(Critical Approaches to Immigration Law)

Logic and Legitimacy of Immigration Law

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1. Introduction

This chapter invites the reader to take a step back and ask what we're talking about when we talk about immigration law. It picks up on the detailed analyses offered in other chapters to examine the underlying logics of immigration law, and what they means for its legitimacy. In order to do this, it advocates adopting a 'noncitizenist' lens, centring the perspectives of people insofar as they must live out their lives despite immigration law. Immigration law is often seen as a core component of sovereignty; as fulfilling a sovereign right of states to control their physical borders. When we both consider immigration law comparatively as in this volume and look at what happens when the immigration laws of individual countries come together to produce a global immigration law landscape, it looks like maybe what's driving immigration law isn't really controlling migration (understood as the crossing of international borders). Rather, immigration law seems to be directed at controlling membership, belonging, and recognition – both domestically and internationally. If this is so, then any viable account of immigration law's legitimacy will need to address these aspects.

The chapter brings together critical analyses of two key spaces in which immigration law is enacted: at the territorial border and within the territory of the state. The immigration laws of individual countries function within a broader policy landscape. This chapter presents international power structures and shared histories that frame how immigration laws are made and enforced today. It shows that some discrepancies in how immigration laws are experienced – both by states and by individuals – echo historic tropes around recognition. These partly arise from colonial systems of thought around who should be part of the international system of mobility, who should be considered eligible for agency, and who should be seen as trustworthy. As such, this chapter suggests that immigration law is not principally about immigration.

2. Adopting a noncitizenist lens

Theorising around immigration law suffers from what Phillip Cole has called an 'insider theory problem'. That is, for the most part, it is theorised by those who, as 'insiders', do not know its hardest edges. People who are excluded by immigration law, and so have the strongest experiences of the difficulties it produces, are also least likely to be involved in public theorising of it. This is a particular problem in the case of immigration law because it is affected by what José Medina has called 'metablindness'. That is, where people are in a dominant position with respect to a discriminatory political and legal system, they may be 'insensitive to their own insensitivity' (Medina 2011). When a person works without impediment or moves smoothly through a border, it is easy to forget how these same structures affect others.

For this reason, it's necessary to study immigration law with intentional vigilance regarding the potential for metablindness. One tool in doing this is to try to cultivate a 'noncitizenist lens' (e.g. Bloom 2018; Bloom 2021). This is not about an opposite to citizenship. Instead,

the noncitizenist lens promotes starting from the perspectives of people insofar as they must in some dimension live out their lives *despite* the structures that govern our world. Noncitizenism holds that in fact those who experience political and legal structures in this way have an insight into how those structures work which is simply unavailable without such experiences. Seen through a citizenist lens, the perspectives of irregular migrants, for example, might seem anomalous and challenging. Seen through a noncitizenist lens, they can seem powerful, with the potential to produce a clearer understanding of reality, which can in turn drive policy and law making which is evidence-based in important ways (Bloom 2022 forthcoming).

Critical legal scholars and jurists Satvinder Juss and Thanos Zartaloudis observe that there is a risk of assuming that immigration law is solving a problem and so to focus on 'the problem to be solved' when examining it (Juss and Zartaloudis 2015). However, a noncitizenist lens turns this around to look at whether immigration law might itself be creating problems. For example, when talking about irregular migration, it can be tempting to talk about how to stop people breaking the rules, framed in terms of protecting those who would otherwise become irregular migrants. But instead we can look at the ways in which immigration laws create the status of irregular migrant, and in so-doing put people's lives at risk, and what this means for its legitimacy.

3. Sovereignties and migration: the varied perspectives of states

Immigration law is often framed as part of the armoury that a state needs to protect its sovereignty, understood as protecting access to its territory and access to its internal systems. However, the relationship between sovereignty and migration is actually more complex, affected by histories of colonialism and decolonisation, war and conflict. This functions in three main ways. First, different histories of the coming of sovereignty generate different understandings of what is important about sovereignty. Second, this history has resulted in unequal access to power for states and agency for individuals associated with them. Third, for now at least, the overarching system within which we all must function is affected by the logics introduced by those colonial powers who drove modern capitalist globalisation.

First, struggles for sovereignty have played out differently. In literature on sovereignty arising in Europe and North America, there can be a focus on a certain sort of Modern sovereignty which arose in (western) Europe from roots in Westphalia (1648) on the one hand and the Age of Revolutions (1760s to 1790s) on the other. In Westphalia, the monarchies and principalities who participated agreed to respect each other's absolute control over the territories within their borders. To this, the anti-monarchist liberal revolutions in France and in America added the importance of *the people*. Even countries that continued to be ruled in some way by monarchies came to centre the idea of equal liberty and of the sovereign people. Crucial to this was the emerging idea of *the nation*, and also its composition. This included the move, for example in France, from a citizenship defined according to birth on the territories of lords to a citizenship defined by birth to a Frenchman (Weil 2008). Although there are different understandings of sovereignty in western Europe, this broadly produced a sovereignty rooted in non-interference in national states surrounded by well-defined and thick borders.

The Westphalian monarchies and principalities agreed to mutual respect of non-interference, but this did not include non-interference in the affairs of those territories that they had

colonised and would go on to colonise elsewhere (e.g. Halisi et al 1998). Around a third of today's states have had to fight for their contemporary sovereignty through claiming independence from rule by foreign (often, but not always, European) elites (E.g. Rejai and Enloe 1969; Lu 2011; …). This experience of colonisation, of the struggle for sovereignty, and of the unequal difficulties in defending it, affects how sovereignty is understood (e.g. Makum Mbaku 2018 45), including the function of the relationship of sovereignty to migration. A central element of this is the political nature of the border.

