
Introduction

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This special issue, entitled ‘Judging in the 21st Century: migration and nationality concerns’, aims to reflect on the role that national and European judges, and to a certain extent, other legal authorities, play in protecting fundamental rights in migration and nationality cases. These issues are at the core of the public agenda both at European and national levels. Migration, nationality and human rights offer an ideal area of investigation into the judicial sphere within Europe.

The debate underpinning the nexus between human rights and immigration law within the European continent concerns above all the scope of the European Convention of Human Rights (ECHR) and EU human rights law at national level.

Judges are called to balance migrants’ human rights against state control policies in refugee determination, removal or expulsion cases and decisions about victims of human trafficking. Often commentators confer them an explicit role in applying human rights standards when evaluating the validity of executive (and, possibly, legislative) actions [McMillan, (2002), p.335]. In fact, judicial decisions aiming at protecting human rights have indirectly precipitated reactions from the government in some European countries, particularly those with restrictive immigration regimes.¹

Consequently, in an attempt to control state borders, migration policies have been amended or even introduced [Morano-Foadi and Vickers, (2015), p.135]. However, getting policies wrong precipitates adverse effects on the host society and indeed, migrants. Some control policies are necessary but their purpose should be to prevent migration accelerating rather than to eradicate such movement. Quite often control migration policies are triggered by an alarmist events’ interpretation rather than an in-depth analysis of the whole phenomenon. Thus, the extent to which regulatory legislative and political choices are effective in reducing the in-flows of migrants (either illegal or legal) within a specific State or a regional geographical area, is essential for the introduction of effective legislative and policy interventions within a country and across Member States [Morano-Foadi, (2005), p.162; Morano-Foadi, (2006), p.222].

Then, consideration and protection of individual fundamental rights are also crucial to the decision making process to contribute to a fair and equal society for migrants and the existing population. The problem, however, is that although it is a human right for every person, citizen or foreigner, to leave a country², with the exception of free movement rights for Union citizens and their families within the EU, States do not have a corresponding duty to accept migrants with the exception of those seeking international protection. Foreigners’ rights to enter and reside are not as such guaranteed by

international law or European law³. Though, immigration control has to be exercised in Europe in accordance with the obligations set out in the ECHR and the European Union Charter of Fundamental Rights. Thus, concerns may occur in relation to returning a person to any country where there is a real risk that he or she would be subject to torture, inhuman or degrading treatment or punishment (Art. 3 of the ECHR) or when there is a risk of extrajudicial killing and following the entry into force of Protocol 13, where there is a risk of death penalty (Art. 2 of the ECHR). Then, expulsion or deportation of a person from a State where members of his/her family reside may raise an issue under Article 8 of the ECHR or Article 7 of the Charter (the right to family life) [Morano-Foadi and Vickers, (2015), pp.115–116].

This special issue includes papers focusing on the rights of migrants and family members, asylum seekers and victims of human trafficking. Authors have observed that particularly at national level, fundamental rights of (family) migrants, asylum seekers and victims of human trafficking have not been adequately protected. Borders' control, together with global tightening of asylum admissions, have increased crimes such as trafficking and smuggling [Feingold, (2005), p.27].

Thus, in an attempt to explore the aforementioned topics, this special issue is divided into three parts:

The *first part* deals with asylum seekers' determination and the national asylum systems in Europe. Three papers are included in this part:

The *first paper* written by Velluti examines the role of the European Convention of Human Rights and the EU Charter of Fundamental Rights in assisting the implementation of the revised Reception Conditions Directive (Directive 2013/33/EU) by various Member States. Velluti critically analyses the ways in which the European Court of Human Rights and the Court of Justice of the European Union (CJEU) have interpreted human rights instruments to the extent of providing for adequate and dignified standard of living conditions to those seeking international protection.

