

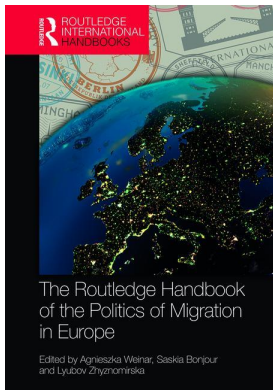
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5

IMPLEMENTING MIGRATION POLICIES

New research puzzles in a Europeanizing context

Nora Dörrenbächer and Tineke Strik

Introduction

Laws and policies often lead to more diverse outcomes than formal statutes suggest (Pressman and Wildavsky, 1974). An ever-growing field of implementation research tries to account for this variation (for reviews see Sabatier, 1986; Püzl and Treib, 2007). Implementation can broadly be defined as the connection between the expression of governmental intentions and the actual results of legislation (O'Toole, 1995, p. 43). Several complications may arise during implementation, related to the characteristics of implementers and the policies they apply (Pressman and Wildavsky, 1974). As these complications resemble obstacles encountered in the process of policy formation, implementation is commonly understood as the 'continuation of policy-making by other means' (Lineberry, 1977, p. 71).

In the field of migration, implementation is particularly challenging. Implementers deal with complex multilevel regulatory frameworks and constantly changing migration patterns (Jordan *et al.*, 2003; Ellermann, 2005). Migration offices are confronted with diverse demands from clients, limited resources and conflicting societal norms when they decide on cases as diverse as asylum (Mascini, 2008), family reunification (Eggebo, 2012) or labour migration (Cyrus and Vogel, 2003). Moreover, migration policies that appear clear on paper often turn out to be quite ambiguous in practice (Jordan *et al.*, 2003). In this light, Mountz (2010) illustrated succinctly that it is the study of daily practices of migration law that can explain migration policy outcome, reveal inconsistencies in states' narratives, and, thus, facilitate policy interventions (see also Andersson, 2014; Wunderlich, 2012; Dauvergne and Ellermann, 2013).

As it is complicated to measure to what extent policies are applied in practice (de Haas and Czaika, 2013) research into implementation is resource intensive. It requires data that captures bureaucratic and political contexts, attitudes and actual decision making. The difficulty of data collection may be the reason why researchers have devoted more attention to migration policy formation than to its implementation. Only recently has the process through which policies reach the intended recipients received broader scholarly attention.

The first migration studies that opened the black box of policy implementation derive from the American context (Gilboy, 1991). However, studies from sociology (of law) and political science increasingly also cover European countries (e.g. Düvell and Jordan, 2003; Ellermann, 2005; Eule 2014; van der Woude and Brouwer, 2017). This literature relies primarily on single-country

studies and emphasizes the individual-level dilemmas of frontline implementers between law and practice. Particularities of the European context, such as the growing Europeanization of migration laws (Kauert and Léonard, 2012; Genschel and Jachtenfuchs, 2016; Zaun, 2016) received only little scholarly attention.

This chapter argues that Europeanization may have important implications for the implementation process and the discretionary room of national immigration authorities. First, European Union (EU) law adds another legal level and ‘clearance points’ to the implementation chain (Pressman and Wildavsky, 1974; Treib, 2014). Second, the Court of Justice of the European Union (CJEU) increasingly challenges national practices. The European multilevel legal context poses new puzzles for scholars of migration law implementation. Moreover, due to Europeanization, national implementers in different EU Member States are increasingly confronted with similar laws. This offers new research opportunities for cross-country comparative research that can go beyond individual-level explanations for implementation practices (Dörrenbächer, 2017b).

This chapter starts out by discussing specificities of the field of migration that have been linked to gaps in policy implementation. The next section reviews the state of the art of migration law implementation studies. Subsequently, the chapter zooms into the specifics of the European context. The section continues by discussing the implications of Europeanization for studying implementation. The chapter concludes by presenting a research agenda on the implementation of migration law in Europe.