Today's borders have very different histories. The many straight lines drawn across the African continent, for example, were largely drawn by civil servants in European capitals, 'drawing lines upon maps where no white man's foot ever trod', as then British Prime Minister, Lord Salisbury, put it (cited in Ramutsindela 2010 p.17). They were produced according to treaties made by European colonisers with African rulers, with varying levels of coercion, and negotiated among Europeans. These often did not relate to any realities on the ground, cutting through traditional territories and populations (e.g. Zartman 1965). During African struggles for independence these borders were seen as 'one of the humiliating legacies of colonialism' (Touval 1967 102). However, the inherited borders are still largely retained, and their future continues to be debated (e.g. Mazrui 1993; Asiwaju 1985; Gakwandi 1996) as well as fought over. Indeed, national borders anywhere are artificial. As with bordering all over the world, in Africa, Modern national identities coalesce around these lines (e.g.Ramutsindela 2010 p.16; Zartman 1965 p.160), while at the same time other identities and ways of life struggle to persist around them (e.g. Kwabla Hlovor 2020; Anzaldúa 1987). This complicates the relationship of national borders to core notions of sovereignty more broadly.

The border problem is perhaps epitomised in the Partition of India by the departing British administration. In the 1940s there was increasing foment against British rule in India. In 1947, then Viceroy, Lord Mountbatten, declared that Britain would withdraw and gave the various factions three months to decide on how to cooperate to manage peaceful transfer of power (Khan 2007; Mahmud 1997). When, given the short time, an agreement was not reached, Mountbatten announced that the country would be 'partitioned'. A lawyer was brought from London to lead two boundary commissions to start drawing lines. In August 1947, when independent nation states of India and Pakistan were declared, the border lines were still being drawn. Unknown millions of people were displaced by the hastily constructed border. The estimated death toll ranges from 200,000 to 2 million. The new governments would be told where their borders were by the departing British officials *after* independence had already been declared. A UN peacekeeping mission was set up in 1949 and has not yet left. In the Westphalian logic of borders, there are countries and those countries have borders. The Partition of India shows how the order can be inverted, so that the border sliced through what was there, to create 'nations' either side of it. These examples show how the construction of borders themselves was in part contributing to shaping the world into the Modern European idea that there should be bounded territorial 'nations', and that an essential part of sovereignty would be to control the composition of them (e.g. Dauvergne 2004).

Second, our shared global history, in which some countries have directly benefitted from draining the resources and impeding the activities of others, has led to a situation in which there are differences in wealth and in access to power – with implications for sovereignty. That is, we have an international system made up of 'countries with unequally articulated

power' (Quijano 2007 168). Some states today can largely take for granted the sovereign control of their economic and political systems, their raw materials, and their industries. For other states, the control of their economic and political systems is not a given. This has implications for each country's understanding of sovereignty. For example, Stanlake Samkange of the International Commission on Intervention and State Sovereignty observes that those African states who do not have the power to repel infractions on their sovereignty 'are compelled to rely instead on respect by others for international law and the established rules of international relations' (Samkange 2002 p.76). While some states focus on repelling immigrants, others must also grapple with cross-border interference from other governments and private companies.

This supports the observation presented by Kevin Cope and David Leblang in this volume that there is a relationship between citizens' access to immigration and their state's activities in the international system. In practice, today it is broadly those countries most able to prevent foreign interference in their affairs that are putting the strongest barriers on immigration. At the same time, citizens of these countries are most able to move freely about the world (though there are important exceptions) . Conversely, it is citizens of those countries that are least able to prevent foreign intervention today that are also least able to move freely around the world. This chapter suggests that this dynamic is related in part to the 'ghosts' of a shared colonial past (to use the language of Kwarteng 2012). This is not to say that all formally colonised states have the same experience. They don't. The function of the ghosts of colonialism is more complex. This will be particularly picked up in the third point below.

Before moving on, though, it is useful to see also how this unequal international power structure affects other aspects of migration. Blocks on emigration have often been seen uncritically as repressive, with paradigmatic examples of those trying to escape USSR to enter other blocs. The landscape of emigration controls today is complicated (e.g. Iran's controls on women travelling alone or Myanmar's controls on emigration of Muslims). Here, though, consider emigration bans imposed by some South Asian states to stop their citizens travelling to work in countries, mostly in the Gulf, which are known to allow the exploitation and abuse of mostly female migrant domestic workers (e.g. Lenard 2021). While there are paternalism problems in curbing the movement of this mostly female workforce for their own protection, it is useful to observe that the affected states claim to have developed these policies because they could find no alternative way to protect those of their nationals hoping to participate in the international system. Without the means to protect their citizens abroad in a more powerful country, and in the absence of trust that this other country will follow international rules, they instead impose barriers on their citizens' movement. This, then, is another way in which the unequal experiences of today's states help to construct a complex and diverse relationship between migration and sovereignty.

Third, the underlying logics of the international system that we have today were set out by those colonial powers who drove modern capitalist globalization. Globalization started long before European colonialism, but these blocs did largely construct the bones of the international legal and economic system that exists today, and as a result today we can still observe a 'structural presence of the unjust history' that gave them the power to do this (Nuti 2019 p.38). This means that even if a state is not subject to direct colonial rule, it must still function within an international system which first arose during colonial times and so was

built on the basis of logics laid down by colonial powers (e.g. Quijano 2007; Hindess 2003). This is a system with certain dominant understandings of sovereignty. For example, sovereignty is presumed to stretch evenly to the border lines drawn on maps, even in regions where people may not live settled lifestyles, or where border lines cut through older homelands. In addition, it is a system in which everyone is presumed to have a citizenship, neatly organised according to nation state, and yet controlling the composition of a national group is an essential aspect of sovereignty (e.g. Dauvergne 2004). It is also a system with unequal sovereignty baked into it, and unequal protection for states and for the people within them (Anghie 2005; Anand 1966).

