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Governing Migration from the Margins

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Abstract

This special issue of *Social and Legal Studies* focuses on refugee and migration governance at the margins (methodologically and geographically), exploring contemporary and historical cases through various socio-legal perspectives (detention, deportation, extra-territoriality, human rights and citizenship law), and in various geographical contexts (Syria and Turkey, France, Canada, Brazil, Indonesia, Australia and India). In this introduction we briefly present each of the papers, and then review three overarching themes that emerge from the collection. The first is law and sovereignty, how the enduring power of sovereign law precludes the wider penetration of norms of international law to protect the rights of non-citizenships. The second is the spatial logic of exclusion, the discretionary process by which states are able to determine what comprises sovereign space is and how they use law to make space malleable for the purposes of migration control. The third is creating precarious lives: Neoliberalism and legal ambivalence, here we signal how state's facilitate mobility for some and not others, and how the terms and conditions attached to such rights are unabashedly based on neoliberal market tenets, not the ideals of citizenship as a form of social and political community. Collectively, the articles demonstrate that international migration has elicited a profound reimagining of the exercise of sovereignty, territoriality and the spatiality of legal frameworks, and that the margins, be they spatial, temporal, textual or legal, are significant to the constitution of these practices.

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Governing Migration from the Margins

As the death toll in the Mediterranean rises, the EU is seeking more mechanisms to prevent migration from Africa and the Middle East. Across the Atlantic, United States President Donald Trump ends DACA - a program that protects 800,000 young people from deportation - and promises 'Muslim bans' and new walls along the country's long border with Mexico. Despite the enormous material and discursive efforts to build walls around the First World, people continue to make dangerous journeys to reach it. Moreover, despite the many boats patrolling the Mediterranean and border guards deployed along the US-Mexico border, migrants continue to die in seas and deserts. This humanitarian crisis and the associated unequal access to mobility are now normalized features of our 'globalized' world. These dynamics reveal a fundamental failure in migration law and governance: the failure of policies and practices to deter 'unauthorized' migrants, protect those who need it, and to prevent migrant deaths at the edges of the First World. This failure has become clearer in the past few years as the number of displaced people increases around the world and states craft new legal mechanisms to deter and contain human mobility, legal mechanisms that erode and circumvent the limited legal protections migrants currently have.

The papers in this collection offer empirical cases that, both historically and geographically, demonstrate the fluxes in the role of borders, legal frameworks and structures of surveillance in upholding state control over territory and human mobility (cf. Roy, this issue). The shrinking spaces of asylum around the world are now well documented (e.g. Hyndman and Mountz, 2008; Anderson, 2013). This issue moves beyond just refugees, however, to focus on how migration governance in general is evolving in the 21st century; how refugees are being denied protection, while other labour migrants are differentially included (Preibisch, 2010; Blackett, 2011). The collection makes plain the importance of the socio-legal in migration governance in terms of both the formal and informal ways that laws are created and implemented in practice.

The underpinning themes of the special issue focus on migration through various socio-legal perspectives (detention, deportation, extra-territoriality, human rights and citizenship law), and in various geographical contexts (Syria and Turkey, France, Canada, Brazil, Indonesia, Australia and India). Legal scholarship on migration has tended to focus on formal laws as enacted by sovereign states, traditional centers of power, and international conventions linked to refugees and migrant workers. Migration policies, legal interpretations and the framing of mobility, however, often play out at the geopolitical margins of the nation-state: at the border, in airports, in detention centers, and increasingly offshore as externalization practices push migration controls further outside state territories. States' legal efforts to prevent unauthorized human migration are now leading to new legal geographies that are unbounded, bureaucratic and productive of whole new geographies that legally include migrants in order to exclude them from accessing any rights (Maillet et al., this issue). Even when policies are decided upon within global centers of power, they are interpreted by street-level bureaucrats and border guards as they implement them, discursively framed through media and public debate, negotiated and resisted by migrants and refugees, and circumvented by migration intermediaries such as smugglers. The socio-legal context frames the conditions under which the migrant's presence is (dis)allowed and which rights are made (in)accessible to her.

