doi:10.1017/aju.2024.35

SYMPOSIUM ON UNSETTLING THE SOVEREIGN "RIGHT TO EXCLUDE"

THE RISE OF HUMAN RIGHTS LIMITS TO MIGRATION CONTROL – A EUROPEAN PERSPECTIVE

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One crucial difference between migration and other areas is that the web of individual rights woven by human rights law has remained thin for a long time. Migration has long looked like the last bastion of sovereignty while other fields of law became subject to a rights revolution imposing meaningful constraints on public authorities. This essay confronts the legacy of immigration exceptionalism with developments in the European legal space since the 1990s. Catalyzed by the case law of the European Court of Human Rights (ECtHR), human rights eventually have taken center stage in legal and political struggles challenging the power to exclude. The expansion of human rights discourse in contemporary Europe is seen as part of a larger trend. Mutually reinforcing processes of "humanrightization" in law, politics, and everyday practice have given rise to successful claims raised by migrants and other social actors seeking to limit the governmental power of migration control. Humanrightization of migration discourse makes it possible to formulate far-reaching demands for the inclusion of migrants within the framework of the recognized rules of legal argumentation—a "positivist human rights maximalism."

Sovereignty and Human Rights: A Sketch

In contemporary European politics, migration issues are among the most contested. Migrants make claims to inclusion—territorially, socially, or politically—which other actors fiercely contest.[1] Public authorities have long asserted their "sovereign" power to intervene in such conflicts, designing and enforcing policies of selective in-/exclusion on account of security concerns, foreign policy objectives, economic requirements, or imaginaries of collective identity.[2] Over the past few decades, however, the discretion of public authorities has been restricted by a force they could safely ignore before: the human rights of migrants. A cultural revolution has taken place,[3] as a result of which actors in migration-related conflicts frequently use human rights language to articulate their interests and self-understandings. For want of an established theoretical concept, my colleagues and I in the MeDiMi project call this transformative process and the ensuing dynamics the "humanrightization of migration discourse."[4]

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[1] *Cf.* Aristide R. Zolberg, *Matters of State: Theorizing Immigration Policy*, *in* THE HANDBOOK OF INTERNATIONAL MIGRATION 71 (Charles Hirschman, Philip Kasinitz & Josh DeWind eds., 1999).

[2] Jürgen Bast, *Das Recht als Archiv sozialer Konstruktionen der Migration*, 3 RECHTSWISSENSCHAFT 139 (2012).

[3] On the interplay of revolutions in the sense of radical advance and revolutions in sense of returning to the past, see FAREED ZAKARIA, AGE OF REVOLUTIONS (2024).

[4] Research Group MeDiMi, *Human Rights Discourse in Migration Societies: A Research Agenda* (MeDiMi Working Paper No. 1, 2023).

Humanrightization means a routinized practice of referring to human rights as a normative resource, whether as a legal argument, a moral-political claim, or as a maxim of professional ethics. We observe that humanrightization of discourse in migration societies is taking place on a continuous basis in law, politics, and everyday life.

The remainder of this essay provides a sketch of this phenomenon. Two disclaimers are necessary before we proceed. First, the essay does not pursue comparative objectives but instead focuses on the legal-political context of Europe. Others may feel invited to compare and contrast the European experience with developments in other regional or national contexts. Second, observing the humanrightization of discourse in migration societies does not imply that human rights claims made in migration-related conflicts are necessarily successful. Humanrightization provides for the *possibility* to contest migration-control practices; the outcome of the challenge is subject to contingent legal and factual circumstances, themselves embedded in a broader set of power relations.

The Belated Revolution

Conceiving of migration as the last bastion of sovereignty overlooks the cultural revolution that the notion of humanrightization captures. The fundamental change to the pre-revolutionary era becomes clearer when one travels back in time to the seventies, described by historians as "the decade of human rights."[5] In the early 1970s, actors from various backgrounds and affiliations had simultaneously started to use the language of human rights to express their moral and political demands beyond the narrow confines of UN committees and official foreign policy. These included, among others, the exiled opposition against military dictatorship in Latin America, the so-called dissidents in the Communist bloc, and a small London-based organization called "Amnesty International," which transformed itself into a role model of global campaigning and happened to be awarded the 1977 Nobel Peace Prize.[6]

What is striking is the almost complete absence of migration-related issues from this plethora of human rights events, emerging social movements, and intellectual struggles. By way of exception, Samuel Moyn's seminal book mentions but a single example of a migrant group whose interests were framed in the language of human rights: the so-called refuseniks.[7] This struggle was about the denial of exit visas to Jews living in the USSR, which gave rise to advocacy using the new language of human rights. Among other things, a conference in Uppsala in 1972 was dedicated to the study of the right to leave any country, including one's own, laid down in Article 13 of the Universal Declaration of Human Rights (UDHR). This exception is itself telling, since today's conflicts related to migration are almost always about *immigration* rather than *emigration*.

