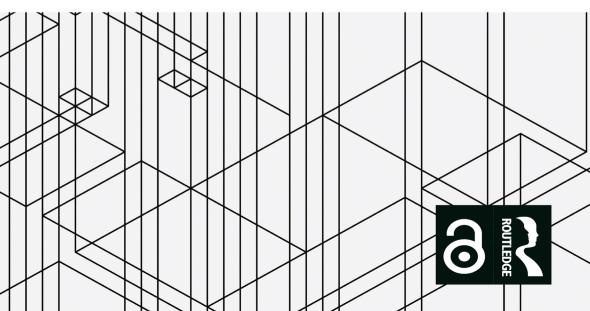# LAW, MIGRATION, AND HUMAN MOBILITY

MOBILE LAW

Magdalena Kmak

Law, Migration, and Human Mobility

This book analyses the multifaceted ways law operates in the context of human mobility, as well as the ways in which human mobility affects law.

Migration law is conventionally understood as a tool to regulate human movement across borders, and to define the rights and limits related to this movement. But drawing upon the emergence and development of the discipline of mobility studies, this book pushes the idea of migration law towards a more general concept of mobility that encompass the various processes, effects, and consequences of movement in a globalized world. In this respect, the book pursues a shift in perspective on how law is understood. Drawing on the concepts of 'kinology' and 'kinopolitics' developed by Thomas Nail as well as 'mobility justice' developed by Mimi Sheller, the book considers movement and motion as a constructive force behind political and social systems; and hence stability that needs to be explained and justified. Tracing the processes through which static forms, such as state, citizenship, or border, are constructed and how they partake in production of differential mobility, the book challenges the conventional understanding of migration law. More specifically, and in revealing its contingent and unstable nature, the book reveals how human mobility is itself constitutive of law.

This interdisciplinary book will appeal to those working in the areas of migration and refugee law, citizenship studies, mobility studies, legal theory, and sociolegal studies.

Magdalena Kmak is Professor of Public International Law, with a specialization in Migration and Minority Research, at Åbo Akademi University, Finland.

Law, Migration, and Human Mobility

Mobile Law

Magdalena Kmak

Routledge
Taylor & Francis Group

a GlassHouse book

Contents

About the Author

Magdalena Kmak is a Professor of Public International Law, with a specialization in Migration and Minority Research at Åbo Akademi University (Finland). She has received her PhD from the Institute of Law Studies, Polish Academy of Sciences, and the title of Docent in law and globalization from the University of Helsinki (Finland). She is a PI and Consortium Director in the project Diversity, Trust, and Two-Way Integration (Mobile Futures) funded by the Strategic Research Council established within the Academy of Finland (2021–2027) and an affiliated researcher at the Centre of Excellence in Law, Identity and the European Narratives at the University of Helsinki. Magdalena's research interests encompass law and mobility, new minorities, exile studies and history of migration, public international law, human rights and International and European refugee and migration law. Magdalena is also co-founder of the Nordic Network on Climate Related Displacement and Mobility.

List of Abbreviations

CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ISIS	Islamic State of Iraq and Syria
SOGI	Sexual Orientation and Gender Identity
UDHR	Universal Declaration of Human Rights
UN	United Nations
USA	United States of America

Acknowledgments

This book has been long in the making. It is a result of many years of my practical and theoretical work as a lawyer and legal researcher that fuelled a long-standing and deep frustration towards the limits of human rights law in safeguarding the rights of people with migrant and refugee background and experience, in Poland, UK, and Finland. The thinking process behind this book was akin to the peeling of the layers of my own ideas and preconceptions of how law is and should function in society. The ongoing process of returning to and rethinking my earlier work through new theoretical lenses as well as following new, exciting developments in migration and exile studies has helped me to understand and accept law as a profoundly imperfect mechanism for emancipation. The concept of mobile law is therefore a coping mechanism. Through this concept I have put flux, movement, and mobility at the centre of my research in law. I believe that such a methodological perspective of mobility and mobility justice opens up a space of contestation. It destabilizes foundations of contemporary migration law, rooted in the nation-states and borders. Destabilizing legal concepts such as a nation-state, citizenship, refugeeness, and migration, allows an abandoning of the static perspective of law as a tool of the state, and highlights the gap between law and practice as a space of movement.

Two events have particularly contributed to thinking about and writing this book. The first was the (failed) application for funding for research on Mobile Law: Law, Dangerousness and Mobility in Europe, together with Aleksandra Gliszczyńska-Grabias and Witold Klaus from the Institute of Law Studies at the Polish Academy of Sciences, Anne Alvesalo-Kuusi from the University of Turku, and Maartje van der Woude from Leiden University. I am very grateful to them for our fruitful discussions and brainstorming both on the project idea but also at many other occasions. Second was a visiting fellowship at the Center for the Study of Law and Society at the Berkeley School of Law in May–July 2019 that provided me with the time and intellectual space for delving more deeply into the topic and developing the idea of the book. Special thanks go to my host Tony Platt and to Jonathan Simon for inviting me to present the Mobile Law idea at the Carceral Studies Working Group and for encouraging me to continue working on it further.

I also want to thank the entire Centre of Excellence in Law, Identity and the European Narratives (EuroStorie) and the Centre for European Studies at the University of Helsinki, as well as the colleagues at the Institute for Human Rights at Åbo Akademi University and in the Diversity, Trust, and Two-Way Integration (Mobile Futures) project – my former and current intellectual homes – for their understanding, support, and collaboration during the book writing process.

Absolutely special thanks go to Dionysia Kang who has not only proofread the manuscript but also has given invaluable comments on the book's content. Special thanks also go to Iida Silfverhuth, Jonna Rajala, and Laura-Helena Suominen who have helped me with the research at the various stages of the book writing.

I would also like to thank all the colleagues who listened to and commented on my presentations of various chapters of this book, at the Migration Law Research Centre and the Poznan Human Rights Centre, both at the Institute of Law Studies, Polish Academy of Sciences, as well as the Centre of Migration Research at the University of Warsaw.

I would like to thank Colin Perrin, Ajanta Bhattacharjee, and Naomi Round Cahalin at Routledge, as well as the anonymous reviewer for their valuable feedback on this volume.

Last but not least, greatest thanks go as always to Antti Sadinmaa. I am also grateful to Runsku for providing (sometimes frustrating yet needed) structure and exercise during the writing process.

