

The Devolution of Immigration Regimes in Europe

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Abstract:

The ability of European nation-states to control migration and regulate the entry and stay of migrant workers, family members, asylum-seekers and undocumented aliens have 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 in this policy area (Hollifield, 1992; Sassen, 1996). Others have gone even further and have declared the double closure of territorial sovereignty and national citizenship to be outmoded concepts (Soysal, 1994; Schuck, 1994;).

This paper inscribes itself in that debate by answering the following questions: 1) To what extent do international legal instruments constrain the actions of national policy-makers?; 2) How have nation-states reacted to international constraints and problems of policy implementation? We focus on European Union and Council of Europe jurisdictions as a critical case of international legal constraints. We examine their jurisprudence with respect to rights of entry and residence and the extent to which national courts have incorporated European norms and European governments take them into account. Focusing on Germany, France, and the Netherlands with comparative reference to the U.S. case, the paper examines ways national policy-makers have responded over the last fifteen years, since the adoption of the Single European Act, and the outset of global economic recession.

In evaluating state responses, the paper identifies the devolution of decision-making in monitoring and execution powers *upwards* to intergovernmental fora (i.e., Schengen, the Justice and Home Affairs 'third pillar'), *downwards* to local authorities (through decentralization), and *outwards* to non-state actors (in particular, private companies such as airline carriers, transport companies, security services, travel companies, employers, churches). We argue that this devolution of policy elaboration and implementation is not so much a sign that states are 'losing control', and giving away sovereignty than an experiment in which principals (national states) involve agents (supranational, local, private non-state actors) as part of rational calculated attempts to diminish costs. We then assess the extent states have been able to recapture control over migration flows in this way. Finally, we draw upon the case of European migration control to highlight the dynamics of European integration and cooperation.

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I. Introduction

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II. Theoretical Framework

As the issue of family reunification emerged at the forefront of international debate at the 1994 Cairo Conference on Population and Development (ICPD), nations positioned themselves on the conflict between national sovereignty and international human rights (*International Migration Policies and Programmes: A World Survey*, UN, forthcoming). The emergence of migration as a global issue, in this context, underscored a major polemic, now being addressed by policy-makers and scholars alike: to what extent do liberal states have control over migration dynamics? Moreover, how can liberal democracies reconcile efforts to control movement of people with those to promote open borders, free markets and liberal standards?

As migration issues have been increasingly caught between domestic and international constraints, states are forced to deal with competing and contradictory interests; between state obligations to the individual, enshrined in international human rights instruments; *versus* competing national interests and fundamental state prerogatives to determine who shall enter its territory---the ultimate embodiment of sovereignty. Although the right to exit one's country is generally recognized as a human right (Art. 13, *Universal Declaration of Human Rights*, 10 December 1948), the corresponding right of a person to enter a country other than his or her own has not developed since no state allows the unlimited and unpatrolled crossing of its borders.

Although the contradictions in migration policy have only recently become salient, they have been a topic of long-standing interest among students of international law (Oppenheim, 1905; Roth, 1949; Weis, 1979; Plender, 1988). Theoretical and juridical distinctions based on the historical evolution of society inform the debate regarding the extent to which nation-states control and define their migration. At least since the 15th century, the school of natural law asserted that human rights were bound up with man's basic nature from which they derived. According to the most traditional conception of human rights, when humanity passed from the primitive state to the social state, human beings concluded a contract by which they transferred part of their rights to the social unit and thus, in a way, renounced them while preserving certain basic natural rights such as the right to life, freedom, and equality. These natural rights constituted eternal and inalienable rights that every social and state system was obliged to respect. Theoretically, human rights set limits on state power by preserving certain rights for men, while preventing the state from interfering in the exercise of those rights. In practice (or in positive law), a state validates its contract with its citizens by enshrining human rights provisions in Charters, Bills, Petitions, Declarations and Constitutions. The modern archetype of human rights, the Declaration of the Rights of Man and the Citizen, which emerged from the French Revolution of 1789, reinforced the dichotomy between 'man', imagined to exist outside and prior to society, and 'citizen', subject to the state's authority. On this account, human rights were fundamental rights, existing before the state, whereas the rights of the citizen were subordinate to and depended upon them (Szabo, 1982, 15).

In the course of political and social development, the distinction between man and citizen has gradually become blurred, and the two categories have commonly been merged. In a more general sense, all rights recognized in national Constitutions have become the rights of the citizen, whereas the rights of man have been more generally delegated to international law. In this way, the interpretation of human rights has been reduced to the question of the relationship between the two branches of law, a relationship in which constitutional law appears to be subordinate to international law (Vasak, 1982, 11). Within this

framework, international law has embodied human rights, promoting the establishment of human living conditions and protecting the individual from the encroaching powers of the state, while national law has tended to safeguard the state.

Legal history has also emphasized the state's rights, especially the principle of sovereignty, which has become one of the greatest obstacles to the international protection of human rights. The question of sovereignty has existed even before the emergence of nation-states, when it was the Sovereign's right to decide the religion of his subjects (Waever, 1995). Since 1945, state sovereignty has been institutionalized in the United Nations Charter. Accordingly, national supremacy is maintained over any other items in the Charter, and the State is free of intervention in matters "which are essentially within the domestic jurisdictions of any state" (*United Nations Charter*, Art. 7, para. 2).

