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Empirical insights on preliminary rulings in the EU migration law field

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Key Words

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Abstract

Relying on an original database containing all the preliminary rulings (291) delivered by the Court of Justice in the migration field, this blog post presents some findings derived from the use of an empirical approach to studying EU migration law. In particular, the paper deals with two issues: the EU norms addressed in the proceedings and the actors involved.

1. Introduction

The use of quantitative and empirical data in legal studies is on the rise in Europe. This is demonstrated by recent publications (Šadl, 2018; Davies, 2020), along with the proliferation of research centers and networks focusing on empirical legal studies.

A classic argument in favor of the adoption of an empirical approach in legal studies is that it debunks false assumptions that would otherwise survive in doctrinal studies, thus helping unveil the gap between the "law on the books" and the "law in action". For instance, a recent study in the context of the Covid-19 emergency analyzed data on the detained population in Italy and showed that judges started to free people from jail already before the Interior Minister adopted ad hoc provisions in this sense; the judges understood that a Covid-19 infection could have a devastating impact on Italian overcrowded prisons and, by relying on existing provisions, granted more alternative measures such as probation and home detention. This type of study raises important questions regarding the role of law and its interpreters (e.g. judges), questioning our assumptions on the importance of legal reforms and suggesting that, sometimes, the solution lies in how old laws are applied.

This blogpost offers some insights on empirically grounded research in the field of EU migration law, showing its potential and limitations. In particular, this contribution relies on a quantitative overview of the preliminary reference rulings (art. 267 TFEU) made by the Court of Justice of the EU (CJEU) in the migration field. This is a procedure whereby Member States' courts and tribunals can submit preliminary reference requests to the CJEU regarding a doubt of validity or interpretation of an EU norm. Although several studies have relied on quantitative analyses of the Court of Justice's preliminary rulings (e.g. Broberg and Fenger, 2013; and Equality Law in Europe), in the particular migration field this type of methodology is still underexplored, and this blog post would like to show its value.

2. The database

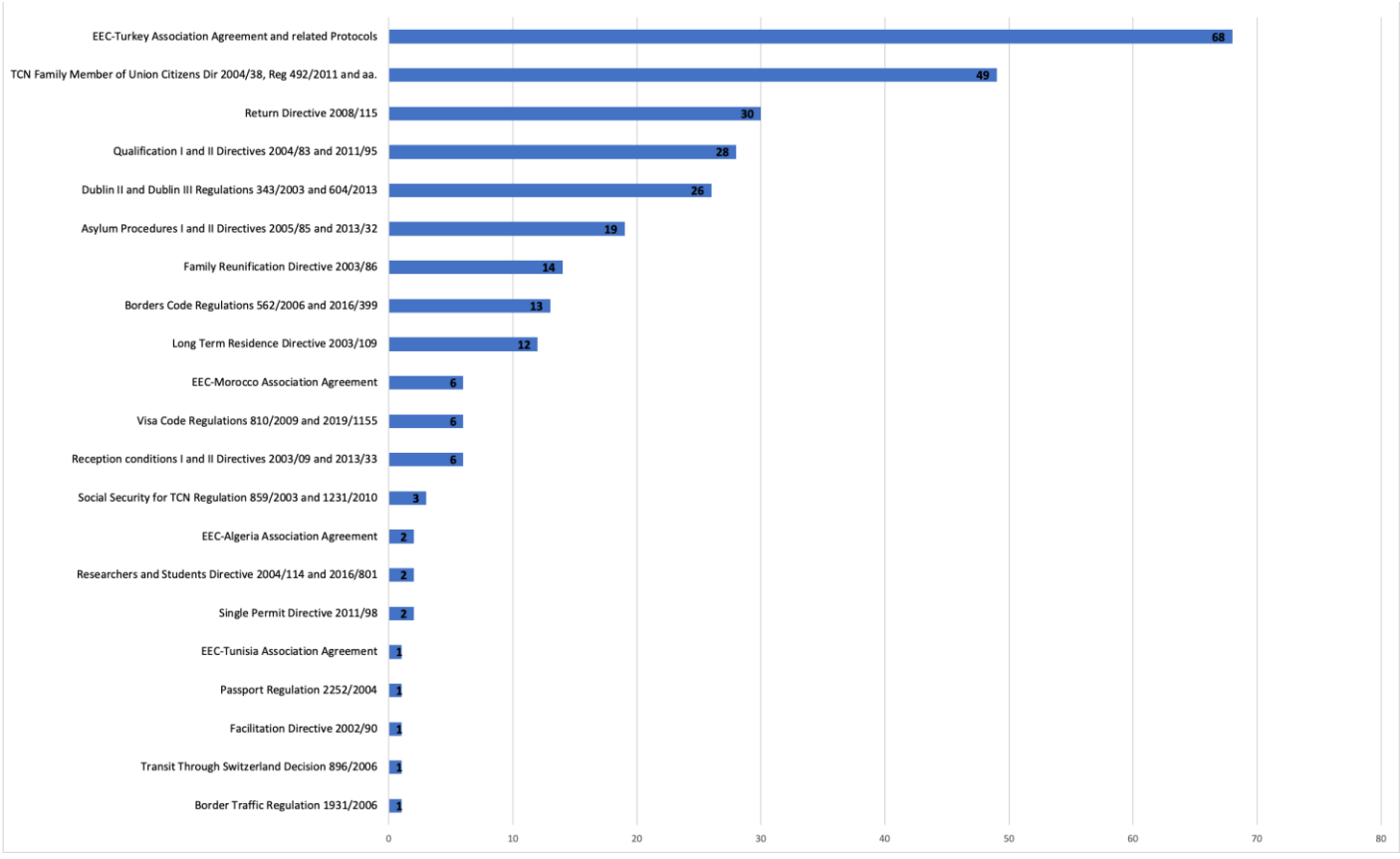
In the context of a larger study, I have created an original database containing all the preliminary rulings issued by the Court of Justice in the field of EU migration law until the end of December 2020, amounting to a total of 291 preliminary rulings.[1] The database was compiled using the official Court of Justice's online search tool, double-checked with the quarterly newsletter of the Nijmegen's Centre for Migration Law. This database provides a quantitative overview of migration litigation before the EU Court, offering many interesting insights on litigation dynamics. I will present here two of them, tackling the EU legislation addressed and the actors involved.

