doi:10.1017/aju.2021.53

SYMPOSIUM ON UNDOING DISCRIMINATORY BORDERS

WHY CHALLENGING DISCRIMINATION AT BORDERS IS CHALLENGING (AND OFTEN FUTILE)

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International human rights law recognizes a general right to non-discrimination.[1] This right has proved to have plenty of legal "bite." It is regularly invoked at both international and national levels to challenge state action which discriminates against vulnerable groups on "suspect grounds," such as race, gender, and disability. Such legal challenges periodically succeed in generating significant law reform and sometimes even social change.[2] However, this (relative) success has not been replicated when it comes to migration control. Non-discrimination challenges to state immigration restrictions have rarely been successful, even though human rights experts, NGOs, and other critics repeatedly express concern about the discriminatory impact of such restrictions. Furthermore, the state of human rights law remains radically underdeveloped in this area: the normative content of international non-discrimination norms, as they apply to migration control, is still lacking substance. This essay seeks to analyze why the cutting edge of the right to non-discrimination becomes blunted at the border, and generally lacks impact when invoked to challenge state migration controls.

The Limited Impact of Non-Discrimination Norms on Migration Control

From a non-discrimination perspective, migration control presents plenty of grounds for concern. Sharp distinctions are made between nationals of favored and non-favored states, often reflecting the embedded legacy of colonialism and its associated racial hierarchies.[3] Immigration restrictions often operate so as to disadvantage individuals and groups on the basis of their ethnicity, nationality, gender, class, disability, and so on, reflecting and amplifying wider intersectional patterns of discrimination.[4] In general, national law grants migrants fewer legal

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[1] *See*, *e.g.*, Article 26 of the International Covenant on Civil and Political Rights art. 26, Dec. 16, 1966, 999 UNTS 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights art. 2(2), Dec. 16, 1966, 993 UNTS 3 [hereinafter ICESCR]; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 14 and Protocol 12, Nov. 4, 1950, Europ. T.S. No. 5 [hereinafter ECHR]; International Convention on the Elimination of All Forms of Racial Discrimination art. 2(1), Dec. 21, 1965, 660 UNTS 195 [hereinafter CERD].

[2] Tarunabh Khaitan, A Theory of Discrimination Law 2-3 (2015).

[3] Marilyn Lake & Henry Reynolds, Drawing the Global Colour Line: White Men's Countries and the International Challenge of Racial Equality (2012).

[4] Antje Ellermann, *Discrimination in Migration and Citizenship*, 46 J. Ethnic & Migration Stud. 2463 (2020).

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https://doi.org/10.1017/aju.2021.53 Published online by Cambridge University Press

rights than others, both in terms of procedure and substance: this can leave them vulnerable to the discretionary power of state officials, and exposed to the risk of serious human rights abuses.[5]

However, despite all of these issues, the right to non-discrimination, considered as a specific element of international human rights law, plays a peripheral role in debates about migration control. Academics and NGOs sometimes invoke the right while criticizing state immigration control measures, in tandem with other human rights concerns. However, as discussed in detail below, international human rights treaty bodies have not defined with any precision what constitutes unjustified discrimination at the border. Their case-law in this area tends to be highly underdeveloped, and characterized by a high degree of deference to state authority. As a result, legal challenges to immigration rules based on non-discrimination arguments rarely succeed, and the current state of human rights law in this area is lacking in clarity and substance.[6]

So why has the right to non-discrimination proved so impotent and lacking in substance when applied to migrant controls, in striking contrast to its significant impact in other contexts? To answer this question, it is necessary to examine how migration control is conceptualized from the perspective of national law—and the way this in turn has impacted upon the application of non-discrimination norms within the framework of international human rights law.

The Assumed Legitimacy of Discrimination at the Border

Migration control has been historically associated with the defense of the realm, and the need to secure state borders against potential invaders—and thus has formed part of the core functions of national governments. By extension, "aliens" have generally been regarded as present on the national territory at the sufferance of such governments: their legal situation has traditionally been radically distinct from the "native" population, who enjoyed the protection of embedded customs and liberties. Since 1945, the growth of international and domestic human rights law has reined in the formerly unbridled authority of national executives in this context. But the historic framing of border control as intimately linked to the maintenance of state security, and thus to state sovereignty, still applies, as does the assumption of a radical disjuncture between the legal status of migrants and nationals.[7]

These assumptions in domestic law have been internalized for the most part within international law. It is generally accepted that states are entitled to control migration across their borders, and to discriminate on the basis of nationality and immigration status. Far from being "suspect" grounds, such forms of classification are treated as an inherently legitimate basis for differential treatment, and national governments are given substantial freedom of action in designing and implementing systems of migration control, irrespective of their potential discriminatory impact.

