Engaging vulnerability: Undocumented migrants as European minority

This paper engages with the contemporary legal and political discourses aiming to respond to and to conceptualise the increasing presence of undocumented migrants in the European Union. It is based on the belief that in this moment of multiple crises the manner how we understand, position and treat the undocumented migrants will determine the fate of the common area of freedom, security and justice, and will be detrimental to the way and form of the EU’s existence in the future. In particular, the article responds to the appeal of French philosopher Alain Badiou, that “by addressing the questions of how we treat the people who are here, who want to be here, or who find themselves obliged to leave their homes, we can initiate a genuine political process”.\(^1\) The paper uses the international legal concept of minority with the aim to rethink the position of undocumented migrants in the EU.

It is estimated that the number of undocumented migrants in the EU oscillates between 5-8 million\(^2\). To be sure, these numbers have been growing in result of the recent so called ‘refugee and migration crisis’ where the structural weaknesses of the Common European Asylum System such as lack of genuine EU burden sharing mechanisms, lack of level playing field with regards to the legal standards of protection, reliance on coercion or unrealistic expectations regarding the role of borders\(^3\), combined with lack of willingness of some of the Member States to be involved in assisting refugees and asylum seekers, left many without shelter and legal protection, contributing to growing group of people without status. The responses of the EU to the crisis reproduce this paradigm as they are based “on an intensification of the prohibition of the cross-border movement of refugees, combined with neglect of the position of refugees in the region”\(^4\). It is therefore highly unlikely that they will bring any meaningful changes in the position of migrants and refugees in the EU.

Undocumented migrants or *sans papiers* in the EU finding themselves without legal status (or with partial status) are subjected to permanent and structural inequality. This inequality manifests itself

\(^1\) Badiou, *Ethics*.


\(^4\) Ibid., 641.
in number of ways, such as lack of access to healthcare, right to work or constant threat of deportation. As Nail pointed out, this situation “is difficult to reconcile with almost any political theory of equality, universality or liberty”\(^5\). In addition, being undocumented is more and more perceived as an essential feature of immigrants themselves who, in result of the migration policies described above, are being turned into, what Balibar calls, ‘unassimilable difference’\(^6\).

In addition, the increasing number of undocumented migrants in the context of rising far right policies is one of the biggest challenges for contemporary Europe, which may bring an end to the European Union as we know it. Recent exceptions to free movement within the Schengen area or the decision of the UK citizens to withdraw from the EU, largely based on the anti-immigration sentiments, constitute some of the examples. This situation is also very challenging when discourses of human rights and refugee protection do not seem to be sufficient anymore\(^7\). It is therefore of perennial importance to take the task of representing such challenges to ourselves and to engage productively “with the contradictions, paradoxes and injustices they engender”.\(^8\) We must ask ourselves in particular, how contemporary scholarship can respond to these challenges posed by the presence of undocumented migrants, in light of the EU policies and societal sentiments.

In my paper, I will approach the phenomenon of undocumented migration from the perspective of the international legal concept of minority. I will claim that the current approach to and the treatment of undocumented migrants in the EU follows the logic of minority protection in international law based on the recognition of the other already within. Specifically, I will show that contemporary perception and treatment of undocumented migrants corresponds with the elements shared by most of the proposals for definition of minorities in international law. Looking at these elements in the context of undocumented migration we can immediately notice that undocumented migrants are already treated as de facto minority, in other words, as those who already belong. This claim reveals the paradoxical position of undocumented migrants as being simultaneously inside and outside of the borders of the EU.

The paper then proposes a special regime for recognition and protection of undocumented migrants at the EU level based on their non-dominant position as a group. This approach goes beyond traditional legal understanding of minorities as groups based on national or ethnic, cultural,
religious and linguistic identities. This paper claims instead, that since undocumented migrants in the European Union are, to a significant extent, a product of the EU legislative processes resulting in their vulnerability deriving from various ways of being undocumented\(^9\), it is this shared vulnerability that should constitute the basis for their position at the EU level.

In conventional understanding the purpose of minority rights is to guarantee rights important to the individuals as members of the minority groups. Their aim is to guarantee both equal treatment with dominant groups and to provide specific positive measures to protect minority groups\(^10\). In other words, the traditional aim of minority protection is to ensure effective non-discrimination and equality and effective participation of members of minorities in public life. However, in her report of 2005, High Commissioner for Human Rights has also called for increased attention to minority communities in the context of poverty reduction strategies and to the promotion of political and social stability. I believe that such approach, especially striving to reduce poverty, and to provide undocumented migrants with specific guarantees such as the right to healthcare, safe working conditions or protection against various types of abuse, could be the first step in efforts aiming at improving their situation. In the context in which guarantees of human rights based on the concept of human dignity are insufficient and ineffective, such group-based approach could be particularly attractive as a step to be taken prior to or parallel with the discussion on legal status.

To be sure, the intellectual endeavour undertaken in this paper is an experimental one. Particularly, its aim is not to impose a rigid identity on undocumented migrants but rather to show the limits of both the nation state and the international legal minority regime and challenge the readers to imagine their alternative understanding that have potential for emancipatory results.

**Bibliography**


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\(^10\) Capotorti, ‘Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities’.

