A Reappraisal of the State Sovereignty Debate: The Case of Migration Control

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The ability of European nation-states to control migration has been at the forefront of the immigration debate. Some scholars have argued that international human rights and the freedom of circulation required by a global economy and regional markets are the two sides of a liberal regime that undermine the sovereignty of nation-states. Others have gone even further and declared the double closure of territorial sovereignty and national citizenship to be outmoded concepts. This article inscribes itself in that debate by answering the following questions: (a) To what extent do international legal instruments constrain the actions of national policy makers? and (b) How have nation-states reacted to international constraints and problems of policy implementation? Focusing on Council of Europe’s jurisprudence, the authors assess the extent to which national courts have incorporated European norms and governments take them into account. The article examines ways that national policy makers have responded by shifting the institutional locations of policy making. In evaluating state responses, the article identifies the devolution of decision making upward to intergovernmental fora, downward to local authorities, and outward to nonstate actors.

A REAPPRAISAL OF THE STATE SOVEREIGNTY DEBATE
The Case of Migration Control

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One of the prominent ongoing debates in international relations and comparative politics has focused on the extent to which developments subsumed under the term “globalization” have eroded national sovereignty (Evans, 1998; Keohane & Milner, 1996) and international norms have constrained national policy making (Goldstein & Keohane, 1993; Katzenstein, 1996). International migration lies at the crossroads of these debates. The latter is not only an instance of transnational flows but also, because it involves human beings, one where normative constraints play an important role.
For globalists, migration is seen as a case of nation-states losing control (Sassen, 1996). Some scholars have argued that the capacity of states to control unwanted migration is declining (Cornelius, Martin, & Hollifield, 1994) because they have been unable to prevent the settlement of unsolicited migrants such as family members of foreign workers, asylum seekers, and undocumented aliens. Furthermore, a number of academic writings attribute this evolution to the emergence of an international human rights regime that prevents nation-states from deciding who can enter and leave their territory (Jacobson, 1996; Sassen, 1996; Soysal, 1994). Neither of these claims is self-evident. Recent studies on asylum policy and border control suggest an increasing will on the part of receiving countries to stem unsolicited migration flows (Brubaker, 1994; Freeman, 1995, 1998; Joppke, 1997, 1998; Lahav, 1997a, 1997b). As to the causal importance of an international human rights regime, the hypothesis still needs to be specified and tested.

This article examines the evolution of international legal norms that affect the status of migrants and the evolution of migration control mechanisms in the recent period so as to assess the empirical validity of scholarly claims on the diminished sovereignty of states in this policy area. First, we argue that one should not overstate international normative constraints on migration control. A study of international jurisprudence and its national incorporation demonstrates that international norms have had belated and circumscribed effects on national policies, mainly regarding the expulsion of foreigners. Liberal domestic norms guaranteed by constitutions, legislation, and jurisprudence have had a more significant impact on national control policies and need to be taken under consideration as well. Second, globalist perspectives tend to overlook state responses to these constraints. National governments have devised a number of ways to circumvent normative constraints. More specifically, they have shifted the level at which policy is elaborated and implemented. We identify the devolution of decision making in monitoring and execution powers upward to intergovernmental fora, downward to elected local authorities, and outward to private actors such as airline carriers, shipping companies, employers, and private security agencies. This multi-faceted devolution of migration policy has not resulted in states losing control over migration. Rather, it shows the adaptiveness of agencies within the

1. Here, the term “globalists” refers to scholars who emphasize the blurring of domestic and international boundaries in an interdependent world, which relies on the free flow of goods, money, people, and ideas or norms. The term also is employed by Joppke (1998).

2. This debate often postulates a golden age of state control that may never have been (Thomson & Krasner, 1989) and sometimes suffers from a monolithic view of the state that omits domestic factors that limit national policy making, such as self-imposed judicial control on state action.
central state apparatus in charge of migration control and their political allies. By sharing competence, states may have ceded exclusive autonomy yet they have done so to meet national policy goals, regaining sovereignty in another sense: capabilities to rule.

Our research focuses on Germany, France, and the Netherlands—three states that have received large numbers of foreign workers in the post–World War II period and who continue to attract new migrants.1 These countries constitute representative cases to test the import of international norms because they belong to the same web of international institutions with monitoring and enforcement powers, in particular, those of the Council of Europe. They should therefore be exposed to the same international normative discourse.

The first part of the article analyzes international legal instruments, the jurisprudence on aliens of European courts since their creation, and their incorporation at the national level for each country case. The second part scrutinizes legislative and regulatory reforms in restrictive migration policies so as to collect instances of changes in the level of policy making, starting in 1985, when the Schengen agreement, an instance of shifting policy elaboration upward to the intergovernmental level, was signed.

INTERNATIONAL AGREEMENTS, JURISPRUDENCE, AND NORMS ON MIGRATION CONTROL POLICIES

Globalists in immigration studies have a tendency to associate individual rights with international forces. Pointing to the creation of a number of international institutions, charters, and declarations providing nation-states with guidelines for the treatment of noncitizen populations on their territory, Yasemin Soysal (1994) states that the source of legitimacy of rights now lies beyond the nation-state. Saskia Sassen (1996) and David Jacobson (1996) also posit that nation-bound rights are in decline and that states face external economic and normative constraints on their action.

This hypothesis is compelling considering that, despite persistent cross-national differences in immigrant rights, all nations have made advances in

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1. They have comparable percentages of resident aliens on their soil. According to the 1990 figures in the middle of the period studied, foreigners made up 4.6% of the total population in the Netherlands, 6.4% in France, and 8.2% in Germany (Organization for Economic Cooperation and Development [OECD], 1992).

2. By the mid-1980s, European governments had realized the permanent character of migration flows as family reunification continued, asylum demands grew, and the return migration schemes generated limited success.
this policy area. It suggests that international forces may drive the evolution of the status of migrants. Especially in an institutionally “thick” environment such as Western Europe, it is plausible that international institutions and transnational actors have been able to diffuse shared understandings about the treatment of foreigners so as to change and shape the views of domestic state and societal actors, as has been the case in other areas (Finnemore, 1993; Wapner, 1993). The research so far still suffers from a lack of attention to actual diffusion mechanisms and domestic political processes (see Finnemore, 1996; Checkel, 1998, for literature reviews that make that point). Paying attention to these is exactly what is needed to assess the validity of the globalist argument.

These considerations also allow us to examine patterns of norms incorporation at the national level. As recent studies on the propagation of transnational ideas and international instruments reveal, national structures influence their domestic infiltration to create significantly different outcomes (Hall, 1989). Indeed, as long as the nation-state is the primary unit for dispensing rights and privileges (Meyer, 1980), it remains the main interlocutor, reference, and target of interest groups and political actors, including migrant groups and their supporters (Kastoryano, 1996). In fact, one does not—yet—find a transnational issue network for migrant rights that would include groups operating at the European level along with others at the national and subnational levels. Despite the presence of a few nongovernmental organizations (NGOs) in Brussels, and efforts of the European Commission to sponsor a Forum of Migrants, recent studies have revealed a missing link between European-level groups and migrant organizations mobilizing domestically (Favell, 1997; Geddes, 1998; Kastoryano, 1994). Therefore, the crafting and diffusion of norms have taken place within the legal sphere, which explains our emphasis on international and national judicial institutions and the ways that their rulings are taken into account by other branches of government.