International Law's Tangential Engagement with Discrimination at the Border

This position is reflected in the text of some international human rights treaties, which contain express provisions recognizing that states are entitled to treat migrants differently from their own nationals, even when it comes to the enjoyment of fundamental rights.[8] Other treaties are silent on the point, but notably do not include nationality and immigration status in the list of suspect grounds in their general non-discrimination clauses.[9] It is significant that the

[5] *Id.*; *see also* Joseph Carens, The Ethics of Immigration (2013).

[6] Marie-Bénédicte Dembour, When Humans Become Migrants (2015).

[7] *See, generally*, Nandita Sharma, Home Rule: National Sovereignty and the Separation of Natives and Migrants (2020).

[8] *See, e.g.*, CERD, *supra* note 1, arts. 1(2) & 1(3); ICESCR, *supra* note 1, art. 2(3); Revised European Social Charter art. N & appendix, May 5 1996, Europ. T.S. No. 163.

[9] *See, e.g.*, ICCPR, *supra* note 1, art. 2(1) & 26; ICESCR, *supra* note 1, art. 2(2); ECHR, *supra* note 1, art. & Protocol 12.

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one UN human rights treaty that sets out qualified guarantees relating to the equal treatment of migrant and national workers, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,[10] has not been ratified by most of the European and North American states.[11]

This tangential engagement with migration control is echoed in the general interpretative statements produced by expert human rights treaty bodies. Both the UN Human Rights Committee and the Committee on the Elimination of Racial Discrimination have produced General Comments which affirm in general terms that states should not discriminate against migrants in securing their fundamental rights.[12] However, none of these interpretative statements specifies in any detail what might qualify as unjustified discrimination in this regard. In particular, there is little or no discussion of when migrant control measures that have a disproportionate impact on particular vulnerable groups will breach state international human rights obligations, which considerably reduces the value of such interpretative statements as a tool for contesting discrimination at the border.

International human rights bodies have shown similar caution in adjudicating non-discrimination claims relating to migration control. In the limited jurisprudence that exists on this issue, differences of treatment based on nationality and immigration status are assumed to be necessary to maintain a functioning system of migration control and state authorities are given a wide margin of appreciation when it comes to justifying the design of such systems. Some challenges succeed. As detailed further below, immigration restrictions that lack any apparent rational basis appear vulnerable to attack, as do restrictions that are overtly discriminatory, i.e., which involve direct discrimination against individuals and groups that is clearly motivated by their race, ethnicity, gender or some other "suspect ground."[13] However, in less straightforward situations, where the legal "wrongness" of state migration control measures is more open to dispute, international human rights bodies (in tandem with their national counterparts) remain highly deferential.

This tends to be the case even where migration controls have a clearly disproportionate impact on particular groups defined by suspect grounds such as their race, ethnicity, disability, and so on. When "disparate impact" claims challenging such measures come before international human rights bodies, they are usually unsuccessful, with such bodies being particularly reluctant to make findings of discrimination in respect of politically or operationally significant aspects of state systems of migrant control.[14] In turn, this seems to have discouraged NGOs and others from bringing legal challenges in this area, judging by the low numbers of such disparate impact claims that have reached apex human rights courts. Lawyers will not bring futile cases, and there is little in existing human rights jurisprudence to encourage claims.

International Human Rights Jurisprudence Relating to Discrimination at the Border

These trends can be seen in the jurisprudence of the European Court of Human Rights (ECtHR). In its first major judgment relating to border control, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*,[15] the Court held

[10] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, 2220 UNTS 3.

[11] At the time of writing, only Albania, Bosnia-Herzegovina and Turkey of the member states of the Council of Europe have ratified the Convention: UN Office for the Hugh Commissioner for Human Rights, Status of Ratifications.

