Courts, the new constitutionalism and immigrant rights: The case of the French *Conseil Constitutionnel*

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Abstract. This article examines the role of courts in the creation of immigrant rights. Immigrant rights are located within a broader 'new constitutionalism' (especially in postwar Europe), in which courts have abandoned their traditional passiveness toward the political process and taken on the role of *de facto* legislator. Analyzing the immigration jurisprudence of the French *Conseil Constitutionnel*, we argue that courts are torn between two opposite imperatives: to protect an especially vulnerable category of people from the enormous police powers of the modern administrative state; and to respect an elementary exigency of sovereign stateness – that is, the capacity to draw a distinction between 'citizens' and 'aliens' as differently situated persons without a right of entry and permanence.

A persistent puzzle across Western states is the disparity between mass publics that are generally opposed, if not hostile, to immigration and increased rights for immigrants, who in important respects have come to acquire a status close to that of citizenship.[1] This rights increase is inexplicable in terms of the usual logic of democratic politics, investigated in the epics of political sociology from T.H. Marshall to Charles Tilly, in which the conflict potential and mobilizing capacity of excluded groups have set the path toward their successive inclusion. Immigrants, as non-citizens, lack the status of membership that is a formal prerequisite for substantive inclusion. In a world divided into states with mutually exclusive citizenries, immigrants are always subject to the *Ernstfall* of expulsion or rejection at the borders, while only citizens are exempt from this and thus have to be lived with and accommodated by states. Immigrants' mobilizing capacity is thus structurally impeded, and also their 'fiduciary' value for vote-catching political parties is reduced. This even helped to turn the democratic process from an asset to a liability for immigrants – testimony to this is the rise of populist right-wing parties across contemporary Europe, one of whose standard lines is to get tough on immigrants (see the recent survey in *The Economist*, 27 April 2002, pp. 29–30).

However, the *Ernstfall* has remained mostly the exception. European societies especially, in which immigration has never been part of national self-understanding, are characterized by a paradox: these are predominantly mono-ethnic societies that after the Second World War, against the explicit

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preferences of democratic majorities, have been transformed into multi-ethnic societies, in which immigrants now constitute between 5 and 10 per cent of the resident populations. Only recently have sociologists and political scientists sought wholesale explanations for this astonishing development, stressing collective action dilemmas (Freeman 1995), institutional rigidities and path dependencies at domestic level (Hansen 2002) or the global forces of capitalism and human rights norms (Sassen 1998; Soysal 1994).

One actor who is often attributed a key role in the expansion of immigrant rights are the courts (Joppke 2001a). There are structural reasons for this. As third-party dispute settlers (see Shapiro 1981) courts are obliged to neutrality – otherwise they would not be 'courts'. In contrast to parties or parliaments, courts are shielded from democratic majority pressures. In one author's words, courts are: 'less determined and more insulated both from concrete social interests and from political struggle taking place in other state institutions' (Alec Stone, quoted in Guiraudon 1998: 301). Of all state institutions, courts' insulation from democratic pressures makes them structurally the friendliest to immigrants.

However, this is at best the beginning of an explanation. One could even cite prominent counterexamples. For instance, the United States Supreme Court, arguably the most powerful court in the world, who not long ago had simply prolonged the racially exclusive desires of white majority society (Haney Lopez 1996), has made itself the champion of individual rights only quite recently (Epp 1998) and in the field of immigration, perhaps not at all (see Chin 2000; Legomsky 2000). Also with regard to Europe, a more specific explanation has to be found. Here courts have traditionally been subordinate agents of political regimes, yet more recently their new activism on individual rights has not stopped short of the immigration domain (much in contrast to the United States). Why was there no court, say, to stop the repatriation of North African workers (many of them, like the Algerians, with French nationality) in interwar France (see Lewis 2000: Chapter 7), while there was (among other actors) a court to stop a French President's plan to forcibly repatriate Algerian immigrants in the late 1970s (see Weil 2002: 317, Footnote 6)?

The difference between both episodes is the rise of a 'new constitutionalism' after the Second World War (see Stone-Sweet 2000: Chapter 2). This phenomenon has at first to be seen independently of immigration. The new constitutionalism points to an Americanization of politics in postwar Europe. It refers to the possibility of courts striking down laws or policies of the state that are seen as violation of a higher-order, constitutional law; conversely, it refers to a constellation in which individuals are seen as endowed with rights that directly derive from this higher-order law, without the need of intermediary parliamentary legislation. This constellation comes with important insti-

tutional variations. In the United States, any judge of any court can declare a law or policy of the state unconstitutional, provided there is a concrete 'case or controversy'. By contrast, in Europe, this function is reserved to 'constitutional courts' proper, and often only *before* the enforcement of a law and thus in absence of concrete litigation. However, the ironic result is the same everywhere: for the sake of a more effective division of powers in the modern state, the functions of divided powers have come to overlap. As Stone-Sweet (2000: 130) describes the outcome: '[T]oday judges legislate, parliaments adjudicate, and the boundaries separating law and politics – the legislative and judicial functions – are little more than academic constructions.'

In Europe, the new constitutionalism has destroyed the traditional doctrine of parliamentary supremacy. Certainly there were constitutions in prewar Europe, but these were in principle revisable, with no fundamental rights provisions exempted from the possibility of revision. To the degree that such rights provisions existed, they needed statutory implementation to become effective – individuals could not directly derive claims from these provisions against the state; and legislative authority was generally not constrained by a higher-order law and a (constitutional) judiciary functioning as its watchdog. The new imperative of taming the state in post-totalitarian Europe radically altered the function of the constitution. The latter was no longer reduced to a formal blueprint of the state's internal organization and division of competences; rather, it became a weapon of the individual against possible intrusions by the state itself. Under the tutelage of the United States, the new German and Italian constitutions enunciated inviolable human rights, independently of citizenship, *before* state institutions were mapped out. These rights were no longer just programmatic statements in need of a legislative act to become effective; they had direct effect, protecting the individual from the vagaries of public authority: 'Today, the positive source of individual rights is the constitution' (Stone-Sweet 2000: 94).