Introduction

Introduction

At the time of writing, the landscape of migration and mobility in Europe has been affected by millions of people leaving Ukraine as a result of the full-scale Russian invasion on 24 February 2022. They crossed borders to Poland, Slovakia, Romania, or Hungary and continued to other EU countries, in many cases exceeding the numbers of asylum seekers from the so-called Long Summer of Migration in 2015. Persons from Ukraine fleeing the war have been mostly met with accommodating measures,[1] from the first-ever deployment of the Temporary Protection Directive by the Council of the European Union[2] to the right to bring to the EU territory domestic animals without necessary documentation and vaccinations.[3] The protection to persons in refugee situation from Ukraine has been happening at the same time as the blatant violations of rights of racialized migrants seeking asylum at the Polish-Belarussian border and

---

1 See however reports on racism and discrimination in the treatment of people fleeing the war, for instance: 'UNHCR Chief Condemns "Discrimination, Violence and Racism" against Some Fleeing Ukraine', *UN News*, 21 March 2022, https://news.un.org/en/story/2022/03/1114282, (accessed 17.12.2022); Elżbieta Mirga-Wójtowicz, Joanna Talewicz, and Małgorzata Kołaczek, 'Prawa Człowieka, Potrzeby i Dyskryminacja - Sytuacja Romskich Uchodźców z Ukrainy w Polsce: Sprawozdanie z Działalności Badawczej i Interwencyjnej' (Zentralrat Deutscher Sinti und Roma / Centralna Rada Niemieckich Sinti i Romów, 2022); Meltem Ineli-Ciger and Sergio Carrera, eds., *EU Responses to the Large-Scale Refugee Displacement from Ukraine: An Analysis on the Temporary Protection Directive and Its Implications for the Future EU Asylum Policy* (European University Institute, 2023).
2 Council of the EU, 'Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences Thereof', Pub. L. No. 2001/55/EC (2021).
3 Gerardo Fortuna, 'EU Relaxes Entry Paperwork for Pets Travelling with Ukrainian Refugees', *Euractive.Com*, 27 February 2022, https://www.euractiv.com/section/health-consumers/news/eu-relaxes-entry-paperwork-for-pets-travelling-with-ukrainian-refugees/, (accessed 18.12.2022).

continuous violations of rights of people arriving at the EU Southern border, exemplifying "persistence of *systemic unequal solidarity* in the EU and Member States' asylum systems [author's emphasis]."[4]

Assessing any possible future developments or shifts in approaches to migration and mobility within the EU and Europe while the war is still ongoing comes with a danger of a lack of objectivity, simplification, and wishful thinking. The questions concern the long-term effect of the Temporary Protection Directive and its affecting migration law and legal practice. For instance, has it been deployed with the expectation that persons in a refugee situation from Ukraine will soon leave to return home? Would the refugee status or subsidiary protection have given the person fleeing the war on Ukraine better status and longer-lasting protection? And most importantly, will there be a general change in the legal interpretation of the right to seek asylum that would benefit all people seeking protection, also those coming from the global South?[5]

Instead of providing answers to these questions or giving any other normative pronouncements concerning law as it ought to be, this book contextualizes them through the lens of mobility[6] and mobility justice.[7] Such perspective allows for an understanding of law's role in regulating as well as producing differential mobility,[8] such as mobility of different groups of people crossing Eastern and Southern EU borders. To be sure, the shift from normative rights-based approach to mobility justice perspective reveals ways in which power relations play out in the movement of people and how such institutions as borders and citizenship in combination with social constructs such as race, gender, or class result in unequal mobility.[9] Understanding differential mobility as a product of law is only one outcome of the shift from migration to mobility justice. Another one is the ability to understand mobility as counterpower,[10] to emphasize the agency of mobile actors, and to study their resistance against law regulating their movement unequally. Finally, the mobility lens makes visible the fact that law is not only affecting but also affected by mobility and that mobility is a quality of law itself.

---

4   Ineli-Ciger and Carrera, *EU Responses to the Large-Scale Refugee Displacement from Ukraine*.

5   For the analysis of the early EU responses see Ineli-Ciger and Carrera, *EU Responses to the Large-Scale Refugee Displacement from Ukraine*.

6   Thomas Nail, *Being and Motion* (New York, NY: Oxford University Press, USA, 2019).

7   Mimi Sheller, *Mobility Justice: The Politics of Movement in the Age of Extremes* (London; Brooklyn, NY: Verso, 2018).

8   Mimi Sheller, *Mobility Justice: The Politics of Movement in the Age of Extremes* (London; Brooklyn, NY: Verso, 2018), 55 (iBooks).

9   On intersectional perspective on human mobility see also Floya Anthias, *Translocational Belongings: Intersectional Dilemmas and Social Inequalities*, 1st ed., Routledge Research in Race and Ethnicity (Oxford: New York: Routledge, 2020).

10 Thomas Nail, *The Figure of the Migrant*, (Stanford, California: Stanford University Press, 2015), 182.

This book is neither about migration and mobility, nor law strictly, but concerns the multifaceted relationship between law and (human) mobility. The main argument of the book is that the relationship between law and mobility encompasses not only dominant rules and practices regulating human motion and mobility, but also mobility playing the constitutive role for law. What this means is that mobility affects the purpose and the scope of law but is also imprinted in its epistemological and ontological qualities – what Ben Golder and Peter Fitzpatrick describe as "mobile and contingent truth" of law.[11] I understand the relationship between law and mobility as multifaceted and encompassing (1) mobility as law's ontological quality characterized by permanent instability of legal concepts;[12] (2) meetings of different laws and tensions between various competing interests related to mobility and migration, both in law's hierarchical structure, at its various levels of implementation, as well as in its relations with other forms of law;[13] (3) laws and rules that become mobile as they are carried or employed by mobile actors themselves;[14] (4) the way law is identified, felt, experienced, and resisted by those on the move;[15] and (5) mobility as a method of studying law and creating legal knowledge.[16]

---

11   Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Abingdon, Oxon; New York, NY: Routledge-Cavendish, 2009), 130.

12   On indeterminacy and movement of law see for instance Peter Fitzpatrick, *Law as Resistance: Modernism, Imperialism, Legalism* (Abingdon, Oxon; New York, NY: Routledge, 2008); Golder and Fitzpatrick, *Foucault's Law*; Olivia Barr, *A Jurisprudence of Movement: Common Law, Walking, Unsettling Place* (Abingdon, Oxon; New York, NY: Routledge, 2016); Alexandre Lefebvre, *The Image of Law: Deleuze, Bergson, Spinoza*, Cultural Memory in the Present (Stanford, Calif: Stanford University Press, 2009).

13   Thomas Nail, 'Figures of the Migrant: Structure and Resistance', *Cultural Dynamics* 30, no. 3 (2018);
      Thomas Nail, *Theory of the Border* (Oxford; New York: Oxford University Press, 2016); Barr, *A Jurisprudence of Movement*, 2016.

14   Franz von Benda-Beckmann, Keebet von Benda-Beckmann, and Anne Griffiths (eds.), *Mobile People, Mobile Law: Expanding Legal Relations in a Contracting World* (Abingdon, Oxon; New York, NY: Routledge, 2005); Barr, *A Jurisprudence of Movement*, 2016.

15   Melanie G. Wiber, 'Mobile Law and Globalization: Epistemic Communities versus Community-Based Innovation in the Fisheries Sector,' in *Mobile People, Mobile Law* (Abingdon, Oxon; New York, NY: Routledge, 2017), 143–164; Günter Bierbrauer, 'Toward an Understanding of Legal Culture: Variations in Individualism and Collectivism between Kurds, Lebanese, and Germans', *Law & Society Review* 28, no. 2 (1994); Paolo Boccagni and Loretta Baldassar, 'Emotions on the Move: Mapping the Emergent Field of Emotion and Migration', *Emotion, Space and Society* 16 (August 2015): 73–80; Elena Fiddian-Qasmiyeh, *Refuge in a Moving World: Tracing Refugee and Migrant Journeys across Disciplines* (London: UCL Press, 2020).

16   Kaius Tuori, *Empire of Law: Nazi Germany, Exile Scholars and the Battle for the Future of Europe* (Cambridge: Cambridge University Press, 2020); Aslı Vatansever, *At the Margins of Academia: Exile, Precariousness, and Subjectivity* (Brill, 2020).