Dominant global interests in how migration should be organised can in turn affect conceptions of state sovereignty. In her analysis of the International Organisation for Migration (IOM)'s work in Djibouti, Sabine Dini observes that the organisation, with funding from the EU, Japan, and the US, also engages in activities directed at 'transforming the way in which the Djiboutian state exercises its sovereignty and governs human mobility' (Dini 2018). This includes, according to Dini, reinforcing the nation-state ideology of sovereignty, made up of sedentary citizens surrounded by a fixed and thick border. This is seen, for example, in the introduction, in 2015, of a compulsory biometric identity card, 'to discriminate 'fake' from 'genuine' citizens' (Dini 2018). All residents of Djibouti were required to submit personal information to the state and they were issued with unique identification numbers which either confirmed their citizenship or confirmed their lack of citizenship. This particularly affected the many people who, because of their traditionally nomadic life, moved frequently across the national borders that had initially been drawn by the French. Thus, through ostensible support for developing the instruments needed to enforce their immigration law, Djibouti's understandings of sovereignty and its relations with its citizenry were brought in line with dominant ways of framing of nation states.

4. Seeking eligibility for international mobility: diverse individual perspectives

A country's immigration law does not exist in a vacuum but rather makes up part of a global tapestry of such systems of law. This is a tapestry in which, overall, some people are presumed more eligible for international mobility than others. In this volume, this has been traced along racial grounds by Kevin Johnson and according to state power in international relations by Kevin Cope and David Leblag. Others frame this in terms of the 'wanted' and the 'unwanted' of the world (Mau et al 2012), or the 'trustworthy' and 'untrustworthy' (REF). To understand this, it's useful to think about how it links to the above discussion of how the systems we have today came about and what this means for the relationships between sovereignty and migration. Colonial tropes included the idea that some people, members of the global ruling class, should be able to move easily and the movement of some people should be determined on the basis of whether they would be more useful in one place rather than another. These tropes continue to affect how people experience international mobility today. I will consider first the role of passports, then visas, and then challenges in visa processing. I will suggest that these inherited tropes about who should have access to mobility play out today, with tragic consequences.

First, access to the international system, including the international system of mobility, is organised according to passports, based on a presumption that all the people of the world can be organised according to citizenships of nation states. This affects individuals' access to rights and resources but it also affects their recognition in the international system and their

perceived eligibility for participation within it. Diverse systems of citizenship have existed all over the world since ancient times. The emancipatory ideals of Modern citizenship, understood as the citizenship that emerged in the 'European Enlightenment' and was imposed throughout spheres of European influence, at its outset did not apply to everyone – and intentionally so. Modern citizenship was used both to exclude and to colonise.

The Modern citizens of several western European countries during the enlightenment benefitted from the wealth brought from overseas, where new ways of categorising people by race were used to give apparent legitimacy to the seizure of land, violence, and the indenture and enslavement of persons (e.g. Hall 2002; Hall 2000). Indeed, as has been observed by contemporary Indigenous scholars in the US, 'egalitarian political theory has often ended up justifying explicitly inegalitarian institutions and practices' (Ivison et al 2000 p.2). One of Modern citizenship's founding fathers, John Locke, had reason to build the potential for exclusion into his theory. He reportedly had shares in the Royal Africa Company (E.g. Losurdo 2014 p.15). He was drafter of Carolina's Constitution which explicitly allowed the ownership of people – and the designation of who could be owned on the basis of race (Tully 1982). It is unsurprising if the system arising from this has discrimination and exclusion built in.

People's participation in the international system today is at the grace of states, and at the grace of certain states in particular, organised through the institution of citizenship. Not only can dominant existing states decide who gets to have citizenship and what that citizenship means for them, dominant existing states also get to decide what entities they want to recognise as citizenship-granting states. Consider the Haudenosaunee in North America who have been able to travel around South and Central America, but unable to travel to parts of Europe on their Iroquois passports (e.g. Bloom 2017). Consider Palestinians, who are unable to access local citizenship in several countries with large Palestinian populations (e.g. Lebanon, Jordan) because they are Palestinian (e.g. Akram 2002), but are also unable to access Palestinian citizenship because there is not a citizenship-granting Palestinian State. Then there are the cases of the citizens of secessionist republics such as Donetsk and Luhansk (Kasianenko 2021) and of so-called rebel governments like Islamic State (Fortin et al 2021). Citizens of these entities may struggle for recognition in dominant surrounding states which do not recognise their existence. Claiming statehood and granting citizenship is all very well, but if those states are not recognised as states, then those people will not be recognised as citizens in the world, which means that they are at risk of not being recognised in the international system at all, making them unable to access smooth and safe mobility within it.

Second, while other chapters in this volume examine the role of visas in depth, here I mention them only briefly. Even if a person's citizenship is recognised by the international system, the force of that citizenship is not guaranteed. It's largely organised according to an International system of grants of travel. While there has been a global shift toward less restrictive immigration law for many, there has also been a move towards more selection (de Haas et al 2018 p.28). While budget airline companies have boomed, and some people can travel further more often, others are increasingly forced to move irregularly if they want to move. Who falls into these categories is not arbitrary, and since it is about selection rather than restriction (e.g. Mau et al 2015), it also isn't about capacity (Koslowski 2000). Instead it is about who is thought eligible for international movement and who needs to prove their eligibility. In some ways these eligibility categories, as well as the categories of who it is thought needs to be

controlled echo categories from colonial periods (Chemni 1998; Chemni 2009). More broadly, that these categories exist is not inevitable, but is a product of the international system that we have inherited.