In order to add new insights to the literature on the socio-legal dimensions of migration and to capture the dynamics at play, this special issue moves from the centers of formal power to the margins, both methodologically and geographically. Thus, we move beyond policy to practice and implementation, including the experiences and voices of migrants and refugees in our analysis. We move beyond wealthy destination cities and states to countries of origin and transit, to peripheral zones and to obscured socio-legal dimensions of migration in order to critically analyze the changing nature of migration governance and the existing and emerging legal frameworks that shape it.

By focusing on migration governance at the margins, we are engaging with debates about the relationship between the state and its margins. Das and Poole's (2004) edited collection on *Anthropology in the Margin of the State* offers three important ways to think about this relationship. One is how the margins contain 'unruly subjects' that the state attempts to convert into lawful subjects of the state. The second is how the margin marks the tension between legibility and illegibility in terms of state documentation practices (characterized by the checkpoint), where security and identity can be violently and suddenly unsettled. The third is the relationship between law, bodies and discipline, and how 'strategies of citizenship, technological imaginaries, and new regions of language...co-construct the state and the margins' (Das and Poole 2004, 10). We build on this analysis of how the margins relate to the power and operation of the state to govern with a focus on migration law and governance. Our contributors show how the state does not just try to convert the 'unruly subject' into a lawful subject; it expels some and exploits others that remain outside the law, and incorporates still others only partially. In terms of the margin marking tension between legibility and illegibility, this special issue reveals that the tension between legibility and illegibility arises in newly proliferating 'border' spaces that are actually inside the state - airport terminals, detention centers, and migrant shelters. This collection brings together a dynamic, interdisciplinary group of scholars from around the world to examine these issues through various socio-legal contexts. Collectively the papers demonstrate that international migration has elicited a profound reimaging of the exercise of sovereignty, territoriality and the spatiality of legal frameworks, and that the margins, be they spatial, temporal, textual or legal, are significant to the constitution of these practices.

In this introduction, we comment on each of the papers and then highlight a number of important themes that arise from the collection. Pauline Maillet, Alison Mountz and Kira Williams explore the entanglements of law and geography in the governance of migration. They focus on new kinds of alternate legal regimes of exclusion that are generated at points of demarcation on the geographical 'margins' of sovereign states in three areas: the airport waiting zone, the territory excised for purposes of migration, and the search and rescue area deployed at sea. Although airport terminals are not necessarily at the margins of the state, the space is legally constructed as such to justify detention and deportation policies. Maillet, Mountz and Williams analyse how states use legal maneuvers in these sites to advance already existing forms of exclusion. Their work reveals the profound spatio-legal revisions sovereign states will engage in to prevent international migrants from making claims upon them.

Preventing access to rights is not a new aspect of the international refugee protection framework, but a central feature of its very construction. Maissaa Almustafa discusses how the failure of Palestinian refugee protection during the Syrian crisis is rooted in the very construction of the

international refugee framework. This case highlights how previous refugee and displacement traumas are folded into subsequent crises. New conflicts overwrite past unresolved ones, and those who carry the weight of this lack of resolution are further victimized and terrorised, most blatantly through the dangerous land and sea crossings that are required in order to seek safety in Europe. Almustafa's paper is a haunting reminder of the international community's failure to offer effective legal protection to whole groups of people.

Another example of this systemic failure to protect a specific group of people is addressed in Pranoto Iskandar's paper on the emergence of a human rights framework in the Association of Southeast Asian Nations (ASEAN). Using the case of the Rohingya, Iskandar explores how notions of an Asian collectivity resist the conceptualization of individual rights at the heart of international refugee and human rights laws. Rather than embrace an international refugee rights framework, Iskandar explores the case of the Malaysian Human Rights Commission (SUHAKAM), and suggests this might work as a model of 'indigenized pragmatism' akin to universal human rights that transcends nationalistic boundaries. In this case, Iskandar questions the concept of 'individual' rights that are central to 'western' human rights laws. Iskandar suggests the individualised focus be marginalized in order to make legible the Asian tradition of collective rights in order to achieve meaningful progress towards an Asian human rights legal framework.