First, one needs to analyze international human rights legal norms and the ways in which they speak to issues affecting the rights of foreigners—

5. This constructivist approach (Finnemore, 1996; Katzenstein, 1996; Klotz, 1995) is still a matter of controversy in international relations theory (see Checkel, 1998, for a review). It is often the microfoundation of international relations studies on immigration and citizenship issues written by sociologists.

6. As Gérard Noiriel (1996) pointed out in his study on the right of asylum, international texts are applied by state administrations and courts that do so according to their own perception of the national interest. Kathryn Sikkink’s (1993) study on human rights policy in Europe and the United States also has demonstrated that despite similar normative commitments, the time at which human rights became important and the nature of the policies generated have been very different.
especially insofar as signatories are meant to protect the fundamental freedoms of people within their jurisdiction regardless of nationality. It also entails a systematic comparative study of the incorporation of these norms nationally. This process-tracing suggests that although there is some empirical evidence that concurs with globalist claims, the human rights norms crafted and diffused by international jurisdictions and their national counterparts are circumscribed to two specific areas: the right to lead a normal family life and the protection against inhuman treatment, both of which have had an incidence on the discretion of migration control agencies with respect to the deportation of aliens.

**INTERNATIONAL AGREEMENTS: A LIMITED COMPETENCE WITH REGARD TO NATIONAL MIGRATION CONTROL**

In the array of postwar instruments setting human rights standards in Western Europe, there are a number of implicit limits to their universal application. A review of international instruments, emanating from the United Nations (UN), the Council of Europe, the European Union (EU), the International Labor Organization (ILO), and bilateral or regional agreements, reveals how states, in the liberal international order, have been able to accommodate interests closely tied to humanitarian standards while reserving certain national rights. Although the international system has established some ground rules for migration policies, which are linked to human rights, embodied in international law, and codified in declarations, conventions, and recommendations, these instruments vary in strength (i.e., whether they are binding) and in impact. They also are often limited with regard to whom their provisions apply. Political rights, for example, are reserved for citizens rather than nonnationals (Article 16 of the European Convention on the Protection of Human Rights and Fundamental Freedoms and Article 25 of the 1966 International Covenant on Civil and Political Rights). The universal character of human rights is further undermined in international conventions that restrict the rights protection to specific nationalities because they are based on the principle of reciprocity (i.e., the 1977 European Convention on the Legal Status of Migrant Workers or the European Social Charter) or only concern EU member-country citizens (Treaty of Rome, Treaty on European Union).

The state can decide who enters, who participates in the general will, and who can become part of the nation and naturalize; it can legitimately prefer its own in legislation (see the 1958 BIT Convention 111). The same remark

7. The protection of foreigners should be the ultimate test of human rights because they do not claim protection as members of a family, a clan, or a nation but as members of humanity. However, present international texts fall short of this ideal.
applies to conventions that focus on socioeconomic rights insofar as the latter justify laws aiming at the protection of the national labor market. More important, national security, public order, public health, and safety are deemed legitimate reasons to restrict liberties (reasons often invoked in cases involving foreigners). What is not included in international texts is equally telling: The prerogatives of a nation-state when it comes to refusing access, residence, or naturalization to its territory have not been put into question. A reminder of these conscious omissions constantly appears in international courts’ minutes. The International Convention on the Elimination of All Forms of Racial Discrimination (1966) also specifically mentions that discrimination on the basis of nationality does not apply (Article 1, No. 2).

International agreements do not all have a legal value. It sometimes takes decades before they are ratified, and states can do so only partially and/or fail to ratify controversial protocols. Moreover, states use “reserves” or “interpretative declarations” when adhering to international conventions so that “a large part of the system of protection [of rights] is excluded in a way which is antinomical with the idea of a minimum standard of protection embedded in those texts” (Frowein, 1990, p. 193). For example, the Dutch Parliament, when considering the European Social Charter in 1978, also entered a reservation so that the lack of adequate means of subsistence could remain a ground for expulsion in spite of the Charter. Furthermore, individual petition is not always possible, and because states rarely sue other states, it severely limits litigation and case law. When individual petition exists, domestic actors, judges, or lawyers need to be aware of the potential of international agreements.

INTERNATIONAL JURISPRUDENCE: THE EUROPEAN COURT OF HUMAN RIGHTS RECORD AS A “MOST LIKELY” CASE

The extent to which international jurisprudence on human rights can constrain national policies may be measured against the impact of international organizations that have monitoring and enforcement power over migration

8. One should except European Community treaties that recognize equality of treatment for European Union (EU) citizens.

9. In addition, international agreements follow the mood of nation-states, and this is why sometimes, similar to the cavalry, they arrive too late to have a specific impact (e.g., the International Labor Organization [ILO] Convention of 1975 that only gave general guidelines for equality of treatment although many states had already gone a long way in this direction or the 1977 European Convention on the Legal Status of Migrant Workers that came into force in 1983 at a time when the situation had changed considerably since the text was elaborated) (Cator & Niesen, 1994).
control. The European Commission and Court of Human Rights, the first international jurisdiction of human rights protection in history, poses as a “most likely” case for such analysis.\textsuperscript{10}

The 1950 European Convention on the Protection of Human Rights and Fundamental Freedoms adopted by the Council of Europe came into force in 1953, and the European Court of Human Rights (ECHR) started functioning in 1959.\textsuperscript{11} Between 1959 and 1993 (inclusive), the Court ruled on 447 cases, and this number is rapidly growing. Less than a dozen decisions involved the civil rights of foreigners (2.5% of the decisions), and they were issued during the last 10 years.\textsuperscript{12} This small number in and of itself does not prove the lack of effect of this European jurisprudence if one considers the possibility that there might be landmark cases. The periodization does confirm, however, that it took a long time for the ECHR to be known and used by lawyers and, in the case of France, for individual petitions to be allowed. Most plaintiffs appealed expulsion decisions or administrative refusals of entry and residence permits. They generally purported that, in the handling of their cases, the public authorities had violated rights guaranteed under Article 3 (protection against inhuman treatment) and/or Article 8 (right to lead a normal family life) of the Convention (see Berger [1994] for details).

Article 8 has been invoked in a number of cases involving foreigners who have lived in a host country since childhood and have held tenuous ties to their country of origin. In such cases, the Court considered that their expulsion from the receiving country could not be tolerated, despite important criminal records. Similarly, in cases in which the alien had a child raised in the country of immigration, the Court had ruled that he or she could not be prevented from seeing him or her and thus was entitled to a residence permit.\textsuperscript{13}

Article 3 has often been invoked in cases of asylum seekers whose demand for refugee status has been rejected and who claim that they will suffer inhuman or degrading treatment if they are sent back to their country of origin. The Court at first did not find that Article 3 was violated in the individual

\textsuperscript{10} We use this term based on Eckstein’s (1975) discussion of case study methodology. Given the unprecedented system of legally binding human rights regime in Europe, this region is where international norms are most likely to affect domestic outcomes.

\textsuperscript{11} The Commission, which judges the admissibility of the cases, has examined many more cases than the Court. There is no substantive difference in the way it interprets the Convention; therefore, the following discussion centers on the Court records.

\textsuperscript{12} The time frame corresponds to a period when the settlement of foreign minorities coincided with strict immigration control.