While the holders of the strongest passports can travel to around 90% of countries without a pre-entry visa, holders of the weakest passports, those from Sudan, Yemen, Somalia, Pakistan, and Syria, need pre-entry visas for travel to almost all other countries.[1] The strongest African passport is from Mauritania. Applying for visas can be costly and difficult, requiring sheathes of documentation, reference letters, certificates, photographs, bank details, and medical checks (e.g. Ng and Whalley 2008 p.264). It can then also take long periods of time to be processed, and require in-person interviews, which may affect people differently depending on their distance from the nearest visa office.

This, then, is another way in which sovereignty and migration are related. One way to see this is to compare rankings of 'human development' according to UNDP with access to migration, as suggested by visa rankings.[2] Citizens of countries identified as having 'very high' human development can travel very freely. On average, they can enter 149 countries without a pre-entry visa. Citizens of countries identified as having 'low' human development can only travel on average to 58 other countries without a pre-entry visa. These are overwhelmingly countries that have experienced generations of colonialism, war, and international interference. Citizens of countries with peacekeeping missions (every one of which has a conflict that is rooted in the forced relocation of people either during colonialism or during colonial withdrawal) also struggle to access today's international systems of mobility. In practice, then, those who may have most interest in migrating, because their countries bear the heaviest burdens of colonialism, climate change, and other factors, for example, also have least access to international mobility. In this way too, then, sovereignty and migration are linked.

Third, not all passports are treated equally in visa processing. Informal systems of discrimination also function. This means that metrics that rely only on looking at the number of countries for which a person would need to apply for a visa are insufficient in understanding international discrepancies in access to migration. Data on this is difficult to gather, so we need to rely on sporadic studies into this (REF). For example, the UK government commissioned a study in response to public concern (including from academics). This study found that African passport holders were more than twice as likely to be denied a visa to the UK in comparison with holders of other passports (Asquith et al 2019). The same study also traced significant barriers imposed on applicants in passport applications. This included fees and documentary requirements. It also included the implications of the location of visa offices, which meant that some people had to travel great distances to apply for visas, and some even had to travel to third countries to get to a visa office (Asquith et al 2019). It would need to be demonstrated that inherited racialised colonial tropes are not part of this differential treatment for people travelling to the UK from SubSahara.

This discrepancy in access to international mobility has tragic consequences. If individuals from certain countries want to move, they are more likely than individuals from other countries to have to do it irregularly. In a world of increasingly regressive migration control

[1] Update this! I took this info from the World Passport Index 2019.

[2] (REFS – nb I calculated the below before most recent iteration, so redo)

measures, this also means that they will need to migrate at much greater personal risk. This can be seen, for example, in the fact that a small proportion of the world's migrant population is thought to be made up of people moving from Africa and the Middle East to Europe. And yet, they represent an enormous proportion of those recorded to have died while migrating globally (MIO 2019; Brian and Laczko). When political leaders in the international system speak euphemistically of 'irregular' or indeed 'illegal' migrants, this is who they are talking about. This is directly produced by global structures of power, control, discrimination, and inequality. When referring to 'irregular migrants', then, it is not helpful to think about wanton rule breakers, but rather people for whom the rules are impossible. As I will suggest below, it is more useful to consider people who are made into noncitizens in relation to the international system.

This is also seen in the differential treatment of irregular immigrants. In 2008, Catherine Dauvergne found that Americans were the largest irregular immigrant group in Australia, which she attributed to American gap years and backpackers who had overstayed (Dauvergne 2008 16). This was still the case in 2013/14 when I looked in to it and yet I could find no evidence of American citizens in Australia's notorious immigration detention facilities (Bloom 2018 45). It seems that Australia's immigration law isn't meant to exclude Americans, and so it is not enforced against them in the same way as it is enforced against others.

Through this section, I've been referring implicitly to global immigration laws. This could appear to be a slight of hand, since there is not a globally enforceable set of laws around migration. Immigration law is created by states. However, immigration law does not function abstracted in this way. In practice, immigration laws make up a global tapestry of control. When a person is affected by state A's immigration law, the implications of this are different depending on whether they are affected by state B's immigration law as well. This means that the legitimacy of immigration law must take into account how it functions globally. If it is possible that a person is not allowed to enter any state, and they are not allowed to be in the state where they currently are, then it becomes possible that they are not allowed to *be* anywhere at all. This is absurd. And yet there are people currently in this situation, particularly some members of the global stateless population. If the current global system of immigration laws is to be considered legitimate, then this would need to include a defence for this global exclusion.

5. Immigration Law and Rooted Displacement: Becoming an immigrant without moving

When immigration law functions within the borders of a state, there is an even weaker connection to the act of immigration and the link to eligibility is accentuated. That is, the question of immigration law here isn't 'did you migrate?', but 'can you show me your right to be here and participate here?'. The terminology of 'rooted displacement', has been used to describe situations across global regions in which law and policy – usually ostensibly immigration law and policy – interrupt the possibility for some people to 'belong' to the society in which they live (e.g. Belton, 2015; Sardelic, 2021; Alshammiry, 2020; Sharma, 2022). Kristy Belton, who introduces the terminology, uses it to describe the situation for some people in The Bahamas and in the Dominican Republic. She identifies individuals who, even if they have been born in either respective country, are unable to access its citizenship, and often have no claim to any other. Belton observes that this lack of citizenship in their

home country makes people feel 'displaced' without moving. They are treated like immigrants, including being blocked by 'immigration law' from accessing key social systems of the state that is their home. But many of those Belton interviews were born in the state they call their home. They controlled by immigration law because they are denied citizenship and so also the documents needed to demonstrate entitlement.