Complications of implementing migration law

According to Ellermann (2005, p. 2), few policy areas reveal an implementation gap comparable to the divergence between immigration laws on the one hand, and their empirical outcomes through practical implementation on the other. Ellermann (2005) points at the divergence between deportations and the amount of undocumented migrants that remain in the country. Others have related implementation gaps to dissimilar administrative treatments of migrants with formally similar characteristics (Mascini, 2008). Several characteristics of the field of migration have been argued to contribute to these gaps.

First, migration law is formulated and implemented at multiple levels (Lahav and Guiraudon, 2006, see Adam and Caponio in this volume). Depending on domestic bureaucratic structures, various administrative levels, such as embassies, municipalities, state agencies or private actors, cooperate to regulate and organize legal entry, reception, integration and deportations (van der Leun, 2006; Christensen and Laegreid, 2009). This diversity of actors and varying levels of institutional discretion enhance divergence in the implementation process.

Second, migration law implementers handle requests of a highly diverse group of clients such as asylum seekers, EU citizens and third country nationals applying for family reunification, a working permit, citizenship, etc. These diverse grounds for immigration constitute issue linkages to sectors such as healthcare, education, crime and labour market (Givens and Luedtke, 2004; Christensen and Laegreid, 2009). Migration offices that are overburdened by the complexity of the legal field constitute serious risks for consistent implementation.

Third, as the sudden increase in the number of refugees in 2015 has shown, the field of migration is highly unpredictable. Migration is affected by international and humanitarian crises, ecological changes and global socio-economic factors (Christensen and Laegreid, 2009). Consequently, the field is constantly evolving (Jordan *et al.*, 2003, p. 211). In this dynamic setting, insufficient administrative resources, robustness and flexibility may easily delay implementation (Psimmenos and Kassimati, 2003; Christensen and Laegreid, 2009).

Fourth, migration law is highly normatively laden and touches on core state powers and values such as border controls, national culture, identity and security (Genschel and Jachtenfuchs, 2016). The political sensitivity of migration places public actors under close public scrutiny, making them vulnerable to public blame and criticism from a wide range of stakeholders who try to influence the implementation process.

Overall, these characteristics of the field of migration make the application and interpretation of migration law challenging for implementers at the frontline between law and practice. Frontline implementers are public workers who carry out and enforce actions required by laws and public policies (Lipsky, 1980; Meyers and Vorsanger, 2003, p. 154). Due to its relevance for the final outcomes of migration law, a growing scholarly interest into the local and practical knowledge and practices of the lowest level of migration law implementation can be observed.

Dilemmas at the frontline of migration law across North America and Europe

The interest into the practices at the frontline of migration law implementations derived from the North American context. For example, Gilboy (1991) investigated how immigration officers at US airports develop categories to decide which foreigners they investigate and Heyman (1999) studied administrative decision making at the US–Mexican border. Moreover, Weissinger (1996) described the normative structure of the US Immigration and Naturalization Service and how the organization struggles with its double function of controlling and providing services to migrants. In a later study, Magaña (2003) added that the ever-changing policy mandates from the US Congress and a lack of funding hinder the migration civil servants to fulfil their enforcement and service functions. US studies have also investigated local levels of implementation. For example, Armenta (2012) found diverse role conceptions of deputized immigration officers. More generally, the US-based literature has paid considerable attention to the multilevel character of US migration law and investigated how local civil servants reshape national migration laws at the city and state level (Wells, 2004; Varsanyi, 2008; Marrow, 2009; Coleman, 2012). Frontline studies also emerged in the Canadian context, where researchers stressed the role of discretion of migration officers (Bouchard and Carroll, 2002). For example Satzewich (2013) studied definitions of ‘normal’ family ties in the contexts of migration and rhetorics around racial profiling of Canadian civil servants (Satzewich and Shaffir, 2009).