Diana Thomaz explores another global south context where international refugee laws are not fully enacted by the state, and novel legal approaches have emerged instead. She examines Brazil's engagement with displaced Haitians, and argues that access to asylum has been curtailed through the mobilization of new categories that restrict rights and mobility. The use of temporary protection and 'humanitarian immigrant' status reflect new legal constructs that are politically expedient for Brazil, a state with regional leadership ambitions that require it offers *some* protection to its neighbours. Here, the Brazilian state makes legible certain types of marginal rights and protections for Haitians in order to signal, but also limit, Brazil's responsibility to its regional neighbours.

Anjali Roy revisits the case of the *Komagata Maru*, a vessel that sailed from India to Canada in 1914. The voyage became a test case against a 1908 regulation that denied anyone the right to land in Canada who had not made a 'continuous journey' from their country of origin. The Continuous Journey Regulation allowed Canada to restrict the immigration of Indian citizens without explicitly stating so. Drawing on Negri and Hardt's *Empire*, Roy asks what lessons we can learn about how technologies of colonial surveillance contained human mobility during the *Komagata Maru* journey, and raises questions about how human mobility might be similarly contained today.

Tracing a more recent Canadian example of migration control, Ethel Tungohan examines the limitations placed on temporary foreign workers in Canada. She explores how even legal changes aimed at offering more rights to temporary workers are ineffective when those rights are not universal. Tungohan demonstrates how partial rights frameworks, especially those that offer the possibility of permanent residence to only a select few, are used by employers to further exploit workers who legally operate within the Canadian labour market. In effect, these partial

rights frameworks provide the context to undermine the rights for the majority of temporary foreign workers.

Together this collection of papers reveals a number of important themes related to how processes occurring at the margins of migration governance are central to socio-legal constructions of migration regulations and the changing morphology of state sovereignty when it comes to migration law and policy. The first is how law and sovereignty interact. The collection illustrates how national and international laws may circumscribe sovereign power but also how laws become a tool of sovereign power. The second theme is the spatial logics of sovereign power. Here we explore how the case of international migration is bringing different spatial and legal practices together in new forms. Finally, we conclude by examining how legal ambivalence and neoliberalism generate precarious labour and precarious lives, which reproduces marginalization even after the migrant ‘event’ in question has ended.

Law and Sovereignty

Law and sovereignty are fundamental to the project of migration governance. Despite premature pronouncements of a ‘borderless world’ in the post-Cold War era (e.g. Ohmae, 1994), border walls and calls for more migration ‘management’ have proliferated in the 21st century (Jones, 2016; Walton-Roberts and Hennebry, 2014). While globalization and universal human rights norms have arguably constrained the autonomy of nation-states, more restrictive citizenship regimes and border regulations have simultaneously gained ground (Bhabha, 1999; Brown, 2010; Howard-Hassmann and Walton-Roberts, 2015).

National laws and policies define administrative categories that govern global human mobility: these categories do not merely filter populations based on objective characteristics, but rather produce subjects and subjectivities (cf. Anderson et al., 2011: 6-7). They represent the state’s power to make legible or illegible the security of the person at the checkpoint (Das and Poole, 2004), and in newly proliferating ‘border’ sites in the states’ interior. It is the border and these newly emerging border spaces, together with the constituent laws, policies and practices that create the ‘illegal’ migrant and the very conditions of their being. The case of the *Komagata Maru* exemplifies the politicized construction of such categories across different historical periods. In the early 1900s, colonial authorities employed law to exclude certain racialized colonial subjects from exercising citizenship rights, while simultaneously conserving the idea of imperial citizenship for (white) others (Gorman, 2010). Law and its discretionary application by emerging sovereign entities was the tool to achieve this divergent legal outcome. This case is an important reminder that such practices are not a historical anomaly, but rather reveal how states constitute the parameters of their control and authority. This is clearly revealed in Maillet, Mountz and Williams’ contemporary example of how states generate and govern marginal spaces in order to assert their sovereign control over mobile populations.

