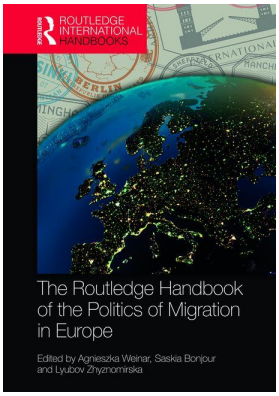

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The role of courts and legal norms

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8

THE ROLE OF COURTS AND LEGAL NORMS

Rebecca Hamlin and Hillary Mellinger

Introduction

The migration studies literature has not reached consensus about how courts and legal norms shape migration policy. Historically, many scholars considered judicial influence over migration to be limited because judges recognize that migration is a core aspect of state sovereignty, and hence are reticent to second guess decisions made by the elected branches of government (Motomura, 2008; Schain, 2008; Tichenor, 2002). However, judicial involvement in migration seems to have increased in recent decades, causing an expansion of non-citizens' rights in many different national jurisdictions. Scholars disagree about whether these shifts should be attributed to the spread of liberal international human rights norms (Dauvergne, 2008; Hollifield, 2004; Sassen, 1999; Tolley, 2012) or to domestic legal and political advocacy (Guiraudon, 2000; Joppke, 2001). Scholars also disagree about the frequency of judicial assertions of power, partially because studies have examined a broad range of topics, including border control mechanisms, refugee policy, and the rights of undocumented migrants, guest-workers and permanent residents – all very different aspects of migration law. Finally, some countries simply have more active judiciaries than others, and varying relationships to international legal norms.

An examination of the European case provides general support for the claim that the historically limited judicial power over migration is increasing in some significant ways. In particular, liberal norms as translated by courts have been used to expand the rights of non-citizens and constrain anti-immigrant politics in Europe, sometimes directly though judicial rulings, and sometimes indirectly through the shaping of discourse about rights. The European case also suggests that judicial involvement in migration matters may be contributing to a political backlash linked to sovereignty concerns and the counter-majoritarian nature of judicial decision-making.

Nevertheless, the European case has several special features that may constrain the general applicability of the lessons to be drawn from it. The central role of supranational courts and international treaties in migration matters are particular to Europe. The existence of European-level legal standards has contributed to some degree of continental unity, especially since the adoption of a uniform European Union (EU) migration policy. However, there is still a surprising patchwork resulting from cross-national variation in implementation, impact and response to judicial involvement in migration. Perhaps the larger lesson gained from a focus on the

relationship between courts and migration in Europe is that it is difficult, even unhelpful, to make sweeping generalizations about the role of courts in migration. Ultimately, the impact of courts can depend on the type of non-citizen, the place, and the moment.

This chapter is divided into two parts. The first part provides an overview of the historical evolution, mission and jurisprudence of the two European Courts, and addresses whether these courts have constrained state sovereignty over migration policy. The second part highlights points of cross-national variation in European states' migration law, using a brief comparison of the most frequently studied cases: Germany, France and the United Kingdom. We conclude the chapter by outlining some larger lessons and suggesting additional avenues of research.

The role of international courts

International courts and legal norms play an exceptional role in the European politics of migration because, while other regions of the world have one supranational court, or none at all, Europe has both the European Court of Human Rights (ECtHR) in Strasbourg and the Court of Justice of the European Union (CJEU) in Luxembourg. These two courts have been surprisingly active in adjudicating migration matters, particularly those pertaining to asylum and deportation, with their involvement increasing rapidly since the mid 1990s (Anagnostou, 2010; Tolley, 2012). In contrast, regional courts in other parts of the world either do not review migration cases at all, or have much more nascent jurisprudence when it comes to migration (Abass and Ippolito, 2016).