From a different perspective, the *second paper* explores asylum seekers' determination procedure and the use of the ground of 'membership of a particular social group' following the application of China's One Child Policy. O'Brien focuses on the recent Irish cases of *L.R.C. v Refugee Appeals Tribunal and Others* [2014] IEHC 500 and *S.J.L. v Refugee Appeals Tribunal* [2014] IEHC 608. A key legal question in both cases is the interpretation of whether persons who were subject to forcible sterilisation, or who were involuntarily sterilised, would fall within the definition of a 'particular social group', as per Article 10 of the Qualification Directive 2004/83/EC.

The *third paper* focuses on the relevance of legal aid for asylum seekers. Borland charted the rise and decline of civil legal aid for UK asylum cases, from the Legal Aid and Advice Act 1949, via the legal aid cuts since 2004 to the Legal Aid Agency recently set up. She identifies various key aspects in upholding the protection of fundamental rights for asylum seekers.

The *second part* of the special issue deals with the rights of family members provided for in EU legislation and as interpreted by the Court of Justice of the EU. Jesse focuses in his article on the legality of pre-departure integration conditions, which oblige family migrants to participate in integration measures before family reunification is allowed in Europe. His paper looks in particular at Germany, the Netherlands, Austria, the UK and France. Jesse argues that existing pre-departure integration conditions in family cases may not be lawful under EU law. Central to his article is an examination of the legal

reasoning in recent Court of Justice cases. Jesse evaluates why the existing judicial ruling is problematic and why this area of law needs to be reformed imminently.

The *third part* of the special issue focuses on the issue of human trafficking within Europe. Morano-Foadi identifies overlapping jurisdictions, legislations, or mechanisms in Europe regarding the protection of, and the rights accorded to, victims of human trafficking. She criticises the lack of coordination and cooperation across these various jurisdictions, which clearly exacerbate the vulnerability of victims of trafficking. She welcomes the implementation of *Directive 2011/36/EU*, which “prevent[s] and combat[es] trafficking in human beings and protect[s] its victims”. In this regard, Morano-Foadi examines the notion of ‘vulnerability’ as a potential interpretative tool for judges in identifying victims of trafficking.

There are noteworthy synergies between the different papers presented in the special issue.

For example, Jesse and Morano-Foadi’s papers both look at the relationship between national and Union levels. Similar to Morano-Foadi, who looks at the connection between different legal jurisdictions, Jesse considers the interaction between national courts and the Court of Justice. Jesse observes that this is an ‘[i]nterrupted dialogue’. Morano-Foadi and Jesse respectively review the degree of ‘vulnerability’ judges have accorded to victims of human trafficking and the restrictions imposed by the pre-departure conditions on family migrants.

Velluti and Borland both identify various key aspects of the protection of fundamental rights for asylum seekers. Then, O’Brien examines the ways in which the Irish and the US courts have interpreted the term ‘particular social group’ and the limitations of those restrictions. It also explores issues in relation to the ‘particular social group’ ground as included in the Reception Conditions Directive, which is widely explored by Velluti in her paper.

Also, Jesse’s paper reflects on fundamental rights when looking at the pre-departure integration conditions for family. He undertakes a macroscopic examination of the lawfulness of the pre-departure integration conditions in Germany, the Netherlands, Austria, the UK and France.

The series of papers altogether examines the courts’ commitment to the protection of fundamental human rights for migrants; asylum seekers; and victims of human trafficking. Despite attempts by the judiciary to offer more extensive protection to migrants and victims of human trafficking, there are still a number of obstacles to overcome. On the one hand, both the EU and the Council of Europe and their respective Courts aim at a very high level of protection of human rights in Europe. On the other hand, restrictive borders control mechanisms undermine these efforts exacerbating phenomena such as trafficking and smuggling of human beings.

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Notes

- 1 See *Theresa May Speech in Full at the Conservative Party Conference 2015 in Manchester* [online] <http://www.ibtimes.co.uk/conservative-party-conference-2015-manchester-theresa-may-speech-full-1522692> (accessed 13 October 2015).
- 2 The right can be found in the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Convention on the Elimination of All forms of Racial Discrimination and Art. 2 of the Protocol 4 to the ECHR.