The new constitutionalism appears wherever individuals are threatened by intrusive state power. At first, one of its key domains was the penal process – nowhere are the rights of individuals more precarious than where individuals have partially forfeited their rights by inflicting harm on others. Since the 1970s, immigrants emerged as a second key focus. After the first oil crisis in 1973, European states turned heavily restrictive and even sought to remove the already admitted labor migrants from their territories. They did this with a plethora of new rules and regulations (see Guiraudon 2000: Chapter 7). Most of these did not have the status of statutory law, but of administrative decrees. In fact, immigrants, as non-nationals, are in principle subject to special, highly discretionary police powers. The German Foreigner Law, for example, established that the presence of foreigners in Germany was tolerable only as long

as this was in the 'interest' of the Federal Republic. Between 1965 and 1991, there was no statutory provision that would secure minimal residence or family rights for admitted guest workers. The sizeable foreigner population was ruled by a jungle of non-transparent and wholly discretionary administrative decrees in which German state interests were supreme and no rights whatsoever existed on part of the foreigners (Joppke 1999: 65–69). Into this legislative void stepped the higher administrative and constitutional courts, which derived elementary residence and family rights for settled guest workers from the country's constitution, the Basic Law. The rights secured for immigrants in this process were by definition not enunciated anywhere in statutory law, but derived directly from the constitution's due process and equal protection provisions. They were thus rights in the strong and narrow sense, as 'trumps' (Dworkin, cited in Waldron 1991: 364ff) of individuals against the majority preferences in society, which are always already represented by the democratically accountable state.

However, there is an inherent limit to the constitutionalization of immigrant rights that stems from the fact that aliens are not citizens. If states could no longer make this distinction, they would cease to be states in the sense of having a bounded membership.[2] The vitality of this distinction is expressed in the fact that in contemporary liberal-democratic states only aliens, not citizens, are subject to the *Ernstfall* of non-admission or expulsion (only in totalitarian states, even citizens could be expelled). It is true that, in the age of universal human rights, the alien-citizen distinction has lost much of its former vigor, perhaps most blatantly in the non-refoulement norm of the international refugee regime (which prohibits states from expelling aliens whose life is at risk in their state of origin). To a certain degree, we are indeed witnessing a trend toward the 'denationalization' of rights (see Sassen 1998), for which the rise of immigrant rights (as discussed in this article) is just another word. However, it has to be kept in mind that the 'national' moment in the history of rights has been extremely short and highly variable. The great codifications of the Western Enlightenment have been universalistic; the alien-citizen distinction is at best peripheral to them. In the history of Western states, the nationality principle has always competed with the territoriality principle, according to which the state was not to intrude in the free play of civil society, which was conceived of as in principle nationality-blind. 'The closer a right was to the expanding state sector, the more the nationality principle prevailed over the territoriality principle,' finds Dieter Gosewinkel (2001: 231) in his meticulous history of the 'nationalization' of German citizenship in the late nineteenth and early twentieth centuries. There never were nation-states in which the whole bundle of civic, political and social rights was exclusively for

citizens; there were at best *moments* and *domains* in which the nationality principle prevailed over the countervailing territoriality principle. Regarding *moments*, the late nineteenth-century period of imperialist state rivalry was certainly the peak of the nationality principle, in which national citizenries were forged as instruments of war, for which they were rewarded with increasingly nationalized welfare benefits; regarding *domains*, the nationality principle fully prevailed only with respect to political rights, whereas civil and social rights could never be completely decoupled from territoriality; within limits, civil and social rights were always available for aliens as well (see Ferrajoli 1994).

As the case of the French *Conseil Constitutionnel* shall demonstrate, in their decisions on immigrants, high courts are torn between two opposite imperatives: to protect an especially vulnerable category of people from the awesome police powers of the modern administrative state on the basis of the universal human rights provisions enunciated in the constitutions of the contemporary liberal state; *and* to respect an elementary exigency of sovereign stateness – namely the state capacity to draw a distinction between aliens and citizens, and to maintain basic discretion over the entry and residence of aliens. This is achieved by means of balancing or proportionality tests in which courts investigate whether, in a (usually restrictive) law or policy, the declared purpose of securing public order (i.e., state interest) is important enough to justify the violation of an individual right on part of the immigrant. We thus get the picture of courts that have slowly but steadily corrected some of the worst anomalies of a special police regime for aliens, which is in violation of basic human rights precepts protected by modern constitutions, while leaving intact a basic prerogative of the state to distinguish between aliens and citizens and to inflict the *Ernstfall* of rejection at the border or expulsion from the territory on aliens.