At the time, such conflicts did not fall under the rubric of human rights. Think, for example, of the end of the guest workers programs in Europe or the refugee crisis following the U.S. defeat in Vietnam. That migrant workers or asylum seekers could derive rights from international law was beyond the horizon of this time. Refugees in particular were seen as an issue of international security and, increasingly, of humanitarian concerns and civil society action but not yet as holders of a human right to international protection.[8] Certainly, the international labor standards developed at the time and the 1951 Refugee Convention are widely understood today as

[5] Samuel Moyn, The Last Utopia: Human Rights in History (2010); Jan Eckel, Die Ambivalenz des Guten (2014).

[6] Stephen Hopgood, Keepers of the Flame: Understanding Amnesty International (2006).

[7] Moyn, *supra* note 5, at 152–53.

[8] On the history of humanitarianism, see Michael N. Barnett, Empire of Humanity: A History of Humanitarianism (2011); Samuel Moyn, *Human Rights and Humanitarianization*, *in* Humanitarianism and Human Rights: A World of Differences? 33 (Michael N. Barnett ed., 2020) (discussing the complex relationship between the two brands of compassionate engagement).

https://doi.org/10.1017/aju.2024.35 Published online by Cambridge University Press

instruments of human rights protection. However, this perception is the result of a conceptual humanrightization that only took place in the 1990s.[9]

The human rights transformations of the 1970s belatedly made their way to the field of migration. Suffice it to observe here that human rights discourse in general has substantially changed since the 1970s. These changes may be captured by the notions of domestication, politicization, and legalization of human rights. In the seventies, human rights practice had a decidedly anti-totalitarian impetus and was mostly concerned with victims abroad. Today, human rights are brought back into the domestic arenas of politics and are mobilized against policies formulated by public authorities in liberal democracies, including migration policies.[10] Moreover, the understanding of human rights by many contemporary actors is a "maximalist" rather than "minimalist" one. Back in the 1970s, human rights claims tended to present themselves as indisputable and non-political, whereas actors today frequently use human rights as a normative resource to make highly aspirational and, by implication, contestable demands on contentious issues such as migration. Finally, human rights discourse at present is much more legalized and has become an integral part of professional legal practice. Arguably, the move from human rights language to human rights law reflects both an autonomous development within the legal field and the strategic choices made by civil society actors pursuing their interests through the courts.

A Cornerstone of Humanrightization: Strasbourg Case Law

The human rights of migrants, including refugees, are now extensively discussed in legal scholarship and litigated in courts.[11] While the turn to human rights law in migration matters cannot be reduced to a single forum, the ECtHR has been a crucial component of this transformation.[12]

For non-European readers, a few remarks on the Strasbourg court seem appropriate. The ECtHR is the judicial body of the Council of Europe, a pan-European association of states, and adjudicates on the European Convention of Human Rights (ECHR). The Court has compulsory jurisdiction to hear complaints brought by individual victims of human rights violations after the exhaustion of domestic remedies. Its decisions are binding, though technically only on the parties to the dispute. The ECtHR interprets the Convention as a "living instrument," a document that must develop over time according to the needs of contemporary societies. After the end of the Cold War, the ECtHR has gained significance, both practically and symbolically. Accepting the jurisdiction of the Strasbourg court came to define what it means to be part of "Europe"; it embodies the European *ordre public*, as it were. Accordingly, most Constitutional or Supreme Courts in Europe accept the ECtHR's supranational guidance in interpreting their own domestic bill of rights. This includes the EU's Court of Justice in its case law on the EU Charter of Fundamental Rights.

That the European Convention would become a document that migrants can draw upon to defend their interests and contest measures of migration control was anything but self-evident. Drafted in 1950 by former and actual colonial powers, the European Convention contained several safeguards to prevent non-European subjects from challenging migration policies. Moreover, none of the provisions of the Universal Declaration of 1948 that explicitly addresses human mobility, notably the right to seek and to enjoy asylum in other countries from persecution (UDHR Article 14), made it into the original body of the Convention. And, indeed, in the first three decades

[9] For a breakthrough toward the humanrightization of refugee law, see James Hathaway, The Law of Refugee Status (1st ed. 1991).

[10] On the United States, see Mark Philipp Bradley, The World Reimagined: Americans and Human Rights in the Twentieth Century (2016).

[11] *See, e.g.*, Human Rights of Migrants in the 21st Century (Elspeth Guild, Stefanie Grant & Kees Groenendijk eds., 2017); Başak Çalı, *Optimism in International Human Rights Law Scholarship*, 118 AJIL 374 (2024) (book review).