Beyond the North American context, migration implementation studies are increasingly also conducted in European settings. For example, Alpes and Spire (2014) have shown how French consular employees draw on the law as a constraint but also as a resource to handle organizational pressures and to manage their fear of fraud. The authors indicate how the extraordinary discretion in consulates is influenced by implementers’ bureaucratic habitus and belief that they defend the national interest. Düvell and Jordan (2003) have studied role conceptions of caseworkers in the UK Home Office. Their study demonstrates how public servants’ self-identification as liberal and just brings them in conflict with some of their duties. Similarly, Hall (2010) demonstrates the importance of emotions in the British detention procedure as important factor for implementation practices.

The role of emotions features prominently also in studies on Scandinavian immigration bureaucracies. For example, Eggebø (2012) observed how Norwegian migration officials balance emotion and reason when deciding on family immigration (on Norway see also Hagelund, 2010). Similarly, Graham (2002) and Ottosson *et al.* (2012) found dilemmas between emotions, organizational pressures and restrictive norms in the Swedish asylum procedure. Across these studies, family migration and bureaucratic evaluations of family ties feature as particularly prominent research topics (see also Pellander, 2015).

In the Netherlands, van der Leun (2006) observed that civil servants whose direct tasks are not connected to migration control are increasingly asked to report undocumented migrants and to deny them services. Her research shows that these implementers often constructed the meaning of compliance with the law themselves, leading to wide discretion and variation in policy outcome.¹ Mascini (2008) compared how Dutch caseworkers differ in their asylum decision making. Presenting one of the few quantitative studies in this field, he finds that differences result from work pressure, the caseworkers' reputation, their role definition, political opinion, professional background, and policy. More recently, van der Woude and Brouwer (2017) uncovered the growing role of technology in Dutch migration control.

Moving to the German context, Cyrus and Vogel (2003) have argued that frontline implementers have legalistic and professional attitudes but use discretion in the interpersonal interaction with clients. Such interpersonal interactions are also studied by Eule (2014). He points at oral traditions when discussing how local German migration caseworkers use migration laws. The local level features also prominent in Ellermann's (2005, 2006) study on local civil servants in the US and their German counterparts. Presenting one of the few cross-country studies of frontline implementation, she indicates how agency staff struggle with the intention to dutifully implement restrictive migrations policies while at the same time responding to resistance and pressure by pro-migrant lobby groups that mobilize against their decisions. The research suggests that agencies that are insulated from the influence of elected politicians are better equipped to counter such interference.

Finally, there has been some research on migration law implementation in Southern Europe. For example, Psimmenos and Kassimati (2003) examined organizational culture and work values in a Greek welfare office that handles labour migration. Moreover, by comparing two Spanish migration administrations, Bastien (2009) has pointed at the role of goal ambiguities and informal discretion during migration law implementation. Research on the Italian case includes a study by Triandafyllidou (2003) on organizational culture and identity processes during labour migration law implementation. Furthermore, Barberis and Boccagni (2014) highlight the centrality of social workers' commitment and discretionary power in addressing migrants' needs in an under-institutionalized Italian setting. Additionally, Zampagni (2016) investigated to what extent Italian consular officials act similarly to Lipsky's (1980) street-level implementers when deciding on Schengen visas.

Overall, the discussed studies indicate that throughout Europe scholars have started to acknowledge that policy-making does not end with the adoption of migration laws. However, the review also indicates that Eastern European countries remain understudied. By way of exception, Düvell (2011) conducted ethnographical research on the Ukrainian border, finding illegal state agents' practices that encourage continuation of irregular migration despite enhanced border controls.

More generally, there is so far hardly any cross-country comparative research (but see Ellermann, 2005; Infantino, 2016). Instead, scholars have devoted considerable attention to single-country studies that focus on individual-level dilemmas and organizational cultures. Compared to the US-based literature, European studies discussed considerably less explicitly domestic institutional contexts, accountability structures and multilevel characteristics of migration law. In light of Europeanization this gap is interesting because European law confronts domestic implementers with very specific multilevel challenges that deserve more explicit attention.