This project on law and mobility is a result of my long-standing and deep frustration towards the gap between law and practice within the field of migration law, and my inability – first as a migration lawyer and then as a legal expert and researcher – to effectively put legal safeguards, in particular human rights, at work. While the existence of the gap between the theory and practice of law is part of the reality of modern law,[17] one needs, I believe, to find one's ways to make peace with the gap as an inherent feature of law. My own approach is to find ways of understanding the gap as a space of resistance and emancipatory change. Such approach has oriented this research and led me towards putting flux, movement, and mobility at the centre of analysis. Such a methodological perspective of mobility opens up a space of contestation. It destabilizes the main grounds of contemporary migration law, rooted in state-nation-community dynamics.[18] Destabilising legal concepts such as nation-state, citizenship, refugeeness and migration, allows an abandoning of the static perspective of law as a tool of the state, and highlights the gap between law and practice as a space of movement. Through such a perspective, law can be seen as inherently unstable; therefore, susceptible to changes. At the same time, it is important to understand that law's mobility, as I will explore later in this book, does not in itself guarantee emancipation. Law moves, but the directions and implications of this movement depend on many elements that are rooted in societal organization and societal interests and desires.[19]

Mobility turn

The increased focus of research on mobility and its multifaceted implications has been observable from early 2000 in the so-called *mobility turn* when social sciences responded to the "complex intersections of 'endless regimes of flow', which move at different speeds, scales, and viscosities."[20] This is understood as a context of increased mobility of various entities including humans, ideas, products. According to Mimi Sheller and John Urry, "the new mobilities paradigm must be brought to bear not only on questions of globalization and the deterritorialization of nation-states, identities, and belonging, but more fundamentally on questions of what are the appropriate subjects and objects of social

---

17 Reza Banakar, *Normativity in Legal Sociology: Methodological Reflections on Law and Regulation in Late Modernity* (New York, Dordrecht, London: Springer, 2015), 54.

18 Prem Kuman Rajaram, 'Refugee and Migrant Knowledge as Historical Narratives', in *Refugees and Knowledge Production: Europe's Past and Present*, ed. Magdalena Kmak and Heta Björklund (Abingdon, Oxon: Routledge, 2022).

19 Lefebvre, *The Image of Law*, 97.

20 Mimi Sheller and John Urry, 'The New Mobilities Paradigm', *Environment and Planning A: Economy and Space* 38, no. 2 (February 2006): 207–226, 213; see also Peter Adey et al., ed., *The Routledge Handbook of Mobilities* (Abingdon, Oxon: Routledge, 2014).

inquiry."[21] Mobility research is in turn closely related to the study of globalization and the unequal relationship between the movement of ideas, finance, and trade, versus the movement of people.

Today, research on law and globalization encompass not only the impact on law by different global actors but also the *mobility* of law: "flows and exchanges of norms and legal discourses across national borders" that impact the adoption, and transformation of legal norms at local, national, transnational, and international levels.[22] Besides, law and globalization contribute to the coexistence of national, regional, or global legal regimes that posit the state as one of several sources of law.[23] Unlike the study of globalization, however, the study of mobility considers movement and circulation as the ontological and epistemological condition of our societies;[24] hence, simultaneously turning attention towards individual mobilities and also corresponding immobilities. Recent research shows that mobility can be central to ones' identity and may constitute a way of life.[25] At the same time, increased mobilities of some are accompanied by increased immobilities of others due to, among others, their citizenship, gender, religion, as well as economic and legal status.[26] As part and parcel of these developments, law is simultaneously enhancing and speeding up, easing, limiting, and even stopping mobility completely. This has been most recently shown by the legal measures adopted to prevent the spread of COVID-19 virus on the one hand and the first-time application of temporary protection in the case of persons in a refugee situation from Ukraine on the other. The former has significantly limited mobility and the latter has enhanced it. It is, therefore, important to study such multifaceted relationship of law and mobility (and corresponding immobility) in political, societal, cultural, and economic spheres.

This book approaches critically the *mobility turn* in research as linked to globalization and the portrayal of mobility as synonymous to freedom. Following the work of Nicolas De Genova, Martina Tazzioli, and others, I approach mobility (together with movement and motion) as minor keywords – understood as concepts and categories that are widely used but require further critical theorization of their meaning and role.[27] For the authors, these minor

---

21 Sheller and Urry, 'The New Mobilities Paradigm', 212.
22 Julieta Lemaitre, 'Law and Globalism: Law without the State as Law without Violence', in *The Handbook of Law and Society*, ed. Austin Sarat and Patricia Ewick (Hoboken, NJ: John Wiley & Sons, Inc, 2015), 436.
23 Lemaitre, 438.
24 Sheller, *Mobility Justice*, 50, 98 (iBooks).
25 For mobility as a European way of life see Tuuli Lähdesmäki et al., *Europe from below: Notions of Europe and the European among Participants in EU Cultural Initiatives*, European Studies, vol. 38 (Leiden; Boston: Brill, 2021).
26 See for instance Dimitry Kochenov, *Citizenship*, The MIT Press Essential Knowledge Series (Cambridge, Massachusetts; London, UK: The MIT Press, 2019), 127–128.
27 Nicolas De Genova et al., 'Minor Keywords of Political Theory: Migration as a Critical Standpoint. A Collaborative Project of Collective Writing', *Environment and Planning C: Politics and Space*, 9 March 2021, 2.

keywords are crucial for understanding contemporary social and political phe-
nomena stemming from the global-as-postcolonial fact of migration.[28] From
this critical perspective, mobility must be disentangled from *freedom* – the idea
that has been underpinning the liberal thought and constituting the basis for the
European liberal subjectivity[29] – and be understood as a technique for govern-
ing different forms of movement. The use of mobility as a minor keyword or a
lens – through which different forms of governance of human movement are
being analysed – reveals not only the inherent instability of all societal forms of
ordering but also the power structure underlying practices and policies related
to movement[30] that are coded in law. It also reveals a characteristic of law as a
phenomenon that affects and is being affected by mobility.

The aim of the book

Despite the significant development in the field of mobility studies and its
expansion within other fields such as sociology and geography, the multifaceted
relationship between human mobility and law has not yet been comprehensively
approached and analysed within the broadly understood discipline of law. To
be sure, the amount of contemporary academic writing on migration has pro-
liferated to an extent that is sometimes difficult to follow, engage with and
contribute to the different strands of migration-related research. Similarly, the
research on international, transnational, or national migration and refugee law
is well established, and its scope has grown significantly over the last decades,[31]
following the increase in global migration movements in our "age of migra-
tion."[32] This concerns not only doctrinal legal research but also other legal
disciplines such as critical legal studies, sociology, and anthropology of law, or
feminist legal research. There has been, however, a gap in research on the
relationship between law and mobility and the need for such a more compre-
hensive focus has been recognized by the recent legal scholarship. The book
responds to an increasing interest in the movement of law. According to Olivia
Barr, "(…) the relationship between law and movement has shifted from no
relationship, to an unseen and hidden one, to one of destinations, and finally to