The conflicts between international and national mandates have become particularly evident in an increasingly global order, where according to interdependence theorists, the lines between nation-states have been blurred. Since the 1980s, global population movements have become identified as issue or problem areas for national welfare caused by actors beyond the jurisdiction of the state. Increasingly, these movements have been understood to take place outside the ambit of state control (Miller and Papademetriou, 1983). The traditional notion of state sovereignty has been further challenged as its prime tasks of defining citizenship was made more elusive (Layton-Henry, 1990; Soysal, 1994). These challenges, in context of what appears to be global immutable factors, has brought into question the competence of national policy-makers to effectively manage migration.

The prevailing scholarship on how liberal democracies are managing migration flows remains divided. Students of international political economy (IPE) and political sociology argue that national choices are increasingly constrained by the liberal precepts of markets and rights---the attributes of their regime, namely embedded liberalism (Hollifield, 1992; Freeman, 1995; Heisler, 1992). Based on neo-liberal theories of 20th century norms, theorists of embedded liberalism contend that rights expressed in

the form of constitutional norms and principles, act to constrain the power and autonomy of states, both in their treatment of individual migrants and in their relations to other states (Hollifield, 1992; Ruggie, 1982; Walzer, 1990; Rawls, 1971). Accordingly, domestic liberal norms are institutionalized in the international system by human rights instruments and international agreements. The convergence of national legislation in the industrialized countries lend support to the hypothesis that immigration policy is an area where states may be expected to defer to international regimes (Ruggie, 1982; Krasner, 1982),¹ an argument that may be used to support a trend towards erosion of the state in controlling immigration.

These arguments have created a challenge to the realist school of politics, and to the state-centric assumptions that states have the power to protect and defend territorial integrity, and that they continue to regulate international migration in accordance with their "national interests" (Waltz, 1979; Zolberg, 1981; Weiner, 1985, 1990). Furthermore, when we go beyond the realist view of the state as a unit of analysis and adopt a more pluralist view, there are still questions regarding other constraints to policy-making such as public opinion (Layton-Henry, 1992; Thrandart, 1992). Finally, it may be argued that those who point to the constraints of globalization and international instruments in undermining state capacity to control migration fail to realize the basis from which they derive: the state, itself.

This debate neglects the mechanisms that states use to effectively manage immigration policy. Thus, while *how* globalization and international instruments pose a challenge to liberal democracies managing migration has been discussed extensively, *state responses* remain largely unexplored. Very little attention has been given, for example, to the actual instruments and policy measures that have been used to restrict and shape immigration flows. Few attempts have been made to disaggregate the state and to identify the agencies and actors involved in regulating migration. Assessments of state capacities tend to be full of generalizations, and devoid of specific claims, particularly concerning the key features of

¹The use of the term "international regime" follows Steven Krasner's definition: principles, norms, rules, and decision-making procedures around which actor expectation converge in a given issue area).

migration regulation, practices and modes of policy implementation.

The United Nations Convention for the Rights of All Migrants, for example, has been commonly cited as testament to universal rights imposed on states by international human rights law. Nonetheless, considering how few states have signed or ratified the Convention, its constraints become elusive. In order to make conventions or covenants relevant, states must go beyond signatory status to ratification, meaning the incorporation of legislation into national law. The approach of the United States to the Geneva Convention, one of the most widely revered international human rights instruments, underscores how ambiguous this process may be; the U.S. ratified the 1951 Convention and its 1967 Protocol in 1980 with the adoption of the Refugee Act, and only in the late 1980s did it actually devise regulations for implementation.

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, ed., 1989). As Gerard Noiriel pointed out in his study on the right of asylum (unambiguously entitled, *La Tyrannie du National*, 1991), international texts are applied by state administrations and courts who do so according to their own national values and with national interests in mind. Moreover, Kathryn Sikkink's study on human rights policy in Europe and the US has demonstrated that, in spite of a similar international normative commitment, the time at which human rights became important and the nature of the policies which are generated have been very different (Goldstein and Keohane: 1993). Indeed, as long as the nation-state is the primary unit for dispensing rights and privileges (Meyer: 1980), the nation-state remains the main interlocuter, reference and target of interest groups and political actors, including migrant groups and their supporters (Guiraudon, forthcoming).

III. The Constraints of International Agreements, Jurisprudence, and Norms on National 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, declarations providing nation-states with guidelines for the treatment of non-citizen populations on their territory, Yasemin Soysal states that the source of legitimacy of rights now lies beyond the nation-state (1994). Saskia Sassen (1996) and David Jacobson (1996) also posit that states are losing control over migration policy and that nation-bound rights are in decline.

This hypothesis is compelling considering that, despite persistent cross-national differences in the immigrant rights, all nations have made advances in this policy area. This suggests that the evolution of the status of migrants may be driven by international forces. 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).² As Jeff Chekel remarked however, the research so far "still suffers from a lack of attention to actual diffusion mechanisms and domestic political processes" (1995). Paying attention to these is exactly what is needed to assess the validity of the international norms argument.

First, one needs to analyze international human rights legal norms and the ways in which they speak to issues affecting the rights of foreigners--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. The following outlines such international human rights agreements and jurisprudence, and how they are incorporated domestically,

²This constructivist approach (Katzenstein et al: 1996) is still a matter of controversy in international relations theory. It is often the microfoundation of the international relations studies on immigration and citizenship issues.

by national actors.

A. International Agreements: A Limited Legal Basis For Constraining 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.³ A review of international instruments, emanating from the UN, the Council of Europe, the European Union, the 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. While the international system has established certain ground rules for migration policies, which are linked to human rights, embodied in international law and codified in Declarations, Conventions, and Recommendation, these instruments vary in strength (that is, whether they are binding or not) and in impact. They are also often limited with regards to whom their provisions apply. Political rights, for example, are reserved for citizens, rather than non-nationals.⁴ The universal character of human rights is further undermined in international conventions which 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", who can become part of the nation and naturalize; it can legitimately prefer "its own" in legislation.⁵ The same remark applies to conventions which focus on socioeconomic rights insofar as the latter justify laws

³The protection of foreigner should be the ultimate test of human rights since they do not claim protection as members of a family, a clan, a nation, but as members of humanity. Present international texts fall short of this ideal, however.

