Migrations and Security. The Problematic Circularity 'Philosophy, Law and Politics'

Migraciones y seguridad. La circularidad problemática 'filosofía, derecho y política'

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ABSTRACT: This article focuses on the problematic nexus migration-security, which calls into question classical philosophical-legal and political categories (State, law, territory) dating back to the origins of the modernity. The analysis of Hobbes' and Grotius' insights allows to grasp the distance between the modern framework and the post-modern scenarios. The contemporary complex societies are characterized by fundamental socio-legal transitions, in particular as regards the notion of "privacy", and by the progressive implementation of a new model of law and politics relations that is closely connected to the crucial role played by technology. In the light of this horizon, the migration issue, and its relations with the political phenomenon called "populism", should be fundamentally understood in a cultural perspective even before its immediate sociological, political and legal projections.

KEYWORDS: Migrations, security, law, politics, culture.

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MIGRATION FLOWS AND SECURITY: THE FUNDAMENTAL THESIS

As it is well known within the current philosophical-legal, political and public debate the issue of migrations represents one of the most important and discussed issue. It can be considered from multiple perspectives, frequently depending on specific situations or political urgencies and sometimes based on a mere superimposition between the question of migrations and the concept of multiculturalism, with the risk to forgot or to dismiss the most important aspects. Beyond the fruitless controversies rooted in local communities, this means that the profile concerning the relation migration-"security", or better the problems of security connected to the migration flows, is to be considered only as an aspect of a bigger and much more complex conceptual framework.

At a philosophical-legal level the migration issue, including its corollary concerning security, involves theoretical aspects and a global question of "justice", which is closely connected to security policies. In other words, international migration can be considered "a test bench [about] the normative limits of institutional order, its contradictions and internal tensions". In fact, migrations allow "to call into question classical political categories and models" including the thorny relation between migration policies and global justice: within a globalized scenario the idea of justice "as a relationship between citizens of the same country and the State" is unfit. That is to say "nation-state cannot constitute the basic unit of the theories of justice […]. [A]n integral approach [based on] the complex and interconnected forms of structural inequalities and [beyond] the borders of national sovereign states is required" (Velasco & La Barbera, 2019: 1; see also Truijllo 2007).

Starting from these remarks the fundamental thesis of this contribution is that the heart of the migrations issue, including the profile related to security, belongs to the *cultural dimension*. In other words, within the contemporary post-modern societies (Peréz-Torres, 1994) the challenge of migrations security, in the light of Beck's paradigm of "risksociety" (Beck, 1992: 46[1]) and beyond the questionable model of "clash of civilizations" proposed in the past (Huntington, 1993, 1996), represents a *cultural question* even before a strictly legal or political problem (Bombelli, 2015a).

Moving from the hypothesis concerning the close relation between social contexts and conceptual categories, we can understand the political and philosophical-legal roots of the migration issue and especially its possible political manipulation. More precisely, we can better grasp any aspects of the nexus migration-security *only* by placing it within two theoretical references: on the one hand the historical-conceptual development of modernity, on the other the contemporary cultural and sociological transition.

In a very schematic way the contribution will focus on elements related to this complex scenario. For the sake of clarity it can be summarized through five key-passages, in order to draw at least a conceptual line: 1) an outline of the modern horizon; 2) the two levels of security; 3) the crisis of the modern framework; 4) the nexus globalization-migrations (including the connected socio-legal aspects); 5) the thorny question of populism.

[1] In a dense passage Beck points out: "As the risk society develops, so does the antagonism between those afflicted by risks and those who profit from them. The social and economic importance of knowledge grows similarly, and with it the power over the media to structure knowledge (science and research) and disseminate it (mass media). The risk society in this sense is also the science, media and information society. Thus new antagonisms grow up between those who produce risk definitions and those who consume them" (Beck 1992: 46).

FIRST KEY-PASSAGE: AN OUTLINE OF THE MODERN HORIZON (THROUGH HOBBES AND GROTIUS)

First of all, we have to pay attention to the crucial nexus modernity-security. In contrast with the classical and medieval period, when the idea of "security" was closely intertwined with a compact social structure, the modern scenario deeply reshapes the entire framework. The *specific politico-legal* question of security could be considered as a typical problem of modernity: somehow the entire western modernity arises as a question of "security".

The conceptual point is represented by the *polarity* modernity-security. On closer inspection at the theoretical level, the political-legal modern framework, including the question of security, is rooted on a sort of axial-geometrical scheme. It takes the shape of a hierarchical structure, which necessarily encompasses the fundamental role played by law and *at the same time* by the political power. More precisely, modernity is dominated by a philosophical-legal model, which could be called *geometria juris*. Inspired by the philosophical horizon drawn by the Cartesian perspective and through the contribution offered by Gottfried Leibniz (Leibniz, 2017; Bombelli, 2015b), modernity believes in the possibility to conceive the society as a whole and to plan the social models as well as their regulation systems based on the capital idea of "legal order".