---

28 De Genova et al., 3.
29 De Genova et al., 38; Hagar Kotef, *Movement and the Ordering of Freedom: On
    Liberal Governances of Mobility*, Perverse Modernities (Durham, NC; London:
    Duke University Press, 2015).
30 De Genova et al., 'Minor Keywords of Political Theory', 37.
31 Anne-Marie Fortier, 'Migration Studies', in *The Routledge Handbook of Mobilities*,
    ed. Peter Adey et al. (Abingdon, Oxon; New York, NY: Routledge, 2014). See also
    for instance IMISCOE Research hub containing a constantly growing database of
    migration research, showing currently 124411 entries: https://www.imiscoe.org/resea
    rch/research-hub (accessed 11 August 2022).
32 Stephen Castles and Mark J. Miller, *The Age of Migration: International Population
    Movements in the Modern World*, 4th ed., Rev. & updated (New York: Guilford
    Press, 2009).

one of relentless and constant activity."[33] Yet, the work on *mobile law*, that looks at complexities and interrelations between the regimes of human mobility and law has not been very extensive.[34] In particular, and surprisingly, the mobile turn has not yet created a great number of theoretical analysis of the impact of human migration and movement on law, nor on the movement as an ontological quality of law.[35] For instance, there is a limited research on law in journals devoted to mobility studies such as *Mobilities* or in publications such as *The Routledge Handbook of Mobilities*.[36] One of the most seminal publications, which inspired this book title, is *Mobile People, Mobile Law*, first published in 2005, that takes an anthropological perspective on the functioning of law in the process of globalization, that is characterized as the increasing mobility of people, capital, technology, knowledge, and communication.[37] Another important, and more recent, publication is *A Jurisprudence of Movement: Common Law, Walking, Unsettling Place*, which focuses on movement as fundamental for the functioning of common law, in particular in the context of colonial legal inheritance in Australia.[38] Also importantly, *Movement and Ordering of Freedom: On Liberal Governances of Mobility*,[39] traces construction of liberal subjectivity in Europe as rooted in regulated mobility. *Spatial Justice: Body, Lawscape, Atmosphere* in turn discusses the conflict arising when different bodies move propelled by a desire to "*occupy the same space at the same time* [author's emphasis]."[40] Another recently published collective volume, *Refuge in a Moving World: Tracing Refugee and Migrant Journeys across Disciplines*,[41] deals with questions of movement and place in the context of migration. It focuses on both the concepts of "refuge" and a "moving world" – shifting from dominant and static concepts such as a "refugee" – and turning to the processes of mobility and migration "engaging with processes and experiences that can and do 'move us'."[42] Finally, within a field of International Migration Law, the 2017 AJIL *Symposium on Framing Global Migration Law*

33 Olivia Barr, *A Jurisprudence of Movement*, 2016, 145.
34 see however recently initiated University of Michigan *Journal of Law and Mobility* focusing on the relationship between transportation and mobility technologies as well as automated and connected mobility systems.
35 See however Lefebvre, *The Image of Law*; Fitzpatrick, *Law as Resistance: Modernism, Imperialism, Legalism*; Golder and Fitzpatrick, *Foucault's Law*. See however Center of Excellence for Global Mobility Law (MOBILE) at the Faculty of Law, University of Copenhagen, established in 2023.
36 Adey et al., *The Routledge Handbook of Mobilities*.
37 Von Benda-Beckmann, von Benda-Beckmann, and Griffiths, *Mobile People, Mobile Law*.
38 Barr, *A Jurisprudence of Movement*, 2016.
39 Kotef, *Movement and the Ordering of Freedom*.
40 Andreas Philippopoulos-Mihalopoulos, *Spatial Justice: Body, Lawscape, Atmosphere*, (Abingdon, Oxon: Routledge, 2015), 3.
41 Fiddian-Qasmiyeh, *Refuge in a Moving World*.
42 Fiddian-Qasmiyeh, 6; See also Paolo Boccagni and Loretta Baldassar, 'Emotions on the Move: Mapping the Emergent Field of Emotion and Migration', *Emotion, Space and Society* 16 (August 2015): 73–80.

is an attempt to conceptualize the Global Migration Law as a discipline. The Global Migration Law, as understood by the editors and authors, encompasses a multiplicity of legal measures at different levels of law, including international, regional, bilateral, transnational, national and subnational, state, and non-state.[43] Notably, the symposium's interventions underline the need for a shift in the understanding of global migration law by moving the emphasis from migration to mobility and i.e. from a state-centric approach towards a human mobility-centric.[44]

The aim of the book is to fill in the gap in research on the relationship between law and mobility and understand the multifaceted ways in which law and mobility function together. The point of departure for this task is the migration law, traditionally understood as a tool to regulate human movement across borders and territories and to define the rights and limits related to such movement. With the recently proposed theory of kinopolitics,[45] and the emergence and development of mobility studies as a discipline,[46] a broader perspective on the relationship between law and human mobility is needed. It calls for a perspective that shifts the focus from the narrow subject of migration towards the concept of mobility encompassing the processes, effects, and consequences of movement in a globalized world.[47]

The book builds on my earlier research focusing on processes of (im)mobility, marginalization, or discrimination but also knowledge production through law.[48] Adopting comprehensively a lens of mobility and mobility justice allows me to relook at these practices anew and understand them better. As a result, movement, mobility, and a figure of a migrant become the centre of analysis, and a static perspective on law as a sovereign product of a nation state is abandoned. Mobility can also provide a new method of studying law, including the development of legal concepts or changes in legal practices through

43 Jaya Ramji-Nogales and Peter J. Spiro, 'Introduction to Symposium on Framing Global Migration Law', *AJIL Unbound* 111 (2017): 1–2.
44 T. Alexander Aleinikoff, 'Toward a Global System of Human Mobility: Three Thoughts', *AJIL Unbound* 111 (2017): 24–28, 25.
45 Nail, *Being and Motion*; Nail, *The Figure of the Migrant*.
46 Sheller and Urry, 'The New Mobilities Paradigm'.
47 Adey et al. 'Introduction' in the *The Routledge Handbook of Mobilities*.
48 Magdalena Kmak, 'Between Citizens and Bogus Asylum Seekers: Management of Migration in the EU through the Technology of Morality', *Social Identities* 21, no. 4 (2015): 395–409; Magdalena Kmak, 'Migration Law as a State (Re)Producing Mechanism', in *Migration, Identity, and Belonging: Defining Borders and Boundaries of the Homeland* (Routledge, 2020); Magdalena Kmak, 'The Impact of Exile on Law and Legal Science 1934–1964', in *Roman Law and The Idea of Europe* (Bloomsbury Academic, 2019); Dorota Gozdecka and Magdalena Kmak, eds., *Europe at the Edge of Pluralism 2015* (Cambridge; Antwerp; Portland: Intersentia Ltd, 2015); Dorota A. Gozdecka, Selen A. Ercan, and Magdalena Kmak, 'From Multiculturalism to Post-Multiculturalism: Trends and Paradoxes', *Journal of Sociology* 50, no. 1 (1 March 2014): 51–64; Dorota A. Gozdecka and Magdalena Kmak, 'Law and the Other', *No Foundations Journal*, no. 15 (2018).

