

Europe's Faustian Bargain

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On Thursday, news broke that in a radical change of course the [German government had agreed to incorporating the previously rejected Crisis Regulation into the EU's new asylum and migration pact](#). Framed as [allowing for more 'flexibility' in case of migratory surges](#), the Crisis Regulation's now very likely adoption [will, in effect, suspend the EU asylum system as we know it for the time being. After all, recorded sea arrivals are significantly up, though not \(yet\) at 2015 levels](#). A crisis in need of regulation, if you will.

There is, in a sense, nothing new about [this latest regulatory attack on the rights of migrants and refugees](#). The last decade has seen a constant ebb and flow of headlines proclaiming yet another new or resuscitated border crisis, flooding our screens with heart-breaking [tales of drowned children](#), [separated families](#), and [guards with guns](#) in front of huddled masses of blank, scared faces. Each time a new 'crisis' is proclaimed, governments adopt harsher, ever more inhumane measures to ["deter"](#) those who cannot be deterred, for they clearly fear nothing, not even death. Each time, [lefty lawyers](#) will diligently point out the inhumanity, ineffectiveness and illegality of the newest addition in the toolbox of migrant deterrence. And each time, this is to little avail, with governmental enthusiasm for ever more restriction remaining unwavering.

In this blogpost, I highlight the dangerous fallacy that underpins our tolerance for the illegality that has come to characterize contemporary migration policy. In particular, our failure to oppose the constant expansion of the limits of the law that occurs in the name of crisis and political necessity rests on the mistaken assumption that we have nothing to lose in this race to the bottom.

Leveling Down to the Point of Oblivion

The last few years have witnessed rising contempt for legal constraints on governmental action in the realm of border control, evidenced most clearly by [the consistent trend of leveling down and hollowing out the rights of migrants and asylum seekers](#). Yet, 2023, in particular, has seen a rapid escalation in the kind and severity of governmental responses to increased human migration, with the right to asylum now being effectively abolished for large swaths of those seeking safety and protection. Thus, earlier this year, the UK made headlines with its [Illegal Migration Act](#) which [abolished the right to asylum for 'irregular' migrants and allowed for indefinite detention without bail or judicial review](#). The US followed suit shortly thereafter, substituting its Title 42 policy, which had legitimized fast-tracked expulsions for public health reasons during the course of the pandemic, with a "carrots" and "sticks" strategy. [The stick was the resuscitation of Trump's asylum ban](#) for individuals who failed to apply for asylum in countries they passed on their

journey to the US; a measure that was repeatedly [declared illegal](#) and [condemned by the very administration who re-introduced it](#).

The Crisis Regulation would permit similar practices through its provision on 'migration instrumentalization;' [a novel legal concept designed to legitimize the denial of the right to asylum](#) to irregular border crosser who are thought to be instrumentalized by hostile governments to put pressure on the EU and its Member States. The instrumentalization paradigm was first utilized by countries such as Latvia, Lithuania and Poland to justify the adoption of legislation that authorized pushbacks of asylum seekers at the Belarusian border. [Latvia and Lithuania](#) have recently doubled down on this practice, despite the [CJEU declaring](#) their legislation incompatible with the [Asylum Procedures Directive](#) last year. Nonetheless, the concept has found its way into the Crisis Regulation, with [only its exact scope and applicability remaining a point of contention](#).

Most of these measures are widely acknowledge to violate either EU or international human rights law, and/or the rule of law itself (see, *inter alia*, [here](#), [here](#), [here](#)).

Nonetheless, there remain plenty of voices who will dispute that any of this is truly illegal. Each time a new measures is adopted, [lawyers and policy makers will highlight the details and complexity of this or that policy, making the kind of lawyerly distinctions and nuances that is their bread and butter](#). I don't meant to discredit this kind of work; after all, determining a policy's legality is a complex and context-dependent enterprise. Yet, this attempt at line-drawing appears increasingly delusional when both the purpose and net-effect of a measure is to disapply a foundational limit on what counts as permissible governmental action in the realm of migration control, of which the right to asylum, notably, is one of the most long-standing and vital ones.

Of Crisis and Necessity

Some might say that harping on about the illegality of border control measures ignores that we are clearly confronting a crisis. It is commonly assumed that [governments should be given more leeway in moments of crisis than during times of normalcy](#). Some believe this includes the adoption of measures that would ordinarily be considered illegal. [It is, of course, true that migrant arrival numbers are significantly up compared to the last few years](#). Yet they are still noticeably lower than when the migrant 'crisis' was first declared almost a decade ago. As such, there is really nothing new, sudden, or unforeseeable about this that would allow, let alone necessitate, the continued invocation of the crisis concept in the above detailed legal sense, ie as a legitimizing device for the adoption of exceptional measures that violate or derogate from certain fundamental principles of governance.

Of course, this might be missing the point. Whatever us [lefty lawyers](#) might think, governments are faced with mass arrivals and no legally available measure is capable of stemming the flow. Yet, they must clearly do something, lest they be voted out of office and displaced by their right-wing opposition. So, whatever the law or our fundamental principles might demand, pure political necessity, indeed perhaps the survival of democracy itself, demands that we built that wall, control those

borders, separate those families, cage those children, cease all rescue operations at sea, and suspend the right to asylum.