From a philosophical-legal point of view, this crucial passage elicits a profound reshaping of fundamental categories: in particular, the concepts of space and time. The necessity to dominate a delimited spatial dimension, which is deeply different from the classical or medieval context, emerges in order to prevent and control the social complexity. Accordingly, the adoption of appropriate legal tools, that is to say the building and implementation of a very articulated politico-legal system in principle unquestionable, becomes a fundamental step in the construction of an efficient and centralized legal system. In this way, starting from Westphalia (1648), a rich, geometrical and intertwined architecture of law and political powers develops. It increases so far as the role of the State gains importance and becomes more and more effective.

These are the essential elements underlying the articulation of the modern scenario. In this contribution it is possible only to outline a short historical glance and cannot analyze the complex construction process of the State that historicians call the process of "State-building". At a philosophical-legal level, this dynamic was supported and legitimated by important contributions, from Jean Domat (1722), inspired to the Cartesian perspective, to Jean Bodin (1967 [1576]), and from Huig de Groot (1625), also known as Grotius, to Robert Joseph Pothier (2019). All these authors are real milestones that make up the process of building the articulated relation of law and politics underlying the modern State.

In particular, the crucial point is represented by the hendiadys State-territory or, more precisely, State-borders. This dynamic evolves according to the equation 'modern grammar of the borders=modern grammar of security'. In other words, the borders (space) dominion as a control policy is the *conditio sine qua non* of the public (i.e. political) security. It elicits a long series of corollaries: the identification, selection and legitimation of the legal subjects; the demarcation of the political powers and competences; the role of the Courts in the light of the rising balance of the public powers. Within this perspective, the norms produced by the State, more and more historically understood as abstract legal devices, play a fundamental role for *ruling and*

guiding the political power *as well as* the social processes, *hence* the social security. This is the conceptual scheme that includes the nexus State-abstract norms) which is starting to fail nowadays. It seems unable to face epochal changes and, *in primis*, the migration flows.

SECOND KEY-PASSAGE: THE LEVELS OF SECURITY

The previous remarks have highlighted the crucial connection of modernity and security. It could be translated in the symmetric pair State-security and involves at least a double level: a) *an internal level (internal security);* and *b) an external level (external security)*.

a) *Internal level*. The fundamental position concerning the "internal" security, that is to say security within the territory and the borders of the State, is expressed in Hobbes' theory. The Hobbesian perspective represents a pivotal point for the development of the modernity and is a real milestone about the modern concept of security. Starting from the fundamental and anthropological dimension of "fear", in his *Leviathan* the English philosopher firstly establishes in few dense words a decisive point:

> The final cause, end, or design of men (who naturally love liberty, and dominion over others) in the introduction of [the] restraint upon themselves, (in which we see them live in commonwealths,) is the foresight of their own preservation, and of a more contented life thereby; that is to say, of getting themselves out from that miserable condition of war, which is necessarily consequent[…]to the natural passions of men, when there is no visible power to keep them in awe, and tie them by fear of punishment to the performance of their covenants, and observation of [the]laws of the nature. (Hobbes, 2001 [1651]: 85; chapter XVII, *Of the causes, generation, and definition of a Commonwealth*, par. 1, *The end of Commonwealth, particular security*).

We can infer that every form of social life (i.e. commonwealth) is based on the sentiment of fear. Accordingly, society is *always* rooted in more or less articulated systems of legal obligation (rules, law, regulations and so on), which *hence* entail the introduction/imposition of models of security. At the same time, Hobbes introduces another concept: the notion of "safety", which has not exactly the same semantic field of "security". In an important passage of the *Leviathan*, the English philosopher points out:

> The office of the sovereign, (be it a monarch or an assembly), consisteth in the end, for which he was trusted with the sovereign power, namely the procuration of *thesafetyof the people*; to which he is obliged by the law of nature, and to render an account thereof to God, the author of that law, and to none but him. But by safety here, is not meant a bare preservation, but also all other contentments of life, which every man by lawful industry, without danger, or hurt to the commonwealth, shall acquire to himself. (Hobbes, 2001 [1651]: 542, emphases in the text; chapter XXX *Of the office of the sovereign representative*, par. 1 *The procuration of the good of the people*).

It is remarkable to underline the complexity of the Hobbesian perspective. According to the English philosopher, there is a difference and at the same time a sort of overlap between the notions of "security" and "safety". The former represents a legal protection of the individual dimension, the latter elicits the constant intervention by the sovereign for providing all that people need. In other words, the sovereign protects the people *through the law*, in the direct and immediate sense of the protection of their existence,

only when he is *also* able to offer a general satisfaction.[2] As regards the question of security (or *safety*), Hobbes' position marks a decisive step: it marks the theoretical range or field of the entire modern debate, which is rooted in the close relation among law, politics and the idea of security.

b) *External level*. This level involves the external security of the State. More precisely, the fragile dimension of peaceful relations *among* the States: a constantly problematic aspect even after and beyond the peace of Westphalia. It has to be considered with attention. The treaty of Westphalia could be understood as an intelligent attempt to combine a pluralistic society, that is to say the Europe of the seventeenth century. The attempt was fundamentally based on the process of "immunisation" or "neutralization" of the social difference. It has been basically done according to a religious perspective and on the basis of the identification State (politics)-religion confirming the complex role played by the religious sphere from the origins of the modernity until its current (possible) sunset. Furthermore, we should consider the entire scenario underlying this framework: the religious-political struggles of the seventeenth century were rooted in a *common* (European) *ethos* dating back to common cultural and religious traditions. Indeed, only shared horizons offer the conditions for the political-religious contrasts.