The case of the French *Conseil Constitutionnel*

More than any other European state, France epitomizes the traditional hostility, and eventual conversion, of European states to the judicial control of politics. Throughout the Fourth Republic, France had stuck to the old principle of parliamentary sovereignty and a hands-off role of the judiciary. Since the 1789 Revolution, which had abolished the court-like *parlements* that had been a bastion of aristocratic privilege, there was a strong antipathy to a non-democratic 'government of judges' (see Vroom 1988). This changed only in De Gaulle's Fifth Republic. Its 1958 Constitution had meant to strengthen

the power of the executive over an all-powerful, yet faction-divided and instability-producing, parliament. For this purpose, the *Conseil Constitutionnel* was created: its designed function was to ensure the dominance of the executive over the legislature (Stone-Sweet 2000: 41). The protection of individual rights was not on its initial agenda. In this respect, France diverged sharply from Germany or Italy, where under the influence of the victorious Allied Powers, most notably the United States, the newly established constitutional courts had from the start the role of individual-rights watchdogs. Perhaps under the influence of what had by then become the liberal (and continental European) norm, the *Conseil Constitutionnel* virtually self-created itself as a human rights protector in a monumental decision of 1971 that affirmed the right to form political associations. This decision created the so-called '*bloc de constitutionnalité*', consisting of the Preambles of the 1946 and 1958 Constitutions, the 1789 Declaration on the Rights of Man and Citizen, and the 'fundamental principles recognized by the laws of the Republic'. In combination, these texts enunciate fundamental individual and citizen rights. Before the 1971 decision, especially the constitutional preambles had only declaratory and programmatic value, and the legislator was in principle free to discard them; after this decision, they had the status of binding law and thus constrained the legislator. Including the 1946 Preamble and the 1789 Declaration in the 'bloc of constitutionality' was crucial for the development of immigrant rights: the equal protection clause (Article 1) in the 1958 Constitution refers only to 'citizens'; by contrast, the 1946 Preamble and 1789 Declaration accord equal protection to all 'persons', so that immigrants too are included (Guendelsberger 1993: 698).[3]

After a constitutional amendment of 1974, which enlarged to 'any group of 60 Senators or 60 Deputies' the scope of referral (so-called '*saisine*') to the Constitutional Council of proposed legislation, this referral – and ensuing temporary blockage, alteration or even cancellation – of proposed legislation has become part of the routine game of French politics. The 1974 amendment empowered the opposition in parliament (and not just, as before, the government only) to call upon the Constitutional Council. After 1981, one-third of all legislation was referred to the Constitutional Council, 54 per cent of these referrals ending in some form of annulment by the court (Stone-Sweet 2000: 63). By the same token, the only type of constitutional review allowed under this system is so-called 'abstract review' according to Article 61 of the Constitution (which provides the '*recours [préalable] d'inconstitutionnalité*'). Abstract review can affect legislation only *before* it goes into effect, and it must be initiated by specifically designated, elected politicians (in practice, mostly the opposition parties). Ordinary individuals, who under an 'individual complaint' procedure in other European constitutional systems (as in Germany or

Spain) have direct access to the constitutional court, are locked out of the French Constitutional Council. In addition, the limitation of constitutional review to legislation that has not yet been promulgated creates the possibility that already existing law, even though it may violate current constitutional opinion and principles, remains untouchable.

Despite this dual limitation of constitutional review under the *Conseil Constitutionnel*, the latter has had important impact on the immigration domain. In the following, we shall concentrate on the balancing act that the court has ventured between protecting the individual rights of immigrants while leaving basic state sovereignty over their entry and residence intact. This analysis will reveal an irresolvable tension between the 'sovereignty' and 'rights' principles. The sovereignty principle requires drawing a sharp distinction between citizens and aliens as differently situated persons with lesser rights, placing the latter under an administrative police regime for the sake of public order protection. By contrast, the thrust of the rights principle is to blur the very distinction between citizens and aliens, and to approximate alien status to citizen status.

Sovereignty

The Constitutional Council's gradually emerging jurisprudence on immigration matters suggests that all 'rights' in this field are inherently precarious. This is because aliens, in contrast to citizens, do not have a right of entry and residence; the 'right' of entry and residence for aliens is entirely at the discretion of the state. Consider the *Conseil*'s most celebrated immigration case, Decision 93-325 of 13 August 1993, in which the court struck down eight of 51 harsh provisions that were meant to realize Gaullist Interior Minister Charles Pasqua's infamous promise to make France a 'zero-immigration' country. While in other respects this decision represents a milestone in the creation of constitutional alien rights, it starts by solemnly reaffirming the sovereignty principle: 'No principle or rule of constitutional value assures to aliens the general and absolute right of entry and permanence in the territory' (Paragraph 2).

Thus self-limiting its possible reach, the *Conseil* leaves it to the legislator to reconcile the sovereignty principle with the rights that nevertheless pertain to the alien. The sovereignty principle is usually couched as the state's mandate to safeguard the 'public interest' and 'public order', which – in the *Conseil*'s parlance – is an 'aim of constitutional value'. As the court stated in its Decision 89-261 of 28 July 1989: '[C]oncerning measures related to the permanence of aliens in France, the legislator can make the modalities of implementation of the constitutional aim of public order rely on rules of police specific for

aliens, as well as on a regime of criminal sanctions, or on a combination of both' (see Chevallier 1989). Throughout its immigration jurisprudence, the *Conseil* has insisted on this fundamental sovereignty principle that grants the legislature wider-than-normal discretion on immigration matters; only lately has the court begun to indicate certain limits to legislative discretion in this area.