While supranational courts and legal institutions are usually viewed as agents of standardization and proponents of universal norms, the dual jurisdictions and distinct legal instruments of Europe's two courts are also a source of variability. Both the ECtHR and the CJEU are located within the territory of the EU and have the word 'European' in their titles, but only the latter is a EU institution. The courts were created for different purposes and are guided by distinct missions, with no formal relationship that ties them together (Balfour, 2005; Vicini, 2015). The Council of Europe created the ECtHR in the aftermath of World War II to interpret the European Convention on Human Rights ('the Convention') and to uphold human rights protection standards among the vast majority of European states that are now members of the Council of Europe. Since its creation in 1952, the CJEU's objective is to interpret and enforce EU law and to ensure that EU Member States and institutions comply with the EU Charter of Fundamental Rights ('the Charter'). The ECtHR has a broader jurisdiction than the CJEU because there are almost twice as many Council of Europe states as EU Member States. Notably, as of 2017, Belarus and Kosovo are not members of either the Council of Europe or the EU, creating an interesting legal vacuum in which neither supranational court has jurisdiction.

It is a testament to the strong working relationship of the two courts that their jurisprudence is strikingly convergent despite their different institutional mandates and lack of official connection. Together, the ECtHR and CJEU 'claim the right to set standards applicable to a substantial part – if not all – of the continent' (Morano-Foadi and Andreadakis, 2011, p. 1075, citing Callewaert, 2009). The two courts cite each other regularly, and both subscribe to the belief that the Convention and the Charter should dovetail each other. In fact, Article 52(3) of the Charter states that Charter provisions 'must be given the same meaning and scope as the rights' ensured by the Convention (Vicini, 2015, p. 57). Their ability to produce a consistent legal narrative is somewhat constrained by their inability to refer cases to themselves. Thus, they are engaged in a watching game with one another, such that the CJEU will issue a judgment, and then wait for the ECtHR to receive a similar case in which it can make its own response, and vice versa. This jurisprudential dialogue allows the two courts to see how they each respond to cases involving

similar issues; however, the ability of each court to correct or add to the jurisprudential record is dependent on when a case arises before it.

Beyond overlapping jurisdictions, the patchwork of European law is exacerbated by the fact that state relationships to the ECtHR have varied tremendously over time and continue to vary by state (Keller and Stone Sweet, 2008, p. 4). For example, states have incorporated the Convention into their domestic law at different points over the decades, some waiting until quite recently, while others embraced a relationship with the ECtHR early on. States with pre-existing independent judiciaries and strong human rights protections have been less likely to proactively incorporate the ECtHR's jurisprudence into their law, preferring their own domestic protections (Keller and Stone Sweet, 2008, p. 20). By contrast, other states have relied upon European jurisprudence to fill a void in domestic law. Based on the 'margin of appreciation' doctrine, domestic courts are expected to treat ECtHR rulings as a baseline of rights protection below which they must not fall. Yet, some domestic courts (particularly the German Federal Constitutional Court) have chosen to go well beyond the baseline set by the ECtHR, while others have chosen to simply 'keep pace with' the jurisprudence of the Strasbourg Court (Tolley, 2012).

The ECtHR requires states to exhaust all domestic remedies before referring a case to it, and European states vary in the extent to which their domestic legal institutions protect the rights of non-citizens. The most frequently invoked aspects of the Convention are Article 8 (the right to private and family life) and Article 3 (prohibiting degrading and inhuman treatment). One study found that international norms about the treatment of refugees had trickled down from the ECtHR to be implemented domestically (Guiraudon and Lahav, 2000). However, at that time, they found no evidence that this trend had any general effect on state sovereignty beyond refugee policy, because in many other areas of migration, states pursued entirely domestic agendas (2000, p. 189). Another more recent study found that the influence of the ECtHR on domestic policy was most significant in regards to social benefits, less so on the topics of deportation and asylum, which are more closely connected to border control and sovereignty concerns (Anagnostou, 2010, p. 735). Overall, the ECtHR has a mixed record of constraining European states' restrictions on the rights of migrants.