The individuals that Belton describes are largely legally 'stateless'. That is, they are not recognised as a national by any state under the operation of its law (1954 Statelessness Convention, Art.1). However, while the situation for stateless persons is at the extreme end of those experiencing rooted displacement as a result of this type of immigration law, in practice, this can occur in a broad range of situations. In their global mapping of visas, Steffen Mau *et al.* describe visas as allowing states 'to exercise extraterritorial control' (Mau et al 2015 1194). Insofar as visas need to be applied far from the border, this is correct. However, insofar as a person is within a state, the need for a visa or permit may also allow a state to exercise control over the most private of spheres *within* the state. The need for and conditions of visas and permits politicises work, family life, and access to healthcare among other things. This section presents how this functions in two key dimensions of the internal structures of states: labour and healthcare. It suggests that the focus here is not immigration. Even in the case of someone who has migrated, this dimension of immigration law does not affect them *insofar as they have migrated*. Instead, it affects them insofar as they are unable to provide the documentary proof of their eligibility for social, political, or economic inclusion. Crucially, it affects people insofar as they are considered by the administrative state to be foreign.

First consider work. Iddrisu Wari, who travelled from Ghana to Spain and lived irregularly in Spain for several years, observes: '[d]oes the immigrant get a salary for not working? They don't have food. Imagine you go to somebody's country and they say you need papers and with papers you need three years […]. What do you do with these three years? Can you sit down for three years without eating?' (Wari 2016 211-212). As Wari demonstrates, legal access to the labour market is fundamental to a person being able to live. Moreover, controls on this create hierarchies in the labour market, in terms of both who is allowed to do what jobs and under what conditions, and who is forced to work without permission in order to eat (Könönen 2019 779).

Könönen suggests that, as a result, all immigration law is also about labour, whether controlling access to labour, or creating hierarchies within labour markets. However, insofar as immigration policies are explicitly directed at the labour market, they are not controlling immigration, but rather a person's eligibility for goods and protections in the society in which they live. While for the most part, such rules affect people who have immigrated, this is not always the case. Immigration law as it relates to labour is complex and I will only be able to address a small corner of it. Citizens of states, and often permanent residents too, are presumed eligible for entry into the labour market of that state, and eligible for all the labour protections available there.

Some people are presumed to need permission to work. This might be in the form of a work visa (which means that the person has entered the state *in order to work*) or a work permit (which means that the person who has entered the state is in fact also allowed to work) (e.g. Ng and Whalley 2008 263). Such individuals may or may not have access to the whole labour market. For example, someone may have a visa which was sponsored by a particular

employer and which entitles them to work for that employer. They also may or may not have the full gamut of labour protections offered in that state. This makes them more vulnerable than other employees (e.g. if your visa only allows you to work for one employer, then you are extremely dependent on that employer, even if they mistreat you). Some people may not have any eligibility to work. This includes people who have never immigrated. It also includes immigrants without a permit. When, as is often the case, such individuals are also without recourse to public funds, they may well need to work without permission in order to survive, thus producing an irregular, labour market.

As the above paragraph demonstrates, the function of immigration law in the workplace effectively creates artificial hierarchies of agency and vulnerability among workers within a state and within sectors within a state (e.g. De Genova 2002; Goldring and Landolt 2013). This affects people in the place where they are living and working. It does not affect them insofar as they are migrating. Bridget Anderson points out that this has significant wider societal implications as it creates ‘a permanent group who are not socially and politically integrated and who are systematically discriminated’ (Anderson 2008). As with all areas of immigration law, it is experienced by different people in different ways. Conversely, where a visa is dependent upon a person working in a particular job or earning a particular salary, their labour market status may in turn affect their right to be in the country and to access other social goods (including healthcare, discussed below) (e.g. Könönen 2018; Könönen 2019 p.780).

To uncover underlying logics of immigration law’s relation to the labour market, I now turn to how it can produce an ‘immigrant’. Consider the case of Muay, a formerly stateless person living in Thailand, who spoke to the researcher, Janepicha Cheva-Isarakul. Muay arrived in Thailand at age 2 from the Shan state of Myanmar. Her language is Thai. Her entire life experience is Thai (Cheva-Isarakul 2021 p.172). However, when Cheva-Isarakul first met her, Muay was considered legally to be an ‘alien’ in Thailand (Cheva-Isarakul 2021 p.169). At age 20, she had not been able to obtain Thai citizenship and had no route to do so. She also did not have any other citizenship. This meant that she had no mechanism for obtaining a permit to fulfil her dream of working as a nurse. The only way in which she could do this would be to have a work permit. But without any citizenship, she couldn’t obtain a work permit.

Immigration protections on certain professions affected locals like Muay more gravely than those travelling to Thailand in order to work, thus reinforcing a hierarchy of foreignness which isn’t about movement. Muay decided to try to become a *recognised* foreigner in order to obtain a work permit in Thailand. She crossed into Myanmar using her alien id card. She met with a friend who spoke Burmese and went to a village where she had some relatives. She collected documents and submitted an application for Myanmar citizenship. Ten days later she collected her Myanmar passport and went back into Thailand using her Thai aliens id card. Once in Thailand, she was able to apply for a permit as a foreigner to qualify as a nurse (Cheva-Isarakul 2021 p.174). In the beginning of this story, immigration law blocked Muay from working as a nurse, not insofar as she was an immigrant, but insofar as she was not considered to be a member of an eligible category. In fact, it took becoming an immigrant for her to gain eligibility to become a nurse.

Even when people have migrated, the control of their access to the labour markets in the countries in which they make their homes (even if temporarily) seem to be more about

regulating foreignness locally rather than controlling immigration. It regulates who is able to put down roots, access other goods, and perhaps eventually become citizens (e.g. Robinson 2015). Some argue that this hierarchy of vulnerability fulfils economic aims of states when drafting their immigration law, ensuring flexible, disposable, and vulnerable labour (Sassen DATE), so that perhaps states even intentionally allow irregular immigration to ensure the presence of such a disposable population (Joppke REF). As we see from the case of Muay, there is another dimension to the possible intentionality. A key part of immigration law in this area seems to be designating who is eligible for agency and recognition in the society in which they live.