voluntary and forced mobility of legal scholars[49] and others who experience, think, talk, and write about law.[50] Methodologically, the book is inter-disciplinary and uses tools from migration and refugee law, migration, citizen-ship, and exile studies, border studies and mobility studies, legal philosophy and theory, legal sociology, and legal ethnography as well as legal history. The *law* in this book does not refer only to the black-letter law or jurisprudence, but also to writings of legal scholars, soft law, and legal education. In concrete terms, the book turns its focus to (1) studying legal regulations and legal insti-tutions such as nation-state or citizenship as fundamentally unstable and in constant process of construction and deconstruction; (2) putting particular attention on existing power-relations between different laws and regulations; (3) studying not only the movement but also corresponding (im)mobilities that are generated by law; and (4) studying law as known to or experienced by mobile persons themselves. The book's focus is limited to international and transna-tional mobility that requires crossing international borders. I acknowledge that differential mobility of people that is intimately linked with the ways that law is mobile do take place within territories of states, cities, neighbourhoods, or vil-lages,[51] but they remain outside the scope of the book. As a researcher located in the EU and specialising in the EU migration regime, I limit my focus to laws and practices of Europe and the EU with additional case-studies from other regions of the global North, such as the USA or Australia. To be sure, the exclusionary migration regime I discuss in this book is the regime of the global North, representing the interests and aimed at benefitting the global North itself. Similarly, the modes of contestation and resistance as well as knowledges and experiences concern the migration regime in the global North and are aimed at problematizing the interests of this regime and revealing its dominating and exclusionary character.[52]

Theoretical framework

Theoretically the book departs from the concepts of *kinopolitics* and *kinology*, developed by Thomas Nail. Kinology understands the movement and motion as a primary ontological condition and constructive force behind political and

---

49 See for instance Tuori, *Empire of Law: Nazi Germany, Exile Scholars and the Battle for the Future of Europe*.

50 For the embodied experience of migration regime see for instance Behrouz Boochani, Omid Tofighian, and Richard Flanagan, *No Friend but the Mountains: Writing from Manus Prison* (Toronto, Ontario: House of Anansi Press Inc, 2019).

51 Sheller, *Mobility Justice*.

52 See for instance Thomas Spijkerboer, 'The Geopolitics of Knowledge Production in International Migration Law', in *Research Handbook on the Law and Politics of Migration*, by Catherine Dauvergne (Edward Elgar Publishing, 2021): 172–188; Achille Mbembe, 'The Idea of a Borderless World', *Africa Is a Country*, 2018, http s://africasacountry.com/2018/11/the-idea-of-a-borderless-world (accessed 18.12.2022).

social systems. From this perspective, mobility is primary and stability is secondary and something that needs to be explained and justified.[53] As Nail writes "[e]ither we begin with discrete and static being and have to say that real motion is an illusion, or we begin with flow and are able to explain stasis as relative or folded forms of movement."[54] In the context of this book such approach implies that forms traditionally considered as static – such as state, citizenship, or border – have an unstable nature. More concretely, Nail explains in *Being and Motion*, when describing a thing, a being, or an entity, one should not be asking questions such as "what is x?" as these questions try to determine the essence of the thing x. Because beings do not have essence and they are nothing else but movements, the questions asked should be instead: "What can it *do*? How can it *move*? (…) *To describe a thing is simply to identify its kinetic capacities and the field of circulation that orders it* [emphasis mine]."[55] In other words, beings are not stable and can be characterized as a *continuous modification* in time. They only appear stable in order to be perceived as a thing, not a progress.[56] On a societal level the lens of kinopolitics helps to understand societies as "regimes of motion" that expand their territorial, political, economic, and juridical power through different forms of exclusion.[57] I use this approach to analyse law but also such legal categories as the nation-state, citizenship, or a foreigner. I combine this approach with the theory of mobility justice developed by Mimi Sheller,[58] that "focuses attention on the politics of unequal capabilities for movement, as well as on unequal rights to stay or to dwell in a place."[59] From this perspective the questions posed by Nail – how can a thing move and what can it do through this movement – requires shifting attention from nation-state, citizenship, and borders towards unequal mobility that is produced by these institutions in order to be *perceived* as stable.

The starting point for analysis of unequal mobility is the distinction between orderly and disorderly mobility, a legacy of modernity/coloniality.[60] In her book *Asylum after Empire,* Lucy Mayblin shows how the dialectical relationship between modernity and coloniality has constructed the relationship between modern law and modern subject and became the backbone of the contemporary nation-state system. Modern/colonial nation-state is based on juridico-political concept of citizenship that represents the order of universalism inherently based

---

53   Nail, *Being and Motion*; Sheller, *Mobility Justice*
54   Nail, 57.
55   Nail, 124.
56   Alexandre Lefebvre, *The Image of Law: Deleuze, Bergson, Spinoza*, Cultural Memory in the Present (Stanford, Calif: Stanford University Press, 2009), 94.
57   Nail, *The Figure of the Migrant*, 24.
58   Sheller, *Mobility Justice*.
59   Sheller, 31 (iBooks).
60   Lucy Mayblin, *Asylum after Empire: Colonial Legacies in the Politics of Asylum Seeking*, Kilombo: International Relations and Colonial Questions (London; New York: Rowman & Littlefield International, 2017), 30.

on differentiation between the colonizers and the colonized and on subjugation of colonial or post-colonial subjects.[61] The only mobility that is accepted within this framework of citizenship is *orderly* mobility. As Hagar Kotef argues in *Movement and Ordering of Freedom* orderly mobility is an immanent feature of liberal subjectivity of the modern citizen and the condition for belonging in the modern community of nation-states.[62] As Kotef shows, historically, the liberal subject could not have been separated from its corporeal dimension – the capacity for movement – which together with other conditions, such as material, racial, geographic, and gender, linked freedom to the movement of some (free, white, male) subjects.[63] John Stuart Mill considered such capacity for movement as not only constitutive of these individual subjects but more broadly for Europe as such, calling it "a site of motion."[64] In Europe, the perpetual and non-homogenous movements of people facilitated and contributed to a homogenous movement of the society as a whole that has been equalled with progress. At the same time, the rest of the world remains stationary.[65] On an individual level, mobility became, therefore, an ordered or stable movement, leading to the formation of a liberal subject as epitomising an ordered freedom.[66] The liberal modern citizens have been defined by their movement in an orderly manner as regulated by law. At the same time, other(ed) subjects, "African, indigenous Americans, or Asians, as well as women or paupers, kept appearing in the texts of liberal thinkers as either too stagnant or too mobile," thus, not fitting into the European liberal subjectivity.[67] Similarly, Thomas Nail shows the intersectional aspect of disorderly mobility through the connection between early migration and anti-vagabond laws in Europe.[68] Disorderly mobility is, therefore, incompatible with modern liberal subjectivity and is a characteristic feature of coloniality. Indeed, such a perspective is also very much visible today, where the Western citizen is generally the most mobile, but their mobility is regulated and often related to stability and sedentarism,[69] and is constitutive of liberal communities as nations and states.[70]

Orderly migration becomes the only form of movement that the modern law, linked to citizenship, can accept. Disorderly, irregularized mobility not only disobeys law (regional, national, etc), but also disobeys the national order of things as people remain, without permission, outside of their assigned place in

61 Ranabir Samaddar, *The Postcolonial Age of Migration* (Abingdon, Oxon; New York: Routledge, 2020), 8.
62 Kotef, *Movement and the Ordering of Freedom*, 5.
63 Kotef, 5.
64 Kotef, 7.
65 Kotef, 7.
66 Kotef, 9.
67 Kotef, 9.
68 Nail, *The Figure of the Migrant*, 206.
69 Kotef, 10.
70 Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press, 2008), 44.