In confirming that the right of entry and permanence is the right of the state, not of the alien, the court has also legitimized the mechanisms that the state sets up to realize its mandate of public order protection. These are mechanisms to effectively implement the state's restrictive immigration policy, and to prevent unwanted aliens from entering and taking residence in the territory. For example, in its decision on the first Pasqua Law of 1986, the *Conseil* established that no constitutional provision could stop the legislator from 'regulating, under the necessary safeguards, the means to allow the administrative authority to order an alien, placed in the territory in a situation of irregularity, to leave this territory' (Decision 86-216 of 3 September 1986 on the Entry and Stay of Foreigners; for an analysis of this decision, see Genevois 1987). In this respect, the *Conseil Constitutionnel* has developed an *ad hoc* construction of the alien's right to personal liberty, to make the latter compatible with the sovereignty principle that by definition limits this personal liberty. Accordingly, mechanisms like expulsion, return to the border (*reconduite à la frontière*), administrative retention and detention, or prohibition of entering the country (*interdiction de territoire*) are all considered administrative measures compatible with the specific type of personal liberty right that pertains to the alien. In ruling out an alien's personal liberty right being violated by such measures, the court has in fact created a new and reduced personal liberty right for aliens. As the court stated in its aforementioned 1989 decision, a measure directed to remove from the territory, or keep away from the territory (*éloignement*), a person 'is only legally acceptable if the person concerned is an alien or a stateless person'.

Given the non-existence of a right of the alien to entry and permanence, the measures chosen by the state to implement its public order mandate are situated within a specific domain of 'administrative police'. All measures in this domain are qualified by the court as purely administrative in nature, and not punitive. This construction allows for the exemption of public order related measures (i.e., immigration control measures) from the constitutional principles that regulate criminal law. The constitutional criminal principles that normally constrain the *de facto* punitive measures by the state thus do not apply to aliens *qua* aliens. Accordingly, from that point of view, the French debate over the '*double peine*' of expelling an alien after his or

her fulfillment of a prison sentence is misleading, because 'expulsion' is not 'punishment'.

This principle was affirmed, for instance, in the *Conseil*'s Decision 79-109 of 9 January 1980 on the so-called 'Bonnet Law'. This was the first time that the *Conseil* was confronted with a reform of the 1945 *Ordonnance*, the basic French immigration law. The Bonnet Law was the first of an impressive battery of restrictive laws under successive conservative governments throughout the 1980s and 1990s that were meant to help the state fight irregular immigration more effectively. One of the Bonnet Law's provisions, opposed by the Socialist critics who had referred the bill to the *Conseil*, considerably lowered the threshold of expulsion for criminal offences – thus provoking the charge that *administrative* authority had unrightfully usurped the space of *judicial* authority. The court rejected this argument, affirming that expulsion was administrative and not penal in nature, and thus was subject to a special police prerogative of the state: 'No constitutional provision or principle of constitutional value prevent the law from conferring to the administrative authority the power to adopt an order of expulsion on the grounds of facts that would justify a criminal sentence, even when no definitive criminal sentence has been pronounced by the judicial authority.' By the same token, the court stated in this decision that Article 8 of the 1789 Declaration of the Rights of Man and Citizen did not apply in this case. Article 8 establishes the principles that guide the penal ('crime and punishment') regime, and, specifically, the principle of non-retroactivity of criminal law. The court considered this provision irrelevant in this case because expulsion and other entry- and permanence-related measures were not of a punitive, but rather an administrative, nature.

In its 1992 decision on the bill that was to incorporate the Schengen Implementation Agreement on removing internal border controls between some European states, the *Conseil* introduced a paradoxical new element into the domain of administrative police powers of the state, rolling back the latter only to maximize their effect. One of the new measures positively sanctioned in this decision concerned carrier sanctions for transport companies that move around illegal or insufficiently documented aliens. In forcing transport companies to check (and act on) the (non-)eligibility of the alien to enter into the state of destination, the system of carrier sanctions implies the delegation to private parties of elementary police control functions, which traditional jurisprudence had considered within a non-transferable public competence. Interestingly, in its positive sanctioning of the Schengen Implementation bill, the *Conseil* did not address this problem directly. The court merely indicated that the transport company, which was *de facto* mandated to determine whether an asylum application was 'manifestly unfounded' or not, should

simply try to evaluate the situation of the alien without proceeding to further inquiries. In this way, according to the *Conseil*, the provision in question should not be interpreted as 'conferring to the transport-carrier a police prerogative that replaces public powers'. One recognizes here, as throughout, a distinct inclination on part of the court not to block the contemporary state's inventiveness in matters of immigration control, even if this flies in the face of the traditional doctrine of the state's monopoly of force.

Rights

The *Conseil Constitutionnel* has progressively introduced some limits to the legislator's choice of placing the immigration question plainly in the sphere of administrative police powers, although accepting the fundamental legitimacy of this option. These limits consist of safeguards for the individual. Above all, this meant extending to the immigration domain the constitutional principles that guide the penal (crime and punishment) regime. In its Bonnet Law decision of 1980, the court for the first time extended these principles to aliens. As noted above, in this decision the court concluded, on the one hand, that penal protection principles did not apply in this case because of the purely administrative (and not punitive) nature of the concrete measure in question; on the other hand, however, by this same reasoning, the court indirectly admitted that aliens *did* fall under the scope of these principles *if* a specific measure warranted it.

The 1992 decision on the law incorporating the Schengen Implementation Agreement represents a step forward in this respect, applying to the immigration domain a jurisprudence that the *Conseil* had already developed in other domains.[4] After listing a series of constitutional requirements, the *Conseil* stipulated that 'these requirements do not only concern sanctions pronounced by criminal jurisdictions, but they also concern any sanction of a punitive character, even if the legislator has invested its pronunciation in an authority of a non-jurisdictional (i.e., administrative) nature'.

Following the same reasoning, the *Conseil* has also introduced various restrictions to the mechanisms chosen by the state to deny entry and permanence to aliens; these mechanisms have shrunk as the court's definition of the alien's personal liberty right has expanded. Through resorting to certain *constitutional provisions* and bringing to bear on the immigration domain *jurisdictional competence*, the *Conseil* has indirectly ventured a complex and expansive construction of the alien's right to personal liberty.