Migrant categories and associated rights are certainly not fixed, temporally or spatially. They fluctuate according to the political exigencies of the day. For example, states use temporary forms of protection to curtail the rights of refugees, especially when the number of refugees increases. This is not a trivial matter as such definitions become the boundaries that mark the difference between life and death. Thomaz argues that although states may offer increased demand for protection as the reason for new forms of management, this does not adequately take

into account the changing sources of asylum seekers and the cultural, racial and ethnic differences this represents. In these matters, law identifies and sorts people into those worthy and those less worthy of protection, and law itself is structured by socio-political interpretations reflective of current ideological tensions. As villain or victim, contemporary asylum seekers are not the heroic (white male) political actors of the cold war era; the agency of the (racialized) refugee is interpreted through the pallor of suspicion, which tacitly curtails their access to full legal protection. Even in cases where the state extends rights to migrants, in the absence of a more radical politics that questions the very nature of borders and the nation-state, the process is always simultaneously exclusionary. While it embraces some migrants as worthy of more rights, it reinscribes territorial and citizenship boundaries and reinforces the categories of 'us' and 'them' along spectrums constructed through multiple axes of difference (Anderson et al., 2011; McNevin, 2009; Tungohan, this issue).

As Giorgio Agamben (1998) has argued, the power of the state lies not only in its ability to define law but also to suspend it and create states of exception where people are reduced to bare life, subject to the law but excluded from any protection it might afford. In this collection, Maillet, Mountz and Williams demonstrate how countries construct this state of exception in different geographic spaces, at sea and in airports. Australia has excised whole swathes of its territory and reimagined them as a state of exception where migrants can be included in order to be excluded. Migrants are made legible at the margin of the state in order to make them legally illegible within the state. The practical, everyday implementation of this state of exception perpetuates violence and inequalities.

Although many scholars have applied Agamben's theory to different areas of migration control, from the detention centre to the refugee camp (e.g. Hanafi and Long, 2010; Rajaram and Grundy-Warr, 2004), other scholars have revealed how migrants are not reduced to bare life in these states of exception. Rather, they negotiate, resist and demonstrate agency despite the formidable barriers and marginalization they face (Mainwaring, 2016; Squire, 2016). Many of these interventions draw from analyses that focus on the everyday experiences of migrants and the implementation of policy. Migrants may also use the law to launch legal proceedings against a state. In the European Union, for example, legal challenges advanced by migrants have successfully circumscribed states' power to detain and forcibly deport (ECHR, 2011; 2012; 2013a; 2013b). EU member states cannot now return asylum seekers to other member states where they know conditions to be inhumane (ECHR, 2011). Migrant testimony was central to the European Court's ruling that condemned Italy's practice of intercepting migrants on the high seas and returning them to Libya without allowing them access to asylum in Europe (ECHR, 2012).

In all these legal cases, migrants and their advocates invoke international law in order to challenge the sovereign power of the state. Despite such victories, the practices involved in migration governance reveal the impotence of international law to significantly improve conditions for many migrants. Migrant workers face marginalization, violence and exploitation despite the UN Convention promising to protect all migrant workers and their families; refugees are largely contained in the Third World, excluded from the rights they should enjoy in Western countries; 'victims' of trafficking are more likely to face deportation than access residency visas (Dauvergne, 2008). Pranoto Iskandar's contribution highlights that the international legal

framing of migrant rights is also problematic in the Asian context, where the idea of individual rights is not as prominent. Iskandar nevertheless argues that progress is possible by promoting a broader human rights discourse as opposed to the idea of individual rights, which he argues is more difficult to embed within many Asian societies. The ongoing humanitarian failure occurring in, and on the borders of, Myanmar attests to the critical need to promote a human rights discourse that might counter the appalling lack of any effective legal framework of protection.