The WHO Constitution (1946), mentions 'the highest attainable standard of health as a fundamental right of every human being'. However, as with other human rights, this doesn't mean that are correlative duty-holders allocated to ensure it universally. States commonly put documentary conditions on access to healthcare. Indeed, the 2019 iteration of the Migrant Integration Policy Index indicated that Chile and Switzerland were the only two countries imposing no administrative barriers for undocumented immigrants' access to health (MIPEX 2020). This means that, whereas the content of human rights may be developed and justified on the basis of the appropriate claims of people in virtue of their humanity, in practice access to those rights is dependent upon some state-recognised status. William Conklin has put this starkly. He argues that this means that there are, in effect, two international communities (Conklin, 2014). First, there is the community made up of everyone in virtue of their humanity. Second, there is the community made up of everyone insofar as they have a recognised status which gives them access to human rights and so forth. In this subsection, then, I suggest that when immigration law affects access to healthcare, it contributes to the creation of these two international communities. But healthcare is more complex.

In practice, access to healthcare is often differentiated by states according to categories of eligibility – and according to the ability of an individual to prove that eligiblity. On the face of it, this can look like differentiation according to a person's migrancy. However, in practice, this is differentiation according to a person's ability to produce the documents needed to demonstrate eligibility for treatment. This is not really about immigration, but rather about *notions of foreignness*. This can be seen from a recent case in the UK. In 2018, *the guardian* newspaper reported that 63 year old Albert Thompson, after 44 years living in the UK as a citizen, suddenly found himself being asked to pay 54,000 GBP for cancer treatment (Gentleman, 2018). The UK's National Health Service means that usually such treatment would be free to citizens and to those who are 'ordinarily resident', though others would be expected to pay (NHS Regulations 2015, SI 2015/238; 2017, SI 2017/756). Without that kind of money, Thompson was forced to forego the treatment. It soon became clear that Thompson's experiences were similar to thousands others who had travelled to the UK from countries which had shared free movement with the UK in the 1950s to 1970s (Gentleman, 2019; OXFORD REPORT). This was because those countries had then still been colonies of the UK or else members of the Commonwealth, which offered free movement to the UK until 1973 (e.g. Bloom and Tonkiss 2014). Thompson describes being unable to find the documents he needed to demonstrate his life in the UK (Gentleman, 2018). Like others affected, legally he was eligible for British citizenship, but could not assert this citizenship because of administrative failings (not least, the British government's destruction of landing cards from the 1970s). In this case, then, it was Thompson's lack of documents that blocked

him from healthcare. It was nothing to do with whether or not he had migrated or when this had been.

The experience of Thompson and others who would become known as the 'Windrush generation' because of the symbolic nature in the British imaginary of the Empire Windrush, a ship on which some of those affected, or the parents of those affected, had travelled. The Empire Windrush is taught to British schoolchildren as bringing workers from Jamaica to help rebuild the country after the Second World War. In this case, too, then, we see how immigration law functions to control people's access to the internal systems of the state, and how this emerges out of the embers of empire. In the case of Muay or of Albert Thompson, the way in which immigration law constrains access to the labour market or to healthcare seems absurd. We could think of these as anomalies. However, instead, I suggest that these cases force us to interrogate the logic and legitimacy of immigration law more generally. Even in cases where immigration law is affecting people who are migrating, we should ask whether it is affecting them *insofar as they are migrating* or whether it is instead affecting them insofar as they are seen as the sort of people who should be controlled.

6. Conclusion

States make immigration law. It is seen as a core element of state sovereignty. However, the immigration laws of individual states cannot be understood in isolation. They must be examined both comparatively and as a whole. Looking at the complex tapestry of control produced by the immigration laws of many countries functioning together, it becomes apparent that the relationship between sovereignty and immigration is more complex. In practice, those living in states least able to protect their sovereignty also have least access to the international systems of migration. This can partly be explained by the roles played by European colonial powers in constructing the bones of our international economic and legal systems, and the tropes that underlay this. During colonial times, there was a global elite that moved easily. Then there were those who moved with relative ease. And then there were those who were not attributed agency. It was assumed that they should either move or stay put based on where it was most useful for them to be. Elements of this persist today. And while it's not the case that all former colonies are disadvantaged in this system, it is the case that racialised hierarchies established during colonial periods do map to a certain extent onto hierarchies of access to international mobility. By looking at how this functions at the state's physical border and how it functions at the state's internal borders, it becomes apparent that immigration laws aren't primarily about immigration. Instead, they are about controlling those who it is presumed should be controlled. It is about membership, belonging, and recognition, both within the society in which one lives and in the international system as a whole.