Europeanization of regulatory migration frameworks and implications for studying implementation

While implementation studies so far paid little attention so far to the Europeanization of migration laws, the establishment of the first generation of European migration directives in the early 2000s has triggered some attention among legal scholars (Odysseus Network, 2007; Pascouau and Labayle, 2011; Strik, 2011). These researchers studied how European law affects national migration laws and how Member States transpose migration directives into their national laws. These transposition studies provide a crucial point of departure to understand the particularities of EU migration law with implications for practical implementation. Especially the transposition of the Family Reunification Directive as one of the most influential European regulatory instruments in the field of legal migration has been studied extensively (Groenendijk *et al.* 2007; Pascouau and Labayle, 2011; Strik *et al.*, 2013). Generally, these transposition studies have shown that European migration law affects not only the substance of national law but also restricts the level of discretion left to national policy makers (Strik, 2011).

Case law by the EU Court of Justice has further limited the discretion of the Member States by imposing strict interpretations of vague EU migration laws (Acosta Arcarazo and Geddes, 2013). This trend has been fuelled since lawyers and judges became acquainted with European Migration Law and started lodging requests for preliminary rulings from the CJEU. In light of the ‘control gap debate’ (Bonjour, 2011; see Garcés-Masarañas in this volume), these effects support the claim of migration scholars that due to Europeanization policy makers have lost much power to the courts (Acosta Arcarazo and Geddes, 2013; Bonjour and Vink, 2013; Kaunert and Léonard, 2012; but see Bonjour *et al.*, 2018 for debate on this issue). Thus, the field of migration seems to support Kelemen’s (2011) Eurolegalism thesis, that EU law formalizes national law and limits national discretion.

Applying these insights to the practical implementation of European Migration Law, the addition of the European legal level implies at first sight that national implementers are increasingly constrained by European law. In turn policy divergence and implementation gaps may diminish. However, as has been observed in general implementation studies, more rules and regulations do not automatically lead to convergence and limited discretion (Evans and Harris, 2004, p. 871).

Severe doubts on the capacity of EU law to fully harmonize implementation practices derive particularly from the EU compliance literature (see Treib, 2014 for review). Despite the growing regulatory effort of the EU, this literature has pointed at considerable gaps regarding the implementation of European obligations. Two broad explanations for non-compliance with EU obligations emerge from this literature, namely preference-based explanations and state-based explanations. Preference-based approaches assume that veto players, national and party interests trigger Member States to comply with some EU obligations but not with others (Mastenbroek and Kaeding, 2006).

By contrast, state-based explanations assume that Member States have a general tendency with which they approach EU law. For example, Falkner *et al.* (2007) identified four worlds of EU compliance. In countries belonging to the world of law observance, which broadly include the Nordic EU Member States, countries typically transpose, apply and enforce EU directives timely and correctly. In the world of domestic politics, including among others Germany, the Netherlands and Spain, the transposition of EU law into national law occurs only if the content of EU law is in line with national interests. Once transposed, application and enforcement runs smoothly. States belonging to the world of neglect tend to ignore EU legislation. Falkner *et al.* (2007) classify France, Greece and Portugal in this world. Finally, Falkner and Treib (2008)

added the world of dead letters to account for the practice of many Eastern European Member States to correctly transpose European directives without ever implementing them in practice. While the typology emerged for social policies, Strik (2011) observed that the typology corresponds well with the way Member States comply with migration directives. However, countries that fall within the world of law observance and domestic politics such as Germany and the Netherlands received considerably more scholarly attention than countries of the other two types.