In spite of the political balance formalized in Westphalia, a permanent situation of uncertainty and insecurity dominated the international political relations throughout modernity. Grotius' position (Grotius, 2012 [1625]) is decisive, especially whether we bear in mind that he elaborates his *De jure belli ac pacis* within the context of the Thirty Years' War and *before* the peace of Westphalia. In particular, Grotius has the merit to have foreseen the next and enduring state of tension among the European States. In the opening lines of the Prologue to the *De jure belli ac pacis,* the Dutch philosopher outlines his sharp perspective by underling the central problem concerning the "body of law […], which is concerned with the mutual relations among states or rulers of states (*inter populos plures aut populorum*)" and furthermore adds that "no one has treated [this question] in a comprehensive and systematic manner" (Grotius, 2012 [1625]: 1). In another passage, Grotius remarks that "since the sovereign power is inevitably exposed to the hatred of many, the security of him who is charged with the exercise of it must be safeguarded in an altogether exceptional way" (Grotius, 2012 [1625]: 72). In substance, the question is the external projection of State. He points out: "[G]reat states, since they seem to contain in themselves all things required for the adeguate protection of life, seem not to have need of that virtue which looks toward the outside, and is called justice" (Grotius, 2012 [1625]: 7).

This perspective necessarily implies an endless conflict among States: "war […] is undertaken in order to secure peace" (Grotius, 2012 [1625]: 23), but "there is a common law among nations, which is valid alike for war and in war" (Grotius, 2012 [1625]: 8). The final outcome is the legitimitation of the defensive war (Grotius, 2012 [1625]: 82[3]. As foreseen by Grotius, the "internal stabilisation" (within each State) established through Westphalia was not proportional to the implementation of the "external system" of security (among the States).

[2] In some way Hobbes *in nuce* elaborates a sort of *Welfare State*.

[3] Moreover see Grotius 2012 [1625]: 82, editor's footnote number 8: "Defensive war is a prerogative of states and is not relevant to individuals". Furthermore Grotius 2012 [1625], par. 17 entitled *On defensive war to weaken the power of a neighbour*.

As it is well known, the question represents a classical topic, which has crossed many research fields (from philosophy of law to political science) and has been discussed from different perspectives. Carl Schmitt, not by chance a great scholar of Hobbes' theory, has offered a good deepening of this very problematic knot, which is related to the structural instability of the *jus publicum europaeum* (according to the formula used by Schmitt). Through the pair *amicus-hostis*, the German author puts in light the constant state of tension (domestic insecurity) underlying the politics of every State. At the same time, Schmitt straightly highlights the long contraposition among the European states understood as a global insecurity, which he interprets in terms of the struggle between land (continental) powers and maritime powers in the light of the other fundamental Schmittian pair *Land und Meer* (Schmitt, 1950). Beyond the unquestionable theoretical-historical limits, Schmitt's analysis (including its Hobbesian echoes) is very important. Being completely immersed in the typical modern categories –State, territory, law, security–, Schmitt cannot renounce the modern framework when he discusses the levels or ambits of security.

To sum up. Grotius elaborated his theory before Westphalia, whereas Hobbes published his masterpiece only three years after the peace of Westphalia (the first edition of the *Leviathan* dates 1651). The combined perspective is paradigmatic because it provides a very useful critical tool as regards the pair modernity-security. In a very schematic manner, it can be explained as follows. First: Hobbes' outlook establishes the distinction as well as the close relation between law, and more widely the legal dimension, and the political sphere. On closer inspection, it appears as an ambiguous model that will be the conceptual trait of large part of the Western modernity. Second: Hobbes clearly tracks the separation between the private/individual sphere and the public level. This distinction is to be considered as a form of control of the political power in so far it draws the limits of the sovereign: the sovereign *must* guarantee the security of the people. That is to say, security is a legal goal and, *at the same time*, a political question. Third: the analysis developed by the English philosopher as well as by Grotius evidences the fundamental role of the social differences as an unavoidable aspect of the process of "State-building". Within the framework of the early modernity (i.e. the Europe of the XVIIth century), this dimension emerges in a religious form, tracking a close relation of politics and religion that underly the entire modernity until the contemporary scenarios.

THIRD KEY-PASSAGE: THE CRISIS OF THE MODERN FRAMEWORK

What happens with this model within the current complex societies? Is it still fit to face the contemporary social challenges? The crisis, we could say the gradual disruption, of the philosophical-legal modern framework dates back at least to the middle of the nineteenth century and develops until the first half of the last century. It progressively compromises the functionality of the democratic institutions including the idea of "security".