\textsuperscript{13} This was reflected in state condemnations in Berrehab v. Netherlands (European Court of Human Rights [ECHR], June 21, 1988), Moustaquim v. Belgium (ECHR, February 18, 1991), Djeroud v. France (ECHR, January 23, 1991), Lamquidine v. United Kingdom (ECHR, June 28, 1993), and Beldjoudi v. France (ECHR, March 26, 1992).
cases that were submitted (i.e., Cruz Varas et al. v. Sweden, Vilvarajah et al. v. United Kingdom, and Viyayanathan and Pusparajah v. France, cited in ECHR, various years). More recently, however, the Court stated that the absolute character of the provision means that protection cannot be ruled out by considerations relating to the public security of the state (Chahal v. United Kingdom, cited in ECHR, November 15, 1996). In three cases, it found that Article 3 would be violated if the applicants were to be deported or extradited. Although the Court seems to consider different kinds of “inhuman treatment” (one case involved an applicant in the final stages of AIDS), applicants must show that they face a “real risk” if they are sent back. The Court’s standard is very high.

The Convention includes other provisions that can be invoked to protect aspects of foreigners’ rights, some of which address the foreigners’ condition, more directly. Discrimination on grounds such as race, color, language, religion, and national origin that is forbidden by Article 14 of the European Convention so far has not been deemed irrelevant by judges (Krüger & Strasser, 1994). The Court has not pronounced itself on human rights dispositions that specifically protect foreigners: against expulsion (Article 1, 7th protocol) and against collective expulsion (Article 4, 4th protocol).

The ECHR has only pronounced itself on narrow aspects of immigrant policy (foreigners’ status in the territory). The evidence suggests that the Court has not so much expanded the social rights of foreigners than contributed to preventing the retrenchment of their civil rights when they faced expulsion. In that respect, they bear more on migration control policy or immigration policy. In these cases, the Court has clearly circumscribed the conditions under which the right protected under the article is deemed violated. In all of its decisions, the Court reaffirms that it does not forbid states to regulate immigration and discusses a number of legitimate reasons for states to restrict migration: the economic well-being of a country (to prevent new entries) and threats to public order (to justify expulsions). These restrictions are vaguely defined as applicable if they are “necessary in a democratic society” (Article 8, paragraph 2). The issue, then, is to judge the proportionality between the legitimate goal of a measure or a law, the means used to achieve

14. These include Ahmed v. Austria (December 17, 1996), D. v. United Kingdom (May 2, 1997), and Chahal v. United Kingdom (November 15, 1996).
15. In the latest judgment of the Court on Article 3, a case involving a Colombian drug dealer who had released information on other traffickers to the French police, the judges did not believe that he faced a real risk if deported back to Colombia (case of H.L.R. v. France, ECHR, April 29, 1997).
16. Germany and the Netherlands have yet to ratify this protocol.
this goal, and the damage done to the individual(s) as measured by the violation of Convention rights.\textsuperscript{17}

Rather than breaking new ground, the ECHR has confirmed, reinforced, and clarified the pertinence of preexisting national legal principles. Most European countries, for example, have inscribed some provisions for family reunification in their constitutions that resemble Article 8 on the right to lead a normal family life. It is thus not fortuitous that the ECHR’s main contribution has been made via the right to a normal family life because in all of the countries studied, this right was already included in constitutional texts and law and/or actively applied. In France, the Conseil d’Etat (highest administrative tribunal) struck down government suspension of family reunification restrictions on the grounds that it was contrary to the “principe général du droit,” which protected the individual’s right to a normal family life as early as 1978 (Arrêt GISTI). In the early 1980s, the German Federal Constitutional Court forced Bavaria and Baden-Wurtenberg to renege on a plan to establish a 3-year waiting period for spouses after marriage before family regrouping in Germany was allowed (Weides, 1989, p. 64). The Court deemed it contrary to Article 6 of the Basic Law on family life, a constitutional provision taken into consideration in residence permits and expulsion court cases since the 1970s (Ansay, 1992; Neuman, 1990). European human rights provide insight on the transmission of norms: National legal norms have been the pillar on which international ones have been elaborated. This confirms constructivist approaches to norms diffusion that emphasize the interaction between national and international dynamics. We now need to analyze the extent to which international norms, albeit based on national ones, then play a role in constraining state action in the area of migration control.

NATIONAL INCORPORATION OF NORMS:
A SLOW, RECENT, YET SIGNIFICANT, PROCESS

How can the jurisprudence of the ECHR affect national practices? This section briefly examines the incorporation of international ECHR norms by national jurisdictions and administrations overseeing migration control in France, Germany, and the Netherlands. This process has been termed “institutional cooptation” (Moravcsik, 1994), in particular when national courts refer to international human rights standards in their pronouncements.\textsuperscript{18}

\textsuperscript{17} The Court thus stated in the Abdulaziz case that “a State has the right to control the entry of non-nationals into its territory” (see Article 94 of the European Court of Human Rights).

\textsuperscript{18} Within the European Convention of Human Rights framework, the Committee of Ministers can order the Commission to publish court decisions so as to “shame violators.” Yet, nearly all cases are reported so that “whatever force lay in this threat has now been lost” (Mower, 1991).
Vincent Berger (1994), division head at the Clerk’s Office of the Court, also speaks of the “preventive consequences” of Court cases and identifies two additional mechanisms: (a) government changes in domestic regulations or promises of reform during a legal procedure in Strasbourg, and (b) in countries where an individual right of petition has been granted, national tribunals take greater care in respecting the convention so as not to have their decisions overruled in Strasbourg (p. 430).

Analysis of our three empirical cases here suggests that international law was ignored for decades and that only recently have high courts used it to buttress their decisions in France and the Netherlands. France only ratified the 1950 ECHR in 1974 and waited until 1981 to permit individual petition under Article 25. It is only in the 1988 Arrêt Nicole that the French Council of State gave full effect to Article 55 of the Constitution under which treaties signed, ratified, and published take precedence over domestic statutes. Two more years passed, however, before the Council of State held that Article 8 of the European Convention could be used whenever the legality of decisions taken against aliens was challenged on those grounds.19

Since 1991, several government measures and actions regarding foreigners have been struck down using Article 3 or 8 of the ECHR. During the 1993 reforms, Articles 23, 25 (last paragraph), and 26 relating to expulsion had to be modified to take new Strasbourg-based standards into account. The 1993 debate on the so-called Pasqua laws on immigration did not mention the ECHR but the highest probability had it in mind when the Council of State criticized the family reunification waiting periods included in the bill.20 Internal government documents then started to include a sort of warning against possible litigation on the basis of Article 8.21 The visas on expulsion decrees now systematically mention the ECHR article.22 The Interior Ministry was not particularly troubled by the incidence of international law and considered it simply a matter of arguing well either the nonexistence of strong ties in France or the overriding danger to public safety. The effectiveness of state responses could be measured against the reported 25% decline in family reunification (Le Monde, Feb. 13, 1995). In 1997, an academic report sug-

19. The landmark decisions were taken in the Beldjoudi (ECHR, January 18, 1991), Babus, and Belgacem (ECHR, April 19, 1991) cases.
20. Furthermore, the Constitutional Council deemed that a new measure that coupled expulsion orders with an automatic 1-year prohibition to reenter France had to take into account the personal life of the expulsee (see “Le Conseil d’Etat,” 1993; “Loi sur l’immigration,” 1993).
22. The automaticity of the mention is a way of warding off court cases or showing good will in appeals.
gested the creation of a special 1-year residence title called “private and family life,” which was clearly inspired from Article 8 jurisprudence (Weil, 1997). The idea was included in an immigration bill submitted by the socialist government in the fall of that year.