⁴Article 16 of the European Convention on the Protection of Human Rights and Fundamental Freedoms; Article 25 of the 1966 International Covenant on civil and Political Rights.

⁵One should except European Community treaties which recognize equality of treatment for EU citizens.

aiming at the protection of the national labor market.⁶ More importantly, national security, public order, public health and safety are deemed legitimate reasons to restrict liberties (reasons often invoked in cases involving foreigners). The nation-state is granted responsibility for organizing state membership and implementing human rights principles.

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.⁷ 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 do not apply (Article 1, # 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).⁸ 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. There are other limitations. Individual petition is not always possible, and, since states rarely

⁶See the 1958 BIT Convention 111.

⁷Conventions are often criticized for resembling laundry lists because their catalogue of rights mostly reiterate past articles ones but omit important aspects of membership (see International Migration Review XXV, no. 4, special issue).

⁸Also, international agreements follow the mood of nation-states and this is why sometimes, like the cavalry, they arrive too late to have a specific impact (e. g. the ILO Convention of 1975 which only gave general guidelines for equality of treatment while many states had already gone a long way in this direction or the 1977 European Convention on the Legal Status of Migrant Workers which came into force in 1983 at a time when the situation had changed considerably since the text was elaborated (Niessen: 1994).

sue other states, it severely limits litigation and case-law. Then domestic actors, judges or lawyers need to be aware of the potential of international agreements.

B. International Jurisprudence: The ECHR Record as a Critical Case

The extent to which international jurisprudence on human rights can constrain national policies may be measured against the impact of international organizations which have monitoring and enforcement power over migration control. The European Commission and Court of Human Rights, the first international jurisdiction of human rights protection in history, pose as a "critical case" for such analysis. The evidence discussed below suggest that: (a) even where the European Convention on the Protection of Human Rights and Fundamental Freedoms provided such a basis, the European Court of Human Rights was reluctant to use its judicial capital in a politically explosive dossier;⁹ (b) even when the Court did condemn a signatory state on a particular issue, only that state reflected on the Court's decision and only in the narrow area on which the Court had ruled; and (c) national implementation of human rights norms requires a combination of factors; they are demanding enough to further hinder the effects of international norms in domestic contexts. The combination of requirements for the implementation of human rights norms include formal rules, the favorable attitude of courts towards international law, the presence of preexisting national norms compatible with international ones, and knowledgeable domestic lawyers willing to draw upon international law to multiply litigation and create case-law.

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

⁹They did rule on certain very specific areas such as family reunification but not the core of the migration issue.

started functioning in 1959.¹⁰ 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 ten years.¹¹ 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 utilized 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.¹²

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 Commission and the Court considered that their expulsion from the receiving country could not be tolerated, despite important criminal records. Similarly, where the alien had a child raised in the country of immigration, the Court had ruled that he could not be prevented from seeing him/her and thus was entitled to a residence permit. This was reflected in state condemnations in *Berrehab vs. Netherlands* (21 June 1988), *Moustaquim vs. Belgium* (18 February 1991), *Djeroud vs. France* (23 January 1991), *Lamguindaz vs. United Kingdom* (28 June 1993), and *Beldjoudi vs. France* (26 March 1992). Article 3 has often been invoked in cases of asylum-seekers whose demand for refugee status has been rejected

¹⁰The 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 so the following discussion centers on the Court records.

¹¹The time frame corresponds to a period when the settlement of foreign minorities coincided with strict immigration control.

¹²See Berger (1994) for details.

and who claim that they will suffer inhuman or degrading treatment if they are sent back to their country of origin. The Court however has generally not found that Article 3 was violated in the individual cases that were submitted (Cruz Varas et al. vs. Sweden; Vilvarajah et al. vs. United Kingdom; Viyayanathan and Pusparajah vs. France).

The Convention includes other provisions which can be invoked to protect aspects of foreigners' rights, some of which address the foreigners' condition, more directly. Article 14 of the ECHR which bans discrimination on grounds as race, color, language, religion and national origin is sometimes invoked by litigating parties, yet so far has been deemed irrelevant by judges (Krüger and Strasser: 1994). The Court has not pronounced itself on human rights dispositions which specifically protect foreigners: against expulsion (Article 1, Seventh Protocol),¹³ and against collective expulsion (Article 4, Fourth Protocol).

The ECHR has only been able to pronounce itself on narrow aspects of a foreigner's status. In these cases, the Court has clearly circumscribed the conditions under which the right protected under the article is deemed violated. In all its decisions, the Court reaffirms that it does not forbid states to regulate the entry and stay of foreigners nor does it have to judge national immigration policy. Furthermore, it discusses a number of legitimate reasons to restrict freedom of movement across borders: 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 this goal and the damage done to the individual(s) as measured by the violation of Convention rights.¹⁴

¹³Germany and the Netherlands have yet to ratify this Protocol.

¹⁴The Court thus stated in the Abdulaziz case that "a State has the right to control the entry of non-nationals into its territory." See ECHR A. 94 (1985), p. 34.