the world.[71] This is enshrined in many contemporary legal documents that only accept orderly and regular migration. For instance, the Global Compact for Safe, Orderly and Regular Migration of 2016 aims to "facilitate safe, orderly and regular migration," that is understood as taking place in a well-informed, planned, and consensual manner. At the same time, it aims to reduce "the incidence and negative impact of irregular migration." Therefore, orderly, and regular migration is the right form of mobility that needs to be facilitated, in this context, through the soft legal measures of the Global Compact.[72] At the same time, mobility that is irregularized and considered disorderly is fought against, and securitized and criminalized migrants and those seeking asylum are systematically stripped of rights. Whereas in the case of orderly mobility, human rights operate smoothly, in the case of disorderly mobility they do not apply or apply only minimally. This has been recently shown, for instance, in judgments *N.D. and N.T. v. Spain*[73] and *A.A. and Others v. North Macedonia*[74] by the ECtHR. In these judgments, the ECtHR argued that migrants and asylum seekers' own culpable conduct has put them in jeopardy which, therefore, excluded them from protection against collective expulsion based on article 4 of the Protocol 4 to the ECHR.[75] In other words, instead of human rights protection being granted based on human dignity, the protection is granted based on good behaviour understood as orderly mobility. The argument I am making here does not mean that I am against *orderly* and support *disorderly* migration. I believe that everyone should have an equal opportunity for safe and *orderly* mobility. What I am against is the presupposition, based on citizenship, gender, race, or wealth, that some inherently move in *disorderly* or *orderly* fashion. This presupposition not only results in the regulation of the movement of people as always already orderly or disorderly but also in the legal construction of their movement in law as such.[76] In this context, I am interested in how the distinction between orderly and disorderly mobility is enshrined in the legal acts and documents, and how law and (dis)orderly mobility affect and orientate one another.

71 William Walters, 'Deportation, Expulsion, and the International Police of Aliens', *Citizenship Studies* 6, no. 3 (2002): 265–292; Nanda Oudejans, 'The Right Not to Have Rights: A New Perspective on Irregular Immigration', *Political Theory* 47, no. 4 (August 2019): 447–474.
72 UN General Assembly, 'Global Compact for Safe, Orderly and Regular Migration', Pub. L. No. A/RES/73/195 (2018).
73 N.D. and N.T. v. Spain, No. 8675/15; 8697/15 (European Court of Human Rights 13 February 2020).
74 A.A. and Others v. North Macedonia, No. 55798/16 (European Court of Human Rights 7 May 2022).
75 N.D. and N.T. v. Spain at 231.
76 Thomas Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalization of Migration Control', *European Journal of Migration and Law* 20, no. 4 (29 November 2018): 452–469; See also Dauvergne, *Making People Illegal*.

I argue that orderly and disorderly mobility is produced and regulated by law for the purpose of stabilising the nation-state. The operation of the *nation-state machine* and the *global mobility infrastructure* that I discuss in the book reveals the intimate relationship between law, the processes of global mobility management, mobility infrastructure, and the position of a nation-state in the globalized world. Thomas Spijkerboer postulates that an understanding of the contemporary production of orderly (desired) and disorderly (undesired) mobilities requires focusing on a wider set of laws and policies regulating global human mobility that manifest themselves in the global mobility infrastructure.[77] For Spijkerboer, the development of the global mobility infrastructure has fostered the expansion of human mobility but also allowed using the infrastructure as a mode of distinction between different forms of movements based on race, gender, and class. In the case of orderly mobility, visible infrastructure (biodocuments, digital borders, airports etc.) enhances movement and the ability to enter from one country to another. Disorderly (colonized, racialized, gendered, or classed mobility) on the other hand is forced to use the *shadow mobility infrastructure* (dinghies, passport copies, tarpaulins, or shipping containers).[78] The latter case is a result of law and infrastructure's aim to control disorderly mobility, stop it altogether, or exploit it as labour force.[79] This has been clearly visible recently in instances such as the closing of the border with Turkey by Greece in March 2020 or the border with Belarus by Poland in July 2021, both in violation of international legal obligations. Whereas the Greek move was appraised by the Head of the European Commission, Ursula van der Leyen as an act of "shielding Europe," the pushbacks at the Polish-Belarussian border were deemed as violating the ECHR in the judgment *MK v. Poland*.[80] On a larger scale, the resistance against disorderly mobility is shown also, for instance, in the wall-building attempts, such as at the EU borders[81] or the border between US and Mexico, in Australia's "Pacific solution," ongoing externalization of EU migration policies, or the EU Border Agency Frontex complicity in illegal pushback operations in the Mediterranean[82] or the UK protection externalization scheme as outlined in the agreement with Rwanda. These developments illustrate also a more general tendency to move law outside the territorial jurisdiction of states, with the

---

77 Spijkerboer, 'The Global Mobility Infrastructure'.
78 Spijkerboer, 461.
79 Sandro Mezzadra and Brett Neilson, *Border as Method, or, the Multiplication of Labor*, 2013; Samaddar, *The Postcolonial Age of Migration* 61 and following; Nadine El-Enany, *(B)Ordering Britain: Law, Race and Empire*, 2020, 13.
80 M.K. and Others v. Poland, No. 40503/17, 42902/17 and 43643/17 (European Court of Human Rights 23 July 2020).
81 Agence France-Presse in Helsinki, 'Finland Passes Law to Bolster Border Fence with Russia', *The Guardian*, 7 July 2022, https://www.theguardian.com/world/2022/jul/07/finland-passes-law-to-bolster-border-fence-with-russia (accessed 18.12.2022).
82 'EU Border Agency Frontex "Covered up" Greek Pushbacks: Reports', *Euractive.Com*, 29 July 2022, https://www.euractiv.com/section/justice-home-affairs/news/eu-border-agency-frontex-covered-up-greek-pushbacks-reports/ (accessed 18.12.2022).

aim of diffusing or relieving the state of legal liability and human rights obligations towards people on the move.[83] These measures are, however, also resisted by mobile actors. To be sure, disorderly mobility is not only a product, but also in itself a resistance to the national order of things having its origins in modernity/ coloniality. As I argue in the book, migrants' resistance cannot be conceptualized as being solely reactionary to the practices of bordering described above, as it also anticipates many of the control measures. The very fact of mobility across borders is a critique in itself and transgression of a system where movement is regulated based on citizenship and exclusively defined by territorial affiliation. As highlighted in the No Border Manifesto, "For every migrant stopped or deported, many more get through and stay, whether legally or clandestinely. Don't overestimate the strength of the state and its borders. Don't underestimate the strength of everyday resistance."[84] Therefore, even though the nation-state machine works through the system of differential inclusion and exclusion, the migrant within such a system is also an active agent of resistance.