Article 3 of the ECHR prohibiting inhuman or degrading treatment of individuals also is beginning to be considered at least on paper. Its main effect is one described as par ricochet. This means that if France knowingly sends back someone to a country where he or she will be likely to suffer treatment considered inhuman by French standards, France is violating Article 3. Administrative tribunals and the Council of State thus annulled a number of arrêts de reconduite à la frontière (orders to leave the territory). The Interior Ministry in a 1991 circular listed the countries where foreigners could not be sent back. It also now motivates its decisions in the written orders.23

In contrast to the French, the Dutch were prompt in ratifying the ECHR (in 1954) and permitting individual petition. Nonetheless, national judges and authorities ignored the Convention for nearly a quarter of a century. This was partly a result of ignorance, the lack of prestige of Strasbourg, and the belief that “the invocation of the Convention was a sign of weakness and was only adhered to when no other reasonable argument was available” (Zwaak, 1989, p. 40). The Dutch Constitution regulates the internal force of treaties in a monistic way and, in its 93rd Article, states that “self-executing” treaty provisions will be binding from the time of publication. However, it is up to the judges to determine whether a provision is self-executing. Thus, until the 1980s, they did not deem the ECHR self-executing. They preferred to apply a comparable provision of Dutch law and, in cases when they did apply the Convention, they did so in a very restrictive way.

The attitude of the Dutch courts toward human rights treaties evolved in the late 1970s and early 1980s, and the Supreme Court took a few landmark decisions invoking the ECHR. It is within this context that one should situate the 1986 ruling of the Supreme Court that confirmed the district court president’s annulment of a deportation order based on the right to a normal family life, despite the Ministry of Justice’s argument that the right to be joined by family members only applied to foreigners already established in the Netherlands. Now, the Judicial Section of the Council of State (who is responsible for reviewing administrative decisions including those taken by the Ministry of Justice in the area of immigration and asylum)24 has crafted precise criteria

23. This development applies to asylum seekers who have been denied refugee status as well (and to illegal aliens).

24. That is, unless the Ministry’s decision was taken in accordance with the advice of the Advisory Committee on Aliens Affairs and the alien had been in the Netherlands for less than a year (see Article 34, paragraph 1b, of the Aliens Act [Vreemdelingenwet]).
for considering Article 8, such as the age of children, regularity of contacts, and means of financial support (Badoux, 1993). The limits of the Convention’s impact are those imposed by Strasbourg case law, which the Council of State often quotes as follows: “Regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual” (see p. 34 of Article 94 of the ECHR).

The postwar Federal Republic of Germany (FRG) is among the few countries with extensive judicial review, and its Basic Law offers strong human rights guarantees. Very few complaints have been filed with the European Commission of Human Rights. Furthermore, the Federal Constitutional Court can only base its decisions on the Constitution. Consequently, on many occasions, the Court has held that a constitutional complaint cannot be based on an alleged violation of the European Convention except in cases in which a court has violated a plaintiff’s fundamental right to equality before the law under Article 3 of the Basic Law by arbitrarily misapplying or overlooking the Convention (Steinberger, 1985). This state of affairs clearly limits the impact of the European Human Rights Convention in Germany. German courts have generally preferred to refer to ECHR decisions when the latter display judicial restraint. For instance, in 1982, when the highest administrative tribunal examined the case of an adult alien who wanted to join his parents in the FRG, it referred to a 1977 decision of the European Commission of Human Rights to state that no right to a residence permit could be derived from Article 8 (Steinberger).

In comparative perspective, the ECHR appears to lead to a harmonization of human rights standards for reasons that originate in the judicial politics of nation-states, given that formal rules allow it. An important factor in understanding the incorporation of norms regarding aliens has been the attitude of courts toward international law, which remains less positive in Germany. Those within the judiciary who favored the acknowledgement of the ECHR jurisprudence did so to avoid being short-circuited by other courts that already applied it or overruled in Strasbourg (Alter, 1998). As it happens, they also were serving the interests of pro-migrant legal aid groups formed in the 1970s, such as the French GISTI or the Dutch Working Group for Legal Aid on Immigrants (Groenendijk, 1980), who sought creative ways to create case law. This motley crew does not so much constitute a “principled-issue

25. One of the cases before the European Court of Human Rights (ECHR) (i.e., Luedicke, Belkacem, and Koc) regarded the right to a free interpreter during a legal procedure for a non-German speaker. After Germany was condemned, the German Parliament amended the relevant legislation. However, it has not done so in other cases when Germany was condemned.

26. This also applies in cases when a state law is deemed incompatible with the Convention, which has the statute of a federal law.
The case of the ECHR and European states does suggest the possibility that under certain conditions, international norms can reinforce national ones to impede certain aspects of migration policy (mainly expulsion). This finding contrasts with more sweeping theoretical claims that correlate transnational human rights norms with the granting of Marshallian rights to foreigners (Soysal, 1994). Long before ECHR decisions, improvements in foreigners’ rights had been achieved through other mechanisms and immigration activists had availed themselves of other means that make this particular factor fail a simple causal test of antecedence. Judicial rulings do not generally represent an expansion of immigrant rights but rather are attempts to limit or perhaps slow down a contraction of such rights (Schain, 1995, p. 10). In brief, although there is recent evidence that governments cannot ignore certain international norms because they are now taken partially into account by national high jurisdictions and legislators, the overall picture is much more nuanced than is suggested by the globalist argument of external constraints on state migration control.

Norms protecting aliens’ rights to enter and stay, to which one may add other impediments to migration control such as “client politics” (Freeman, 1998) whereby business and other interest groups lobby for some openness of borders, can limit the leeway of migration control agencies. Yet, what is often overlooked in sociological accounts that emphasize human rights norms is that state agencies have devised strategies to circumvent these developments, as we show in the next section.

**STATE RESPONSES:**
**SHIFTING THE LEVEL OF MIGRATION CONTROL**

Although immigration issues, political structures, and policy making vary substantially among the European liberal democracies, there are several unmistakable features common to all migration control policies. First, the rate of change of immigration and asylum policy has been reinforced by the rapid development of immigration legislation. After the termination of guest-worker recruitment in 1973 (a process that did not always require legislation because it had not proceeded from legislation in the first place), many European countries passed little legislation for a decade, except for some to facilitate return migration (United Nations Economic Commission for
Europe [UN ECE, 1997, p. 168). Throughout the 1980s and early 1990s, nearly all countries introduced restrictive legislation—in many cases requiring a few versions to get it right (see Lahav, 1997b, for more details). From different starting points, most advanced European countries have been converging toward more restrictive policies, and most have rapidly accelerated the pace of legislative and administrative reforms to control immigration in the 1990s. These developments reflect the adaptive nature and increasing commitment of states to changing migration pressures.

Accelerated procedures have been used as part of more serious efforts to regulate and expedite the departure of unwanted migration. In the Netherlands, the government has claimed that effective policies are needed to deport foreigners who are resident illegally by stressing required cooperation of countries of origin. Amended versions of the Aliens Act, which came into force in January and March 1994, aimed to speed up the admission procedure for claimants, prescreen manifestly ill-founded applications at an early state, remove rejected persons quickly, and create a legal basis for “exceptional leave to remain” for a duration deemed warranted according to sending country conditions (UN ECE, 1997).27 In Germany, as well, the 1993 Amendment to the Basic Law (Article 16a) now excludes from asylum persons entering through “safe third countries” and makes such claimants at the border eligible to be sent back there (UN ECE, p. 112).28

The adaptation of states to migration pressures is perhaps nowhere better reflected than in the nature of policy implementation and the changes in the character of the gatekeepers. The extent of state commitment to control its borders is marked by a shift in the level of decision making and regulation, resulting in a proliferation of new actors involved in migration control. This phenomenon is applicable to both areas of policy making: external and internal control, including questions of entry and stay of migrants.