In more recent years, as EU migration law has developed, the CJEU has had more success in asserting its jurisprudence over EU Member States. It has developed an 'EU rule of law' that has constrained Member States' ability to adopt restrictive migration policies, particularly within the domains of family reunification, long-term residence, expulsion, and integration (Acosta and Geddes, 2013). The Amsterdam Treaty, the Nice Treaty and the Lisbon Treaty each increased the competencies and powers of the CJEU, which has utilized these newfound powers to progressively interpret and enforce certain directives that pertain to migration (Acosta and Geddes, 2013; Kaunert and Léonard, 2012). The 2008 introduction of a 'high-speed preliminary ruling procedure' permits the CJEU to expedite their decision-making for cases in which 'an urgent response is required because of issues of personal freedom' (Kaunert and Léonard, 2012, p. 1407). Nonetheless, the CJEU is constrained by the extent to which EU Member States refer cases to it. Lower courts choose to refer cases in varying degrees, both within and across states (Kelemen and Pavone, 2016).

The CJEU has progressively interpreted several directives that pertain to migration policies. For example, in 2011, the CJEU interpreted the Returns Directive, ruling that Member States must prioritize voluntary departure over deportation, and that the imprisonment of undocumented third country nationals (TCNs), i.e. non-EU citizens, was overly restrictive (See the *El Dridi* and *Achughbabian* decisions). Regarding the Long-Term Residence Directive, the CJEU has proscribed Member States from denying long-term residence status to TCNs who fulfill all the conditions of the directive (Acosta Arcarazo, 2015). These judgments can be viewed as a

challenge to Member States' sovereignty, since they constrain states' ability to exclude certain TCNs from their polity. Although Member States continue to retain the sovereign right to decide upon whom to confer citizenship, some argue that long-term residence status is a subsidiary form of EU citizenship given the many rights that it entails (Acosta and Geddes, 2013; Wiesbrock, 2013). Thus, the CJEU's interpretation of the Long-Term Residence Directive can be understood as directly affecting the 'politics of belonging' in the sense that it does not limit an individual's degree of inclusion within a polity to their citizenship status. EU citizens still possess greater rights than non-citizens, but TCNs with long-term residence status fall just below them.

The CJEU has also ruled that Member States are in contravention of the Family Reunification Directive if they introduce onerous policies as a mechanism by which to deter or deny family reunification. The Netherlands imposed high-income requirements as a condition for long-term resident TCNs to sponsor their family members; it also required that family members pass an integration test with a Dutch language and civics component for the reunification request to be granted (Acosta and Geddes, 2013; Groenendijk, 2006). In 2015, the CJEU ruled that states could impose these kinds of integration tests so long as they did not make family reunification excessively difficult. Nevertheless, when the CJEU has shown willingness to constrain sovereignty, there is domestic political effect. For example, Bonjour and Vink (2013) found that CJEU rulings on EU family reunification policy that restricted the Netherland's discretion fuelled a political backlash against Europeanization (2013, p. 404).

Finally, the CJEU has also increased protections for asylum seekers in Europe, mitigating Member States' restrictive implementation of various EU directives by enforcing shorter processing times, and insisting on interpretations that are compatible with the 1951 Refugee Convention and the ECHR. In turn, the EU Commission 'has drawn upon [the CJEU's judgments] to advance its more inclusive agenda in the field of asylum' (Kaunert and Léonard, 2012, p. 1407). Nonetheless, the CJEU faces challenges to its ability to uphold high levels of protection for *all* asylum seekers. Specifically, in *NF, NG and NM* v. *European Council* (2017), the CJEU argued that it lacks jurisdiction to rule against the EU–Turkey deal given that the deal 'was not adopted by one of the institutions of the EU' but rather by the individual Member States (CJEU Press Release No. 19/17). The CJEU's self-limitation in regards to the EU–Turkey deal will likely result in *refoulement*, which is a violation of Article 19 of the EU Charter. It is also a sign of the Court's caution around core sovereignty issues.

While the two European Courts agree on much of their case law, the teleological nature of their decision-making means that they do not always produce a consistent legal narrative; indeed, they occasionally diverge in their jurisprudence on migration. One major divergence involving asylum policy was resolved in February 2017. Under the principle of mutual trust, Dublin signatory states are all considered to be safe countries to which an asylum-seeker can be transferred for processing. Although both the ECtHR and the CJEU had ruled that the principle of mutual trust was rebuttable in some instances, they initially provided different thresholds for when transfers could be prevented. The ECtHR ruled in *Tarakhel* v. *Switzerland* (2014) that the *individual risk* of inhuman or degrading treatment that an asylum-seeker would face if transferred to another Dublin state was sufficient reason to halt a transfer. In contrast, the CJEU required there to be *systemic deficiencies* in a Dublin state's asylum system. It was not until February 2017, in *CK and Others* v. *Republika Slovenija*, that the CJEU aligned itself with the ECtHR's case law, leaving a gap of several years in which the two courts differed on this question. These different thresholds caused confusion about when Dublin transfers could be halted, and may have resulted in people being expelled to a state where they would face inhuman or degrading treatment (Vicini, 2015).