With regard to constitutional provisions, this liberty right was at first seen by some legal scholars (the *Conseil* did not initially pronounce itself on this) as justified in terms of the constitutional category of '*principes fondamentaux*

reconnus par les lois de la République' (see, e.g., Kissangoula 2001). However, this was a relatively weak provision because, on its basis, the liberty right was compatible with the state's discretionary prerogatives. As a territorial right it applied to aliens also, though in their case it was limited in content. Only later, for the first time in the Bonnet Law decision of 1980, did the *Conseil* openly justify the alien's personal liberty right in terms of Article 66 of the 1958 Constitution, thus strengthening this right formally (through couching it more universally) and substantially (through interdicting arbitrary detentions). In contrast to the weaker '*principes fondamentaux*' provision, Article 66 represents an irreducible 'last resort' guarantee for which no differences whatsoever between aliens and citizens are allowed ('*nul ne peut être arbitrairement détenu*').

This points to a second line of strengthening alien rights: bringing the immigration domain under jurisdictional (as against merely administrative) competence. In principle, the administrative judge (*juge administrative*) who is responsible for the protection of individual liberties in the face of public powers is charged with supervising detention procedures. However, in invoking Article 66, the *Conseil* has also brought the additional *juge judiciaire* into the game who is the 'guardian of individual liberty' (Article 66).[5] Because Article 66 allows no discrimination between aliens and citizens, the introduction of the *juge judiciaire* entailed recognition of the universal nature of the right to personal liberty, which now is the same for aliens and citizens with respect to the interdiction of arbitrary detention.

Once the *juge judiciaire* was introduced into the immigration domain, the *Conseil* has progressively extended the scope of his possible interventions. For instance, in its Schengen Implementation bill decision of 1992, the *Conseil* extended the reach of the *juge* from the field of administrative detention to that of the new international transit zones. Part of the Schengen Implementation bill, as proposed to parliament by Interior Minister Marchand, was the creation of 'anomalous zones' (Neuman 1997) at the country's airports or harbors, which are nominally outside the normal territorial jurisdiction of the French state, and in which aliens not admitted to the territory (such as asylum-seekers during the processing of their claims or aliens rejected by other states and sent back to France) can be processed according to a legal 'fast food' regime. Although accepting the government's claim that the processing of claims in the new '*zones de transit*' was different from administrative detention, the *Conseil* nevertheless found that they impacted on the alien's personal liberty, thus requiring the intervention of the *juge judiciaire*.

Next to bringing in the judicial judge, the *Conseil* has also defined the duration of detention as a main criterion to judge the conformity of immigration restriction to the constitutional liberty right of the alien. In its Bonnet Law

decision of 9 January 1980, the *Conseil* established that 'personal liberty can only be considered safeguarded if the judge intervenes in the shortest possible time'. Similarly, in its 1986 decision on the first Pasqua Law, the court underlined that 'even if controlled by the judge, the detention cannot be extended without violating the right to personal freedom, unless it is a case of absolute urgency and a particular threat to public order'. Accordingly, the court declared as unconstitutional a provision that would have automatically allowed the extension of a detention.

The general trend of constructing a constitutional alien status was confirmed in the *Conseil*'s monumental 1993 decision on the second Pasqua Law. On this occasion, the court significantly broadened the meaning of Article 66 of the Constitution, including under the right to personal liberty not just physical liberty, but also the right to freedom of movement (*liberté d'aller et venir*), data protection or marriage.

Over time, the *Conseil Constitutionnel*, in its construction of a constitutional alien status, has even gone beyond introducing limits (in terms of 'safeguards') on the basic state prerogative over the entry and permanence of aliens, toward challenging the legitimacy of this prerogative itself. This is especially evident in the two domains of asylum and family reunion. In conferring on an alien the possibility of entry and permanence, the right of asylum cancels out the right of the state to keep out unwanted aliens. Enshrined in the fourth paragraph of the Preamble of the 1946 Constitution (and indirectly incorporated in the 1958 Constitution), the right of asylum has undergone significant changes as a result of the *Conseil*'s jurisprudence. In its first immigration (Bonnet Law and Pasqua Law) decisions of 1980 and 1986, the court gave the constitutional asylum clause the status of positive law, yet one that was still in need of further norms of implementation (such as the 1952 French Refugee Act or the 1951 Geneva Convention on Refugees). Only in the second Pasqua Law decision of 1993 did the *Conseil* recognize the asylum clause's autonomous status and character as a constitutional right, separate from and independent of the 1951 Geneva Convention. In doing so, the court defined the right of asylum as a subjective right of the individual (and corresponding obligation on part of the state to accept a successful asylum claimant), thus reversing the constellation within the international refugee regime, in which the right of asylum is the right of the asylum-granting state (and not of the individual).

Ironically, the *Conseil Constitutionnel* launched this coup just after in neighboring Germany, in a long and torturous fight, the constitutional subjective asylum right according to Article 16 of the Basic Law had been neutralized in a constitutional change. After attacking the court for its 'judicial activism', which in effect – and quite similar to the situation in Germany –

threatened France's participation in the Dublin and Schengen conventions on 'safe third countries', the French government chose the German solution to this problem – namely amending the constitution in a way that the right of the state to reject ('manifestly unfounded') asylum-seekers was re-established (see Oellers-Frahm & Zimmermann 1995). Asylum thus was an instance in which the court's questioning of the entry-and-stay prerogative of the state could be rebuffed.