To be sure, inclusion and exclusion as outcomes of these legal processes support the maintenance of identity and stability of the nation-state by controlling movement and regulating migration through its borders. At the same time the sovereignty of the nation-state is challenged through unstoppable movement across its borders. The picture becomes even more fragmented when one shifts from the *perceived* stability of the nation-state to the *perceived* stability of law. Law has been presenting itself as static due to its traditional linkage with the nation-state and the state territory.[85] In addition, the perceived stability of law is also a result of the function of law in the democratic state, where law has to be clear, stable, public, and universal.[86] The purpose of these features is to guarantee equality and non-discrimination; however, these guarantees are often not realized in concrete embodied, material situations.[87] The mobility lens helps to understand how law moves and what it does do through this movement. In particular it helps to change the perspective from the universal mobile subject to mobility's further concrete materializations in the lives of those who are moving across international borders. It also allows to inquire into the methods and strategies through which mobilities can resist, affect, or change law.

The structure of the book

My theoretical and methodological approach generates three (interrelated) implications that orient the contents of the book: (1) mobility is a quality of

---

83 Gammeltoft-Hansen and Vedsted-Hansen, *Human Rights and the Dark Side of Globalization*, 5.
84 Tamara Carauş and Elena Paris, eds., *Migration, Protest Movements and the Politics of Resistance: A Radical Political Philosophy of Cosmopolitanism* (Abingdon, Oxon; New York: Routledge, 2019), 15.
85 Barr, *A Jurisprudence of Movement*, 140.
86 Fitzpatrick, *Law as Resistance: Modernism, Imperialism, Legalism*, 169–170
87 Philippopoulos-Mihalopoulos, *Spatial Justice: Body, Lawscape, Atmosphere*, 36.

law and law itself is seen as mobile both in single jurisdictions (for instance in the instability of legal regulations and institutions) and throughout all jurisdictions (for instance in the mobility of legal concepts and the meetings of laws); 2) legal institutions and concepts have their origins in modernity/coloniality, and construct desired and undesired mobilities and immobilities; 3) focus is shifted from legal institutions to mobile subjects and mobility is approached as resistance. The book is divided into five chapters, each dealing with one aspect of the relationship between law and mobility. The first chapter focuses on instability of the nation-state and on mobility of law as well as their implications for the construction of universal mobile subjects and for resistance. The second and third chapters discuss the exclusionary character of the migration law of the global North characterized by unequal human mobility. Finally, chapters four and five challenge these dominant perspectives on law regulating mobility and discuss mobility as resistance to law and as a method of producing legal knowledge. The order of chapters does not mean that I consider resistance as secondary or reactionary to the bordering and othering measures. Such structure, where the hegemonic thoughts, practices, and the forms of ordering of human mobility are introduced first and the alternative ideas and measures are introduced later, serves the clarity of the argument that will be, nevertheless, deconstructed at the end of the book. Concluding reading the book, the reader's preconceptions about law and resistance are hopefully challenged by ideas and practices of mobility when mobility rather than stability becomes a dominant perspective on community, law, and subjectivity.

Chapter 1 *Mobility as a quality of law* introduces the concept of mobile law and challenges the perception of law's stability.[88] In this chapter I apply mobility lens to the relationship between law and the nation-state, that affects our dominant thinking about law as stable. With the use of the concept of the nation-state machine.[89] I show how the nation-state itself is an unstable entity produced through the processes of discursive and non-discursive practices that aim at homogenization and stabilization of the state. This encompasses continuous interactions between state's various elements such as persons, material and symbolic artefacts, and the ways they are regulated by rules or historical narratives.[90] Law is one of such discursive practices that can sort people into categories and produce concepts such as a citizen or a foreigner. It can also regulate the movement of people or goods across national borders, consolidating

---

88 Olivia Barr, 'Movement. An Homage to Legal Drips, Wobbles and Perpetual Motion', in *Routledge Handbook of Law and Theory*, ed. Andreas Philippopoulos-Mihalopoulos, Routledge Handbooks (Abingdon, Oxon; New York, NY: Routledge, 2019), 139.

89 Gilles Deleuze and Felix Guattari, *Anti-Oedipus: Capitalism and Schizophrenia*, trans. Robert Hurley, Mark Seem, and Helen Lane, 6th printing (The Athlone Press, 2003), 142.

90 Manuel De Landa, *Assemblage Theory*, Speculative Realism (Edinburgh: Edinburgh University Press, 2016), 2, 20.

the state and providing it with a stable form and identity.[91] Revealing the unstable quality of the state contributes to the shift of perception of law as mobile. I then turn to discuss different ways that one can approach law as mobile. Based on the literature on law and movement, I identify four such ways. The first one is a movement of law embodied by people who are on the move. The second is mobility fostered by movements of transnational organizations, their epistemic and physical infrastructure. The third way of movement is embedded in law's interactions with other laws – the meetings of laws – at the borders but also elsewhere. Finally, the fourth way is an understanding of law as ontologically mobile. This manifests itself in jurisprudence exposing both openness and closeness of legal concepts. Through all these interlinked perspectives, law is being turned from static to mobile by shifting from objective and universal rules and regulations to concrete cases, concrete legal decisions, and concrete bodies. Chapter 1 thereby focuses on outlining the implications of such a mobile turn of law, focusing on the role of law for the creation of the universal mobile subject and then for its further concrete materializations in the lives of those who are moving across international borders, looking in particular at the potential of mobility for resistance.

Chapters 2 and 3 critically analyse the role of law in relation to human mobility, traditionally understood as regulating the substantive and procedural conditions for movement and residence within and across national borders. In these two chapters, I show how a shift of perspective – from the content of legal rules and procedures to their productive function – reveals how law constructs both mobilities and immobilities. By focusing on *Mobility as a right* in Chapter 2 and *Mobility as a violation of law* in Chapter 3, this book shows the construction of, respectively, orderly, and disorderly mobility. It also shows how the distinction between these two forms of mobility serves to maintain the nation-state. The chapters also show how a shift of perspective from static to mobile reveals the primary instability of institutions currently constitutive of the nation-state – that of citizenship and borders – and how they remain in a constant process of construction and deconstruction, impacted by the shifting dynamic of mobility.

In Chapter 2 *Mobility as a right*, I argue for the conceptual shift from the right to the freedom of movement to mobility as a right. Mobility as a right has its background in the asymmetrical right to the freedom of movement, understood as ordered, stable, and rooted in territorially constructed citizenship. I approach citizenship as an institution that has been historically constructed in law as differential inclusion of some and exclusion of others. I draw my analysis of citizenship on Hagar Kotef's genealogy of liberal subjectivity based on regulated and orderly movement as a condition for belonging.[92] At the same time, by looking at citizenship through the lens of immobility I show how citizenship

---

91   De Landa, 38–39.
92   Kotef, *Movement and the Ordering of Freedom*.

has been gendered, racialized, or minoritized and how these facets affect the contemporary right to the freedom of movement.[93] I also analyse what this conceptual shift reveals: the productive function of international and national legal regulations on obtaining and losing citizenship that sets conditions for mobility of some and immobility of others. As case studies I use two sets of rules that recently gained prominence (1) allowing for acquiring citizenship through investment, and (2) allowing for removal or revocation of citizenship if it is conducive to the public good. The chapter demonstrates the contradictions embedded in the concept of citizenship and the waning justifications for its existence.[94]