As Kristen Hill Maher (2002) reminds us, it is still the nation state that decides who has the right to have rights. Despite international law's celebration and promotion of human rights, these rights remain out of reach for many migrants. National laws have the power to deny status and thus exclude migrants from accessing rights. Moreover, even when judicial review and formal access to rights is attained, the impotence of law is evident in its ineffective implementation. For instance, although a multitude of courts have condemned the detention practices of many first-world countries, they continue largely unaffected by these pronouncements.

Spatial Logic of Exclusion

Turning from formal laws to their implementation and the everyday practices that constitute migration governance reveals the spatial logics of exclusion. Exclusion occurs at certain sites, such as borders and airports (see Maillet et al., this issue), but also through the demarcation of spaces as either producing genuine refugee or not. Sovereignty and territory are not neatly intertwined: borders are mobile and the state's power to control migration extends far beyond them. The case of the *Komagata Maru* offers a rich example of the state's ability to use communication technologies to excise a ship as it is in motion across the oceans and limit its abilities to re-provision and seek legal support. Almustafa reveals how international legal frameworks are founded on the exclusion of those most in need of the protections enshrined in such law.

Alongside the internal expansion of policing power (Coleman, 2007), the current era has seen states' sovereign reach extend beyond their borders to contain migrants and dissuade refugees from leaving the Third World and arriving on their doorstep. Western states have increasingly externalized asylum processes, exhorting sending and transit states to fortify their borders and to sign readmission agreements: offshore interception and processing means that migrants travelling by boat run the risk of being returned to countries of departure or to other states, where they are detained. This spatial architecture that traps or deflects mobile subjects shrinks spaces of asylum, denying access to refugee protection in the First World, and makes migrant journeys longer and more dangerous (Collyer, 2007; Hyndman and Mountz, 2008; Mainwaring and Brigden, 2016; Mountz and Hiemstra, 2014).

The border is thus mobile, moving to contain particular migrants and refugees long before they reach its physical manifestation. It also metamorphoses, changing its form when politics require. Roy demonstrates that the process of malleable sovereignty was also evident in the colonial period, when the Dominion of Canada created laws that closed the country's borders for those not making a 'continuous journey'. The ability of the state to selectively and categorically determine who can enter their sovereign space remains seemingly inviolable, but the determination of what comprises sovereign space is discretionary and malleable for the purposes

of migration control, as current maps of detention and deportation sites reveals. Likewise, Maillet, Mountz, and Williams show how the Australian coastline was transformed, excised from Australia's territory solely for the purposes of migration control. The state first excised smaller Australian islands that are geographically closer to Indonesia, where many migrants departed. However, after migrants began making the longer and more dangerous journey to the mainland, the Australian government responded in 2013 by excising the entire mainland. In law, migrants who arrive on Australian territory by boat have effectively not reached Australia and may be detained offshore and denied access to asylum.

Similarly, through laws and policies, whole countries are metamorphosed as 'safe third countries', denying their nationals robust asylum processes. Indeed, even when they reach the First World, migrants again encounter the sharp edges of sovereign power at the socio-geographic margins of the state. At sea, migrants may be 'left to die', their pleas for rescue ignored (Gatti, 2017; Heller and Pezzani, 2012). In detention centers and during deportation flights, migrants experience violence and death at the hands of border guards and private contractors (e.g. Mainwaring and Silverman, 2017; Walters, 2016). Many of these spaces at the socio-geographic margins are hidden from view, spaces where monitoring of state practices is difficult or purposefully obscured; the state thus manipulates the in/visibility of such spaces to advance their political authority and control. Some logics of exclusion are so normalized that we fail to see them. For example, Almustafa's analysis of international refugee law shows how Palestinians were written out of this legislation, and that the failure of refugee protection regimes today is in part the consequence of that original omission.

