



Peace, War and the World in European Security Challenges

The Securitization of European Migration Policies: Learning Lessons from the United States?

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Different Legal Systems

Remarkable differences on some key-elements

A different “culture” of security

Scope and content of judicial review of Executive actions

The way of interpreting and applying the law



Narrowing the Gap?

Are the latest EU policies in the field of migration overcoming these differences?

Is the EU learning lessons from the US in dealing with migration, security and human rights?

US Culture of Security

Human rights are sometimes **balanced** with security
and severely limited

Continued indefinite detention without charge or trial
“remains necessary to protect against a continuing significant
threat to the security of the US” (White House, 2016)

US Judicial Review of Executive Actions

Judicial deference is a long-established doctrine

Judicial Power yields its competence to other Powers
in case of national security, foreign affairs and immigration

Judiciary cannot hinder the ability of Congress and President
“to act decisively and without hesitation in defence
of US interests” (USDC, *Al-Aulaqi*, 2014)



Judicial Deference in the US

Deference “is particularly powerful” in immigration cases

“the power to expel or exclude aliens is a sovereign attribute exercised by the Government largely immune from judicial control” (USCA, *Peralta-Sanchez*, 2017)



Judicial Deference in the US

“The judiciary has an exceedingly limited role” in war-making, national security and foreign relations’ cases

US Courts cannot “impermissibly draw [...] into the heart of executive and military planning and deliberation [and] examine national security policy as well as operational combat decisions regarding the designation of targets and how to best to counter threats to the US”
(USDC, *Al-Aulaqi*, 2014)

Balancing Test in the US

Human rights **vs** State security

Extrajudicial killing of American citizens who are senior operational leaders of terrorist groups is allowed

“US citizenship alone does not make such individuals immune from being targeted [because] the Gov’t has the right to use lethal force to protect the American people from threats posed by terrorists”
(US Attorney-General, 2013)



Balancing Test in the US

Expedited removal procedure

Private interest (due process right to counsel)

vs

Government's interest (additional financial or administrative burden the granting of such right would impose)



US vs. Peralta-Sanchez

Aliens have no right to counsel
or to a hearing before an immigration judge

Even if aliens have “technically effected entry into the US”,
they have NO Fifth Amendment due process right due to
their limited presence on US soil (“a few minutes or hours”)

Human rights cannot thwart the Gov’t in excluding quickly
aliens who are inadmissible

European Culture of Security

Security is protected within a more comprehensive framework of values and interests in which human rights and the rule of law are equally important

There is NO judicial deference in European culture

Primacy of law and judicial review over Executive actions is absolute

NO Balancing Test in Europe

NOT allowed by European supranational Courts even if the security risk posed by an individual to national security is high

States cannot balance their security risks with human rights violations' risks

ECHR Art. 3 prohibition is absolute and applies to everyone regardless of his legal status and requested measure

Full Protection of Human Rights

European supranational Courts strictly enforce and widely protect substantial and procedural rights

Full judicial review is always guaranteed

Not even UNSC binding resolutions can displace human rights

Full Protection of Human Rights

UNSCR have primacy only if they are “in line with human rights” and the ECHR is not displaced (ECtHR, *Al-Jedda*, 2011)

Notwithstanding “overriding considerations” on security, judicial review remains “indispensable to ensure a fair balance between maintaining international peace and security and protecting fundamental rights” (ECJ, *Kadi*, 2013)

The American Legal Formalism

Interpretation and application of rules and principles
+ assessment of factual circumstances

Literal approach rather than teleological approach to the law
Assessing the **letter/text** rather than the spirit of the law

Formalism often limits human rights protection

The American Legal Formalism

“The Constitution [e.g., the law] follows the flag [e.g., Government’s actions] but doesn’t quite catch up with it”
(Elihu Root, Secretary of War)

Judiciary interprets “American law instrumentally, in a manner that generally enhanced the autonomy and power of the US government so as to not overly fetter the projection of American power, and American commerce around the globe” (Raustiala, 2009)

Habeas Corpus Cases

Extraterritorial reach of the writ denied to war prisoners by “practical concerns or obstacles” that would make “impractical or anomalous” its issuing (USSC, *Eisentrager*, 1950)

Transport the petitioners across the seas for the hearing, divert soldiers’ efforts and attention from the military offensive abroad to the legal defensive at home, allocation of human/economic resources, etc.

