that *only the law* can limit the exercise of rights and freedoms. This is in line with the constitutional traditions of liberal democracies which uphold freedom and core human rights above most other rights, values, or priorities and in which limitations to individual freedom can only stem from primary sources, and only on strict conditions of necessity and proportionality. This precludes secondary rules such as administrative decrees or orders, political agendas, policy documents and the like, to regulate constitutionally guaranteed interests. However, what we observe is a contrary trend, whereby "emergency politics occasions the creation of new administrative powers and the redistribution of existing powers of governance from proceduralized processes to discretionary decision, from the more proceduralized domains of courts and legislatures to the more discretionary domains of administrative agency".[37]

IV. From emergency to exception: on the anomalous normalisation of executive governance

A vast body of literature has already explored and dissected the link between crises and executive empowerment.[38] Constructivist works have contributed by analysing the building

[33] PJ Cardwell, 'Rethinking Law and New Governance in the European Union: The Case of Migration Management' cit. 9.

[34] And in other rights, such as the right to dignity, security, as well as the prohibition of degrading treatment and procedural rights.

[35] Charter of Fundamental Rights of the European Union [2012], art. 52(1).

[36] 'Riserva di legge', from Italian law: certain matters can only be regulated by primary laws and not by administrative decrees, government decrees, etc. See similar difference in US between norms and orders.

[37] B Honig, *Emergency Politics: Paradox, Law, Democracy* (Princeton University Press 2009) 67.

[38] C Fatovic, *Outside the Law: Emergency and Executive Power* (Johns Hopkins University Press 2009); E A Posner and A Vermeule, *The executive unbound: after the madisonian republic* (Oxford University Press 2011); and, offering conflicting evidence: T Ginsburg and M Versteeg, 'The bound executive: Emergency powers during the pandemic' (2021) ICON, 1498. See also, for further literature on the issue, N Bolleyer and O Salát, 'Parliaments in times of crisis: COVID-19, populism and executive dominance' (2021) West European Politics, 1103. A

process and consequences of crisis narratives,[39] legal and political philosophy brought insights on the "state of exception" underlying migration (and other) policies,[40] while constitutionalist legal literature examined the effects of executive governance on rule of law and democratic fundamentals.[41] Engraining the different strands of literature allows to grasp the constructive, transformative potential of soft governance, which is both shaping and shaped by positive law.[42] Building on such scholarship, this section furthers the discussion on the increasing use of executive governance in the EU in the area of migration –and its aftereffects. These latter are appraised against Schmitt's idea of a state of exception, i.e., the suspension of the normal rule of law, as decided by the ruling authority.[43]

As seen with the example of the hotspots, the urgency and exceptionality of the migrant crisis justified, in the opinion of its proponents, the use of functional, innovative, ad hoc measures to cope with the unprecedented influx of migrants of 2015. The need for an *immediate* response, in turn, legitimised the designing (and operationalisation) of policy solutions by the executive branch, i.e., the Commission and the Council acting with its political hat on, rather than in its capacity of legislator (as well as specialised agencies for operational execution). The abnormality of the measure, however, does not lay in the fact that the executive took the lead in times of crisis *per se.* That, in fact, is what the executive is *normally* mandated to do. The abnormality of the hotspots approach derives from the distorting and moulding of what was an *emergency* into what has become an *exception*. In a state of emergency, the rules regulating public interests, rights and duties are suspended, derogated from, modified – for the duration of the emergency. The possibility of

Cozzolino, 'Reconfiguring the state: Executive powers, emergency legislation, and neoliberalization in Italy' in I Bruff and C B Tansel (eds), *Authoritarian Neoliberalism. Philosophies, Practices, Contestations* (Routledge 2020).

[39] M Stępka, *Identifying security logics in the EU policy discourse: the "migration crisis" and the EU* (Springer 2022); C Cantat, A Pécoud and H Thiollet, 'Migration as Crisis' (2023) American Behavioral Scientist; V Bello, 'The spiralling of the securitisation of migration in the EU: from the management of a 'crisis' to a governance of human mobility?' (2022) Journal of Ethnic and Migration Studies 1327.