The two courts still have different approaches to deciding when TCNs qualify for relief from deportation by an EU Member State (Morano-Foadi and Andreadakis, 2011). Whereas the CJEU's first consideration appears to be citizenship, the ECtHR's principle concern is the extent to which an individual has assimilated into, or has ties with, the host country. The CJEU uses a hierarchy that privileges EU citizens and permanent resident TCNs over undocumented TCNs. In comparison, the ECtHR treats all individuals equally, regardless of whether they hold EU citizenship or are undocumented.

In sum, while both the CJEU and the ECtHR can be considered 'activist courts' within the realm of migration, the CJEU has had greater success in constraining European states' introduction of restrictive policies. Both courts' jurisprudence has been more immigrant-friendly than most European states' policies, leading some scholars to argue their case law has provided a powerful source of legitimacy for domestic courts that choose to push back against policies that may be driven by anti-immigrant popular sentiment (Tolley, 2012, p. 80). Indeed, Tolley (2012) argues, supranational law and courts have contributed to an expansion of domestic judicial power in an area that is traditionally viewed as one in which courts play a limited role. Advocates in some European states have used the two courts' jurisprudence as a springboard from which to push for more liberal migration policies. However, while it is certainly true that the courts have delimited European states' ability to adopt restrictive migration policies, it is also true that substantial cross-national variation in these policies continue to exist.

Much might be simplified if the EU were to accede to the Convention, thereby authorizing the ECtHR to have jurisdiction over those cases that involve alleged Convention violations. After all, the two courts have overlapping jurisdictions in many European states, and both hear migration cases. While the CJEU briefly entertained the option of acceding to the Convention, it ruled that it would first have to amend the Treaty on the European Union (Editorial Comments, 2015). No such amendment is envisioned on the horizon, so some variation and confusion between the two courts' jurisprudence is likely to continue. This inconsistency has significant consequences for migrants.

Cross-national variation

In addition to the complicated landscape of overlapping supranational court jurisdictions, European migration law at the domestic level involves a striking degree of cross-national variation. Most of the scholarship, both single country studies and comparative work, has focused on the domestic jurisprudence and policies of Germany, France and the UK. There is far less scholarship on the migration jurisprudence of other European states. The skewed nature of the literature is understandable to a degree. Germany, France and the UK are the major power players of Europe and all have rich traditions of constitutionalism, though they take three distinct forms. All three countries have relatively long histories of migration compared to other European states. However, the changing dynamics of migration in Europe beg the question of whether the lessons to be drawn from these three cases are generalizable to states with more recent experiences of migration, and more recent developments in the entrenchment of judicial power.

Germany is in many ways an outlier in the European story of law and migration. Despite the fact that Germany has long been reluctant to consider itself a country of immigration (Joppke, 1997), it has gained a reputation for being the most generous migrant-receiving state in Europe. This paradox is due in no small part to the role of courts and legal institutions. First, Germany has adopted all of the relevant UN and European human rights conventions into its law. It is also the only country in the world whose Constitution explicitly includes a right to asylum, one

that is framed in broader terms than even the UN Refugee Convention. Article 16 of Germany's Basic Law says that politically persecuted people shall 'enjoy the right to asylum'. As Joppke observes, this is 'a unique limit on state sovereignty' (1997, p. 273). This provision gives potential refugees direct access to the German court system, resulting in a heavy migration caseload for the Federal Constitutional Court (FCC) (Soennecken, 2008). Further, Bonjour argues that advocates have used a legal language of rights that has come to dominate policy debates surrounding the claims of non-citizens in Germany (2016).