Habeas Corpus Cases

Extraterritorial reach of the writ denied to aliens detained by the US in Afghanistan by “**circumstances of fact surrounding**” the military base (USCA, *Al Maqaleh*, 2013)

Armed conflict raging **outside** the base strips away the right to habeas corpus: “troops are actively engaged in a war with a determined enemy”

GITMO detainees **vs** Bagram detainees



Non-refoulement Principle

No extraterritorial application (USSC, *Sale*, 1993)

US government may return asylum-seekers provided they have not reached or crossed national border (e.g., on high seas)

Textual interpretation of the word “return”
in Article 33(1) of 1951 Refugee Convention

Diplomatic Assurances

Required before transferring foreign nationals to Countries where there is a real risk of human rights violations

Only “appropriate humane treatment” required

NO substantive assessment of risks occurring after the transfer

US only relies on formal assurances

The European Legal Functionalism

Interpretation and application of rules and principles
+ assessment of factual circumstances

Teleological approach rather than literal approach to the law
Assessing the **spirit** rather than the letter of the law

Functionalism often extends human rights protection

The European Legal Functionalism

Functionalism almost always links the “flag” and the “Constitution” (International law, ECHR, EU legislation, EU Member States legal systems, etc.)

European States are usually held accountable for their actions wherever in the world are committed

“Reality on the Ground” Test

NO literal and/or formalistic interpretation of the law
Effective, careful and detailed assessment of legal rules and factual circumstances in order to detect any possible **real risk** of human rights violations

“surrounding circumstances” are irrelevant and cannot limit or thwart human rights protection

“Safe Country” Test

Country where human rights are generally and consistently protected with no real risk of ECHR article 3 violations

Return, extradition, removal: sending State must demonstrate receiving State is really “safe”

Existence of domestic laws and treaties on human rights has NO probative value (ECtHR, *Hirsi Jamaa v. Italy*, 2012)

Diplomatic Assurances

Generic and scant assurances never pass the reality on the ground test and are not allowed by European Courts

Assurances must be “detailed”, “reliable”, “specific”
and provide “individual guarantees”
(ECtHR, *Tarakhel v. Switzerland*, 2014)

Non-refoulement Principle

Extraterritorial application in line with the UN High Commissioner for Refugees' approach

Principle applies **wherever** asylum-seeker come within the effective control and authority of an European State (including interdiction on high seas)

Narrowing the Gap?

Is the European approach to security threats coming a little bit closer to the US approach?

Is Europe changing its way of dealing with security issues and interpretation/application of rules and principles?

Searching for more security = limiting judicial review of European courts + more formalism and less functionalism?



Increasing Securitization in EU Policy

In the field of counter-terrorism and migration policy:

- amendment/suppression of European integration principles (Schengen free movement, minimum checks for EU citizens at external borders, etc.)
- Large-scale data collection, treatment and analysis to identify previously unknown likely suspects and criminal profiling purposes (PNR Directive)
- Enhancement of EU asylum, migration and return policy
- Enhanced cooperation with non-EU States to prevent and manage irregular migration by halting and turning back migrants **before** they reach or cross EU borders



Limiting (Supranational) Judicial Review

Derogations from the ECHR under Art. 15
(France, Ukraine, Turkey; United Kingdom?)

Amendments to the ECHR brought by Protocol no. 15
(last ratification: Italy, February 2021; in force since
next July/August?)



The “New” ECHR Judicial System

“The Convention system is **subsidiary** to the safeguarding of human rights at national level and national authorities are in principle **better placed** than an international court to evaluate local needs and conditions”

National courts vs ECtHR?

ECHR as a (international) “living instrument” vs margin of appreciation (national) doctrine?



More Legal Formalism in the Future?

EU revised asylum, return and migration policy: simplification and swiftness of procedures (border and accelerated procedures, presumptions, etc.)

More simplification and swiftness = less careful examination of asylum applications?

More Legal Formalism in the Future?

EU revised asylum, return and migration policy: externalization of migration management by enhanced cooperation with third countries

More reliance on non-EU States' assurances and human rights commitments

The more the EU outsources human rights protection, the less the EU can command respect for human rights in the wider world

EU Common List of Safe Countries

Proposed EU common list of safe countries of origin
(Balkan countries, Turkey, etc.)

Asylum applications lodged by nationals of safe countries are fast-tracked to allow faster returns if refused

Safe-country assumption = too fast assessment of applications?

Need for faster returns **vs** effective human rights protection

Conclusions

Differences between US and European approach to security
STILL exist **BUT** the gap is slowly narrowing

EU asylum, migration and return systems have been
under huge pressure for many years

Are European States seeking for a new balance
between human rights and security in these fields?



Conclusions

Searching for more security through less judicial oversight
and more legal formalism?

Willing to trade some political idealism and legal functionalism
in the field of migration and human rights for more political pragmatism
and legal formalism in the field of security?

Future clash between Courts' functionalism
and Governments' formalism?



Thank You!

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