[40] L Caraceni, 'Dalla "detenzione" al "trattenimento" dello straniero: un lessico giuridico spregiudicato per eludere le garanzie dell'habeas corpus' (2022) Cultura giuridica e diritto vivente 8; K Nordentoft Mose and V Wriedt, 'Mapping the Construction of EU Borderspaces as Necropolitical Zones of Exception' (2015) Birkbeck Law Review 278; M P A Murphy, 'The Double Articulation of Sovereign Bordering: Spaces of Exception, Sovereign Vulnerability, and Agamben's Schmitt/Foucault Synthesis' (2021) Journal of Borderlands Studies 1; D Davitti, 'Biopolitical Borders and the State of Exception in the European Migration 'Crisis'' (2018) EJIL 1173; B Spengler, L Espinoza Garrido, S Mieszkowski and J Wewior, 'Introduction: Migrant Lives in a State of Exception' (2021) Parallax 115.

[41] R Schütze, 'Sharpening the Separation of Powers through a Hierarchy of Norms? Reflections on the Draft Constitutional Treaty's regime for legislative and executive law-making' (EIPA Working Paper 2005/W/01); D Curtin, 'Challenging Executive Dominance in European Democracy' (2014) ModLRev 1.

[42] G De Búrca and J Scott (eds), *Law and New Governance in the EU and the US* (Bloomsbury Publishing 2006), 6: 'On a constructivist analysis, soft law is understood as a transformative tool capable of changing behavior [and rules, I would add]'.

[43] As developed in 1922 by C Schmitt, *Political theology: Four chapters on the concept of sovereignty* (University of Chicago Press 2005).

introducing such extra-ordinary regime is normally[44] already foreseen in the legal order and the conditions for its use are usually predefined. In that sense, the resorting to emergency measures do not necessarily deviate from the normal democratic order, as these are included and foreseen in the *norm*, and as such, they are not exceptional. On the contrary, in a state of exception (of the Schmittian kind), measures *extra ordinem* would subvert the norm, superimpose over the established order, breaching its very foundational rules in a (more or less conscious) attempt to establish a new order. As such, these measures are ab-normal (in its etymological meaning, outside of the norm).

To exemplify in a comparative fashion, amongst the measures proposed to respond to the 2015 crisis, the relocation scheme adopted by the Council can be seen as an emergency measure, the hotspot approach as a measure of exception. The relocation scheme was adopted as a special legislative measure pursuant to art. 78(3) TFEU (allowing for provisional measures tackling migration-related emergencies), derogating from the normal legislative decision-making dynamics, but still within the confines of the modalities foreseen by the legal order in place (and by art. 78 TFEU specifically). In its substance, the relocation scheme derogated from the existing Dublin legislation, again, compatibly with the existing conditions regulating emergency measures. Among these conditions, of utmost importance is the fact that emergency legislation cannot derogate from primary law (while it can provisionally derogate from secondary legislation). The hotspots, on the other hand, were introduced as a policy/political initiative that indeed impinged on fundamental rights and interests protected by primary EU law as well as international law,[45] and as such should have stemmed from the legislator. It is ab-normal in the liberal democratic order that executive policy measures create legal concepts, legal situations, legal statuses and spaces, or otherwise regulate conflicting public interests, even more so when in tension with constitutionally guaranteed liberties. For the sake of accuracy, the hotspot approach might constitute a space of exception even if it had been codified and determined in a self-standing legal instrument –thereby satisfying the formal and procedural requirements of the democratic order-, as its substantive aspects may still be found in breach of foundational higher-rank rights, values, and freedoms.[46]

From their very establishment, some academic and policy commentators suggested that the hotspots should be regulated by targeted, self-standing legislation.[47] While there

[44] On the assumption of liberal democracy.

[45] And national law in liberal democracies.

[46] L Caraceni, 'Dalla "detenzione" al "trattenimento" dello straniero: un lessico giuridico spregiudicato per eludere le garanzie dell'habeas corpus' cit. 11: "Sul terreno delle migrazioni oggi, in nome proprio dell'emergenza – vera, presunta o indotta poco importa –, si emanano *leggi* che creano un diritto speciale, violano trattati internazionali, sovvertono regole che ci siamo impegnati a rispettare e diritti fondamentali su cui poggia l'intero sistema di valori democratici, primo fra tutti la libertà personale" (emphasis added).