Migration control policy in the 1990s reveals a threefold dynamic: a shift of decision making in monitoring and execution powers upward to intergovernmental fora (i.e., Schengen, the Justice and Home Affairs “third pillar”), downward to local authorities (through decentralization), and outward to nonstate actors (in particular, private companies, such as airline carriers, transport companies, security services, travel companies, employers, and civic actors). Efforts to reconcile liberal norms, reinforced by international

27. Such permission will be withdrawn when the situation in the sending countries no longer warrants it.

human rights instruments, and to effectively control immigration are resulting in shifting and extending national liabilities.

The changes are all examples of delegation whereby actors outside the central state apparatus are given a role in migration control. They constitute instances in which a principal who has a monopoly over a certain jurisdiction delegates part of the latter to an agent to meet certain goals. The national government (the principal) in this case delegates its authority to agents (i.e., mayors, private companies, other states) more likely to meet policy goals. This model derives from transaction costs economics and principal-agent theory (Williamson, 1975, 1993). The framework has been used to analyze situations in which an agent has access to information or particular qualities and capabilities that the principal may lack.

Using delegation as a theoretical starting point, one can ask why national control agencies came to believe that co-opting other actors would enable them to achieve their stated goals of controlling migration. What had they learned from the evaluation of past policy conflicts that led them to denationalize migration policy elaboration and implementation (for more on learning, see Olsen & Peters, 1996; Rose, 1991)? We posit that the shifts up, down, and out of policy instruments create a vertical chain of policy making that circumvented many of the constraints apparent in a horizontal mode of policy making at the national level and/or incorporated new actors whose own interests coincided with those of national control agencies (Guiraudon, 1998). Judicial constraints mostly operate at the national level, where most of the resources of migrant aid groups have been concentrated (Kastoryano, 1996). National-level policy making involves interministerial arbitrage, and this has meant that ministries, such as interior and justice, that were responsible for control had to compromise with other ministries, such as economics and social affairs, with different perspectives on immigration.

Agenda-setting and policy studies have argued that strategically minded political actors engage in “venue-shopping” and seek locations that will be receptive to their preferred outcomes (Baumgartner & Jones, 1993, pp. 36-37; Sabatier & Smith, 1993). In the case at hand, this implies that actors who belong to the restrictive camp of the migration control policy subsystem will favor a policy-making framework where the balance of forces is tipped in their favor. As we show below, shifting up, down, and out achieves this goal in

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29. Principal-agent theory comes from the work of O. E. Williamson (1975, 1993) on transaction costs. The principal-agent model has been used in political science to understand such diverse phenomena as congressional committees, courts, regulatory agencies (for a review of that literature, see Moe [1984] and Shepsle and Weingast [1994]), and European integration (Garrett, 1995; Garrett & Weingast, 1993; Pollack, 1997). For a critical corrective, see Pierson (1996).
several ways. First, some of the changes, such as carrier sanctions or international cooperation with neighboring and sending countries, result in a “remote control” policy so that aliens do not even reach the receiving state and therefore cannot claim judicial protection. Second, some national actors who could express a less restrictive point of view are remarkably absent from the vertical policy chain, in particular in intergovernmental cooperation where law and order personnel dominate. Third, some of the actors involved may be restrictive of aliens’ rights in the way that they implement their new control functions for reasons of their own (electoral, fear of sanctions). To reap votes in the next elections, for example, mayors and regional leaders in France and Germany have risked being sued because of their attitudes toward migrants in their municipalities. The following section examines the ways in which France, Germany, and the Netherlands have resorted to these methods of policy delegation since 1985.

SHIFTING UP: INTERGOVERNMENTAL COOPERATION AND EXTENDING STATE BORDERS

As international human rights norms develop, national governments also engage at the international level to regain some of the control that they have lost over migration flows because of national jurisprudence. At the international level, this has led to the multiplication of intergovernmental cooperation groups on immigration, asylum, police, and border control (such as the Ad Hoc Immigration Group, Schengen Group, TREVí, the coordinating Rhodes Group, the Vienna Group, and the Justice and Home Affairs European Union working groups). Since the mid-1980s, these groups have been institutionalized (many outside of the community framework) to forward a more effective migration control regime. International and transnational cooperation has enabled EU states to incorporate each other in policy elaboration and to use EU and transnational developments to fortify and extend state borders well before immigrants arrive, and after, by circumventing more liberal national jurisprudence.

Bolstered by the European project of regional integration, these types of arrangements have now evolved in the image of the Schengen Group and are representative of the administrative culture of traditional immigration decision making, where decisions have typically been made behind closed doors with little or no formal debate in a public forum. They include all types of coordinated efforts to assure immigration control, such as EIS (European Information System) or EUROPOL, an intergovernmental police cooperation agency based in The Hague. These groups do not have to answer to a more representative body or to international courts such as the European
Parliament or the European Court of Justice. The lack of transparency of these negotiations also makes it difficult for certain national actors to oversee the process. It is almost impossible to have access to the minutes of ministerial meetings or to the documents that they agree on until after they have been implemented, often without domestic legislation (Bunyan & Webber, 1995).

The proliferation and diversification of instruments used to restrict immigration in Europe are considered to fortify the state agencies of immigration control, such as security forces (Anderson & den Boer, 1994; Bigo, 1996), which reinforce images of police states (Bunyan, 1991; Pastore, 1991; Van Outrive, 1990). Particularly in matters of policing and border control, for example, competition between different types of police at the national level makes participation in international fora an important source of domestic recognition and may be a means of expanding national jurisdiction. As new spaces are introduced by European integration, the securitization of internal and external controls has been strengthened through collaborative police agency work and the extension of police and gendarmerie activities (Bigo, 1998; Miller, 1995). Empirical studies in the Netherlands and France (and other EU member-states) suggest that increased competition for budgets has forced these agencies to develop strategies for the expansion of their jurisdiction by appealing to EU networks, both as a source of legitimacy and efficiency (Bigo, 1998).

The measures that have been adopted so far as part of international cooperation show a will to fortify external controls. Despite the practical redundancy of passports for movement of EU nationals, the trend has been toward more severe visa demands as a response to the increased pressures of asylum-claiming and illegal overstaying. Such pressure, reinforced by international agreements, has generated substantial visa harmonization between Western European countries. The joint visa list of the EU states established in 1993 as a result of the Dublin Convention imposed visa requirements on travelers from 73 of the 183 non-EU states. A list of 110 countries whose nationals require visas to enter the EU region was established at the EU Justice and Home Affairs Council meeting on September 25, 1995. In November, an additional requirement for airport transit visas was adopted on nationals of 10 countries from which many asylum claims originated. In addition to the uniform pan-European entry visa regime, where “problem countries” are identified, some countries station immigration officers at overseas airports to ensure that documentation is correctly checked. At German airports, passengers arriving from “sensitive” areas outside the EU are checked twice by

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30. These include Afghanistan, Ethiopia, Eritrea, Ghana, Iraq, Iran, Nigeria, Somalia, Sri Lanka, and Zaire.

The devolution of immigration regulation upward to intergovernmental and supranational fora occurs beyond the level of admissions control and is evident in the employment arena, where immigration control may be equally effective. One critical trend in shifting liabilities upward comes in the form of bilateral contracts or work agreements between EU or Eastern European firms who are authorized to move with their foreign workers to complete a project. In these cases, the workers are physically present in Germany, France, or the Netherlands but they cannot claim pension or social insurance benefits or be protected by the country’s labor law (Faist, 1994; Rudolf, 1998). Transnational spaces are thus created to circumvent national laws protecting the rights of foreign workers.