The right to family reunion represents a second instance in which the court has sought to suppress the state's discretion over entry and stay – but this time successfully. Traditionally, the right of the alien to family reunion had been subordinated to the general public order clause, which left a great margin of discretion to the state. The *Conseil*'s earlier jurisdiction had confirmed this view.[6] Only in the second Pasqua Law decision of 1993 did the right to family reunion acquire the status of a fundamental right, grounded in the tenth paragraph of the Preamble of the 1946 Constitution (according to which 'the nation assures to the individual and to the family the necessary conditions for their development'). In fact, this is a case in which the *Conseil* only affirmed the already established jurisdiction of administrative courts. In its famous GISTI decision of 8 December 1978, the *Conseil d'État* had deduced the 'right to lead a normal family right' from the mentioned provision in the 1946 Preamble, establishing the right to family reunion as a matter of the '*principes generaux du droit*', and in effect blocking the government plan to stop family migration.

The *Conseil*'s aggressive line on family rights culminated in Decision 97-389 of 22 April 1997, which was spurred by yet another attempt by a Gaullist Interior Minister (M. Debré) to further restrict the 1945 *Ordonnance* (and that gave rise to the famous '*sans-papiers*' movement) (see Lecucq 1997). Not only did this decision recognize the fundamental character of the right to family reunion; for the first time, the court also argued that the right to lead a normal family life (*droit à une vie familiale normale*), in combination with the right to private life, cancelled out the general public order clause. As the court put it, the 'simple threat to public order' could not suppress the right of permanence acquired by a person who had been lawfully residing in the territory for over ten years, and who had developed strong ties within French society in the process. The importance of this decision lies not only in putting the right of the immigrant over the right of the state, but also in recognizing – for the very first time – a right of permanence on part of the alien (as a consequence of the constitutional right to lead a normal family life). As long as the alien did not create a 'serious threat to public order', he or she now had a quasi-unconditional right to the renewal of his or her residence permit. The sovereignty principle, affirmed or even strengthened in other parts of the *Conseil*'s immigration jurisprudence, has thus been severely constrained with respect to

family unity and – in effect – permanence. This reveals an important distinction, drawn also by high courts in other Western states, between strong rights for *settled* aliens and weaker rights for *first-time* entrants (Joppke 2001a: 351ff).

Discussion

A similar process of constitutionalized immigrant rights, constrained by the sovereign state power to regulate the entry and permanence of aliens on their territory, is observable in other Western states as well, especially in Europe (for comparisons, see Guiraudon 2000: Chapter 7; Gomes 2000). This raises the question of whether the relationship between domestic courts and the creation of immigrant rights is spurious because conditioned by higher level, international or even supranational sources of rights. This is a particularly relevant question in Europe, which is characterized by the world's densest network of international and supranational norms and institutions co-existing with, and increasingly conditioning, the national ones.

Let us respond to this possible objection in two steps. First, the *Conseil Constitutionnel* is only one of several domestic courts involved in the constitutionalization of immigrant rights in France. Characteristic of the French case is that this constitutionalization is not by design, resulting from a single constitutional court in the center (as, e.g., in Germany or Spain); instead, it has been the result of the progressively and unsystematically evolving interactions between the *Conseil Constitutionnel* and other courts, most importantly the *Conseil d'État*, France's highest administrative court and arguably the one with the biggest role in the immigration domain. In some cases, the *Conseil Constitutionnel* only reiterated and endowed with constitutional dignity legal principles that had been first established by other courts. For instance, the constitutionalization of family rights was kicked off by the *Conseil d'État*'s famous GISTI decision of 1978, in which a state policy of restricting spousal migration was found to be in violation of the *principes generaux du droit*; only after this initial foray did the *Conseil Constitutionnel* go one step further and affirm the constitutional dimension of the right to family protection. Conversely, in other cases it was the *Conseil Constitutionnel* doing the first step in establishing a constitutional alien right, but then it remained dependent for its implementation on other courts, most notably the *Conseil d'État*. An example is the *Conseil Constitutionnel*'s imposition of judicial controls regarding detention in its Bonnet Law decision of 9 January 1980. While the *Conseil Constitutionnel* was competent to strike down a new state law, it remained dependent on the *Conseil d'État* for suppressing an already existing *décret* that precisely allowed

the kind of detention without judicial control that the *Conseil Constitutionnel* had found wanting (see Auby 1980). In fact, the other high courts in France were initially reluctant to adopt and follow new constitutional jurisprudence by the *Conseil Constitutionnel*, which could assert itself only gradually and against significant opposition. In sum, the constitutionalization of alien rights in France has been a highly interactive process involving a variety of high courts, particularly the *Conseil d'État* in addition to the constitutional court proper.

Second, in this interactive constellation, some French high courts were more responsive to extra-domestic, international sources of alien rights than others. In its second Pasqua Law decision of 1993 (Decision 93-325), the *Conseil Constitutionnel* explicitly discarded any international sources of contesting the constitutionality of the law in question. This simply followed from its self-given mandate of evaluating proposed government laws in light of the *bloc de constitutionalité*, of which international laws, conventions and legal principles are just not a part. However, the matter is different with respect to the *Conseil d'État*. Departing from its own GISTI decision of 1978, which was still based on national legal sources, from the early 1990s on the *Conseil d'État* progressively constructed family rights for aliens on the basis of Article 8 of the European Convention of Human Rights, which – after the long resistance by this very court – is now taken to have direct effect in French law.

