The freedom of movement of asylum-seekers within the host State under international and European human rights law

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2024

DOI (link to publisher)
10.5463/thesis.522

document version
Publisher's PDF, also known as Version of record

Abstract

Asylum-seekers in several European States often have to endure policies that make them feel trapped in a specific part of the country or that constrain their movements to such an extent that their situation resembles detention. How can human rights law respond to these practices? This PhD thesis comprehensively examines the right to free movement within the country under international and European human rights law, as well as under the Spanish and German domestic legal systems. With a specific focus on asylum-seekers, the study analyses this issue from four different angles: (1) the *travaux préparatoires* of the various instruments that enshrine this freedom; (2) the personal scope of the right according to legal doctrine and case law; (3) the material scope of the right, i.e. the distinction between a restriction on movement and a deprivation of liberty; and (4) the safeguards offered by this right. By comparing the protection afforded to asylum-seekers with that extended to nationals and individuals in general, the thesis contributes to the growing literature on *migration exceptionalism*. Additionally, the exploration of the legal status of asylum-seekers under various treaties and the detailed assessment of the definition of 'detention' hold the potential to inform research in other areas of human rights law, including refugee law.

Extended summary

During the COVID-19 pandemic, restrictions on movement became part of the daily lives of millions of Europeans. From prohibitions of moving from one region to another, all the way to strict quarantine measures, citizens of democratic countries stopped taking for granted their right to freely move within their State of nationality. For individuals seeking asylum in European States, however, limitations on freedom of movement are nothing new. They have long had to endure policies that make them feel trapped in a specific part of the receiving country, such as the obligation to stay in a specific city or *Land* in Germany, the geographical restrictions in the Greek islands or the prohibition on leaving the exclaves of Ceuta and Melilla towards mainland Spanish territory. Some policies, like the confinement in the Hungarian transit zones or in the international zones of airports, restrict asylum-seeker's movement to such an extent that the distinction between 'restriction on movement' and 'detention' becomes blurred.

This PhD thesis aims to examine whether, and how, the right to freedom of movement within the country can serve as a tool to protect asylum-seekers from the arbitrary imposition of such restrictions. This is done by analysing this right from four different angles: its historical origins, its personal scope, its material scope (i.e. the limits between this right and the right to liberty) and the safeguards it provides. The analysis primarily

focuses on international and regional human rights law, supplemented by two case studies: Spanish and German domestic law. The methodology followed is characterised by the systematic analysis of the *travaux préparatoires* of international instruments, Refugee Convention doctrine and judicial (ECtHR, domestic courts) and quasi-judicial (HRC) decisions.

The study shows that there are *multi-sourced equivalent norms* that give a different scope and content to freedom of movement which fragments the protection offered by this right. By comparing the protection afforded to asylum-seekers with that extended to nationals and individuals in general, the thesis contributes to the growing literature on *migration exceptionalism*. Additionally, the exploration of the legal status of asylum-seekers under various treaties and the detailed assessment of the definition of 'detention' hold the potential to inform research in other areas of human rights law, including refugee law.

Some of the key findings are the following: (1) the drafters of this right feared that granting freedom of movement to everyone would be interpreted as an attempt to afford migrants the right to move *between* States, which led to the exclusion of irregular migrants (under international law) and of migrants generally (under the Spanish constitution) from the personal scope of this right; (2) there are five different perspectives in legal doctrine concerning the question of whether (and which) asylum-seekers are 'lawfully in [the] territory' within the meaning of Article 26 of the Refugee Convention (titled 'libertad de circulación'); (3) the HRC and the ECtHR confer great leeway to States in the determination of whether asylum-seekers are 'lawfully within the country' in the sense of Article 12 ICCPR and Article 2(1) of Protocol 4 ECHR. In Spain and Germany, however, national courts have been crucial in bringing the movement of asylum-seekers under the radar of constitutional protection; (4) the ECtHR uses two different standards of assessment to determine when a confinement of asylum-seekers and of nationals can be qualified as 'detention' and thus falls under the scope of the right to liberty (Article 5 ECHR); and (5) the safeguards afforded by the ICCPR and the ECHR to the right to free movement of individuals in general provide more protection than the Refugee Convention as interpreted by the majority of legal doctrine. This differentiated protection is also visible in the domestic legal systems of Spain and Germany, both at the constitutional and the legislative level.

Overall, while there are some avenues for asylum-seekers to use the right to free movement as an instrument to challenge restrictive European policies, the freedom of movement of asylum-seekers is granted less protection than to nationals, confirming that, as in other areas of human rights law, migration exceptionalism undermines the aspired universality of human rights.