From this point of view Michel Foucault's outlook (Foucault, 2004, 1975) about the concept of "security" (*sécurité, sûreté*) still belongs to the modern landscape. There is no doubt that the brilliant analysis developed by the French author of the levels and the multiple articulations of "power" (political, economical, sociological, ecc.), focused on the close relation of power over bodies, highlights and foresees all fundamental developments (including the capital role of technology). At the same time, Foucault's idea of security still looks strongly rooted in the classical modern premises above

mentioned and rooted in the circle State-law-territory-politics. In particular, within his perspective the question of the social complexity, that is to say the possible presence of non-homogeneous societies (i.e. multiculturalism), is absent. In other words, Foucault focuses on the "traditional" Western models of society.

As regards the category of "security", the real break of the conceptual grammar underlying the modernity is determined by the increasing role of technologies, even before the question of migrations (later we will return on the problematic relation between migration flows and technological evolution).

This is a very relevant passage. The passage from the typical modern idea of *security* to the post-modern concept of *protection* should be understood in the light of a *cultural* transition which *crosses* the western democracies. Along the conceptual line characterized by pivotal steps –Locke's theory of individual rights; the implementation of the modern Constitutions and the multiple "bills of right" flourished in the earl modernity– the concept of *security* was essentially rooted in the personal dimension, the premise of the modern idea of "privacy". It was oriented to the legal defense of the *singular and autonomous* sphere of the individual and its enlargement. In this way, security synthesized the series of conditions for developping the individual autonomy, through the formula "supervising and controlling for enhancing the individual liberty".

The post-modern notion of *protection* instead develops according to a totally different articulation. It emphasizes a sort of criptic *obedience-submission* of the individual to the technological-political apparatus, a sort of "voluntary" subordination to sophisticated, anonymous and technology-based forms of social control. It is a completely a new phenomenon, which *de facto* implies the consequent partial renounce to the individual sphere of freedom and autonomy. The rich and well known fenomenology related to the problems of open data and data protection (Wikileaks, Panama Papers, Cambridge Analytics and so on) clearly highlights the paradoxical nature progressively developed by the concept of privacy. On the one hand, the increasing production of documents and charts emphasizes the role of privacy (European Commission, 2019). On the other, both individual choises and collective behaviors (i.e. the global diffusion of social networks) confirm the increasing willingness to make freely accessable the personal data, through the formula "safe because controlled (protected)".

Here it is the crucial passage. Only at this level we can appreciate the cultural reflex of the evolution (or involution), and the slow "slip" or transformation of the concept of privacy. From the safeguard of the individual freedom of the modern notion of security-privacy to a technology based system of protection (*melius:* security-control-protection). Accordingly, this ongoing absolutization of the new acceptance of security as a *cultural factor* entails the enlargement of the role of the politico-legal apparatus. The potential or real sacrifice of the individual autonomy, also beyond the relation power-bodies articulated by Foucault, is its logical corollary.

Such a cultural transition evidently involves a peculiar understanding of the social changes. The crisis of the philosophical-legal grammar elaborated during the modernity not only modifies the *common perception* of the global sense of the migration flows, it also influences the selection and the implementation of the political solutions.

FOURTH KEY-PASSAGE: THE PAIR GLOBALISATION-MIGRATIONS

Only in the light of the described historical-cultural landscape, which shapes the concept of security, it is possible to discuss the contemporary scenario and the question concerning the migration-security pair. In particular, we shall consider the nexus globalisation-migration as the current fundamental framework.

The migration phenomenon should be understood as an effect, or a profile, and a dimension, of the wider process known as "globalization" (for instance, Graham & Poku, 2000; Keely, 2009; Gammeltoft-Hansen & Vedsted-Hansen, 2017). This horizon really differentiates the contemporary migration flows from other analogous historical processes of human migration: the formers simultaneously develop *at a global level* and in specific directions (i.e. Africa-Mediterranean area-Europe; central America-United States),[4] the latter were characterized by different periods and were related only to local areas: i.e. the European scenario and the Roman Empire; the expansion of Islam starting from the late Middle Ages (Esposito, 1999).In the light of this horizon, we can focus on two levels: a) the *sociological level*, and b) the *legal reflexes*.

a) *Sociological level*. Firstly, we have to consider the sociological level paying attention to two fundamental aspects: *interpretation of the migration flows* and *the role of technology*. The *interpretation* of the real sociological dimensions of the migrations, that is to say a correct analysis of the phenomenon (i.e. numbers, statistics, data), represents an important preliminary condition (remarked also in the "Global Compact for Safe, Orderly and Regular Migration", GCM). This aspect is decisive especially in order to orient the migration policies as well as the adoption of appropriate and well-timed legal measures. For instance, in many countries it is possible to observe a particular dynamics: the progressive reduction of the migration flows is directly proportional to the increase of the attention-*perception* (i.e. alarm) about migration in the public opinion. It is a sort of *leit-motive* underlying the recurrent claims for legal tools to face migration flows.