While there is thus an unquestionable influence of extra-domestic, European sources of immigrant rights in France, this has to be immediately qualified. The European Court of Human Rights, endowed with the task of supervising the European Convention of Human Rights, has taken a prudent and self-limiting approach, inserting its authority only in domains in which strong national protections already existed. Moravcsik (1995: 173) found that this strongest regional human rights regime in the world was altogether more about 'harmoniz(ing) preexisting human rights guarantees (than) extend(ing) basic guarantees'. European Court of Human Rights' jurisprudence on aliens has prominently zeroed in on violations of Article 8 of the Strasbourg Convention (the right to private and family life) precisely because family rights enjoy constitutional status across European states, and *before* the Strasbourg court entered the scene these constitutional family rights had already been applied by domestic courts to aliens. Guiraudon (1999: 1114) cuts down to size the influence of European courts on immigrant rights: 'human rights courts preach to the (almost) converted'. And even when pronouncing itself on Article 8 violations, as in the famous Abdulaziz decision against the United Kingdom in 1985, the European Court of Human Rights *also* stated that family rights did not cross out state sovereignty: 'a State has the right to control the

entry of non-nationals into its territory', and family reunion could as well take place in 'their [the plaintiffs'] husbands' home' (quoted in Joppke 1999: 123). In sum, while there clearly are international (in addition to domestic) sources of immigrant rights, their impact has been more oblique and *post hoc* than is often assumed, even in 'Kantian' Europe (see Kagan 2002).

There is no doubt that in the 'Hobbesian' United States, which continues to live in an environment of anarchy and war, there has been even more reluctance to submit itself to the rule of international laws and conventions. The American case is interesting in one further respect: the incomplete constitutionalization of immigrant rights and a much deeper grip of the sovereignty principle than in Europe. This is ironic, if one considers that the entire move toward constitutionalism after the Second World War has always taken the United States as model. However, the American constitutionalization of immigrant rights has been abridged by the so-called 'plenary power' principle, according to which the regulation of immigration is the prerogative of the federal government (Congress and Presidency), to which the usual (and quintessentially American) principle of judicial review does not apply. First formulated in the racially motivated exclusion of Chinese (and later all Asian) immigration in the late nineteenth century, the plenary power principle has remained the guiding principle of American immigration law up to the present,[7] though in the procedurally thinned and weakened version of *stare decisis* (precedence). The only inroad to this has been at the sub-federal (state) level, where since the Supreme Court's *Graham v. Richardson* decision of 1971, 'alienage' is considered an 'inherently suspect' classification, like race or national origins, which is subjected to the demanding legal test of 'strict scrutiny' (that is almost always fatal to a proposed state law wishing to discriminate on this basis). It is not even clear, however, if the resulting state-level protection of immigrants is due to the rights-granting 'equal protection' principle of the 14th Amendment of the Constitution, or rather due to the supremacy clause of the Constitution, which makes the regulation of immigration the prerogative of the federal government (Joppke 2001b: 42). In any case, under a non-repealed plenary power principle, the federal government is in principle free to discriminate against immigrants as it wishes: alienage discrimination, which is considered unreasonable and irrational in France, as well as in most other continental European states, is still non-reviewable at national level in the United States (see Guendelsberger 1993).

Accordingly, the level of constitutional protection for immigrants is far higher in Europe than in the United States. For instance, under the influence of constitutional court scrutiny, administrative detention of illegal or expellable aliens in most European states is limited to relatively short durations;[8] by contrast, in the United States aliens subject to deportation can be

detained for up to six months, and if no state can be found that is willing to accept them, apparently unlimitedly. The lower court rebellion against harsh detention and expulsion practices of the federal government, in the Cuban-Haitian asylum crisis in the early 1980s, has not been able to invalidate the basic fact that the American Constitution remains inapplicable to aliens detained at the border.

It is only apparently a paradox that the proverbial 'nation of immigrants' has proved so reluctant to constitutionally empower its immigrants, whereas the European non-immigrant nations have gone much further in this. First, one has to consider that the entrenchment of an ethnic lobby in the American polity (see Freeman's (1995) discussion of 'client politics') has made the political process, next to the legal process, an additional avenue to secure rights for immigrants – witness that the United States has remained open to legal immigration throughout the past three decades, whereas European states closed their doors after the first oil crisis of 1973. The plenary power doctrine is thus largely fictional, because – under the sway of the ethnic lobby and due to other, discursive constraints – the federal government has self-limited itself not to pass laws that unduly discriminate against immigrants (see Chin 2000).[9] Second, limited immigrant rights and a sovereign state firmly in control of an alien's entry and residence may well be the price for the persistent openness to legal immigration that the United States has displayed since the mid-1960s, in stark contrast to Europe. Guendelsberger (1993) has keenly observed that the relationship between citizens and aliens in France is framed in terms of 'solidarity', whereas in the United States immigrants (as well as citizens) are perceived of in terms of 'individualism' and 'self-sufficiency'. French-style 'solidarity' obviously is premised on limiting the number of aliens entitled to it, whereas the flip-side of American-style rugged 'individualism' is a greater openness to immigration.

Independently of cross-national variations, the reach of constitutionalization is structurally limited by the division and competition of powers in a liberal state. In this respect, the constitutionalization of immigrant rights has to be put into the dynamic context of states' discriminatory practices triggering court intervention, but also of executive states responding to court intervention by seeking to neutralize or pre-empt it. State responses to constitutionalized immigrant rights have been varied – pre-empting the latter by passing only laws that are likely to survive court scrutiny (on the ensuing 'autolimitation' of a lawmaker that now adjudicates as much as it legislates, see Stone-Sweet 2000: Chapter 3); out-sourcing immigration control to actors and places that are to a lesser degree subject to judicial supervision (Guiraudon & Lahav 2000; Neuman 1997); or 'window-dressing', in which pending or existing law is rewritten to meet the courts' explicit human rights

objections, while the restrictive or discriminatory intention is in the end still realized.