[12] *See* Migration and the European Convention on Human Rights (Başak Çalı, Ledi Bianku & Iulia Motoc eds., 2021).

https://doi.org/10.1017/aju.2024.35 Published online by Cambridge University Press

of the ECtHR's activity, the rare cases in which governmental measures of migration control were at issue left the applicants empty-handed.[13]

However, in the late 1980s a development began which, in hindsight, marks the beginning of a new era in the case law of the Court.[14] Over the course of little more than a decade—a fairly short period when talking about judge-made law—the Court transformed several migration-blind provisions of the Convention into core guarantees of migrants. Today, the relevant case law covers a wide range of issues and consists of literally hundreds of judgments that are the bread and butter of migration law scholars and practitioners.[15] In the following, I will limit myself to outlining the cornerstones of this transformation.

The first provision to be mentioned is ECHR Article 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment."). The foundational case is *Soering v. UK*, decided in 1989.[16] In the course of the 1990s, it became settled case law that ECHR Article 3 enshrines the principle of *non-refoulement*, that is, the unconditional right not to be subjected to grave human rights violations due to measures of migration control.[17] It entails a right to stay for as long as the threat persists, also in cases of looming chain *refoulement*, and a right to admission in border situations for the purposes of conducting a proper asylum procedure. Under the ECHR, any "pushbacks" of protection-seeking migrants are illegal.[18] These rights are accompanied by strong due process guarantees and minimum social rights, also derived from ECHR Article 3.[19] In effect, the Convention provides for an enforceable right to claim asylum, including at the European borders. Human rights became the conceptual foundation of refugee law, which in turn fostered a new understanding of the 1951 Refugee Convention, with the two instruments and other human rights treaties complementing each other.[20]

In parallel, the Court carried out a reconstruction of ECHR Article 8 ("Everyone has the right to respect for his private and family life . . . ."). The foundational judgment is *Berrehab v. The Netherlands* of June 1988.[21] The ECtHR held that the interests of migrants to pursue a normal family life at their place of residence can override the public interests served by means of migration control. Over the course of the 1990s, the Court developed a rich case law on non-expulsion of "settled migrants" and the right to admission of close family members. Expulsion or non-admission of a family member is lawful only if a "fair balance" has been struck between the private and public

[13] For a critical review, see Marie-Bénédicte Dembour, When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint (2015).

[14] The bottom-up processes that triggered this development are an understudied topic. On France, see Leila Kawar, Contesting Immigration Policy in Court: Legal Activism and Its Radiating Effects in the United States and France (2015); on the Netherlands, see Wiebe Hommes, Co-creating European Human Rights: How the Netherlands Received and Shaped the European Convention on Human Rights, 1945–2022 (2023) (unpublished PhD thesis, on file with Universiteit van Amsterdam).

[15] For an overview, see Aliens Before the European Court of Human Rights: Ensuring Minimum Standards of Human Rights Protection (David Moya & Georgios Milios eds., 2021).

[16] Soering v. United Kingdom, App. No. 14038/88, Judgment (Eur. Ct. H.R. July 7, 1989).

[17] Cruz Varas v. Sweden, App. No. 15576/89, Judgment (Eur. Ct. H.R. Mar. 20, 1991); Vilvarajah and Others v. United Kingdom, App. Nos. 13163/87 et al., Judgment (Eur. Ct. H.R. Oct. 30, 1991); Chahal v. United Kingdom, App. No. 22414/93, Judgment (Eur. Ct. H.R. Nov. 15, 1996).

[18] *See, e.g.*, Hirsi Jamaa and Others v. Italy, App. No. 27765/09, Judgment (Eur. Ct. H.R. Feb. 23, 2012); Ilias and Ahmed v. Hungary, App. No. 47287/15, Grand Chamber Judgment, para. 124 (Eur. Ct. H.R. Nov. 21, 2019).

[19] *See, e.g.*, M.S.S. v. Belgium and Greece, App. No. 30696/09, Grand Chamber Judgment (Eur. Ct. H.R. Jan. 21, 2011).

[20] Jane McAdam, Complementary Protection in Refugee Law (2007); Kees Wouters, International Legal Standards for the Protection from *Refoulement* (2009); Fanny De Weck, *Non-refoulement* Under the European Convention on Human Rights and the UN Convention Against Torture (2017).