[1] EU migration law is understood here as comprising all the norms that regulate the status of third-country nationals, such as their entry and residence conditions, their family reunification rights, asylum and reception conditions, etc. All other cases discussed before the Court of Justice that involve third-country nationals but without addressing migration law are excluded.

But, before doing that, a clarification is needed. Not all the preliminary references raised by national judges receive an answer from the Court of Justice. A significant portion of them does not receive a judgment on the merits, either because they are withdrawn by the national court or because the Court of Justice settles them with an order. I could trace 53 of such references, that are not included in the total of the 291 rulings.

3. *References and EU migration law*

The first interesting finding regards the EU norms that have been addressed by the preliminary reference procedure: What are the EU norms that national judges ask clarifications about? It is commonly assumed that after the so-called "refugee crisis", asylum laws are the migration norms more often discussed before the CJEU. Indeed, one of the reasons why the Amsterdam Treaty provided that only last-instance courts could submit preliminary reference in the Area of Freedom Security and Justice (AFSJ) was that Member States governments feared that the CJEU would be flooded with references on asylum and immigration law (Pollack, 2003). However, if we divide the preliminary rulings according to the EU norms that they address, the outcome is rather different. As Figure 1 shows, the EU norms that received more attention from national judges are those on Turkish nationals and third-country national (TCN) family members of EU citizens, which are norms that do not form part of the AFSJ. These are followed by the Return Directive 2008/115, and only in the



fourth position, we find the first norm on asylum.

Figure 1: Number of preliminary rulings by norms.

The most obvious explanation for the high number of rulings on the first two groups of EU norms is that this has to do with the time of their adoption. The norms on Turkish nationals and TCN family members of Union citizens are among the first migration provisions ever adopted by the then European Economic Community. However, why then other old provisions were not the object of comparable amounts of preliminary rulings? For instance, the Association Agreements with Algeria, Tunisia, and Morocco were concluded in 1976, and they received only a few rulings (see Figure 1). Moreover, as we can see in Figure 2, in the last fifteen years there was a steady increase of preliminary rulings in the migration field, which would induce us to think that newer norms are litigated more often (erroneously, as this has also to do with the EU's expansion in competences and members).