Furthermore, we should consider the complex and ambiguous *role of technology*. In this contribution we cannot deeply discuss the various aspects of the technological development: the increased autonomy of technology compared to other social dimensions; its increasing degree of specialization; and its high level of complexity. The point here is the new circle 'technology-power-security' compared to the 'first modernity' and the ambiguous role of the technological sphere.

For instance, in the light of the 17 Sustainable Development Goals (SDGs),[5] technology is a fundamental tool for governing migration flows (Gelb & Krishnan, 2018[6]). Regardless of the contribution of migration to the production and diffusion of technology (and how technology facilitates migration: Gelb & Krishnan, 2018: 3-11), there is no doubt that technology allows to collect a much greater number of data in order to better govern the migration flows and hence to arrange in advance better policies. *At the same time*, the technological apparatus could represent a subtle form of social control as regards both the border crossing technology and, more generally, the migration management:" '[d]ual use' technology with military and non-military applications has long been central to governments' efforts to increase the effectiveness and efficiency of controls" (Gelb & Krishnan, 2018: 11).The crucial point is the

[4] For a complete and updated overview, see United Nations (2018b).

[5] Adopted in September 2015 by the United Nations General Assembly, the document came into force on 1st January 2016. It is part of the Resolution 70/1 (the 2030 Agenda for sustainable development).

[6] It is to be remarked that the quoted paper is particularly oriented to overrate the role of technology for achieving the SDGs.: see for instance Gelb & Kishnan, 2018: 13.

structural ambiguity of technology: "Notwithstanding its technical limitations, surveillance technology for border crossing control raises major concerns about potential impacts on privacy and human rights, not only of migrants but also of citizens" (Gelb & Krishnan, 2018: 12).[7]

More widely, the presence of increasingly sophisticated scanning devices represents the technological condition for creating a global map (i.e. through Internet) of the migration flows. That is to say, the predisposition of a complex apparatus in order to supervise the migration phenomenon and delimit it within geographical areas (according to a historical progression of the control systems that goes beyond the perspective foreseen by Foucault about power and security). In conclusion, "Migration management technology illustrates clearly the potentially contradictory nature of technology: some technologies enhance well-being and enable realisation of rights and capabilities; others are a means to restrict and limit well-being and rights. The border-crossing technology market is growing rapidly" (Gelb & Krishnan, 2018: 15).[8]

b) *Legal reflexes*. As already remarked, only a correct sociological analysis allows to adopt more appropriate political decisions. In particular, at this level we can appreciate the contradictory legal reflexes concerning the question of migration flows. We have to deepen this aspect focusing on three points related to each other: 1) the process of privatization; 2) the genetic mutation of the legal architecture; 3) the limits of the legal intervention. All these aspects are rooted in the passage from the modernity to the post-modern framework.

1) The first point concerns *the circuits of privatization*, which characterizes the current migration question and, more precisely, the crisis of the modern pair 'private dimension-public level'. On closer inspection, this point confirms the long and continuous crisis of the modern philosophical-legal model and calls into question one of its fundamental categories. This encompasses many levels underlying the migration flows: for instance, the questionable role and the legal nature of the Non-Governmental Organizations (NGO^{s}), which look as a sort of hybrid entities (i.e. private subjects with a social/public function). The ongoing re-discussion of the couple private-public, including the presence of hybrid subjects, entails a legal de-regulation wherein private "security-markets" (neighborhood watches, private and technology-based firms and so on)[9] can develop completely separated from a general and legal-political framework. In other words, the more the State looses its fundational privileges, that is to say the control of the space and the territory, the more the private dimension increases and hence the more the political control declines.

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[7] A good example is represented by the block chain technology or distributed ledger technology, which "is still in early stages of development but it is considered promising for both migrants' rights and welfare. One application being explored is in digital identity […] but extending naturally and importantly to migrants outside their country of birth. […] The European Parliament has set up a taskforce to discuss the potential of blockchain for refugee identification and related programmes. Blockchain's indelibility and decentralised governance means it is central to emerging initiatives to enhance financial inclusion of migrants and refugees, and to manage public expenditures on these groups" (Gelb & Krishnan, 2018: 12).

[8] Furthermore: "Most technologies on offer aim to reinforce control over human and goods traffic but are not generally as effective or as efficient as intended. Migration information management systems rely increasingly on digital and biometric technologies. These facilitate systems integration and may assist migrants but also reinforce migrant and refugee management as control, both at the border and 'behind the border'. Blockchain and biometric technologies may offer an alternative grounded more firmly on individual rights, enabling migrants more secure and portable identity documentation, which can help them enter and settle in transit and destination countries and enhance financial inclusion" (Gelb & Krishnan, 2018: 15).

[9] See Bombelli (2015c) and, for a wider perspective, Katzenstein (1996).