The last response has been chosen by the French Gaullist Interior Minister, Charles Pasqua, to the Constitutional Council's momentous 1993 rule discussed above. One author has described this response as 'the legislature danc(ing) around the shadow cast by the (Constitutional) Council' (Soltesz 1995: 300). This entailed revising the Constitution in order to allow France to partake of the Dublin and Schengen Conventions on restricted asylum-granting; or resurrecting a proposed three-month long judicial detention of undocumented foreigners, which had been annulled by the Constitutional Council, by adding some token safeguards, such as a minimum age of the detainee and the availability of legal and medical assistance. Pasqua's 'creative' response to the Constitutional Council's 1993 rule shows that, as long as there is a political will and clever lawyers to hand, there is always the possibility of circumventing constitutional constraints, often with the tacit agreement of judges who shrink back from intervening too aggressively in the political domain.

Let us conclude with two last caveats. First, the umbrella term 'immigrant rights' used in here should not detract from the fact that these are everywhere highly 'stratified' rights (see Morris 2001) that differ sharply not just across states, but according to immigrants' individual profile and functional or sectoral location – legal or illegal, temporary or permanent, skilled or unskilled, labor versus family versus asylum migrant, and so on. For instance, due to a communitarian logic respected by contemporary constitutional states, long-settled immigrants have more rights than first-time entrants and indeed have come to approximate the status of citizens (Joppke 2001a: 363). In the era of global competition for the 'best and brightest', an interesting variation on the theme of stratified rights is the recent creation of different incentive structures for skilled and unskilled labor migrants by states that simultaneously seek to solicit the former and contain the latter. The 2002 German Immigration Law (*Zuwanderungsgesetz*), for instance, granted more generous family rights to the courted highly skilled than to less wanted unskilled labour migrants. Criticized by the Green coalition partner as a 'two-class law', Interior Minister Otto Schily (SPD) thinks that in the 'competition for the best brains' not everything could be decided on the grounds of justice (*Frankfurter Allgemeine Zeitung*, 4 September 2001, p. 2).

Second, the entire process of constitutionalization is more ambivalent than a look at the narrow sphere of immigrant rights conveys. The dark side of constitutionalization is to withdraw and immunize increasing portions of public life from the ambit of democratic decision-making. In Stephen Gill's somber scenario, the 'new constitutionalism' is less about protecting the vulnerable

than about ensuring the 'dominance of the investor' in the contemporary global 'market civilization', through the insulation of economics from politics (Gill 1995, 1998). One does not have to share Gill's Gramscian framework to draw a connection between the rise of constitutional rights for everyone and the decline of the collective constructs of class and citizenship in which the generation and protection of (substantive, not just procedural) rights had traditionally been located. The increased recognition of rights beyond citizens has indeed implied a thinning of what 'rights' are deemed to consist of, from substantive-redistributive to formal-procedural (highly instructive on this connection is Abraham 2002). However, contrary to the globalization critic's claim, this may as well be an unintended (and naturally unrecognized) form of redressing the North-South disparity because constitutionalized alien rights force the North to accept increasing portions of the South's migrants, against the declared wishes of Northern mass publics. Whatever position one takes on this, the meaning of the 'new constitutionalism' by far exceeds the legal sphere, and as a normatively ambivalent phenomenon it points to one of the central fault-lines of contemporary politics.

Notes

1. For the opposition of mass publics to immigration across Western states, see Simon & Lynch (1999); for the increase of immigrant rights, see Hammar (1990); Soysal (1994); Guiraudon (1998).
2. In Jellinek's classic terms, states would be devoid of a 'state people' (*Staatsvolk*), which in combination with territory (*Staatsgebiet*) and sovereign power (*Staatsgewalt*) makes a state a 'state'.
3. Another route to secure immigrant rights would be through explicit 'alien rights', as in the Spanish or Italian constitutions. In the French 1958 Constitution, the only explicit reference to aliens is in the asylum clause. The general absence of either alien or personhood rights in the 1958 Constitution marks a certain rupture with previous constitutions, particularly those passed in the late eighteenth century, all of which included universal personhood rights.
4. A milestone in this respect was the Decision 82-155 DC of 30 December 1982, in which the *Conseil* recognized the possibility for the legislator to establish administrative sanctions under the double condition of: (1) excluding sanctions that deprive a person of his or her personal liberty; and (2) subjecting administrative sanctions to the constitutional principles that guide criminal law.
5. The French judicial system distinguishes between the *juge judiciaire* and the *juge administrative*. Until 1995, only the *juge judiciaire* had the power to put an end to arbitrary detentions. This may have motivated the *Conseil* to resort to Article 66 of the Constitution.

6. In its first Pasqua Law decision of 1986, for instance, the *Conseil* affirmed the right of the legislator to reduce the categories of people who were protected against expulsion due to their family links (Paragraph 18).
7. In the Supreme Court's influential *Matthews v. Diaz* decision of 1976, the principle of plenary power was reaffirmed in order not to 'inhibit the flexibility of the political branches of government' (quoted in Guendelsberger 1993: 672).
8. In the very first immigration-related rule of the French *Conseil Constitutionnel* in 1980, the administrative detention of aliens for up to seven days (as proposed in the Bonnet Law) was declared unconstitutional (if not accompanied by the intervention of the *juge judiciaire*). While the critical issue was not so much the duration of the detention as the intervention of the *judge judiciaire*, there are obviously sharply divergent tolerance levels with respect to the length of detention on both sides of the Atlantic.
9. A partial exception is the exclusion of legal immigrants from federal welfare benefits in the mid-1990s. However, this – by all means – draconian exclusion has since been significantly softened (see Freeman 2001).

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