[12] UN Human Rights Comm., General Comment No. 15: The Position of Aliens under the Covenant, UN Doc. HRI/GEN/1/Rev.1 at 18 (1994), para. 7; UN Human Rights Comm., General Comment No. 18: Non-discrimination, UN Doc. HRI/GEN/1/Rev.1 at 26 (1994); UN Comm. on the Elimination of Racial Discrimination, General Recommendation No XXX on Discrimination Against Non-Citizens, UN Doc. CERD/C/64/Misc.11/rev.3 at 4 (2004).

[13] See, e.g., the discussion below of Kiyutin v. Russia, Application No. 2700/10 (Eur. Ct. H.R., 2011).

[14] See, e.g., the discussion below of Bah v. United Kingdom, Application No. 56328/07 (Eur. Ct. H.R., 2011).

[15] Abdulaziz, Cabales and Balkandali v. the United Kingdom, Application Nos. 9214/80; 9473/81; 9474/81 (Eur. Ct. H.R, 1985).

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that immigration rules that overtly discriminated on the grounds of sex breached Article 14 of the European Convention on Human Rights (ECHR) (non-discrimination in the enjoyment of other Convention rights) taken together with Article 8 ECHR (right to private and family life). However, the Court rejected claims for race discrimination, on the basis that there had been no difference of treatment formally based on considerations of race or ethnicity as such, despite substantial evidence that suggested the immigration rules in question were indeed racially motivated. It also rejected a claim alleging discrimination between persons born and not born in the United Kingdom, the Court emphasizing that states enjoyed broad leeway in designing their immigration policies.

The Court's case-law has evolved in some ways since *Abdulaziz*. However, in general, subsequent cases have followed the broad parameters of this template.[16] The Court is sometimes prepared to find that overt or irrational forms of discrimination in the application of migration control measures breach the Convention. However, it is much more reluctant to find a breach in respect of less overt or more indirect forms of discrimination, or to place substantive limits on the freedom of states to frame their own migration policies.

Thus, in *Kiyutin v. Russia*,[17] the denial of a residence permit to a migrant on the basis that he was HIV-positive was held to be unjustifiable discrimination, with the Court emphasizing that the ban overtly targeted a "particularly vulnerable group" and was lacking in rational justification. In *Biao v. Denmark*, the ECtHR dipped its toes into the waters of indirect discrimination in ruling that the denial of family reunion rights to a Danish citizen of Ghanaian ethnic origin, in a situation where he would have been eligible for such rights had he been a national, or been born and lived in Denmark for twenty-eight years previously, constituted unjustifiable indirect race discrimination in breach of Article 14 ECHR.[18] Again, the lack of a clear rational basis for the distinction was decisive, with the Court noting that the "28 year rule" in question seemed to have been largely based on stereotypes about the lack of attachment of "newer" citizens to Denmark.

However, in contrast, in *Bah v. United Kingdom,*[19] the Court was unwilling to find a breach of Article 14 ECHR in relation to state law which made persons subject to immigration control ineligible for housing assistance, even though the claimant in this case had indefinite leave to remain in the United Kingdom, and was seeking to exercise her family reunification rights in respect of her son. Her lawyers argued that she and her son had been subject to unjustified discrimination on the basis that it was clearly disproportionate to subject someone with her established level of connection with the United Kingdom to less favorable treatment than others in similar need. The U.K. Equality and Human Rights Commission also intervened in the case, claiming that it highlighted the existence of "structural discrimination" against vulnerable groups. However, the Court dismissed the claim, holding that states have wide discretion to regulate migrant access to state benefits as an aspect of their wider systems of migration control.

Similarly, in *Moser v. Austria*,[20] the Court found no breach of Article 14 in respect of a failure by the Austrian authorities to take special measures to enable and encourage migrant mothers in need to access specialized family support centers, which the claimant alleged had contributed to her losing custody of her child. The lack of any overt bar to non-nationals accessing such centers was sufficient to foreclose any possibility of an Article 14 breach. In both *Bah* and *Moser*, the Court was clearly reluctant to probe deeply into allegations of disparate impact and structural discrimination against migrants. More generally, the Court's deferential approach in this context seems

[16] DEMBOUR, *supra* note 6.

[17] *Kiyutin v. Russia*, *supra* note 13, at 74. *See also* Hode and Abdi v. the United Kingdom, Application No. 22341/09 (Eur. Ct. H.R., 2012).