[21] Berrehab v. Netherlands, App. No. 10730/84, Judgment (Eur. Ct. H.R. June 21, 1988).

https://doi.org/10.1017/aju.2024.35 Published online by Cambridge University Press

interests involved and due consideration was given to all relevant circumstances of the individual case.[22] This excludes, *inter alia*, any schemes of automatic expulsion following a criminal conviction or unlimited re-entry bans.[23] In exceptional circumstances, ECHR Article 8 may even give rise to a right to regularization.[24] Based on a broad reading of the term "private life," this rationale was extended to the protection of other social ties developed at the place of residence. The Court considers the entire network of personal, social, and economic relations an essential aspect of the private life of a person.[25] Thus, the interest of any migrant in staying in the country where such ties exist is protected by ECHR Article 8. The Convention provides for a human right to sojourn in all but name, albeit a conditional one.[26] Human rights became a source of denizenship beyond nationality.[27]

Human Rights Backlash?

These rough sketches of a complex jurisprudence may suffice to make the point that in the European legal context, well-established instruments of migration control such as expulsion or refusal of entry at the border are not purely within the discretion of states anymore. If such unlimited discretion actually constitutes sovereignty, sovereignty is lost. Public authorities today must justify their action against the yardstick of individual rights derived from human rights law.

The actual impact of the Strasbourg case law on the practice of migration control was and is subject to debate.[28] More recently, scholars have noted signs of retreat from earlier jurisprudence in border management cases and a trend toward a more deferential approach in its case law on ECHR Article 8.[29] Some have even diagnosed a "provisional endpoint of three decades of dynamic human rights jurisprudence."[30] I would argue that telling such a story of rise and fall is not entirely appropriate. After the initial rapid transformation in the long 1990s, there was no permanent expansion of the protection of migrants' rights but rather a typical back-and-forth. The ECtHR's approach to migration-related cases has always been somewhat indecisive, oscillating between Utopia and Laodicea, as it were. The Court's revolution has created the possibility to contest measures of migration control

[22] Boultif v. Switzerland, App. No. 54273/00, Judgment, para. 48 (Eur. Ct. H.R. Aug. 2, 2001); confirmed in Üner v. Netherlands, App. No. 46410/99, Grand Chamber Judgment, paras. 57–58 (Eur. Ct. H.R. Oct. 18, 2006); Sen v. Netherlands, App. No. 31465/96, Judgment (Eur. Ct. H.R Dec. 21, 2001).

[23] *See, e.g.*, Maslov v. Austria, App. No. 1638/03, Grand Chamber Judgment (Eur. Ct. H.R. June 23, 2008).

[24] *See, e.g.*, Jeunesse v. Netherlands, App. No. 12738/10, Grand Chamber Judgment (Eur. Ct. H.R. Oct. 3, 2014).

[25] Slivenko v. Latvia, App. No. 48321/99, Grand Chamber Judgment, para. 96 (Eur. Ct. H.R. Oct. 9, 2003).

[26] For a more detailed account, see Jürgen Bast, Frederik von Harbou & J. Wessels, Human Rights Challenges to European Migration Policy: The REMAP Study 186–90 (2022).

[27] On the interplay with denizenship based on supranational or national legislation, see Jürgen Bast, *Denizenship als rechtliche Form der Inklusion in eine Einwanderungsgesellschaft*, 2013 Zeitschrift für Ausländerrecht 353.

[28] *See, e.g.*, Cathryn Costello, The Human Rights of Migrants and Refugees in European Law (2016); Itamar Mann, *Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993–2013*, 54 Harv. Int'l L.J. 315 (2013); Anuscheh Farahat, *Human Rights and the Political: Assessing the Allegation of Human Rights Overreach in Migration Matters*, 40 Neth. Q. Hum. Rts. 180 (2022).

[29] Stefan Schlegel, *Does International Human Rights Protection Trigger a Copernican Revolution for Immigration Law?*, *in* Can Human Rights and National Sovereignty Coexist? 186, 200–05 (Tetsu Sakurai & Mauro Zambone eds., 2023); Prisca Feihle, *Asylum and Immigration Under the European Convention on Human Rights*, *in* The European Court of Human Rights: Current Challenges in Historical Perspective 133, 153–55 (Helmuth Philipp Aust & Esra Demir-Gürsel eds., 2021).

[30] Daniel Thym, *The End of Human Rights Dynamism? Judgments of the ECtHR on "Hot Returns" and Humanitarian Visas as a Focal Point of Contemporary European Asylum Law and Policy*, 32 Int'l. J. Refugee L. 569, 589 (2020).

https://doi.org/10.1017/aju.2024.35 Published online by Cambridge University Press

on human rights grounds, while at the same time always ensuring that the core instruments of migration control remain in place as a matter of principle.

However, the Court did not sanction a return to the *ancien régime* of unfettered state discretion in migration issues either. The essential legal doctrines that came into being during the foundational period have not been reversed. This has opened up a discursive space for far-reaching demands for the inclusion of migrants within the framework of the recognized rules of legal argumentation. Such "positivist human rights maximalism" by human rights lawyers and activists will continue to clash with counterclaims made by other actors, including governments—with unpredictable outcomes. It seems humanrightization is here to stay.

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