Advocates and migrants have had so much success using the German legal system that restrictionist politicians have repeatedly tried to limit access to the judiciary. First came a 1993 Constitutional amendment that limited the scope of Article 16 by harmonizing it with EU standards (Tolley, 2012). More recently, German politicians have passed measures that increase judges' docket control, in the hopes that this would reduce asylum caseloads (Soennecken, 2016). Nevertheless, the FCC continues to interpret Germany's law related to both asylum and the rights of non-citizens in a way that outpaces the human rights jurisprudence of the ECtHR (Tolley, 2012). It remains to be seen what the long-term effect of discursive rights frames and the endurance of Constitutional protections for migrants will look like in the face of renewed large-scale migration to Germany resulting from the crisis in Syria. In the spring of 2017, a German court upheld a Federal Government policy that Syrians were not automatically entitled to refugee status, but could instead receive subsidiary protection that bars family reunification for two years.

Since the 1970s, French courts have been fairly active in defending the rights of non-citizens in the face of legislative attempts to limit those rights (Tolley, 2012). For example, in 1993, the Constitutional Council found a reference to asylum in the French Constitution to be a Constitutional right (Lambert *et al.*, 2008). And yet, Kawar argues that increased litigation of migration issues in France has not had a substantive effect in terms of judicial decisions expanding migrants' rights (2015). Rather, she argues that it has had an indirect effect on how the concepts of rights and the migrant are framed in political discourse. These rights frames are not always successful, as in October 2016, when a French court upheld the government decision to close the 'Jungle', a migrant camp in Calais, against the appeals of migrant rights advocacy groups. Thus, while France and Germany have both experienced an increased role for courts in migration matters in recent decades, France seems to be more of a mixed case than Germany, with judicial involvement playing a less clear cut role in protecting the rights of non-citizens.

The role of courts in migration is weaker still in the UK. Like Germany and France, the UK is a signatory to the Convention and (at least currently) is an EU Member State. While the UK lacks a written Constitution, the Human Rights Act of 1998 (HRA) codified the Convention into British law, and has taken on a semi-Constitutional significance (Bogdanor, 2005). In fact, an increased judicial role in asserting and protecting the rights of non-citizens pre-dates the passage of the HRA, since it was observable in the 1980s and 1990s (Sterret, 1997). For example, in 1993, the British House of Lords decided the 'highly significant' *M* v. *Home Office*, in which the Lords ruled that government ministers had to adhere to procedural justice standards (Leyland 2007, p. 58). Judicial involvement in migration matters has only accelerated in the years since the HRA's passage, but in a parallel with the French case, it rarely involves major jurisprudential shifts that substantively expand the rights of migrants (Hamlin, 2016). There have been a few high-profile cases in which the Judicial Committee of the House of Lords, or (post 2009), the UK Supreme Court, have issued rulings that expand the rights of non-citizens in significant ways (Tolley, 2012). However, the most significant impact of the empowerment of British courts over migration matters may not be jurisprudential. Instead, judicial involvement in migration has led to a major political backlash against domestic courts as well as the Strasbourg Court and, by extension, the Europeanization of British law (Hamlin, 2016, p. 458).

Despite clear differences, a comparison of these three cases suggests that the judicial role in migration can have major political implications outside of the courtroom. In Germany, France and the UK, judicial involvement in migration has had an impact on politics beyond the rulings in individual cases. In Germany and France, judicial involvement has affected public discourse and the behaviour of advocates and bureaucrats, spurring them to adopt a more juridical frame. In the UK, the major public impact of judicial involvement in migration has been on a powerful link, perpetuated by the tabloid press, between the foreignness of migrants and the foreignness of European human rights law (Hamlin, 2016, p. 438).

Directions for future research

Migration in Europe is a highly dynamic and politically inflammatory issue. There are many unsettled questions in relation to the role of the two European Courts and other legal institutions. Will European Courts harness their judicial power as final authorities over the law to produce a consistent case law that both defends and expands upon human rights? Will the CJEU continue to expand its authority to enforce uniform EU-level migration policy, or will it strategically hold back when it meets with intense domestic political opposition? Will European Courts produce discordant interpretations of the law that result in an unequal patchwork of human rights protections? Is the latter more likely given that the CJEU is not acceding to the Convention?