[18] Biao v. Denmark, Application No. 38590/10 (Eur. Ct. H.R., 2014).

[19] *Bah v. United Kingdom*, *supra* note 14.

[20] Moser v. Austria, Application No. 12643/02 (Eur. Ct. H.R., 2006).

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to be deterring claimants from bringing Article 14 claims: it is striking that the *Biao* judgment, hailed at the time by many academics as a significant development in the Court's case-law, has so far not generated any real "follow-up" jurisprudence.

Other international human rights adjudicatory mechanisms have been a little more willing to make findings of discrimination in relation to non-overt/irrational forms of discrimination. For example, the UN Human Rights Committee in *Toussaint v. Canada* concluded that Canada's denial of health care coverage to undocumented migrants constituted a breach of the right to non-discrimination protected by Article 26.[21] However, the Committee emphasized that the finding of discrimination was linked to its further conclusion that the denial of health care had endangered the complainant's right to life—meaning that the decision is perhaps best seen as involving the protection of the core or essence of the complainant's human rights, rather than establishing any wider principle relating to discriminatory access to health care per se.

The only international human rights adjudicatory bodies that have shown some real readiness to apply non-discrimination norms in their full rigor in the migration control context are the Inter-American Commission and Court of Human Rights. For example, in its much-celebrated advisory 2003 opinion on the *Juridical Condition and Rights of Undocumented Migrants*, the Inter-American Court concluded that "in each specific case [of migration control], the State must justify not only the reasonableness of the measure, but also examine rigorously whether it damages the principle of illegitimacy that affects all measures that restrict a right based on grounds that are prohibited by the principle of non-discrimination."[22]

On its face, this approach represents a rigorous application of non-discrimination norms to migration control measures, standing in stark contrast to the ECtHR's approach in for example *Bah v. United Kingdom*. Having said that, the advisory opinion was delivered in response to the Mexican government's concerns about how its nationals were being treated in the United States: in other words, it was a judgment which was sailing with favorable political winds. Furthermore, this Inter-American jurisprudence has yet to be fleshed out in detail. Apart from the above-mentioned Advisory Opinion, it has thus far only been applied in situations involving overt race discrimination.[23] As such, it remains to be seen how this jurisprudence will develop in the future, and whether it will influence legal developments in others parts of the world.

Conclusion

Thus, in general, international non-discrimination norms have had little impact on migration control. States are assumed to be generally entitled to control their borders and are given wide discretion to subject migrant groups to less favorable treatment if they consider this necessary to maintain such control.

Is this deference inevitable, along with the associated lack of normative development in this area of human rights law? Are non-discrimination norms inherently limited in terms of how they can be applied in the context of border control? Is this an area where international human rights bodies should acknowledge the limits of their role, and the inevitable complexities of applying non-discrimination norms in the context of migration control, and focus perhaps on protecting a "baseline" of migrant rights rather than wandering too far down the discrimination path?

It can certainly be conceptually difficult to distinguish between justified and unjustified discrimination for the purposes of human rights law, when the context in question—migration control—is riddled with embedded

[21] UN Human Rights Comm., Toussaint v. Canada, UN Doc. CCPR/C/123/D/2348/2014 (July 24, 2018).

[22] Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18 (Sept. 17, 2003).

[23] Expelled Dominicans and Haitians v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 282 (Aug. 28, 2014).

https://doi.org/10.1017/aju.2021.53 Published online by Cambridge University Press

inequalities and ingrained hierarchies. Furthermore, the development of human rights law is often characterized by deference to prevailing political consensus, often reflecting the self-preservation instincts of international human rights bodies keen to maintain their legitimacy in the eyes of state governments. However, it is also important to recognize that migration controls have become the front line for the enactment of racialized prejudice and other forms of discriminatory practice. It is disingenuous to turn a blind eye to this reality.[24] Non-discrimination norms are essential tools in diagnosing and challenging such processes, including "disparate impact" analysis. International human rights bodies should be prepared to apply these norms in the area of border controls, as they have elsewhere, and not let deference to state authorities overwhelm their jurisprudence.

[24] E. Tendayi Achiume, *Putting Racial Equality onto the Global Human Rights Agenda*, 28 Sur Int'l J. Hum. Rts. 141, 142 (2018).

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