Bibliography

Alshammiry, A. (2020) 'Writing in Exile: Bidoon Resistance and Speaking Truth to Power', *Cultural and Pedagogical Inquiry* 12(1) 149-164

Anand, R. (1966) 'Sovereign Equality of States in International Law – I', *International Studies* 8(3) 213-240

Anderson, B. (2008) ‘Migrants and Work-related Rights’, *Ethics and International Affairs* 22(2) 199-203

Angie, A. (2005) *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press

Anzaldúa, G. (1987) *Borderlands / La Frontera: The New Mestiza*, Aunt Lute Books

Ashely, R.K. (1988) ‘Untying the sovereign state: A double reading of the anarchy problematique’. *Millennium: Journal of International Studies* 17 227-262

Asquith et al…

Belton, K. (2015) ‘Rooted displacement: the paradox of belonging among stateless people’, *Citizenship Studies* 19(8) 907-921

Bloom, T. (2022 forthcoming) *Noncitizen Power: Agency and the Politics of Migration*, I.B.Tauris

Bloom, T. (2021)

Bloom, T. (2019) ‘When Migration Policy Isn’t about Migration: Considerations for Implementation of the Global Compact for Migration’, *Ethics and International Affairs* 33(4) 481-497

Bloom, T. (2018) *Noncitizenism: Recognising Noncitizen Capabilities in a World of Citizens*, Routledge, Abingdon

Bloom, T. (2012) ‘Contradictions in Formal Commonwealth Citizenship Rights in Commonwealth Countries’, *The Round Table: The Commonwealth Journal of International Affairs* 100:417 639-654

Bloom and Tonkiss (2014)

Brian, T. and Laczko, F. (eds) *Fatal Journeys: Tracking Lives Lost During Migration*, International Organisation for Migration

Bulhan, H. (2015) ‘States of Colonialism in Africa: From Occupation of Land to Occupation of Being’, *Journal of Social and Political Psychology* 3(1) 239-256

Bulhan, H. (1985) *Frantz Fanon and the psychology of oppression*, Plenum Press.

Bull, H. (1977) *The Anarchical Society*, Macmillan Press

Chetail, V. and Giacca, G. (DATE) ‘Who Cares? The Right to Health of Migrants’, in Clapham, A., Robinson, M., Mahon, C., and Jerbi, S. (eds) *Realizing the Right to Health*

Chemni, B.S. (1998) ‘The Geopolitics of Refugee Studies: A View from the South’, pp350-374 in
Refugee Studies 11(4

Chemni (2009)…

Cheva-Isarakul, J. (2021) ‘Seeking ‘a right to belong’: A stateless Shan youth’s journey to citizenship in northern Thailand’, in Bloom, T. and Kingston, L. (eds) *Statelessness, Governance, and the Problem of Citizenship*, Manchester University Press 169-180

Cole, P. (2017) ‘Insider theory and the construction of statelessness’, in Bloom, Tonkiss, and Cole (eds) *Understanding Statelessness*, Routledge.

Conklin, W. (2014) *Statelessness: The Enigma of the International Community*, Hart.

Costa Lopez, J., De Carvalho, B., Latham, A., Zarakol, A, Bartelson, J., and Holm, M. (2018) ‘Forum: In the Beginning ther ewas No Word (for it): Terms, Concepts, and Early Sovereignty’, *International Studies Review*20(3) 489-519

Dauvergne, C. (2004) ‘Sovereignty, Mgiration and the Rule of Law in Global Times’, *Modern Law Review* 67(4) 588-615

De Genova, N. (2002) ‘Migrant ‘illegality’ and deportability in everyday life’, *Annual Review of Anthropology* 31 419-447

Dini, S. (2018) ‘Migration management, capacity building and the sovereignty of an African State: International Organization for Migration in Djibouti’, *Journal of Ethnic and Migration Studies* 44(10) 1691-1705

Evans, T. (2002) ‘A human right to health?’, *Third World Quarterly* 23(2) 197-215

Fassin, D. (2012) *Humanitarian Reason: A Moral History of the Present*, University of California Press, translated by Gomme, R.

Feldman, S. (2021) ‘In-Situ Displacement: Institutional Practices and the Making of the Hindu Other’, *Journal of Historical Sociology* 34(2) 271-286

Ferris, D., Hayduk, R., Richards, A., Strauss Schubert, E., and Acri, M. (2020) ‘Noncitizen Voting Rights in the Global Era: a Literature Review and Analysis’, *Journal of International Migration and Integration* 21 949-971

Fortin, K., Klem, B., Sosnowski, M. (2021) ‘Legal identity and rebel governance: A comparative perspective on lived consequence of contested sovereignty’, in Bloom, T. and Kingston, L. (eds) *Statelessness, Governance, and the Problem of Citizenship*, Manchester University Press.

Gammeltoft-Hansen, T. WHICH

Gentleman, A. (2019) *The Windrush Betrayal: Exposing the Hostile Environment*, Faber, London

Gentleman, A. (2018) ‘Londoner denied NHS cancer care: ‘It’s like I’m being left to die’’, *The Guardian*, 10th March 2018, available at https://www.theguardian.com/uk-news/2018/mar/10/denied-free-nhs-cancer-care-left-die-home-office-commonwealth (accessed 13th July 2022)

Goldring, L., and Landolt, P. (2013) ‘Precarious legal status in Canada: Theorizing non-citizenship and conditionality’, in Goldring, L., and Landolt, P. (eds) *Producing and Negotiating Non-Citizenship: Precarious Legal Status in Canada*, University of Toronto Press 3-27

de Haas, H., Czaika, M., Flahaux, M, Mahendra, ., Natter, K., Vezzoli, S., and Villares-Varela, M. (2018) ‘International Migration: Rrends, determinants and policy effects’, DEMIG paper 33IMIn Working Paper Series no. 142

Hacker, K., Anies, M., Folb, B. and Zallman, L. (2015) 'Barriers to health care for undocumented immigrants: a literature review', *Risk Management and Healthcare Policy* 8 175-183

Halisi, C., Kaiser, P., and Ndegwa, S. (1998) 'The Multiple Meanings of Citizenship: Rights, Identity, and Social Justice in Africa', *Africa Today* 45:3/4 337-349

Hindess, B. (2003) 'Responsibility for others in the modern system of states', *Journal of Sociology* 39(1) 23-30

Kahn, Y. (2007) *The Great Partition: The Making of India and Pakistan*, Yale University Press