As we watch the cruelty of this reasoning unfold on our screens, we comfort ourselves that whatever governments are doing with regards to [them will never affect us](#). Whenever another border control measure that violates our fundamental principles passes into law, we tell ourselves that loosening the law's limits will not unleash arbitrary governmental power upon us: after all, we are not migrants and likely never will be (though Ukraine's fate should cast some doubt on this). Yet, this thought process – which disassociates the health of our system from the havoc and destruction that contemporary migration policy wreaks on our principles of governance – rests on a mistaken and dangerous fallacy.

The Fallacy of Us vs Them

In [Origins of Totalitarianism](#), the Jewish political philosopher Hannah Arendt chronicles how the European nation-state system, understood as a system of political organization premised on the rule of law and the principle of equality, collapsed. She notes, *inter alia*, a creeping lawlessness that spread across the Continent when governments were confronted with an ever-growing population of individuals whom they did not want to include but could not rid themselves of either [281]. Instead of governing them on the basis of the rule of law and the principle of equality, governments transferred the matter to the police which governed by an “arbitrary [...] rule against which there are no lawyers and no appeals” [286]. Arendt frames this embrace of a lawless rule as a crucial step towards the totalitarian collapse that ensued. After all, the “clearer the proof of [the nation states'] inability to treat stateless people as legal persons and the greater the extension of arbitrary rule by police decree, the more difficult it is for states to resist temptation to deprive all citizens of legal status and rule them with an omnipotent police [290].”

To be sure, we cannot equate the problems of 2023 with those of 1935. Nor do I wish to argue that the illegality that marks the contemporary border regime necessarily puts us onto a path into totalitarianism. Nonetheless, Arendt's analysis suggests that allowing governments to consistently flout the restraints we ordinarily impose on the exercise of the political power comes at a price, and potentially a very steep one. With each new measure that disregards what were previously considered hard limits to legitimate government authority, we normalize granting government and its agents more power and discretion than we know (and have learned the hard way) is wise to do.

It shouldn't pacify us that this disregard for our principles occurs in the realm of border control. The underlying assumption is that border control measures are exclusively deployed against undeserving, territorially excluded aliens whom we can easily identify and whose well-being we can legitimately and safely disregard. Yet, this ignores that contrary to popular imagination, [the border does not end at our territorial frontier but reaches both into the territory and lives of those around us](#). Once the territorial dividing line falls away, the question of who *they* are and who *we*

are becomes much harder to answer. More often than not, racially sanitized national identities that do not map onto a citizenry's actual cultural, ethnic, or religious composition fill the gap. As a result, [they easily become those who do not look, speak or act the way the imagined national we does, irrespective of their actual legal status or material belonging to the political community.](#)

The aggrandizement of governmental power in the name of shielding us from an ill-defined *they* matters to the extent that just like some 70 years ago, we see right-wing parties gaining political strength, even as or perhaps precisely because they openly oppose the very principles and values that are supposedly foundational to our political-legal orders. Whether it is the US, UK, Italy, Poland, Hungary, France or even Germany, anti-democratic and illiberal ideologues are swept into power on electoral platforms rife with xenophobic and racist rhetoric and policies. Do we really believe that these individuals and the parties they lead will respect the principles whose continuous violation we so carelessly tolerate?

Towards a New Political Imaginary

So where does this leave us? Migrants will keep coming, governments will keep pushing back, more dead babies will be swept up at our shores, and more right-wing extremists will be voted into power. And so continues the toxic carousel of deterrence politics, avoidable human death, and right-wing opportunism until eternity. The current state of politics leaves little room for thinking otherwise. Yet, there is nothing inevitable or irresolvable about the problem we are confronted with.

Arendt also highlighted that the problem that facilitated the collapse of the nation-state system was almost entirely one of their own making: only with the self-administered hardening of national borders – both territorial and metaphysical in kind – did the intractable problem of the non-deportable and non-includable undesirables arise. And so it is today: the crises we are facing at our borders are man-made. They are the direct result of conceiving our communities as walled kingdoms with fixed identities under siege, not malleable, well-funded and powerful systems of political organization with porous boundaries that allow for both continuity and change. There is nothing inevitable about our choice to pursue the former instead of the latter. And we would do well to remind ourselves that [passports, detention centers, militarized fences and walls](#), and indeed, state-administered, centralized immigration control itself, [are all very recent inventions](#) that were, lest we forget, [driven almost exclusively by racism and xenophobia.](#)

Of course, the political implementation of a decisively inclusionary approach to border control would be costly, both in monetary and societal terms. From funding the administrative capacities to process tens of thousands of arrivals to facilitating their settlement and societal inclusion, managing migration within the structure of the modern state system costs a pretty penny. But [it is not the case that the walled kingdoms we are currently pursuing are cheap either.](#) And what we are currently paying for is human death and suffering as well as the abrogation of the very principles that supposedly make us who we are. This is a Faustian bargain we must resist striking.