Various initiatives also have been taken to coordinate the implementation of deportation and exit strategies and to promote international cooperation in this domain. The number of bilateral agreements concluded between individual countries has greatly increased. All states in the EU have deferred partial responsibility to foreign governments for the forcible return of their nationals. In 1993, the Netherlands and Morocco signed an agreement whereby the Moroccan authorities would verify the identity of suspected offenders liable to be sent back to Morocco and accept their expulsions. Likewise, Germany and the Czech Republic signed a treaty designed to speed the return of undocumented migrants in November 1994. Under the agreement, the Czech Republic would readmit individuals who crossed illegally into Germany from Czech territory. Germany, in turn, was to provide the Czech Republic with DM60 million during 1995-1997 to help finance tighter border controls.

As EU states have pursued policies of effective removals, take-back agreements have been increasingly in use and to some degree have reinforced an essential border shift outward.

Although this shifting upward of migration control to international actors is in its infant state, it is making progress. During the Inter-Governmental Conference on post-Maastricht reforms of European institutions, the third pillar, which deals inter alia with immigration and asylum, has been credited as the occasion for increased cooperation among states in contradistinction to the “second pillar” on a common defense and foreign policy. The 1997 Amsterdam Treaty has further institutionalized this shift upward to intergovernmental fora, because it has incorporated the Schengen Treaty into the Treaty on European Union (via the Schengen Protocol), and the Schengen Secretariat into the General Secretariat of the Council. Title VI of the Treaty on European Union (third pillar) is now left with a much more police-oriented role, which focuses on trafficking in persons and drugs, judicial and
criminal cooperation, data exchange, extradition, and the role of EUROPOL (Baldwin-Edwards, 1997).

The coexistence of trans/international and national migration norms has been underestimated because globalists have overlooked the fact that international rules also sanction states to adopt all types of restrictive migration policies. Indeed, when national interests coalesce, favorable conditions leading to the pooling of sovereignty may lead to migration coordination to “upgrade common interests” (Keohane & Hoffman, 1990). European regional integration reflects a prevalent supranational order that consists of strong states committed to pooling sovereignty based on restrictive migration policies and more effective control. The compatibility of diverse national interests in this domain has led to increasing coordination and the devolution of decision making to supranational bodies in order to increase state effectiveness in controlling migration. International or transnational fora may enhance the degrees of freedom and legitimacy of national policy makers by providing international leverage to appeal to domestic constituencies and public opinion back home while containing judicial oversight.

**SHIFTING DOWN: DECENTRALIZATION**

Another type of state response to international and global migration constraints is a process of shifting monitoring and implementation powers downward to local authorities. Through processes of decentralization, national governments have delegated substantial decision-making powers to local elected officials. Why is the local level a venue more amenable to the ends of national control agencies? Local elected officials under financial stress and/or facing pressure from extreme right wing parties sometimes seek to attract attention to receive more funds or gain votes by adopting exceptionally harsh measures against immigrants. Political incentives to single out aliens stem from the fact that the electoral success of anti-immigrant new right parties has mostly been a local one. This was the case in France, where the National Front now controls four city halls and acts as an arbiter in numerous regional and municipal assemblies. In Germany, the regions most exposed to migration pressures because of their proximity to the southern border also have a conservative political tradition. Bavaria, for example, is the home of the Christian Social Democrats, whose slogan has been “no one to our right.” To these electoral incentives, one must add the tension between the local and national level over the costs of immigration. In all of our cases, as in the United States, local leaders have underlined that because they shoulder the burden of receiving and integrating newcomers, they should be able to decide
who comes and to intercede if the national government is unable to control borders.

One example of local involvement that has been the object of media attention in France is the prerequisite housing certificate administered by city hall in order to be eligible to host a foreigner. A 1982 creation,31 the certificate became a migration control tool in mayors’ hands in 1993.32 According to the law of August 24, 1993, the mayor could refuse to sign the certificates after ordering an investigation by the International Migrations Office (OMI). In fact, some mayors refused to give out the forms or systematically did not deliver them, and more than 50% asked for papers not required by law (see the 1997 CIMADE study on the delivery of housing certificates in 945 French towns and Le Monde, Feb. 19, 1997). The law of December 30, 1993, also gives mayors the possibility to prevent marriages involving an alien and refer it to the Procureur de la République. Before these changes, there had been a number of instances in which mayors had exceeded their authority to target aliens but had been condemned in court. The novelty in the 1990s is therefore not the attitude of local authorities but the new means that they have been granted to play a role in migration control.

To be sure, the devolution of mandates downward to states, regions, or municipalities to monitor immigrant stays are old strategies employed when nations look to impose more stringent control over migration. One recalls the American case when foreigners were suspected of anarchism rather than of illegal status and local authorities or associations would collaborate with federal authorities. In Europe, there were also antecedents, especially in border industrial regions (Noiriel, 1996), whereby the central state could count on local elected authorities and other local actors to surveil foreigners, albeit this type of cooperation was informal.

In France and the Netherlands, city halls have the prerogative to inspect the veracity of marriages between a national and a foreigner (and to ask for an inquiry into the status of the latter). A disposition of the law of December 30, 1993, in France, for example, allows mayors to suspend a marriage procedure and ask the Procureur de la République. The latter can further delay the marriage for a month and then prevent it. A 1996 survey on this measure revealed significant geographical diversity in its implementation and a use of the measure to arrest illegal aliens (41.6% of the marriages suspended by mayors involved an undocumented alien) (Weil, 1997). Since 1982, when the Deferre laws on decentralization were voted in France, mayors have gained in clout

31. The decree was dated May 27, 1982.
32. Due to heavy protests in February 1997 against the Debre laws, the certificat d’hébergement will most likely be abolished. The socialist parliamentary majority has recently voted to terminate the measure (see Le Monde, Dec. 12, 1997).
and local political debate has intensified even outside electoral campaigns (see the special issue of POUVOIRS, Vol. 60, on “Decentralization: 10 Years Later”). Mayors in urban areas or in the southeast where the National Front has made electoral headway have used their new monitoring role in migration control policy to the fullest. Because most politicians hold a local and a parliamentary seat, they also have sought to propose migration bills. The parliamentary commission composed of many mayors that investigated the fight against illegal migration in 1993 issued the Sauvaigo report, which called for harsher employers’ sanctions, the cooperation of social services, and an increase in the competence of local officials.

In the Netherlands, the Ministry of Justice has proposed several measures involving mayors both in controlling marriages and family reunification since the beginning of the 1990s (Muus, 1994). In November 1994, new legislation was introduced to give register office officials, and the public prosecutor, powers to refuse to solemnize bogus marriages. The formal approval of the Dutch Aliens Department is now required for migrants wishing to marry (UN ECE, 1997, p. 132). The recent Dutch policy toward migrant newcomers that links welfare allowances with the attendance of Dutch classes and other training is also one that requires monitoring by local authorities. Notwithstanding, the civil servants we interviewed at the Ministry of Justice acknowledge that there is great variance in the way that mayors interpret their new mandates—from too much severity to annoyance (Gerard de Boer, Nicolas Franken, and Natalie Jonkers of the Ministry of Justice, Immigration, and Naturalization Division–The Hague, personal communications, February 1995). These developments parallel the decentralization of the Dutch state in the 1980s, whereby the budget allocated to ethnic minorities (including immigrants) is now directly managed by the regions and no longer earmarked for specific policies, with equally varying outcomes (Ben Koolen of the Ministry of Interior–The Hague, personal communication, February 1995). The local authorities’ responsibilities and autonomy in immigrant policy are reinforced at the same time that their roles in migration control also are becoming more important.