[47] LA De Vries, S Carrera and E Guild, 'Documenting the Migration Crisis in the Mediterranean Spaces of Transit, Migration Management and Migrant Agency' (September 2016) CEPS Paper in Liberty and Security in Europe 94 aei.pitt.edu; D Neville, S Sy and A Rigon, 'On the frontline: the hotspot approach to

is no way to know if such legislation would have constructed those spaces as they are today, or if they would look completely different, what is certain is that they would be a *normal* fruit of the democratic deliberative process, they would be legally determined spaces that leave little space to contestation of legitimacy or constitutionality. And now that hotspots are being crystallised in law (although not yet determined), one could further wonder if such ex-post legal cover does not come as an acknowledgment of a situation that might be easier to legalise than to revert. The trend is particularly worrying considering that such non-legally determined situation sways individual rights-sensitive decisions.

The hotspots are not the sole example of the executive successfully creating legal concepts, situations, or regimes that are then slowly englobed in the legal order –a process where the executive branch discretionally creates the legal regime it will operate in and in which the legislative branch is increasingly relegated to an ex-post legitimising authority –a process that is gaining resemblance to the ex-post validating role of the judiciary vis-à-vis the activities of the executive.[48] Other examples from the area of migration include: the narrative around "facilitation" of illegal migration, whereby the Council distorts the legal distinction between solidarity and smuggling are now likely to be codified in law;[49] the use of non-legal categories such as "pre-frontier", "external border area" or "registration area" that *de facto* create a different legal regime in those spaces,[50] while de

managing migration' (2016) Study. European Parliament, Policy Department for Citizen's Rights and Constitutional Affairs www.europarl.europa.eu

[48] DR Stengle and JP Rhea, 'Putting the Genie Back in the Bottle: The Legislative Struggle to Control Rulemaking by Executive Agencies' (1993) Florida State University Law Review 415; J Abourezk, 'The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives' (1977) Indiana Law Journal 323.

[49] Economic profit differentiates smuggling, under international law, from other activities. The 2002 EU Facilitation Directive (Directive 2002/90/EC) uses the term 'facilitation', likely confused with humanitarian assistance or search and rescue. All facilitation is understood as a criminal activity, with depenalization in case of humanitarian exceptions left to the voluntary consideration of Member States. The Council's Presidency is now calling for a further narrowing of the distinction between facilitation and solidarity (see Statewatch, *EU: Council lowers threshold for migrant smuggling prosecutions* www.statewatch.org. For an academic analysis, see: V Mitsilegas, 'The normative foundations of the criminalization of human smuggling: Exploring the fault lines between European and international law' (2019) New Journal of European Criminal Law 68.

The distinction between smuggling/facilitating and trafficking is also increasingly blurred in the EU official narrative; see M Gkliati, 'Registering Humanity: The EU's Plan to Halt Citizen-led Response to the Migration Crisis' (21 March 2016) Border Criminologies www.law.ox.ac.uk. D Rodrik, 'Solidarity at the Border: How the EU and US Criminalize Aid to Migrants' (2021) Berkeley Journal of International Law 81; M Martin, 'Prioritising Border Control over Human Lives: Violations of the rights of migrants and refugees at sea' (June 2014) Euro-Mediterranean Human Rights Network (EMHRN) Policy Brief www.statewatch.org.

[50] See e.g. Associazione per gli Studi Giuridici sull'Immigrazione. Le zone di Transito e di Frontiera, *Commento al decreto del Ministero dell'Interno del 5 agosto 2019 (G.U. del 7 settembre 2019, n. 210)* www.asgi.it. This terminology effectively blurs the concept of border, and consequently of jurisdiction, enabling the application of the border procedure foreseen in the Screening Regulation to an undefined area. See also K S Follis, 'Vision and Transterritory: The Borders of Europe' (2017) Science, Technology, & Human Values 1003.

jure belonging to one territory and jurisdiction, hence to the *normal* legal regime applicable therein; and the mandate creep of specialised agencies that see new tasks conferred upon them during the operationalisation of crisis responses – tasks that are hardly compatible with their legal remit (again, just to be legalised ex-post).[51]