2) Moving from this context, we can grasp the second aspect concerning a sort of *genetic mutation of the legal architecture*, which involves a radical conceptual change of the model of law. This transformation implies the slow but unstoppable and unavoidable passage from the modern hierachical legal construction, which is based on the mentioned idea of *geometria juris* and exemplified in a paradigmatic manner by the positivist orientation developed by Hans Kelsen, to another very different way to conceptualize the law. This is the post-modern idea of law, which implies a sort of self-increasing, disorganic and horizontal-reticular scheme (Ost & De Kerchove, 2002; Bombelli, 2017) according to which the classical distinction politics-law vanishes and many typical modern distinctions progressively lose importance.

At a theoretical level the consequences are relevant. For instance, the "classical" distinction among different levels gives way to a continuous mixture of the "orders of discourse" (Foucault, 1971); the idea of legal "subject" (both singular and collective) simply turns in a "knot" belonging to law conceived as a net; the radical re-discussion of the classical idea of "institution". Starting from another perspective, most of the contemporary legal theory describes this scenario as a transition from a model of *hard law*, structurally rooted in the idea of sanction, to another conceptual scheme called *soft law* and principally based on the mechanism of non-legally binding guide-lines and on moral suasion.

It should be noticed that the implementation of this model of law is strongly influenced by technology, following a sort of mutual exchange. The increasing sociological relevance of the results achieved by the technological development (i.e. Internet) makes it possible and legitimates the conceptualization of the society as a net (Web/Net-society) and certain model of law (Web/Net-law). Conversely, the constant adoption of unsystematic and incoherent norms by the legal actors (State, supranational entities/bodies, and so on) contributes to confirm the reshaping of the social contexts as disorganic and fluid realities.

As regards our question, the European Union is a good example of the scenario described above. In abstract terms, the role of the European apparatus for the government of the migrations is (or *melius* should be) undoubtly decisive. The critical point concerns the *capacity* of the European Union to *really* rule the migration issue, as it is clearly showed by the recent conflicts among the European institutions and States members of the Union (in particular Italy and, more generally, the States belonging to the Mediterranean area).

The question presents two levels. At a first level, the difficulty, or maybe we should say the impossibility, to build up an efficient European migration policy emerges. Once again, this aspect highlights the structural limits underlying European institutions and their inability to really implement common policies within the States.

Secondly, the political *impasse* closely involves the level related to the typologies of the normative production according to a double direction. On the one hand, the constant tendency of the European Union to adopt *ad hoc* norms or legal measures: a sort of segmented and disarticulated (i.e. reticular) model of law, especially with regard to the migration flows and always only under the pressure of political urgencies.[10] On the

[10] See for instance the proposal for a Decision of the Parliament and of the Council amending Decision (EU) 2019/276 as regards adjustments to the amounts mobilised from the Flexibility Instrument for 2019 to be used for migration, refugee inflows and security threats

other, this new typology of law, which could be better defined as a mere "normative technology", is to be placed within a wider scenario characterized by the more and more articulated twine of normative levels. In other words, what is normally defined *multilevel regulatory governance.*

Multilevel regulatory governance also dominates the entire question of migration flows. This dynamic in particular pertains to the relation between the centre of the European Union and the member States, that is to say, the difficult implementation-application of the European legal frameworks within each legal order. The application of the European norms is highly problematic. Frequently, they have to be interpreted according to national criteria and categories, sometimes there is the questionable prevalence of the singular State law, even when the European dispositions have direct effect (i.e. the mentioned "General Data Protection Regulation").

It is necessary to make a short clarification. These considerations could suggest a radical critique of the "idea" of Europe. On the contrary, and as it has just been remarked, the European Union is supposed and requested to play a crucial role in order to govern the migration issue: in the future the European framework will be probably irreplaceable. Therefore, the point is not the renounce to the contribution of the European institutions, but to enhance their functionality. In other words, we do not have to remove Europe, but we need to build up a "different Europe", which involves the European identity (Bombelli & Montanari, 2008). This is the only way for implementing a real and efficient *European* governance of the migration flows, which is the fundamental problem underlying our daily political debates.

Beyond the European reference, another good example of the ongoing twine between a new model (or praxis) of law and the migration issue is offered by the increasing role of the Courts. As it is well known, the multiplication of the Courts, especially in the form of supra-national and international institutions, represents a typical trait of the current (i.e. post-modern) scenario. Once again, it develops according to a rhizomatic manner. In fact, this dynamics involves a complex relationship among the Courts, frequently called *legal comity*, which far from being a sort of dialogue raises serious problems of coordination (especially as regards the national or "internal" Courts: for instance the decisions of the Italian Constitutional Court n. 348-349/2007). This composite and problematic universe of Courts certainly plays a decisive role in governing migrations (i.e. European Court of Human Rights and the Court of Justice of European Union). Notwithstanding, the just mentioned problem of coordination entails a very questionable praxis. In particular, the activity of the Courts sometimes involves the construction of new legal categories (i.e. "dignity": Bombelli, 2016) partially incompatible with the principles underlying national legal orders or, at the same time, the exaggerated and uncritical recourse to the notion of "human rights".