Ongoing research will need to examine how tensions around the recent increase in unauthorized migration affects the public response to judicial involvement in migration matters. Will domestic courts and policymakers work to keep pace with supranational courts in the face of political backlash to large-scale arrivals? Will the ECtHR and CJEU respond to changing political winds by self-limiting? For example, both the CJEU and the ECtHR have ruled that states should *not* send asylum seekers to Greece given the systemic deficiencies in its asylum system. However, the EU Commission has indicated that Dublin transfers to Greece should recommence once EU Member States commit to burden-sharing. In response, both EU Courts asserted that their moratorium against transfers to Greece remained in place. Will the EU Commission heed the judiciary? Or will it push for Dublin transfers to Greece, going against both courts' case law? Similarly, will EU Member States engage in additional bilateral or multilateral agreements in the future in an effort to adopt more restrictive migration policies and shirk their international obligations towards asylum seekers and refugees? Or will the CJEU find a creative way in which to bring international agreements like the EU–Turkey deal within its jurisdiction?

Relatedly, more research is needed on the role the judiciary has played in the rise of populist anti-EU and xenophobic parties in many European countries. Has judicial involvement in migration fuelled support for these movements in France, the Netherlands and beyond? In particular, there is a fascinating opportunity for ongoing research into the role that legal decisions about migration played in the 'Brexit' vote of June 2016. Furthermore, what is the future of law and migration in the UK, and the relationship between the UK and European law as the UK moves forwards with its plans to withdraw from the EU, and perhaps even repeal the HRA?

There is also a major hole in the literature, and a need for much more research on the role of law and courts on migration in the lesser-studied countries of Europe, particularly those which are recent hosts to large numbers of non-citizens, such as Greece, Hungary and the Balkans. Since the bulk of the literature currently focuses on Germany, France and the UK, all three of which are signatories to the Convention and (for now) EU Member States, more research on countries that are outside the purview of one or more of these supranational courts would make an interesting point of comparison.

Finally, future research on courts and migration should consider the recent findings by several scholars that judicial involvement in a policy area may not always have a direct doctrinal effect, but may still have notable impacts on political discourse. Evidence of this key factor in the relationship between law and migration may be found in many places where it has not yet been identified.

Conclusions

Can the European case help to illuminate the larger question of whether judicial power over migration is increasing? Certainly, the European case provides evidence of this trend. Most notably, the power of the CJEU over migration is increasing because the EU has created supranational migration law and policy that must be enforced consistently. However, that commitment seems to be under some strain as the numbers of migrants coming to Europe continue at a high level. The power of the ECtHR is more contingent, but it too demonstrates that supranational courts can have an impact on migration; they need not always stay out of such matters. As for domestic courts, there has been increased involvement in migration issues in multiple different national settings. However, at both the national and supranational levels, it is not totally clear that judicial involvement always equals judicial power. Sometimes courts weigh in to affirm the legality of restrictive politics, and sometimes courts are simply doing large-scale processing of migration cases without much jurisprudential impact.

Rather than resolving debates in the literature about the role of courts in migration, the European case illustrates the important reality that the relationship between the concepts of migration and judicial power is highly contextual and particular. Even within Europe, a continent with a relatively powerful shared commitment to liberal values and individual human rights, as well as longstanding efforts to achieve harmonization of legal precedent, there is tremendous variation over time, cross-nationally, and by sub-issue.

The European case also affirms the political nature of judicial decision-making. Judges are aware of public opinion, and know that their decisions can be controversial. Regardless of whether these concerns affect courts preemptively by causing them to act in a restrained manner on migration matters, or whether these concerns emerge in reaction to judicial rulings that are perceived to represent an over-extension of judicial authority, they are part of the story. The reinforcing and intersecting threads of anti-EU, anti-migrant and anti-judge sentiments are particular to Europe, since no other part of the world has made such a commitment to regional unification and territorial protection. However, contemporary European dynamics illustrate a more general lesson that concerns about sovereignty and democratic legitimacy are a powerful force that shapes and constrains the relationship between courts and migration.

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