Moreover, studies have devoted more attention to the legal transposition of European obligations and neglected the practical implementation stage. So far, only a handful of very recent studies started to shed some light into the practices of national officials who handle European migration obligations. For example, van der Woude and van der Leun (2017) observed that despite the fact that EU law prohibits migration controls at the internal borders of the Schengen area, practical implementers can circumvent these regulations. More concretely, the authors show how civil servants link crime and migration controls at the Dutch internal borders through discretionarily extending the controls to *crimmigration* checks (see also Brouwer *et al.*, 2017).

Additionally, Infantino (2016) provides ethnographic insights on frontline implementation of EU visa policy. She compares the consulates of Belgium, France and Italy in Casablanca and finds that on the ground, EU visa policies are state-bound and dependent on the historical roots of the bi-lateral relations between the Schengen countries and Morocco. This finding leads Infantino to question whether Europeanization of visa policies implies diminishing cross-national differences in day-to-day implementation.

These findings correspond with a recent study by Dörrenbächer (2017a). She shows that while EU law may limit the discretion of national policy makers, EU migration law often also includes fuzzy legal concepts that offer migration law implementers new discretion. Discretion emerges out of controversy in Council negotiations (Zaun, 2016) and vague transposition at the national level (Dörrenbächer and Mastebroek, 2017). This turns national migration law implementers into EU policy makers who are forced to fill discretionary EU law with meaning on the ground.

Additionally, Dörrenbächer (2017a) shows that while the CJEU restricts the discretion of Member States, the rulings may create new room for manoeuvre for lower level implementers. For example, in *Chakroun* (C-578/08) the CJEU demands more individual-level assessments by practical migration law implementers than the national statutes of some of the Member States prescribe or even allow. In its subsequent judgements (*K. and A*, C-153/14; *Khachab*, C-558/14), the CJEU has confirmed this obligation demanding again greater discretion from lower level implementers. By requiring a proportionality test, taking into account all individual interests and circumstances of each migrant, the CJEU obliged Member States with a highly centralized and computerized administrative decision-making system to relax their discretion-constrained implementation procedures.

Finally, new discretion emerges as an unintended consequence of EU law. For example, when EU migration laws are transposed in a noncompliant way, implementers need to decide if they rely on national or European guidelines. Dörrenbächer (2017a) finds such situations in German local migration offices where national caseworkers decide on the basis of their implementation motivations to follow national or European legal requirements. In a comparative study between German and Dutch migration officials Dörrenbächer (2017b) shows that beyond personal motivations, the decision to rely on original EU migration law is also a matter of national bureaucratic structures.

Overall, there are still only few studies that discuss the impact of Europeanization on migration law implementation. However, the few studies that emerged recently indicate that despite

the formalization of migration laws in Europe, discretion and divergence in migration law implementation still persist and the multilevel European context may even lead to new legal ambiguities and puzzles at the frontline of implementation.

Conclusions: avenues for future research

This chapter reviewed the state of the art of migration law implementation studies in Europe. The review showed that scholars from a variety of disciplines started to go beyond policy formulation to pay more attention to those actors who apply migration law on the ground in migration agencies, embassies, consulates and alien police offices (e.g. Cyrus and Vogel, 2003; Jordan *et al.*, 2003; Ellermann, 2006; Eule, 2014; Eggebø, 2012; Infantino, 2016). These studies provide impressive insights into the struggles of individual migration officials and the complications of bureaucratic discretion in the field of migration.

However, these studies have so far largely neglected the particularities of the European context of migration law implementation despite the fact that Europeanization of migration laws increasingly affects national regulatory frameworks (Boswell and Geddes, 2011; Block and Bonjour, 2013; Zaun, 2016). Beyond the substantive effects, EU law and its subsequent case law increasingly diminish the discretion of national policy makers (Strik, 2011). For migration law implementation studies, this raises new puzzles such as to what extent discretion remains for national migration officials, to what extent implementation practices converge and which effect Europeanization has on alleged implementation gaps.