Germany is a slightly different case because its political system is federal. The Aliens Act that regulates the entry and stay of foreigners is nevertheless a federal law implemented by state agencies. Only immigrant policy is left to states and to parapublic welfare organizations that receive some federal funds. As Michael Bommes (1996) has shown, this dichotomy creates tensions because welfare state provisions are decentralized yet the Bund still decides on entry and stay. The states may resent having to provide housing, assistance, and education for people that the federal state has admitted. Renewed conflicts between federal, state, and local mandates, as has been the
case in the United States (see Neuman, 1993; Olivas, 1994), have contributed to initiating a dynamic of localizing migration control in Germany. Other factors resemble the French and Dutch cases: Certain state politicians consider that the issue may be electorally lucrative in their region (i.e., in Baden-Württemberg and Bavaria) and use their discretion in interpreting federal laws to their full extent. The other reason relates to the increasing resort to burden sharing in the handling of migration and asylum. Whereas at first only southern receiving states were active in migration control policy, regulations that redistributed asylum seekers throughout the territory have led other states to become alert to the issue of migration control. The most dramatic example of this system consisted in granting East German Landern their share of asylum seekers immediately after unification, whereas the cities that hosted them did not have the facilities or the popular support for it, resulting in violence, as was the case in Rostock.

**SHIFTING OUT: NONSTATE ACTORS**

Immigration regulation is undergoing a process that is distinguished by the introduction of third parties in burden sharing. Through the use of sanctions, governments have shifted the liabilities for migration regulation outward to nonstate actors, such as private, societal, and business actors, as well as foreign actors in the form of cooperative arrangements. The role and liabilities of nonstate actors in sharing the burden of regulation have developed almost uniformly in the countries of Europe and are manifest in the use of more stringent deterrent methods such as sanctions (see Table 1).

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**Table 1**

*Third Party Nonstate Actors in Immigration Regulation (in select countries)*

<table>
<thead>
<tr>
<th>Country</th>
<th>Transport Companies (sanctions)</th>
<th>Employers (sanctions)</th>
<th>Immigrants (punishment for illegal)</th>
<th>Civil Society (sanctions for harboring illegal)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>Canada</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>Denmark</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>Finland</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>N</td>
</tr>
<tr>
<td>France</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>Germany</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>Italy</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>N</td>
</tr>
<tr>
<td>the Netherlands</td>
<td>Y</td>
<td>Y</td>
<td>N</td>
<td>Y</td>
</tr>
<tr>
<td>Sweden</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
</tbody>
</table>

*Note:* Y = yes, N = no.
The proliferation of actors in the regulation of migration represents a shift of liabilities and implementation sites for external and internal controls, including the entry, work, stay, and deportation of foreigners.

As the entry site of immigration control has developed, there has been a noticeable trend toward extending the area of what has been referred to by Aristide Zolberg (1999) as “remote control” immigration policy. A core actor in the enlarged control system at the entry level has been the transport or carrier company. Thus, where the move toward free movement of persons has become critical to full European integration, the abolition of checks at internal borders has become essentially offset by the flurry of legislation and implementation of the carriers’ liability to check passengers. Indeed, more stringent security checks at airports—of identity cards, tickets, boarding passes, baggage, and so on—have made the absence of passport controls virtually irrelevant. These measures also may be interpreted as a border shift outward; the result of “Schengenland” is a border extension that makes each member country the beneficiary of police screening efforts of the others long before incomers arrive to national borders.

International instruments have further sanctioned the role of states in controlling their borders. In the EU, member-states refer to their obligations to Article 26 of the 1990 Supplementation Agreement of the Schengen Convention in relying on carriers to serve as immigration officers. Governments may rely on “remote control” immigration policy or the creation of international zones (i.e., in airports) where intervention by lawyers and human rights associations is almost impossible and thus foreigners’ civil rights are less likely to be respected in these juridical “no man’s lands.”

The practice of sanctioning carriers does not, in itself, represent a precedent in legislation governing the rules of entry. Carriers have long been obliged, at their own expense, to transport inadmissible passengers back to their countries of departure. Sanctions against ships have been in force since the Passenger Act of 1902. In accordance with guidelines established by the 1944 Convention on International Civil Aviation (ICAO), transport companies have increasingly been forced to assume the role of international immigration officers imposed on them by states. Standards 3.35 to 3.38 of the ICAO established the responsibility of the airline to ensure that passengers have the necessary travel documents.

33. The same can be said of detention centers for illegal aliens or asylum seekers whose applications have been rejected. Their status and internal regulations are ill defined compared to regular prisons (Weber, 1997). This is especially true in Germany where the conditions of detention greatly vary from one center to another.
Nonetheless, whereas the burden of assuming expenses at one time amounted to the costs of retransport, increasingly countries have introduced laws to raise the responsibilities of carriers to pay fines. In 1994, all EU countries, with the exception of Spain, Ireland, and Luxembourg, passed laws increasing the responsibilities of carriers.\textsuperscript{34} Ironically, as negotiations in the EU continue to focus on how to suppress checks at internal borders, these sanctions have led to the reappearance of checks that had been suppressed since the 1960s. Faced with strong pressure from the German government, and with threats of fines on their ferry companies, Denmark has reintroduced passport checks on some ferry passengers arriving, in particular from Sweden (Cruz, 1994, p. 26). Such checks were suppressed more than 30 years ago as a result of the Nordic Passport Agreement.

Although the contents, interpretation, and application of these laws on carriers’ liabilities have varied greatly among European member-states (Cruz, 1994), they similarly represent efforts of states to extend the burden of implementation away from the central government and to increase national efficacy in the process. In this context, it is noteworthy that in all the laws on carriers’ liability, there is a striking absence of any provision to fine railways. As suggested by one commentator, a possible reason is that most railways are state owned and the treatment of railways as airlines (i.e., charged with fines unless providing convincing evidence discharging them of negligence) could cause embarrassing problems between European states (Cruz, p. 25), incurring extra costs and diminishing the effectiveness that may be gained by policy devolution to private agents.

Approaches to stem illegal migration at the work site also have been developed to extend and redistribute liabilities of migration control outside of the central state. By the mid-1970s, both Germany and the Netherlands first prohibited the employment of clandestine aliens, instituting similar strategies already adopted by the French (Miller, 1995). Employers of illegal migrants in the 1990s may be fined up to Dfl.10,000 in the Netherlands (UN ECE, 1997). In France, where employer sanctions have been part of labor laws since as early as 1926, new corporate approaches to stem illegal migration at the work site have been further developed.

Enforcement of labor laws has increasingly involved a plethora of actors because infractions are subject to both judicial and administrative punishment. In the French case, for example, an offending employer is liable to an

\textsuperscript{34} In Spain, an interministerial working group has been established to examine the feasibility of following the example of the other member states of the Schengen group. For obvious reasons, Luxembourg has not been confronted by the problem of inadmissible passengers by air, but under a new bill drawn up with the aim of bringing its Aliens Law in line with the Schengen Convention, there is a provision on carriers’ liability (Cruz, 1994, p. 7).
administrative fine to the Office of International Migrations (OMI) in the form of a special contribution and to judicial punishment that flows from legal proceedings. Most citations for illegal alien employment are made by labor inspectors but involve police gendarmes, judicial police, agricultural inspectors, and fiscal agents, including customs, maritime affairs, and social security. In further removing immigration control from the central or federal government, a more recent trend has been a contracting out of enforcement to labor inspection agencies, security services, or police who play an important role in protecting the borders of the work site from illegal infiltration. In France, there are approximately 4,000 police competent to enforce laws against illegal employment (Miller, 1995, p. 23). Although interpretation of the French practices and laws is controversial, the success of these efforts may be measured against the unprecedented numbers of special contributions assessed in 1992 alone (2,498) compared to a total of 25,942 infractions reported for the period between 1977-1992 (Miller, p. 18). The French approach to such internal control has been considered a model of emulation for other Western countries, including the United States (see Miller). This model of department-level commissions, bringing together concerned enforcement services, elected officials, and representatives of employers and employees, is premised on the assumption that the battle for immigration control will be won or lost at the local level, in particular in industries and places of employment (Miller, p. 27).