The absence of a robust legislative intervention at source leaves wide margins for executive experimentalism and governance through soft law to intervene to fill the gaps.[52] These measures tend to show their shortcomings in terms of compatibility with existing legal and democratic fundamentals, i.e., because of their ad hoc nature, narrow functional scope, or rushed through designing, they are often found to lack minimum safeguards, redress mechanisms, monitoring and accountability processes, or to be conflicting with other legislation (output legitimacy). But more importantly, executive governance is increasingly intervening in the space of regulation of public interests, creating the embryos of new legal situations, and leading the practice of what is later on locked in in law. In itself, such tipping of the balance of public powers towards the executive branch gives rise to issues of input legitimacy as it erodes the normal process of political deliberation that occurs within the legislative. It directly violates the principle of legality for it allows the legal norm to be integrated by a mechanism that leaves to the executive "the due to define completely the structure and the limits of the safeguard of the interests involved".[53]

While executive empowerment is a common trend to other liberal democratic regimes, when this occurs in the EU constitutional order it is even more problematic, as, on the one hand, the EU level of governance is more distant from its constituencies, and, on the other hand, the law and policy that derive therefrom are more "sticky" vis-a-vis their addressees.[54] Democratic deliberation is more cumbersome at the EU level, because it requires a wider consensus not only between political parties but also between different national political cultures. Where such deliberative process is rendered even more difficult by the sensitivity or politicisation of the matters at stake, like in the case of migration, we observe an even greater marginalisation of the legislative action to the benefit of executive dominance. To prove the point, suffice it to observe that other (less politically loaded) crises resulted in a peak of legislation enacted to tackle them,[55] while the migrant

[51] N Perkowski, M Stierl and A Burridge, 'The evolution of EUropean Border Governance through Crisis: Frontex and the Interplay of Protracted and Acute Crisis Narratives' (2023) Environment and Planning D: Society and Space 110.

[52] J Scott and DM Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union' cit.

[53] P Capoti, 'Il delitto di usura "bancaria"' (Doctoral thesis, University of Padua, 2010). Argument made on the integration of criminal law norms, but applies also in general.

[54] F de Witte, MCEL presentation (Maastricht 2023). Characterized EU law as 'sticky'.

[55] K Armstrong, 'New Governance and the European Union: An Empirical and Conceptual Critique' in G De Búrca, C Kilpatrick, J Scott (eds), *Critical Legal Perspectives on Global Governance: Liber Amicorum David M. Trubek* (Hart Publishing 2013) 267. Also, T A Börzel and T Risse, 'From the euro to the Schengen crises: European integration theories, politicization, and identity politics' cit.

crisis has mostly been addressed by means of policy responses deemed *necessary*. But invoking necessity is an intrinsically "political claim, not an existential condition".[56]

I argue that *precisely* where political deliberation resulting in legislative measures is difficult, we should have more of it. The regulation of public interests, especially when sensitive and highly politicised, *should* stem from lengthy discussions, cumbersome deliberation processes, and an attentive ponderation of the interests involved. The resulting comprehensive legal determination would leave little gaps for different narratives of the (legal) situation, or undetermined norm shaping by the executive. Demarcating good politics, those deliberating with the aim of balancing different public interests, from an arbitrary use of public power is needed to live up to the rule of law standards of the European liberal democratic orthodoxy.

V. Conclusion

The hotspot approach is a novel and controversial policy tool that has been used by the EU to manage the migration crisis since 2015. However, the legal status and functioning of the hotspots remain unclear and contested, as they operate in a complex and dynamic legal framework that involves multiple actors and levels of governance. This *Article* highlights the need for a clear and comprehensive legal determination of the hotspots and their procedures. Without such a legal determination, the hotspots risk becoming sites of arbitrariness, insecurity and injustice.

The hotspots approach qualifies as a measure of exception that subverts the normal democratic order and infringes on fundamental liberties, the balance of public powers and the principle of legality. The executive branch effectively shapes new legal concepts, situations, and regimes that are later on validated by the legislative and judicial branches, thus bypassing the normal process of democratic deliberation and political accountability. A way forward for addressing these issues is to ensure that any future measures of emergency is subject to rigorous legal scrutiny and public debate, avoiding legal codification of norms that were not legally deliberated by the lawmaker –so not to become measures of exception.

The *Article* calls for more substantive legislative intervention and political deliberation in the regulation of public interests, especially when they are sensitive and highly politicised, as in the case of migration.

[56] CASE Collective, 'Critical approaches to security in Europe: A networked manifesto' (2006) Security Dialogue 443.