

Marie-Bénédicte Dembour, 2015
When Humans Become Migrants:
Study of the European Court of Human Rights with
an Inter-American Counterpoint
Oxford: Oxford University Press

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The number of people seeking refugee status in Europe has soared over recent times and has intensified the debate on national immigration policies. In light of this debate, Marie-Bénédicte Dembour addresses international human rights law in Europe and America in her necessary and thought-provoking book *When Humans Become Migrants* (2015). The book looks critically at how we, as Europeans, conceive migrants both in everyday life and within the legal framework. Based on a review of the migrant case law from the early history of the European Court of Human Rights¹ (1959) to this day, this book shows that the principles followed by the Strasbourg-based Court in migration cases are highly problematic from a human rights perspective. The author strongly criticizes the representation of the Strasbourg Court as the “Conscience of Europe”, arguing that the way it treats people on the basis of their nationality is a form of institutionalised discrimination (p. 503). The rigorous legal perspective is enriched with anthropological insights, grounded in a description of the European and Latin American social and political contexts. As an experienced human rights lawyer with a background in anthropology, Dembour demonstrates that, overall, the European Court has failed to enhance migrants’ rights, despite the numerous opportunities to adopt a more pro-migrant position. To show that a more humane treatment of migrants is possible, the author highlights the *pro-homine* orientation of the Inter-American Court of Human Rights as a counterpoint to the Strasbourg case law.

The first part (*Foundations*) analyses the founding texts of the European and American Conventions of Human Rights in order to show how such texts have influenced the two Courts in the treatment of migrants. It illustrates that the Strasbourg Court has a citizen-centred focus at its very core.

1 The European Court of Human Rights is a supranational court that decides complaints submitted by individuals and states concerning violations of the European Convention.

In contrast, the Inter-American Court addresses migrants as non-nationals in a proactive way that aims at advancing their human rights. The author also criticizes the influence of the colonial ideology that characterizes the European Convention, and the Strasbourg Court's reluctance to recognize Europe's postcolonial responsibilities when ruling. Part II (*Consolidation*) illustrates how the early trends of the European and the Inter-American Courts have taken very different paths. It reviews three early migrant cases that have opened up the rights of migrants in important areas such as deportation and access to social security. These cases had the potential to advance migrants' rights, but due to the "mild attitude" of the Strasbourg court they were not developed further. Moreover, it is argued that the Strasbourg Court does not adopt a principled approach in ruling over cases, but rather, it has used a case-by-case approach in many instances, such as torture or ill-treatment cases. In contrast, the author brings forth two strong statements: namely, advisory opinions 16 and 18, which respectively concern labour rights and the rights to consular information for migrants. Developed by the Inter-American Court by initiative of the Mexican government to protect its nationals from the frequent abuses Mexican illegal workers face in the United States, advisory opinions 16 and 18 have enlarged the human rights of migrants by declaring the principle of equality and non-discrimination as *jus cogens*.

The third and final part (*Prospects*) reviews some relevant ongoing cases in order to identify future trends and developments in the migrant case law. On the one hand, this section argues that the Strasbourg Court still fails to provide a system of protection distinct from any consideration of nationality, and supports this argument by reviewing cases of immigration detention and domestic asylum procedures. On the other hand, it praises the Inter-American court for addressing inequality in state practices in the context of discrimination against Haitian migrants in the Dominican Republic. It also highlights the important contribution of the Inter-American Court in recognising the need for protection of vulnerable groups (such as children and women), although many important principles stated by the court have had no concrete follow-ups in modifying discriminatory state policies.

Placed at the intersection between human rights law and anthropology, this work adopts an interesting research methodology as it provides in-depth analyses of migration-focused cases from a legal perspective, in order to critically discuss concepts such as of nationality, state sovereignty and migration as they are commonly conceived today. As suggested by the title, the book is a *study of the European Court of Human Rights with an Inter-American Counterpoint*, conducted combining numerous interviews with judges, lawyers and migrant applicants with the analysis of the relevant case law within each court. Firstly, the concept of the "Strasbourg Reversal" – i.e. the fact that the European Court has prioritized state sovereignty over human

rights in dealing with migrant applicants – is critical to this study. Dembour shows that this perspective can lead states dangerously close to becoming accomplices in crimes against humanity. Secondly, there is a striking contradiction between the proclamation of universal aspirations, as exemplified in the declaration of human rights, and the power relations that enable movement for some and impede it for others. The author looks critically at the very concept of *nationality* and observes that it involves distinctions between insiders and outsiders, which in turn cause discriminations based on nationality laws: “we live in an era where the state is expected to privilege its citizens. Admittedly, this principle is not absolute” (p. 31). By the same token, this book advocates for mitigating the restrictive national immigration policies in place, in contrast with the recent decisions of states to wall migrants out of their borders (such as the Hungarian border barrier marking its separation from Serbia and Croatia that was built in 2015). Thirdly, it gives voice to some of the people who pay the price of a discriminatory system that determines one’s freedom of movement according to one’s nationality.

Clearly, anthropology plays a critical role in helping to rethink the hegemonic categories used both in human rights law and public discourse on migration. This is a relevant contribution to the anthropological debate on human rights and cultural relativism, as it presents collective rights as a fundamental aspect of the concept of human rights (focused, traditionally, on the rights of individuals), and questions the “double standard” that has characterised the actualisation of the Universal Declaration of Human Rights. Specifically, this study contributes to the growing literature of action-oriented anthropology by analysing the processes of change in the universal human rights framework and widening its scope. Its critique of the way public policy represents the interest on neoliberal states, as well as its informed representation of the perspectives of those affected by migration policies, add to the body of anthropological research conducted on the subject of migration with specific reference to power and subjectivity.

In sum, Marie-Bénédicte Dembour criticizes the way in which the European Court is treating migrants as “aliens”, who are first and foremost subject to the control of the state, and advocates for opening European borders “much more than we do”. She does so by analysing specific social categories through a crosscutting and comparative perspective. The book’s main thesis can be summarised as follows: 1) the European Court of Human Rights has a negative bias against migrant applicants – in contrast with the Inter-American Court’s pro-applicant bias – that is in evident contradiction with the idea of universal human rights; 2) the author stresses the importance of ethical considerations when considering the fate of many unprivileged migrants, expressing the concern that “one day, immigration control may well retrospectively appear to have been one of the greatest abominations of our time” (p. 30); 3) this book questions the discourse, too often promoted

by politicians, that depicts the “alien” as somebody dangerous for society. The author suggests that we urgently revise the assumptions (regarding state sovereignty, nationality and citizenship) that underscore such discourse, whose only concern is to maintain the status quo, in favour of interventions that support the values of equality and humanity as an ethical imperative.