The combination of these factors (role of Europe, increasing space of the Courts) represents a crucial point and confirms the progressive post-modern decline of the distinction between politics and law. Only in the light of this articulated framework we can better evaluate the choice and the adoption of legal measures and the importance or "weight" assigned to them. Consider, for example, the recourse to the category of "terrorism". The frequent and easy superimposition between the notions of "migrant" and "terrorist", especially in any Western democratic contexts, causes a sort of "conceptual short-circuit". One of the direct effects is represented by the progressive

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https://ec.europa.eu/transparency/regdoc/rep/1/2019/EN/COM-2019-600-F1-EN-MAIN-PART-1.PDF (European Commission, 2019).

diffusion of the so-called "criminal law of the enemy" (Jakobs, 2010) dating back to other normative measures like the Patriot Act adopted by the United States in 2001 under a presumed terrorist attack and, then, the potential limitation of the individual rights and privacy. This, once again, shows the role of fear as a factor of building and ruling society, following the long theoretical line from Hobbes to Carl Schmitt. In a wider perspective, this framework demonstrates the crisis of the modern legal categories, as regards both the difficulty for planning law and the control of the "space", and the relevance of the concept of privacy.

3) The two levels just considered allow to better grasp the third legal reflex: *the limits of the legal intervention*. The genetic mutation of the nature of law, including the re-discussion of the pair private-public dimension, encompasses a rethinking of the relation between law and political power in the light of the Hobbesian and modern connection politics-law. The limits of the political power of the States, that is to say the possible reshaping of the national sovereignty, directly affect the typologies of the legal measures chosen by the national governments.

Regarding migrations and security an outstanding example is represented by the recent "Global compact for Safe, Orderly and Regular Migration (GCM)". This document is different from the previous International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (2003). It is an intergovernmentally negotiated agreement, signed on 19th December 2018 at the Marrakech Conference, with the endorsement of the United Nations General Assembly. It concerns our discussion for two related reasons.

First of all, GCM implies a mere series of guidelines. Using the contemporary legal lexicon, the document represents a form of *soft law*, not *hard law*. On this aspect, it is sufficient to quote two short passages from the section entitled *Our vision and guiding principles*, n. 15. The first one concerns the international cooperation and highlights the *nature* of the Global Compact:

> [it]is a non-legally binding cooperative framework that recognizes that no State can address migration on its own due to the inherently transnational nature of the phenomenon. It requires international, regional and bilateral cooperation and dialogue. Its authority rests on its consensual nature, credibility, collective ownership, joint implementation, follow-up and review. (GCM, 2018: 4).

The second passage remarks the *role of the national sovereignty* in order to implement migration policies:

> The Global Compact reaffirms the sovereign right of States to determine their national migration policy and their prerogative to govern migration within their jurisdiction, in conformity with international law. Within their sovereign jurisdiction, States may distinguish between regular and irregular migration status, including as they determine their legislative and policy measures for the implementation of the Global Compact, taking into account different national realities, policies, priorities and requirements for entry, residence and work, in accordance with international law. (GCM, 2018: 4).

As far as we are concerned, this is a confirmation of the above mentioned genetic mutation of the nature of law: due to its nature of guideline, GCM is not oriented to limit or to compromise the space of the national sovereignty and, then, the possibility for each State of implementing specific or local migration policies.

Secondly, GCM offers a wide horizon concerning the position of the different States on migration and security (the text presents thirteen repetitions of the word "security").

The document was voted by 152 countries (5 countries voted against and 12 abstained from the vote), but the interesting point regards the various reception of the document. Many countries unreservedly approved the document (for instance Albania, Bosnia and Herzegovina, Slovenia), whereas others did not support the agreement (for instance Australia, Bulgaria, Poland) or, sometimes, accepted the guidelines of GCM raising a rich debate in the parliament or in the public opinion (for instance, Germany, Italy, New Zeland, Russia).

To sum up, under the pressure of epochal questions, *in primis* the increasing migration flows, post-modernity is deeply reshaping the entire legal-political architecture dating back to the "first" modernity. This historical-conceptual passage involves the *idea* of law, the allocation scheme of the legal competencies and the models of security including the idea of territory-borders (Velasco & La Barbera, 2019). In short, it implies the restructuring of the *governance* of complex questions and, in the ultimate analysis, the entire *ethos* underlying the legal orders (Rosenau & Czempiel, 1994). The overall impression is that the law risks to become only a sort of technique of social regulation, also as regards the regulation of migration flows. It entails an important corollary: the increasing subordination of the legal sphere to technology and a consequent reshaping of the nexus regulation-security. The outcome is a very contradictory process. On the one hand, the progressive and rhizomatic fragmentation of norms and dispositions (i.e. the mentioned GCM and European measures), and, on the other, a hyper-regulation which does not necessarily imply a wider protection of the individual rights or better migration policies.