Exclusion can also occur when migrants are inside the nation. The case of temporary workers (Tungohan) and those with temporary protection (Thomas) detail the means by which states can selectively include migrants for the purposes of work, and for political reasons, but retain the ability to limit and curtail the full set of rights other citizens can demand of the state. This partial inclusion/exclusion is facilitated through formal laws, as well informal processes enacted in socio-economic and political realms.

Creating Precarious Lives: Neoliberalism and Legal Ambivalence

States employ spatial tactics and sovereign power in order to circumscribe the mobility of noncitizens not only at their borders, but also within and beyond them. Despite this, the economies of industrialized states are increasingly dependent on temporary immigrant labour (Ruhs, 2006). Moreover, these populations pose a challenge to the international nation-state system and to a state-centered administration of rights that has assumed their subjects to be citizens (Maher, 2002).

In order to make sense of this ambivalence, we must understand sovereign power in the context of the neoliberal state (Ong, 1999: 204; Cohen, 2001; Sassen, 2002). Indeed, it is neoliberal economies that generate a demand for cheap, flexible, and compliant labour. The neoliberal state thus tacitly accepts the presence of precarious migrants in its territory, which it creates through its border and immigration policy regime while still flexing its sovereign muscles through, for example, deadly border spectacles to ensure its continued legitimacy (McNevin, 2006; Ong, 1999). This age of violent borders forcefully demonstrates how the border produces and is produced by the material and representative violence of population and resource division (Jones,

2016). This division entails the sorting of populations through social and legal technologies of citizenship and rights claims (Howard Hassmann and Walton-Roberts, 2015).

Even when people have legal access to first-world countries, that access is increasingly temporary as states expand their temporary and seasonal foreign worker schemes. These schemes limit rights in a myriad of ways, most fundamentally in exploiting labour while disallowing long-term settlement (e.g. Preibisch, 2010; Huang and Yeoh, 1996). Similarly, refugees also are increasingly classed as lesser than and bestowed with temporary or subsidiary forms of protection rather than refugee status (Hyndman and Giles, 2017). These forms of protection deny refugees long-term settlement opportunities and other significant rights such as family reunification.

Faced with the exigencies of neoliberalism and the nation-state system, national and international legal systems have largely failed to protect the fundamental rights of many migrants and refugees. States bluntly reject attempts to remedy this through for instance the International Convention for Migrant Workers, which entered into force in 2003: only sending countries have signed the Convention; states that receive migrants and where migrants are in need of protection have not. Moreover, the model for more protection and mobility rights exists: the wealthy circulate the globe easily, crossing borders seamlessly, afforded rights that we are told states cannot give other migrants. Thus, while millions of refugees are denied access to the first world, and labour migrants are only conditionally and temporarily accepted into affluent receiving states, citizenship is on sale for the wealthy. ‘Golden passports’ for high net worth individuals are offered by over a one-fourth of the world’s countries today, and represent the other side of this human mobility story. States can effectively block the mobility of those who seek opportunity and protection, but just as easily they can develop new legal means for the wealthy to buy political membership. This commodification of citizenship ‘aggravate[es] inequality, accentuat[es] already deeply stratified global mobility and migration patterns, and further contribut[es]... to the “hollowing out” of citizenship from within’ (Shachar, 2017, 813).

The inequality in access to mobility and rights around the world reflects the differentiated ways that migration is governed depending on who moves across which boundaries. The variable right to mobility intersects with other classed, gendered, and racialized inequalities in the world. Moreover, the commonsensical air of fact produced around the ‘illegal migrant’ as much as the ‘ex pat’ obscures the specific historical contexts of migration governance and the ways such categories are not fixed but constructed and governed through spatial, socio, and legal practices. The seemingly ahistorical nature of such categories and practices of exclusion also conceals the daily challenges that borders and bordering produce. More fundamentally, it distracts from the reality that a world with more open borders is not a utopian fantasy, but a daily lived reality for wealthy global elites.

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