Rather than breaking new grounds and venturing where no national court had gone before, the ECHR has confirmed, reinforced and clarified the pertinence of preexisting legal principles. As in other areas, it has tried to harmonize preexisting practices rather than impose new ones. Most European countries, for example, have inscribed some provisions for family reunification in their Constitutions which 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 since in all 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 individuals' right to a normal family life as early as 1978 (*Arrêt GISTI*, see below). In Germany, in 1983, the Federal Constitutional Court forced Bavaria and Baden-Wurtemberg to renege on a plan to establish a three-year waiting period for spouses after marriage, before family regrouping in Germany was allowed (interview, Jurgen Haberlandt, Federal Interior Ministry, Berlin, 1995).¹⁵ 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 (Ansary: 1992). European human rights provides insight on the transmission of norms: national legal norms have been the pillar on which international ones have been elaborated. Moreover, the European Commission and Court of Human Rights's jurisprudence only in specific areas of aliens law has not exploited the Convention fully in this respect. Notwithstanding, we 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.

¹⁵This was an important decision not only because the *Länder* changed their reform plans but also because it went against the opinion of the Federal Administrative Tribunal who had approved of the waiting period (Weides: 1989, p. 64).

C. National Incorporation of Norms: A Slow, Recent, and Limited 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. The cases chosen are France, Germany and the Netherlands—countries with comparable migration levels, and that adhere to the same international fora and agreements. One of the main means of exerting pressures on nation-states consists in shaming violators by publishing court decisions and reports. Within the European Convention of Human Rights framework, the Committee of Ministers can order the Commission to do so. Yet, nearly all cases are reported so that "whatever force lay in this threat has now been lost" (Mower: 1991).

More leverage is gained from what can be termed "institutional cooptation" (Moravcsik: 1994), in particular when national courts refer to international human rights standards in their pronouncements. Vincent Berger, division head at the Clerk's Office of the Court, speaks of the "preventive consequences" of Court cases and identifies three types: 1) government changes in domestic regulations or promises of reform during a legal procedure in Strasbourg; 2) 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 criticized in Strasbourg; 3) whenever conventions are vague on a particular point, judges may inspire themselves from the solutions adopted in a ECHR case (Berger: 1994, p. 430). These effects are far from systematic and often difficult to measure.

Analysis of our three empirical cases here suggest that international law was ignored for decades and that, only recently, have high courts used it to buttress their decisions. France only ratified the 1950 ECHR in 1974 and waited until 1981 to permit individual petition under Article 25. It is only in 1988 that the French Council of State gave full effect to Article 55 of the Constitution under which treaties which are signed, ratified and published take precedence over domestic statutes in the *Arrêt Nicolo*. One had to wait two more years 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 were challenged on those grounds.¹⁶

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 debate on the so-called Pasqua laws on immigration did not mention the ECHR but the highest probably had it in mind when the Council of State criticized the bill's family reunification waiting periods.¹⁷ Government internal documents now include a sort of warning against possible litigation on the basis of Article 8.¹⁸ The visas on expulsion decrees now systematically mention the ECHR article.¹⁹ The Interior Ministry is not particularly troubled by the incidence of international law and considers it simply a matter of arguing well either the non-existence of strong ties in France or the overriding danger to public safety.

Article 3 of the ECHR which prohibits inhuman or degrading treatment of individuals is also 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/she will be likely to suffer treatment which are considered inhuman by French standards, France is violating Article 3.

¹⁶The landmark decisions were taken in the Beldjoudi (18 January 1991), Babas and Belgacem (both 19 April 1991) cases.

¹⁷Furthermore, the Constitutional Council deemed that a new measure which coupled expulsion orders with an automatic one-year prohibition to re-enter France had to take into account "the personal life" of the expulsee. See "Le Conseil d'Etat critique plusieurs aspects du projet de loi de M. Pasqua sur l'immigration" in Le Monde, 27 May 1993 and "Loi sur l'immigration: Pasqua peaufine son style" in Libération, 23 September 1993.

¹⁸See "les évolutions du droit des étrangers" internal Interior Ministry document (procured during an interview with Oriane Fournier-Belmont, French Ministry of Interior, Paris, 1994).

¹⁹The automaticity of the mention is a way of warding off court cases or showing good will in appeals.

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.²⁰ A noteworthy consequence of the use of both Article 3 and 8 of the ECHR in France has been the tightening of asylum and immigration laws in the last ten years. International standards have not been able to preempt passage of these bills in Parliament. The effectiveness of state responses under such conditions may be measured against the reported 25 per cent decline in family reunification (*Le Monde*, 13 February 1995).

In contrast to the French, the Dutch were prompt in ratifying the ECHR (in 1954) and permitting individual petition. Notwithstanding, 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 or not. 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 towards 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 which stated that the President of a District Court had been right to annul a deportation order based on the right to a normal family life, despite the

²⁰This development applies to asylum-seekers who have been denied refugee status as well (and to illegal aliens).

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),²¹ has crafted precise criteria for considering Article 8, such as the age of children, regularity of contacts, 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: "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."²²

The postwar Federal Republic of Germany is among the few countries with extensive judicial review, and its Basic Law (Constitution) offers strong human rights guarantees. Very few complaints have been filed with the European Commission of Human Rights.²³ 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. It only accepts to interpret the Convention 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,²⁴ by arbitrarily mis-applying or overlooking the Convention (Steinberger: 1985). This state of affairs clearly limits the impact of the European Human Rights Convention in Germany.

²¹Unless 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*).

²²*Abdulaziz...*, ECHR A. 94 (1985), p. 34.

²³One of the cases before the ECHR (Luedicke, Belkacem and Koç) 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. It has not done so in other cases when Germany was condemned however.

²⁴Or in cases when a state law is deemed incompatible with the Convention which has the statute of a federal law.