The general EU compliance literature (Treib, 2014) and a handful of very recent studies on practical implementation of European migration law suggest that EU migration law sustains or even increases the level of discretion for national migration administrators (Brouwer *et al.*, 2017; Dörrenbächer, 2017a; van der Woude and van der Leun, 2017). Thus, divergence in the implementation phase and implementation gaps are likely to persist.

In order to investigate this claim further, we need more cross-country comparative studies on the implementation of migration laws in Europe. The EU context provides particularly good conditions to go beyond single-country studies because EU law increasingly confronts national implementers with the same legal stimuli. To fruitfully apply cross-country comparisons, scholars need to extend their analysis of individual frontline variation to pay more attention to national institutional context. For example, the level of discretion left by institutional structures, the authorities to which implementers are accountable or feel loyal to and the level of client contact they have in their daily implementations tasks may affect how common European legislation is applied across countries. Standard public administration theories may provide a useful point of departure to integrate such aspects (see Dörrenbächer, 2017b).

Considering migration management as including ‘actors, practices and discourses’, it is also important to simultaneously study state, inter-governmental and non-state (implementing) actors (Geiger and Pecoud, 2010), and to build on the concept of ‘implementation dynamics’ (Wunderlich, 2012) which implies the importance of understanding causes of changes in practice. Migration law implementers can be understood as dynamic agents who are not only passively constrained by the structures in which they operate, but who also participate in shaping these structures. Thus, they are not only policy takers, but also policy shapers (Lipsky, 1980). This understanding of implementation as ‘policy assemblage’ consisting of actors, institutions and knowledge are useful structuring tool to study implementation (Feldman, 2011). Generally, these concepts could be explored more closely in migration implementation studies.

Another gap in the European research on migration law implementation uncovered in this review is the lack of communication between studies that focus on the legal transposition of

European migration law and studies that examine practical application and enforcement. A way forward would be to encourage more interdisciplinary research between legal and social scientists to combine expertise on the functioning of the law with an interest in the empirical behaviour of implementers. Connected to this, future research on the implementation of European migration law should also broaden its methodological tool kit. For example, a combination of legal methods with social science approaches of in-depth fieldwork but also quantitative survey or experimental approaches may shed new light on the relation between migration law and empirical behaviour at the frontline of migration law.

Next, this chapter has shown that countries are not yet equally explored with regard to their migration law implementation. In particular, there is a lack of research into the Eastern European Member States. These countries are confronted with distinct migration patterns and have historically different approaches towards migration than the older EU Member States. While good empirical data may be even harder to gather in these countries than in other EU Member States, in light of Falkner *et al.*'s (2007) typology of the world of dead letters it is particularly relevant to examine how these countries apply migration rules on the ground.

Finally, implementation research should also follow new tendencies in EU migration policies more generally, such as the increasing externalization of responsibilities to third countries (see Part VII of this Handbook). Studies dealing with cooperation between the EU and partner countries have not only been criticized for their Eurocentrism, but also for their tendency to limit their policy analyses to the supra-national or national levels (e.g. Dauverge and Ellermann, 2013). This state-centric and structuralist approach has severe limitations for an understanding of actual outcomes of policy-making. Extending implementation research to the local level of third countries adds new dimensions to the multilevel implementation context of European migration law. Additional approaches for instance on norm diffusion (Zimmermann, 2016) can shed new light on the influence of national and cultural contexts on implementation practices, both within and outside Europe.

Overall, it should be mentioned that migration law is a relatively young field of Europeanization. Thus, it is not surprising that there haven't been many studies on the practical implementation of common European migration laws. However, in view of the high salience of migration policy, there is an urgent need for further insight in how migration agencies and individual street-level bureaucrats deal with (European) migration rules in such a politicized environment. Closing these gaps is important because without understanding how rules are implemented, we are unable to evaluate to what extent national and European regulatory frameworks work, how they affect individual migrants, and which implications they have for the politics of migration in Europe.

Note

1 For similar conclusions regarding the Swedish case see Björngren Cuadra and Staaf, 2012.

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