The stay and deportation of foreigners also have been marked by the tendency toward shifting liability outward to nonstate actors. In cost-effective measures, states have increasingly shifted liabilities of migration regulation away from courts and toward individuals. As Saskia Sassen (1998) has noted, the logic embedded in immigration policy “places exclusive responsibility for the immigration process on the individual” regardless of the macrodynamics at work. The individualization of migration control has further extended to include individuals that come into contact with migrants: sponsors, friends, family, and association members. The February 1997 controversy in France over a proposed government proposal aiming to prevent

35. Namely, because it has been said to rely on a genuine will to curb illegal work.
36. This model includes an interagency task force charged with monitoring and facilitating enforcement of laws against illegal employment, most prominently illegal alien employment (i.e., the Interministry Liaison Mission to Combat Illegal Work, Undeclared Employment and Manpower Trafficking); the creation of regional, state, and local advisory committees designed to facilitate enforcement; implementation of a more secure employee eligibility verification system; and a system in which employers notify authorities of a new employee’s identity prior to the onset of employment.
illegal immigration reflects state efforts to “transform all citizens into police informers” (New York Times, Feb. 20, 1997). The new bill proposed that French hosts who have foreign guests on special visas inform the town hall when their guests leave, allowing the French government to compile computer records on the movements of foreigners.

All of the countries studied have also reinforced laws on harboring aliens, and Schengen’s Article 27 specifically calls for measures prohibiting aid to foreigners. In France, Article 21 of the 1945 ordinance that regulates the entry and stay of foreigners states that “any individual who, either directly or indirectly, helps or tries to help the illegal entry, movement, or stay of a foreigner will be imprisoned for 2 months to 2 years and a fine of 2000 to 200000 francs.” Although it stems from a 1938 decree adopted in a particularly restrictive period of migration policy, the fine and prison terms were changed in 1991 by the loi Sapin that increased both. In 1995, the Toubon antiterrorist law added the abetting of illegal aliens as a terrorist act, defined by Article 21. The provision has been applied extensively to sue and condemn the spouses and partners of illegal aliens who lack a “lucrative purpose” as stated in the Schengen agreement (CIMADE, 1996). In the spring of 1998, Minister of Interior Chevènement threatened to use it against tourists who refused to board planes that carried deportees.

The multiplication and coordination of nonstate or private actors are evident at both the external and internal immigration control levels. They reinforce the trend toward shifting policy elaboration and implementation powers outward to nonstate actors—in particular, private companies and actors, ranging from airline carriers, transport companies, security services, travel agencies, employers’ groups, and individuals. With little training investment, private carriers and agencies are able to partake in an enlarged migration control system as agents of the state while providing the principal actor the technological and resourceful means to effectively differentiate between economic tourists and would-be overstayers.

CONCLUSION

In view of the evidence presented above, it appears that great caution must be heeded to news of expropriated state sovereignty in migration matters spawned by globalist arguments. Process-tracing the crafting of Council of Europe norms on aliens and their diffusion at the national level in our three country studies, we uncovered two strands of jurisprudence with observable domestic effect. Based on Article 8 on family life and Article 3 on inhuman treatment of the Convention, both the ECHR and later some national high
circumscribed administrative capacity to expel certain categories of foreigners. This is a striking finding for scholars who doubt the soft power of international law either in this policy area or in general because of a realist theoretical stance. Yet, it does not equate with the general correlation between international human rights and the inability of states to control migration put forth by globalist sociologists.

We have shown that despite the existence of international conventions and human rights courts, constraints on national migration control policy have to a large degree derived from national basic laws and jurisprudence. In this respect, state sovereignty has been kept in check by national human rights guarantees more than by a transnational discourse or international legal norms. It thus seems that “constitutional politics better explain the generosity and expansiveness of Western states towards immigrants than the vague reference to a global economy and an international human rights regime” (Joppke, 1998, p. 267). Rather than global processes constraining domestic action, what we observe in the case of aliens’ rights is a legally driven process of self-limited sovereignty. As German scholar Josef Isensee already pointed out almost a quarter of a century ago, this means that the state has self-limited its capacity to dispose of aliens at will, once they have been admitted (1974). Yet, judicial control over migration control has led to responses by executive agencies that consist in shifting the level of policy elaboration or implementation to avoid court review and lawyer intervention.

In brief, it seems that although we see the signs of a dynamic between European and national judiciaries where certain norms on aliens’ civil rights emerge and mutually reinforce each other, the executive sphere cannot be said to be socialized in these norms but rather resists them as they would constraints. A constructivist approach to norms therefore may work in the domain of law, whereas a rationalist one seems more appropriate to understand executive agencies’ resistance to these legal norms. Therefore, the main divide does not lie between the international and the national but between the judiciary and the executive and between law and politics.

The analysis here has provided empirical evidence of the number of possible strategies available to nation-states in circumventing some of the human rights constraints on migration control, and some of the practical or geopolitical ones as well. National governments who sought to restrict migration flows have been able to do so even if that meant devolving national administrative prerogatives to local and private actors or engaging in multilateral talks with neighboring states. Some of these developments belong to an old repertoire of strategies employed when nations look to impose more stringent control over migration (i.e., the 1902 Passenger Act in Ellis Island days). Yet, the denationalization of migration regulation is consistent with trends
evident in other policy areas, namely, to shift the externalities of policy making outside of the central government. It is also not necessarily incompatible with the reinforcement of existing national agencies (i.e., through budgetary expansion). National policy makers in Germany, France, and the Netherlands have been able to control migration by venue shopping (for new allies and eluding old rivals) and to shift institutional locations of policy making.

These developments reflect the adaptive nature of states to changing migration pressures. In this respect, the view of a unitary nation-state facing international constraints prevents us from understanding that norms limiting state discretion in the treatment of aliens can be both internally and externally generated. It also masks the range of responses available to national governments when they face policy constraints and the number of levels at which they can be deployed.

A disaggregated view of the state allows us to go beyond state-level instruments and to identify third-party actors as agents in migration regulation. In responding to changing global and migration pressures, diverse agents have been incorporated at different levels in implementation functions that premise on the logics of burden sharing and efficiency. The national government (the principal), in this case, delegates its authority to agents (i.e., mayors, private companies, international actors) more capable and likely to meet policy goals. The calculus involved is that the cost of relinquishing some of its autonomy over policy will be compensated by the benefits entailed: more efficacy in stemming unwanted migration and less judicial oversight—a reinvented form of control. Whether that calculus bears its fruits remains to be seen and studied.

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37. In the United States as well, the Immigration and Naturalization Service (INS), an agency traditionally plagued by low morale and negligible resources, has become one of the few agencies in the government to grow in the 1990s. The INS budget has increased to $3.1 billion for the fiscal year 1996 from $1.5 billion 4 years earlier (U.S. Department of Justice, 1996).


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