When asked about the role of the European Convention in immigration policymaking, a German Interior Ministry official dismissed it by saying that the Convention had been ratified in 1952 and that its mark remained to be seen in Aliens Acts, including the 1991 one (Herr Malwald, Federal Ministry of the Interior, Bonn, 1995). The government here is in harmony with court records. They have generally preferred to refer to ECHR decisions when the latter display judicial restraint. For instance, in 1982, 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 to state that no right to a residence permit could be derived from article 8 (Steinberger: 1985).

In comparative perspective, the ECHR appears to lead to a harmonization of human rights standards for reasons which originate in the judicial politics of nation-states. Governments pay attention when they are condemned by the ECHR but not to the whole jurisprudence. As the French and Dutch cases concerning the application of Article 8 reveal, countries focus on clarifying administrative practice to avoid further similar situations rather than on the significance of the Article as a whole. Furthermore, as it has been correctly pointed out, by focusing on judicial resistance to state action, there is a tendency to ignore the fact that such 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: 10). Similarities in the rights of foreigners across countries are due to parallel developments rather than a convergence imposed from above. Long before ECHR decisions, improvements in foreigners' rights had been achieved through other means, and immigration activists had availed themselves of other--nation-based--means which make this particular factor fail a simple causal test of antecedence. In brief, although there is some recent evidence that governments cannot ignore certain international norms because they are now taken partially into account by national high jurisdictions, the overall picture is much more nuanced than the globalist argument of top-down constraints on state migration control suggests.

III. State Responses: The Devolution of Immigration Regulation

In order to assess the extent of state control over migration, or the effect of international and supranational influences on migration policies and outcomes, we may consider *how* states manage policy outcomes that respond to their national interests. State responses to both immigration and immigrant pressures are typically examined in form of national legislation and immigration reforms. While these represent the most obvious policy responses to regulate immigration, administrative decisions and policy implementation may provide more practical implications of the character of immigration control in advanced liberal countries. Despite state intentions, policy goals are not necessarily clear when often they are only loosely enforced, as has been the case in illegal migration. To a large degree, the measure of state control is commensurate with means, capacities, and policy instruments available in pursuit of policy objectives.

At the state level, the main provision governing migration are normally established by law. The legislature has the prerogative to promulgate regulations or rules through ordinances. The executive may issue circulars and administrative officials may give instructions which are not always made public, and which may be modified or revoked. Guidelines for government action are deferred to the administrative discretion of different ministries and departments, such as Justice, State, Labor, Health and Human Services, and Treasury, in addition to the president's or prime minister's staff.

As legislation frequently uses vague expressions such as 'special reasons,' or 'particular circumstances,' the administration has broad powers of interpretation (Perruchoud, 1989). In this framework, international agreements using similar wording may be implemented quite differently. The breadth of discretion commonly conferred on administrative agencies when, for example, they have to determine if wages or housing of applicants are sufficient to permit the arrival of families are vast. Moreover, as is recently evidenced by the surge in fingerprinting, marital inspections, DNA testing, the function of immigration control is often delegated to bureaucrats, administrators, and police officers.

One of the key tools states use to regulate immigration is through the definition and selection of immigrants, a mechanism that is not necessarily marked by restrictive acts, but rather by positive preferences as well. Thus, for example, while it may not be appropriate for liberal states to judge the 'desirability' of an immigrant on the basis of ethnic or national criteria and to refuse entrance on the basis of 'negative discrimination', many countries practice a form of 'positive discrimination' regularly. As some scholars have pointed out, welcoming legal immigrants from selected countries to meet market needs in labor intensive industries has become an official as well as a humanitarian justification for a policy which condones the selection of 'desirable' legal immigrants in lieu of legal or illegal immigrants with 'undesirable' origins (Weil, forthcoming: 39).

To the extent that legislation allowing humanitarian forms of migration, such as family reunification exists, states have substantial latitude in protecting their migration interests. The criteria and definition of 'family' for example is often based on Western notions of limited family (nuclear), and is exclusive and selective (i.e., a right of the citizen rather than of the migrant; provided for the EU national rather than the 'third-country' national). Moreover, empirical research conducted in the United States confirms that the multiplier effect of reunification with immediate relatives is limited (Heinberg *et al.*). The multiplier effect in conjunction with the restriction of family rights to nationals essentially guarantees to contain migration flows throughout liberal democracies. Longitudinal data on family migration flows suggests that: 1) although family migration has increased relative to migration, it has stabilized over the last 30 years; and 2) family reunification policy reinforces state control by influencing the scale, direction and composition of population flows (Lahav, 1996). The case of family-based migration provides a poignant example of the contradiction that may exist between liberal principles of universal rights, upheld in almost all legislation, and fundamental state prerogatives to decide who shall enter its territory.

National interests in governing humanitarian migration such as family reunification policies were

further bolstered at the International Conference on Population and Development (ICPD) in Cairo in 1994. As the issue of family reunification emerged at the forefront of international debate, nations positioned themselves on the conflict between the individual's universal right to leave his/her country, and to live with his/her family *versus* the nation's right to sovereignty and to decide who shall live on its territory (UN, forthcoming). The authority of the nation-state in migration has been consistently reinforced at the international level, whether one considers the triumph of developed countries in protecting national sovereignty, reflected in the final (ICPD) Programme of Action adopted,²⁵ or the prevalence of the intergovernmental approach in dealing with migration matters in the EU.²⁶

Although immigration issues, political structures and policy-making vary substantially among the European liberal democracies, there are several unmistakable features common to all. 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 which did not always require legislation since 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 (UNECE, forthcoming: 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, 1997, for more details). From different starting points, most advanced European countries have been converging towards more restrictive policies

²⁵At the heart of the debate was whether or not family reunification existed as a fundamental right. The controversy resulted in a Programme of Action which only noted that "the family reunification of documented migrants is an important factor in international migration" (10.9), and further urged governments, particularly those of receiving countries, to be consistent with article 10 of the Convention on the Rights of the Child, and to "recognize the vital importance of family reunification and promote its integration into their national legislation in order to ensure the protection of the unity of the families of documented migrants."

