The Margins of Discretion in Transnational Administrative Acts: Expulsion Decisions and Entry Bans Following a Criminal Conviction
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This book is an outline and comparison of the expulsion and deportation law of Germany, the Netherlands, and the UK, and of how they are each constrained by the supra-national legal regimes of the EU and ECHR. It outlines the Schengen Information System II Regulations and how this transforms expulsion decisions taken by the domestic authorities of one Schengen state into transnational administrative acts. The book seeks to problematise when a too-wide margin of discretion is granted by EU and ECHR law to national authorities in deportation decisions, because of this transnational dimension.

The introduction provides a very clear outline of many of the key theoretical issues with expulsion and deportation as a practice. Part 1 provides an accessible, textbook-like account of how the EU, ECHR, and European Charter of Fundamental Freedoms have imposed their own sets of rules and regulations which restrict the margin of discretion (or appreciation) of national authorities to make expulsion decisions. Part 2 provides an equally accessible description of the national expulsion and deportation rules extant in Germany, the Netherlands, and the UK.

The primary value of Parts 1 and 2 lie in providing an authoritative account of the deportation laws of other states is valuable as UK immigration policy design is often hindered by language barriers which obscure European comparators and so lead to over-reliance on comparison with the immigration systems of English-speaking nations (especially Canada, the US, and Australia) which do not share the same supra-national legal constraints as the UK (such as those provided by the ECHR). Furthermore, the more descriptive portions of the book would be a useful addition to student reading lists on the topic of deportation as a supplement to standard texts such as Clayton and Firth's textbook. The description of the Strasbourg case law on expulsion and deportation sits nicely in detail between the brief overviews in most textbooks on the ECHR (eg Harris, O'Boyle, and Warbrick), and full-length scholarly treatments (eg Carmen Draghici, *The Legitimacy of Family Rights in Strasbourg Case Law*).

Part 3 is the analytical core of the book. It is the part which engages national expulsion and deportation decisions as transnational administrative acts, and the details of the Schengen Information System (SIS) II Regulations. It is the SIS which turns national-level decisions to expel or deport into transnational administrative acts, because individuals entered into the SIS

because they are expelled from one country are in principle banned from the entire Schengen area (p186).

Hamenstädt identifies clearly that one of the central issues with transnational administrative acts is that when a wide margin of discretion is granted to individual states to make national-level decisions, it can result in other states having to give effect to a decision which is wildly out of kilter with how that case would have been decided in those other states in the first instance. The risk for the SIS system is that 'without a certain degree of harmonisation of the substantive requirements for adopting these decisions or giving them a European dimension runs the risk of undermining the coherence of the European Union's approach to migration, and it impinges on legal certainty' (p187).

However, a degree of harmonisation is precisely what, arguably, the ECHR and EU Charter on Fundamental Freedoms provide (EU, EEA, and Swiss citizens – covered by the more expansive protections against expulsion and deportation found in EU freedom of movement law – cannot be entered into the SIS). The expulsion and deportation law of Germany and the Netherlands are not sufficiently divergent to suggest that the margin of discretion or appreciation permitted to these states is being used by states in a way which is arbitrary, irrational, or illegitimate so as to undermine the legitimacy of the SIS regime. Indeed, Hamenstädt notes that German expulsion law was substantially revised in 2016 in order to achieve greater ECHR compliance and thereby further reduced any differences with the expulsion law of the Netherlands (p232). Hamenstädt also notes changes in the SIS regulations in 2006 which also introduced a degree of harmonisation by more closely defining when cases could be included in the SIS and so excised some of the more egregious disparities such as the inclusion by some states of 'truck drivers who failed to pay traffic fines' (p184). As a result, Hamenstädt's presentation of policy options in chapter 11 for greater harmonisation are necessarily incremental and heavily caveated.

I found particularly interesting the point made briefly and never really returned to in detail in this book about the problem that when entry in the SIS is based on a national-level expulsion decision taken in country A it should include, in theory, an ECHR compliant assessment of the deportee's family and private life in country A. When this expulsion decision is included in the SIS the individual is then precluded from entry to other Schengen countries. Yet the individual's claim to an Article 8 ECHR case to not be barred from country B may be based on an entirely different set of factual circumstance which may affect the Article 8 ECHR balancing exercise. Any absence of effective recourse to be able to re-enter country B – where they may have family or may have grown up – because of their being entered into the SIS,

undermines the ECHR compliance of the SIS system and thus its legitimacy. It is also a problem that cannot be addressed by greater harmonisation of national-level expulsion decisions. I would have welcomed more discussion of this discrete problem.

Comparative legal scholarship is always interesting because of how it provides an alternative, outsider's perspective on one's own legal habitus, which we can all too often take for granted. For example, I tend to avoid describing UK deportation law as starting with 'automatic deportation' – despite it being labelled as such in the statute – on the basis that the wide-ranging nature of the exceptions to deportation and the lengthy process of appeals mean that the phrase 'automatic deportation' is arguably an aspect of the performativity of UK deportation law and practice, rather than an accurate label. I would also treat the absolute exception to deportation for Commonwealth nationals ordinarily resident for five years before the coming into force of the Immigration Act 1971 (provided for in s 7) as a mere footnote, an idiosyncratic detail reflecting the historical-political moment of the 1971 Act of the UK's transition from a colonial to a post-colonial system of immigration and nationality control. However, Hamenstädt identifies these both as points which indicate key divergences between UK law on the one hand, and German and Dutch law on the other (p12).

I have also previously highlighted the ways in which the s 117, Nationality, Immigration and Asylum Act (NIAA) 2002, conditions for deportation are 'subjective and vague'.[1] In contrast, Hamenstädt describes UK deportation law as presenting a 'high degree of legal certainty' (p180), in contrast to the comparable Dutch and German laws. These different ways of seeing UK deportation law – illuminated by the act of comparison – help shake up insider perceptions which risk becoming rote rather than reflective.

Hamenstädt highlights (pp172-3) my suggestion[2] that one of the key problems with UK deportation law is that it relies on binary outcomes to deportation decisions: to deport or not deport. This is a problem when hard and fast lines are drawn for relief from deportation as it can lead to unjust outcomes (eg a qualifying child is one that has been resident for seven years or more, thereby excluding the child who is six years and 360 days old). Hamenstädt suggests that the problem is not per se that UK law is based on binary outcomes but as 'a consequence of its rigid rules' and that this would be resolved by the introduction of more executive discretion to conduct a more holistic balancing exercise. Yet I also highlighted that binary

[1] Jonathan Collinson, 'Suspended Deportation Orders: A Proposed Law Reform' (2020) 40 Oxford Journal of Legal Studies 291

[2] ibid.

outcomes to deportation decisions are also problematic when used to determine the outcome of the kind of nuanced, fact-specific balancing exercise championed by Hamenstädt. There is always an element of uncertainty in deportation decisions, such as the empirical uncertainties inherent to making assessments of the risk of future offending. When a balancing exercise is conducted under conditions of empirical uncertainty, 'there will always be cases which sit in a grey area of uncertainty whatever formulation is used. The problem with the binary nature of deportation is that it does not permit the nuanced outcomes which proportionality demands.'[3]

This, as well as my observation above that the suggested policy options for harmonisation are necessarily incremental and heavily caveated, reflects an essential tightrope in deportation policy-making. Harmonisation and legal certainty come at the price of rigidity and individual injustices, whereas individualised balancing exercises can result in hugely divergent outcomes. Whilst European states continue to accept the deportation of foreign national offenders as a legitimate public policy tool, this tension is inevitable.

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[3] ibid.