FIFTH KEY-PASSAGE: THE QUESTION OF POPULISM

The previous remarks highlight the paramount role played by politics and the current new articulation of the conceptual circle 'law-security-politics-power'. At this level, we can consider the thorny relation between migration and populism. Regardless of the immediate and specific political debates, which are frequently connected to local questions and merely oriented to the political manipulation, populism represents a very delicate aspect especially whether combined with the rising sovranism[11]. We have to take into account two aspects: a) the notion of "populism" and b) its connection with the migration question.

a) Firstly the concept of "populism". It has been well remarked that populism

> is one of the main political buzzwords of the 21st century. The term is used to describe left-wing presidents in Latin America, right-wing challenger parties in Europe and both left-wing and right-wing presidential candidates in the United States. But while the term has great appeal to many journalists and readers alike, its broad usage also creates confusion and frustration. (Mudde & Kaltwasser, 2017: 1).[12]

Beyond the multiple descriptive and normative definitions of "populism" that have been provided (i.e. a democratic way of life, an emancipatory force, a type of irresponsible economic policy, a political strategy employed by a specific type of leader, a folklorist style of politics: Mudde & Kaltwasser: 3-4), according to Mudde and Kaltwasser, all forms of populism "include some kind of appeal to «the people» and the

[11] For the global relevance of the populist orientation, see Moffitt (2016), Kaltwasser et al. (2017), Mudde & Kaltwasser (2017).

[12] Furthermore: "the discussion about populism concerns not just what it is, but whether it even exists. It truly is an essential contested concept" (Mudd & Kaltwasser, 2017: 2).

denunciation of «the elite»" (Mudde & Kaltwasser, 2017: 5). In particular, Mudde and Kaltwasser opt for an "ideational approach" according to which populism is based on three core concepts (the people, the elite and the general will). This perspective allows to adopt the following global definition: [Populism is] "*a thin-centered ideology that considers society to be ultimately separated into two homogeneous and antagonistic camps, "the pure people" versus "the corruptelite", and which argues that politics should be an expression of the* volonté générale (*general will) of the people*" (Mudd-Kaltwasser, 2017: 6, emphases in the text).

b) The concept of populism and its corollaries require to be considered with great attention. In particular, the question should be discussed in the light of the different political scenarios involved by the migration issue, particularly as regards the European context. "In the European context populism often refers to anti-immigration and xenophobia, whereas in Latin America it frequently alludes to clientelism and mismanagement" (Mudde & Kaltwasser, 2017: 2).[13] We can formulate at least two considerations.

The first one involves the frequent and populist evocation of legal tools. The point is closely related to the above mentioned problematic role of law, and rests on the juxtaposition-polarity between "us" and "them" (see also what remarked above about the cultural transition from "security" to "protection"). The previous reference to the criminal law of enemy is an important example, but we cannot forget other dimensions: the constitutional level, which concerns the relation between the autonomy of the States and the supranational/international organizations, or the administrative sphere. In particular, about this aspect the question of "citizenship" emerges. Once again, the public debate, focused on the rules and criteria for citizenship acquisition (*ius soli*, *ius sanguinis*, *ius culturae*), emphasizes the highlighted overlap politics-law, sometimes making confusion among the concepts of "refugee", "migrant" or "economic migrant".

The second remark concerns the discussed category of "populism". Being frequently evoked in an improper political context, it should be used in a very cautious way. Within the public debate, the syntagm "populism", especially when referred to the migrations question, sometimes becomes material for the political manipulation. A pernicious tendency underlying the democratic systems emerges (Mudde & Kaltwasser, 2017): the recourse to the notion of "populism", almost always associated to conservative governments, is likely to hide the real forms of populism. A deep rethinking both of the concept of "public opinion" (Habermas, 1989 [1962]) and of the bases of the liberal model (also according to the classical theoretical framework elaborated in Rawls 1971, 1993) is required.

A SHORT CONCLUSION

The conceptual framework underlying the nexus migration-security calls into question relevant philosophical-legal categories and complex political horizons. We should be able to bypass the populist horizon and the consequent exclusionary biases underlying the current political debate. Only in this way it is possible to grasp the crucial point: migration issue represents an epochal *cultural* question. Breaking a conceptual grammar

[13] From this point of view it would be very interesting to elaborate a compared analysis among different countries in order to highlight significant analogies and differences: for instance a comparison between the United States, in particular as regards the role of the National Security Agency, and China (China voted for GCM).

dating back to the origins of modernity, the problems connected to migration flows are to be considered in a wider perspective.

The overrated relevance attributed to the sociological and legal-political point of view, especially within the public discussions as well as in the scientific approaches, involves a strong reduction of the full spectrum analysis and the consequent misunderstanding of the post-modern complexity. In other words, we risk losing sight of the decisive aspect of the migrations considered in the light of security dimension. As it has been remarked since the beginning of this contribution, beyond the immediate politico-legal implications, the migration issue *fundamentally* takes the shape of a comparison among cultural models. It requires the unavoidable task of choosing and selecting appropriate policies and legal tools, in the ultimate analysis, for the endurance of the entire democratic systems.

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