²⁶Three types of approaches have influenced the construction of a unified Europe: intergovernmentalism, functionalism, and political unity. In contrast to the latter two, intergovernmentalism assumes no federation and no supranationality but autonomous executive organs. The conflicting trends between the two have dominated the evolution of European integration.

and most have rapidly accelerated the pace of new legislative and administrative reforms to control immigration in the 1990s. These developments reflect the adaptive nature of states to changing migration pressures.

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 two developments: 1) the proliferation of new actors; and 2) the devolution of decision-making and regulation, which is applicable to both areas of policy-making: immigration policy, addressing questions of intake; and immigrant policy, dealing with the conditions of migrants in the host country.

Immigration policy in the 1990s reveals a three-fold dynamic: the devolution of decision-making in monitoring and execution powers *upwards* to intergovernmental fora ((i.e., Schengen, the Justice and Home Affairs 'third pillar'), *downwards* to local authorities (through decentralization), and *outwards* to non-state actors (in particular, private companies, such as airline carriers, transport companies, security services, travel companies, employers, churches). Efforts to reconcile liberal norms, reinforced by international human rights instruments and to effectively control immigration are resulting in shifting and extending national liabilities.

A. 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 Schengen Group, and the Justice and Home Affairs European Union working groups). These groups do not have to answer to a more representative body or 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 and Webber: 1995). Nonetheless, in this respect, supranational bodies may be used to circumvent even the most liberal national constraints on migration control.

The evolution of the European Union underscores how at one time seemingly contradictory streams of interest between domestic and international constraints may be reconciled to promote state interests in migration. The coexistence of both intergovernmental (national tendencies) and supranational decision-making incorporated by the Maastricht Treaty represents one of the most original approaches to policy-making in an increasingly interdependent world.²⁷ The compatibility of diverse national interests to control migration has led to increasing coordination and the devolution of decision-making to supranational bodies in order to increase state effectiveness in controlling migration.

A plethora of inter-governmental institutionalized round-tables and agreements outside the Community framework have flourished (i.e., the Ad Hoc Immigration Group, TREVI, the coordinating Rhodes Group, and Schengen Group) to forward a more effective migration control regime. Bolstered by the European project of regional integration, these types of arrangements have now evolved in the image of the Schengen Group, representative of the administrative culture of traditional immigration decision-making, where decisions have been typically 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 EUROPOL, an intergovernmental police cooperation agency based in the Hague. This

²⁷The Maastricht Treaty incorporated three pillars: a supranational pillar of the institutions of the European Community, the first pillar; and two parallel intergovernmental pillars for cooperation between member states on Common Foreign and Security Policy, the second pillar; and delegated migration matters largely to Justice and Home Affairs Ministers, the third pillar (Title VI, Article K, Council of the European Communities (1992) *Treaty on European Union*, Luxembourg: Official Publications of the European Communities).

proliferation and diversification of instruments used to restrict immigration in Europe are considered to fortify the state apparatus in immigration control, leading some to insinuate evolving images of police states (Pastore, 1991; Bunyan, 1991; Van Ostrive, 1990).

The fortification of external controls, magnified by international agreements, has generated more restrictive migration reforms. Despite the practical redundancy of passports for movement of EU-nationals, the trend has been towards 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 through the Dublin Convention in 1993, imposed visa requirements on travellers 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 25 September 1995. In November, an additional requirement for airport transit visas was adopted on nationals of ten countries from which many asylum claims originated.²⁸ 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 border police: once as they disembark; and a second time inside the terminal (The Economist, 24 August 1996: 40)

The devolution of immigration regulation upwards 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 upwards comes in form of bilateral contracts or work agreements between EU or Eastern European firms who are authorized to move with their foreign workers in order to complete a project. In these cases, the workers

²⁸These included Afghanistan, Ethiopia, Eritrea, Ghana, Iraq, Iran, Nigeria, Somalia, Sri Lanka and Zaire.

are physically present in Germany, France, or the Netherlands, but they cannot claim pension or social insurance benefits nor be protected by labor law there (Faist: 1994). Transnational spaces are thus created to circumvent national laws protecting the rights of foreign workers.

The bi-directional effect of international migration norms on national migration policy has been underestimated as 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."

European regional integration reflects a prevalent supranational order which consists of strong states committed to pooling sovereignty, based on restrictive migration policies and more effective control. While this shifting upwards of migration control 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 defence and foreign policy.

B. Shifting Down: Decentralization

Another type of state response to international and global migration constraints is a process of shifting monitoring and implementation powers *downwards* to local authorities. Through processes of decentralization, national governments have delegated substantial decision-making powers to local elected officials in a way that has been considered to be substantially detrimental to foreigners' rights. The dynamics of this process are inspired by the dependence of national actors on local elected officials who, under financial and political stress seek to attract attention to receive more funds or gain votes, by adopting exceptionally harsh measures against immigrants. This phenomenon occurred in Great Britain under the Thatcher government, and has been manifest in states like California in the United States,

where the demands for more local power concur with plans for restrictions of foreigners' rights.