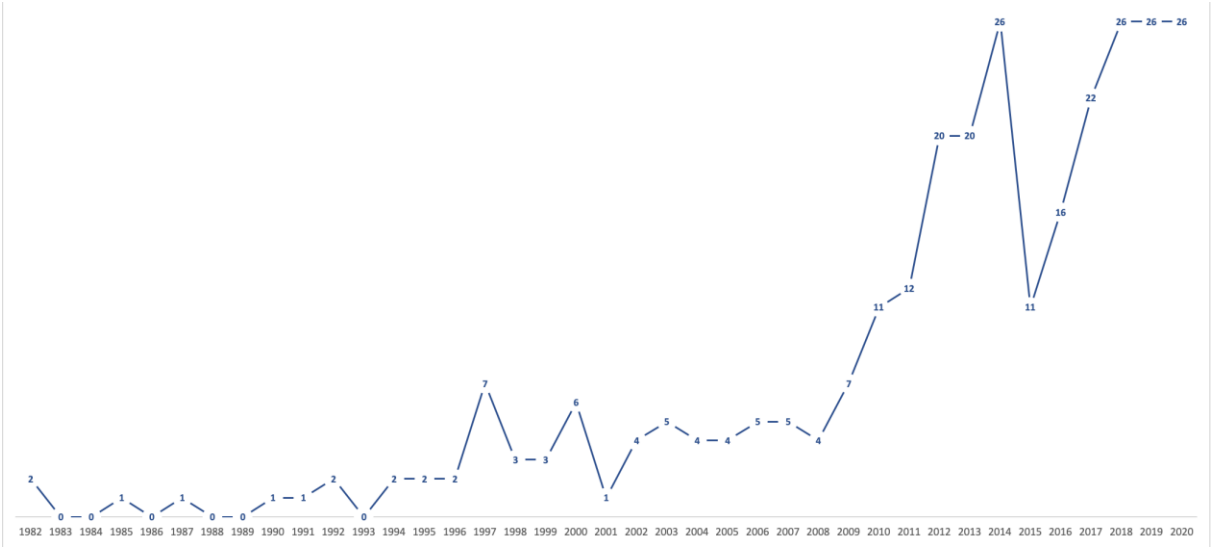


Figure 2: Number of preliminary rulings by year.

In sum, patterns of litigation before the CJEU are difficult to explain. Temporal analysis is insufficient as it leaves unanswered the question of why certain EU norms are invoked so often and others so little, or never, like the Seasonal workers Directive 2014/36. To fully understand patterns of EU litigation, we would probably need further data and research on litigation at the national level. Indeed, the existence of national proceedings is a precondition for having a preliminary reference submitted to the CJEU, and without understanding the first we cannot fully understand the second.

4. Participants in the preliminary reference proceedings

The second empirical insight regards the actors that participate in the preliminary reference

proceedings. In particular, in the database, I have coded four types of actors: the migrants, the government of the Member State of reference, other Member State governments, and private third parties. Table 1 summarizes their level of participation in the preliminary reference procedure.

	Total	*Percentage*
Number of cases where the Member State of reference participated	289	99,3%
Number of cases where at least another Member State intervened	247	84,8%
Number of cases where the migrant participated	245	84,19%
Number of cases where private parties intervened	14	4,8%

Table 1: Participation in the preliminary ruling proceedings.

As the Table shows, Member States are very active in preliminary ruling proceedings when it comes to migration issues. The State where the reference comes from always intervenes; moreover, in 84,8% of cases, at least another Member State files an intervention (usually in support of the first State and against the migrant).

On the contrary, public interest actors, most notably NGOs and migrant rights defenders, have participated seldomly: they were among the main parties in only four cases (*MRAX*, *ANAFE*, *CIMADE and GISTI*, *CGIL-INCA*), and they intervened as third parties in 14, that is 4,8% of the total cases. This is a low percentage if compared to the European Court of Human Rights, where on average (not only in the migration field) NGOs file amicus curiae in 21% of cases (Van den Eynde, 2013). This is largely explained by the different procedural settings of the two international courts: before the European Court of Human Rights, NGOs and groups have to apply to the President of the Chamber to ask for permission to submit amicus curiae briefs, which normally is granted (Art. 36(2) ECHR); conversely, under the CJEU's Rules of Procedure, amicus curiae and third-party interventions by private actors are not admitted. The only ways NGOs and groups can participate is by filing an intervention before the national court before it asks for a reference, or by informally supporting or sponsoring the litigation (Virginia Passalacqua, 2020).

One of the most interesting findings, that goes often unnoticed, is what I call the 'missing participants': in a relevant number of cases (46, 15,8%) migrants have not participated in the preliminary ruling procedure, neither in the written nor in the oral phase. Given the power configuration of migration litigation, which is often characterized by a relevant disparity between a resourceful party (the state) and a resourceless applicant (the migrant), this raises critical concerns on participation and access to EU justice.

5. Conclusions

This blogpost provides some examples of how empirical data can offer new insights on litigation in the EU migration field. In particular, the quantitative overview that I presented helps better understanding which migration norms are addressed and what actors participate in the proceedings before the Court of Justice. This type of research is particularly useful to raise new questions and to reflect upon EU migration law from innovative angles.

At the same time, this brief blog post already points out what such an approach cannot provide. For instance, the presented quantitative overview tells us precisely how many times NGOs intervened before the Court of Justice but cannot provide any information on their informal participation in the cases. To understand informal strategies of participation, we would need to integrate our analysis with information obtained through a different type of empirical research, which relies on qualitative methodology.

A second limitation of this type of analysis is that we lack an important part of the puzzle: we have no information on the number of proceedings brought at the national level in the migration field. Indeed, and unfortunately, information on national proceedings is very scarce, as only a few domestic courts provide online systematized access to the full text of their decisions. Access to information on national proceedings would be important to understand the reason why some EU norms are more invoked than others, and whether the supranational patterns of litigation reflect the national ones. Maybe, as empirical legal studies are gaining momentum in Europe, also national judiciaries will understand the importance of having open and easily accessible information on judicial activities and will follow the example of the Court of Justice.

SUGGESTED READINGS

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