Kasianenko, N. (2021) 'Statelessness and governance in the absence of recognition: The case of the 'Donetsk People's Republic', in Bloom, T. and Kingston, L. (eds) *Statelessness, Governance, and the Problem of Citizenship*, Manchester University Press

Könönen, J. (2019) 'Becoming a 'Labour Migrant': Immigration Regulations as a Frame of Reference for Migrant Employment', *Work, Employment and Society* 33(5) 777-793

Könönen, J. (2018) 'Differential inclusion of non-citizens in a universalistic welfare state', *Citizenship Studies* 22(1) 53-69

Koslowski, R. (2000) *Migrants and Citizens*, Cornell University Press

Kuzmova, Y. (2021) 'Statelessness elimination through legal fiction: The United Arab Emirates' Comorian minority', in Bloom, T. and Kingston, L. (eds) *Statelessness, Governance, and the Problem of Citizenship*, Manchester University Press 276-290

Kwabla Hlovor, I. (2020) 'Inclusion of Borderlanders in Border Management in Africa: Toward an Emancipatory Framework for the Study and Management of African Borders', *International Studies Perspectives* 21(1) 37-53

Kwasi Kwarteng (2012) *Ghosts of Empire*, Bloomsbury

Lawson, R. and Lemke, J. (2012) 'Travel visas', *Public Choice* 153 17-36

Lu, C. (2011) 'Colonialism as Structural Injustice: Historical Responsibility and Contemporary Redress', *The Journal of Political Philosophy* 19(3) 261-281

Mahmud, Y. (1997) 'Migration, Identity and the Colonial Encounter', *Oregon Law Review* 73 633-690

Makum Mbaku, J. (2018) 'International Law and Limits on the Sovereignty of African States', *Florida Journal of International Law* 30(2) 43-110

Mau, S., Gülzau, F., Laube, L., and Zaun, N. (2015) 'The Global Mobility Divide: How Visa Policies Have Evolved over Time', *Journal of Ethnic and Migration Studies* 41(8) 1192-1213

Mau, S., Brabandt, H., Laube, L., and Roos, C. (2012) *Liberal States and the Freedom of Movement: Selective Borders, Unequal Mobility*, Palgrave

McHale, J. and Speakman, E. (2020) 'Charging 'overseas visitors' for NHS treatment, from Bevan to Windrush and beyond', *Legal Studies* 40 565-588

Medina, J. (2011) 'The Relevance of Credibility Excess in a Proportional View of Epistemic Injustice: Differential Epistemic Authority and the Social Imaginary', *Social Epistemology* 25(1) 15-35

Meyers, E. (2000) 'Theories of International Immigration Policy – A Comparative Analysis', *The International Migration Review* 34(4) 1245-1282

MIO (2019) 'Africa's Youth: Jobs or Migration?', Mo Ibrahim Foundation Report;

MIPEX (2020) Migrant Integration Policy Index 2020, Health, available at https://www.mipex.eu/health (accessed 13th July 2022)

Ng, E. and Whalley, J. (2008) 'Visas and work permits: Possible global negotiating initiatives', *Review of International Organisations* 3 256-285

NHS (Charges to Overseas Visitors) Regulations 2015, SI 2015/238

NHS (Charges to Overseas Visitors) (Amendment) Regulations 2017, SI 2017/756

Nuti, A. (2019) *Injustice and the Reproduction of History: Structural Inequalities, Gender and Redress*, Cambridge University Press, Cambridge

Nyers, P. (2012) 'Moving borders: The politics of dirt', *Radical Philosophy* 174 (July/August) 2-6

Pugh, J. (2016) 'Postcolonial Development, (Non)Sovereignty and Affect: Living On in the Wake of Caribbean Political Independence', *Antipode* 49(4) 867-882

Quijano, A. (2007) 'Coloniality and Modernity/Rationality', *Cultural Studies* 21(2.3) 168-178

Ramutsindela, M. (2010) 'Africa's borders in colonial and postcolonial contexts', *HAGAR: Studies in Culture, Polity and identities* 9(2) 13-29

Rejai, M. and Enloe, C. (1969) 'Nation-States and State-Nations', *International Studies Quarterly* 13(2) 140-158

Samkange, S. (2002) 'African Perspectives on Intervention and State Sovereignty', *African Security Studies* 11(1) 73-84

Sardelic, J. (2021) *The fringes of citizenship: Romani minorities in Europe and civic marginalisation*, Manchester University Press, Manchester.

Sen, A. (2008) 'Why and how is health a human right?', *The Lancet* 372 (no.9655) 2010

Sharma, C. (2022) 'National Register of Citizens Assam, India: the Tangled Logic of Documentary Evidence', *Journal of Immigrant and Refugee Studies*, early view

Smith and Rogers

Spijkerboer, T. (2018) 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control', *European Journal of Migration and Law* 20 452-469

Toebes, B. (1999) 'Towards an Improved Understanding of the International Human Right to Health', *Human Rights Quarterly* 21 661-679

Touval, S. (1967) 'The Organization of African Unity and African Borders', *International Organization* 21(1) 102-127

Touval, S. (1966) 'Treaties, Borders, and the Partition of Africa', *The Journal of African History* 7(2) 279-293

Tuck, E and Yang, K. W. (2012) 'Decolonization is not a metaphor', *Decolonization: Indigeneity, Education & Society* 1:1 1-40

Weil, P. (2008) *How to Be French: Nationality in the Making Since 1789*, Duke University Press, translated by C. Porter

Weissbrodt, D. (2009) *The Human Rights of Non-citizens*, Oxford University Press, Oxford

Zartman, I.W. (1965) 'The Politics of Boundaries in North and West Africa', *The Journal of Modern African Studies* 3(2) 155-173

1954 Convention relating to the Status of Stateless Persons (1954 Statelessness Convention)