One example that has recently 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,²⁹ the certificate became a migration control tool in mayors' hands in 1993. Since the law of 24 August 1993, the certificates can be refused by the mayor after ordering an investigation by the International Migrations Office (OMI). In fact, some mayors refuse to give out the forms or systematically do not deliver them and over 50% ask for papers not required by law.³⁰ The law of 30 December 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 they 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 (or *länders*), municipalities, and local actors, to monitor immigrant stays are old strategies employed when nations look to impose more stringent control over migration. Such activities range from residence permit requirements to detention and expulsion. Immigrant policy has long been delegated to state and local governments to implement and fund, often with unfunded mandates from federal legislation and federal court decisions. In the 1990s, immigration policy, the province of the federal government since the turn of the century has been effectively enlarged through burden-sharing, while immigrant policy has been privatized and devolved outward. In part, these trends have led to renewed conflicts between federal, state, and local mandates (see, Neuman, 1993; Olivas, 1994).

²⁹Decree dated 27 May 1982.

³⁰See 1997 CIMADE study on the delivery of housing certificate in 945 French towns and Le Monde, 19 February 1997.

C. Shifting Out: Non-State Actors and Privatization

One of the most significant developments in state responses to migration constraints is the process of "privatization". More specifically, this represents a 'contracting out' of implementation functions *outwards* to non-state actors, such as private, societal, and business actors as well as foreign actors in the form of cooperative arrangements. Privatization, loosely defined as the shift of a function from the public sector to the private sector, involves a dependence on market forces for the pursuit of social goods, and may turn local actors or contractors into regulators (Feigenbaum and Henig: 1995). As immigration control is undergoing a process of privatization, the emergence of new actors in regulation is evident on both immigration and immigrant policy levels. In the former policy domain, these include such private companies as airline carriers, transport companies, security services, and employers; in the latter, integration of migrants has increasingly become the domain of civic actors such as churches, trade unions, and the family. The proliferation of actors in the regulation of migration represents a shift of liabilities and implementation sites for internal and external controls including the entry, work, deportation, and stay of foreigners.

As the entry site of immigration control has developed, there has been a noticeable trend towards extending the area of, what has been referred to by Zolberg as 'remote control' immigration policy (forthcoming). A core actor in the enlarged control system at the entry level has been transport or carrier companies. Thus, where the movement towards free movement of persons has become critical to full European integration, abolition of checks at internal borders have 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 may also be interpreted as a border shift *outwards*; the result of "Schengenland" is a border extension which 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 European Union, 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 (e.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 land."³¹

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.

Nonetheless, whereas the burden of assuming expenses at one time amounted to the costs of retransport, increasingly countries have introduced laws to increase 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.³² It is particularly noteworthy that as negotiations in the European Union continue to focus on how to suppress checks at internal borders, checks which had been

³¹The 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: 1995). This is especially true in Germany where the conditions of detention greatly vary from one center to another.

³²In 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: 7).

suppressed since the 1960s, are now reappearing. Faced with strong pressure from the German Government, and with threats of fines on their ferry companies, for example, Denmark has reintroduced passport checks on some ferry passengers arriving, in particular from Sweden (Cruz, 1994: 26). Such checks were suppressed more than 30 years ago as a result of the Nordic Passport Agreement. Likewise, checks at the border between Belgium and the Netherlands have been reintroduced by the Netherlands.

While the contents, interpretation and application of these laws on carriers' liabilities have varied greatly among European member-states, they similarly represent efforts of states to extend the burden of implementation away from the central government and to the sources of control, 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, 1994: 25)

The counterpart to privatization of admissions regulation at the internal level lays in the employment sector. In a revitalization of neo-corporatist arrangements, burden-sharing norms have developed in the form of tripartite agreements between governments, employers, and trade unions, or coordinated activities, which emphasize the central role of employers. In the construction industry in Germany, for example, agreements between trade unions, employers and governments regarding minimum wages have been designed to discourage illegal migration and neutralize any foreign labor advantage (NY Times, 11 December 1996). These agreements have coincided with the reemergence of guest-worker programs, a feature of the initial 30 year post-War period until 1973. A the core of this system were quotas, negotiated between government, employers and trade unions, as in the case of Austria's *Kontingentesystem* (UNECE, forthcoming: 89). The reformed Austrian legislation of 1991 established quotas each year after consultation on the basis, as before, of economic need and absorptive

capacity (Widgren, 1994: 26). In France, where employer sanctions have been part of labor laws since as early as 1926, new approaches to stem illegal migration at the work site have been developed to extend the liabilities of migration control outside of the central state.

The French approach to stem illegal migration at the work site has been considered a model of emulation for other Western countries, including the United States (see Miller, Report to U.S. Commission on Immigration Reform, 1995). This model includes: an interagency taskforce 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. The French 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, 1995: 27). The recent agreement between the U.S. Department of Labor and the Immigration and Naturalization Service to allow labor inspectors to check I-9 compliance represents a step towards the French approach.

Enforcement of labor laws has increasingly involved a plethora of actors, as infractions are subject to both judicial and administrative punishment. In the French case, for example, an offending employer is liable to an 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 worksite from illegal infiltration. In France, there are approximately 4,000 police competent to enforce laws against illegal employment (Miller, 1995: 23). In addition, French labor inspectors enjoy a great deal of discretion; they need not write up citations if it is not in the public interest, which they are free to interpret (Miller, 1995: 23). Although interpretation of the French practices and laws are controversial,³³ 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, 1995: 18).

The stay and deportation of foreigners have also been marked by the tendency toward shifting liability outwards to non-state actors. An analogue to the devolution of mandates downward to states, municipalities and local actors (see Section B) to monitor immigrant policies, has been a reemphasized shift of integration strategies out to private actors, such as churches, schools, hospitals, immigrant aid groups, NGOs, and the family itself.

In cost-effective measures, states have increasingly shifted liabilities of migration regulation away from courts and towards individual migrants. The proliferation of actors and shifting liabilities in deportation strategies has been echoed in all Western countries. The recent controversy in France over a proposed Government law aiming to prevent illegal immigration reflects state efforts to "transform all citizens into police informers" (NY Times, 20 February 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. Although due to heavy protests the article of the bill was amended, efforts to extend the burden of regulation was shifted to the foreigner, who is now required to submit his certificate of accommodation upon leaving the country.

Clearly, immigration regulation is undergoing a process, distinguished by the introduction of third

³³Namely, because it has been said to rely on a genuine will to curb illegal work.

parties in 'burden-sharing'. Through the use of sanctions, governments have shifted the liabilities for migration regulation. The role and liabilities of non-state actors in sharing the burden of regulation has developed almost uniformly in the countries of Europe as well as the U.S., and are manifest in the use of more stringent deterrent methods such as sanctions (see Table 1)

Table 1: Third Party Non-State Actors in Immigration Regulation (in select countries)

Country	Transport Companies (sanctions)	Employers (sanctions)	Immigrants (punishment for illegal)	Civil Society (sanctions for harboring illegal)
Belgium	Y	Y	Y	Y
Canada	Y	Y	Y	Y
Denmark	Y	Y	Y	Y
Finland	Y	Y	Y	N
Germany	Y	Y	Y	Y
Italy	Y	N	Y	N
Netherlands	Y	Y	N	Y
Sweden	Y	Y	Y	Y
UK	Y	N	Y	Y
USA	Y	Y	Y	Y

The proliferation of actors in the regulation of migration represents a shift of liabilities and implementation sites for internal and external controls including the entry, work, stay, and deportation of foreigners.

V. Conclusion

A comparative analysis of international and domestic policies and instruments in the liberal states of Europe, suggests an increase in state capacity to control immigration. State efforts to control migration have been reinforced by international and multilateral instruments, which have sanctioned the role of the state. While the multiplication of human rights conventions and international treaties, coupled by parallel developments in immigrant policies in the post-War period have given the semblance of a supranational development at work, this paper argues that convergence is based on compatible national interests, which on the balance reinforces state sovereignty on migration matters. Since convergence is based on compatible interests to secure effective state control over migration, it reminds us that cooperation may bolster not compromise state sovereignty. This is especially true of human rights issues, which involve limitations on the scope of authority which a state can exercise over individuals; and where implementation in one polity is not like to be dependent on monitoring behavior in others. As astutely pointed out, if all states were committed to the same conception of human rights, there would be no need for an international regime (Krasner, 1993: 140). Cooperation rather than harmonization has been the rule and the former is often hindered by bureaucratic or political encumbrance.

The evidence so far suggests great moderation is required before affirming the existence, let alone the explanatory leverage of a human rights discourse pervading European immigration politics. International texts and jurisprudence are cautious and ambiguous and national implementation uneven. Even the most developed system of human rights monitoring and enforcement (the ECHR) has been cautious in its handling of foreigner-related issues and has limited itself to a narrow aspect of foreigners' civil rights. Moreover, the incorporation of international norms in national context is no easy task and one should not expect a major impact but rather a subtle, slow and limited process. When national judiciaries have changed their attitudes toward international law in general, and when domestic activists in dire need of new means of action saw international texts as a new tool, there have been areas when

the protection of non-nationals against administrative discretion have improved---no laws were changed, however.

Furthermore, national governments have counterattacked against the possibility of international and national constraints on migration policy. The data here on national legislation and practices provide evidence of the adaptation of states to migration pressures of the 1990s through the process of devolution. This process is marked by a shifting of decision-making and implementation powers *upwards* to intergovernmental agencies and structures, *downwards* through decentralization, and *outwards*, by privatization of regulation. Diversification of strategies is emerging, reinforced by accelerated procedures and coordination of national policies to navigate state interests.

While it is true that international and domestic liberal norms have influenced the emergence of legal modes of migration, it is becoming *more* difficult to support the proposition that immigration is encouraged by a rights-based embedded liberalism, imposed by factors beyond the state. A crucial factor in the consolidation of the rights of non-nationals has been national jurisprudence. National norms rather than international ones have been key. 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: 1997). 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 pointed out, this means that, "although states have discretion in allowing or rejecting the entry of aliens,³⁴ 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.

The devolution, decentralization, and privatization of migration regulation are consistent with a

³⁴Even the rejection of entry is no longer discretionary given the jurisprudence on family regrouping.

trend towards more selective and restrictive immigration policies. They are consistent with trends evident in other policy areas, namely to shift the externalities of policy-making outside of the central government. These shifts in implementation to local or cooperative arrangements reflect less an abdication of state sovereignty, and more an experiment in which national states involve agents as part of rational attempts to diminish costs of migration. In this context, it is important to keep in mind that in immigration reforms, the impetus to change has come from states themselves, and that private actors (i.e. transport companies, detention centers, etc.) face ever more numerable restrictions, either from central governments or from common legislation of the EU, or international agreements. The process of devolution aims to enhance the political capacity of states to regulate migration, to make states more flexible and adaptable to all types of migration pressures, to shift the focus of responsiveness and generate more effective state legitimacy. The risk to the state in these processes lays in the *appearance* of expropriated control, a risk that gives support to more nationalist movements of the extreme-right.

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