Chapter 3, *Mobility as a violation of law*, continues exploring the mobility and movement of law as rooted in the relationship between the nation-state, citizenship, mobility, and migration. This chapter turns however from citizenship towards state sovereignty and borders. In other words, it explores these movements that are considered as violating existing laws. What constitutes such violation depends on the national and international rules governing migration, that increasingly criminalize and illegalize certain mobilities.[95] The chapter focuses on production of disorderly mobility that happen, first, at the border which constitutes a meeting place for the multiplicity of laws determining the status of the person and deciding on belonging and non-belonging, and consequently on rights related to movement. Second, the chapter focuses on what happens outside of the border where deterrence measures and overall externalization of protection takes place. Whereas at the border, "there is a relation between international law, the status of the person and the domestic laws in place: a meeting of laws" that has a productive function of filtering desired from non-desired migrants,[96] moving law outside the border aims to avoid such legal encounters and in consequence to prevent the emergence of any obligations towards those on the move.[97] The chapter then traces the operation of contemporary processes of bordering that function through securitization and criminalization, deterrence and exterritorialization of protection as well as the overspill of migration law into other areas of law. These measures enable the state to both reproduce and reinvent itself through positing migration at its centre. Processes of bordering leading to the multiplication of borders[98] constitute a basis for such states' reproduction and reinvention.[99]

---

93 See for instance Sheller, *Mobility Justice*; Kochenov, *Citizenship*, 127–128
94 See also Kochenov, *Citizenship*, xii, xv.
95 See for instance Katja Franko, *The Crimmigrant Other: Migration and Penal Power*, Key Ideas in Criminology (Abingdon, Oxon; New York, NY: Routledge, 2020).
96 Barr, *A Jurisprudence of Movement*, 2016, 39.
97 Gammeltoft-Hansen and Vedsted-Hansen, *Human Rights and the Dark Side of Globalization*, 5.
98 Mezzadra and Neilson, *Border as Method, or, the Multiplication of Labor*.
99 Kmak, 'Migration Law as a State (Re)Producing Mechanism'.

Chapters 4 and 5 shift the focus from the state and law to mobile subjects. They approach mobility (1) as a form of resistance; and (2) the way of the production of embodied knowledge. Chapter 4 *Mobility as a resistance to law* builds on findings of the previous chapters and poses a question on the possibility of resistance to the institutions of citizenship, state, and borders, both from within and from outside law. Whereas in the previous chapters of the book I show how the forms of mobility that are not streamlined and orderly are considered a violation of state sovereignty and law designed to implement it, Chapter 4 focuses on mobility as a force that can resist this law. But I am not aiming solely to juxtapose mobility and law but also to think whether mobility can serve as resistance from within law.

Chapter 4 conceptualizes two levels of resistance: resistance against law setting up the national order of things and the global mobility infrastructure; and resistance against the national order of things in itself. Analysing resistance from within law I ask which types of resistance are possible if we chose to stay within the nation-state system rooted in modernity/coloniality. I argue that resistance in a form of human rights can be effectively claimed only by those who move in an orderly fashion and are, therefore, included into the global mobility infrastructure. In the case of others, the protection can be minimal or non-existent and the role of human rights is often taken by humanitarianism. The chapter then turns from resistance within the system of human rights law towards resistance from outside law. This move is inspired by movements such as *Sans-Papiers* and a great body of work within the field of mobility studies focusing on mobility and movement opposing the static system of statehood and law. This includes for instance the work on autonomy of migration,[100] the acts of everyday citizenship,[101] or autonomous solidarities with migrants.[102] Is it, however, possible to resist the national order of things not only from within the existing human rights framework or from the outside, through actions taken against or despite the legal rules and legal practices, but also from the inside, through the legislative changes and the legal practice itself? In other words, is there an emancipatory potential within law that could overcome the national order of things? Can law itself be used as resistance by destabilising its premises and principles such as citizenship and statehood? In this context the chapter moves to discussing the possibility of resistance through law by referring to the scholarship on right to have rights[103] and right not to have rights,[104]

---

100 De Genova, *The Borders of 'Europe'*.
101 See for instance Nyers and Rygiel, *Citizenship, Migrant Activism and the Politics of Movement*; Rigo, 'Citizens despite Borders: Challenges to the Territorial Order of Europe'.
102 See for instance Dadusc and Mudu, 'Care without Control'.
103 Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law*; Gündoğdu, *Rightlessness in an Age of Rights*.
104 Oudejans, 'The Right Not to Have Rights'.

right to social membership,[105] and concepts such as illegal,[106] transgressive citizenship,[107] and belonging based on distributive justice.[108]

The final chapter, *Mobility as a method of legal knowledge production*, analyses a particular form of resistance to the static concept of the nation-state that is brought by experiences and knowledges of people on the move. Such perspective emphasizes both the agency of the mobile person and approaches mobility through a novel perspective as a method of studying and producing law.[109] After conceptualising the epistemological role of mobility for knowledge production in general, the chapter takes on juxtaposing the dominant and mobile knowledges. In particular, in reference to previous chapters of this book, it recounts the dominant knowledges of migrants and persons in refugee situation that are perpetuated by media and politicians that are then challenged by knowledges constructed through the process of mobility. Mobility as a mode of knowing or the production of knowledge through mobility is not a new field of study, and movement or circulation of human beings has been recognized as a necessary element of the transfer of valuable knowledge.[110] This chapter demonstrates the direction in research that studies more comprehensively the knowledges produced through the experience of forced displacement and migration, or the knowledges facilitating the movement itself. Through the focus on mobile epistemology or mobile knowledges, this chapter juxtaposes methodological nationalism and the state-based concept of belonging[111] with communities of knowledges[112] that encompass not only knowledges of law but also experiences of living and acting with, along, or against law. By countering

105 Carens, *The Ethics of Immigration*.
106 Rigo, 'Citizens despite Borders: Challenges to the Territorial Order of Europe'.
107 Rygiel, 'Dying to Live: Migrant Deaths and Citizenship Politics along European Borders: Transgressions, Disruptions, and Mobilizations'.
108 E. Tendayi Achiume, 'Migration as Decolonization', *Stanford Law Review* 71 (2019): 1509–1574.
109 Kader Konuk, 'Jewish-German Philologists in Turkish Exile: Leo Spitzer and Erich Auerbach', in *Exile and Otherness: New Approaches to the Experience of the Nazi Refugees* (Oxford: Peter Lang, 2005).
110 See for instance Peter Burke, *A Social History of Knowledge II: From the Encyclopaedia to Wikipedia* (Cambridge: Polity Press, 2012); Peter Burke, *Exiles and Expatriates in the History of Knowledge, 1500–2000*, The Menahem Stern Jerusalem Lectures (Waltham, Massachusetts: Brandeis University Press/Historical Society of Israel, 2017).
111 Andreas Wimmer and Nina Glick Schiller, 'Methodological Nationalism and beyond: Nation-State Building, Migration and the Social Sciences', *Global Networks* 2, no. 4 (October 2002): 301–334.
112 Tekalign Ayalew Mengiste, 'Refugee Protections from Below: Smuggling in the Eritrea-Ethiopia Context', *The ANNALS of the American Academy of Political and Social Science* 676, no. 1 (March 2018): 57–76; Nicos Trimikliniotis, Dimitris Parsanoglou, and Vassilis Tsianos, 'Mobile Commons and/in Precarious Spaces: Mapping Migrant Struggles and Social Resistance', in *Politics of Precarity: Migrant Conditions, Struggles and Experiences* (Leiden: Brill, 2017).

the official knowledges, mobile knowledges contribute to the resistive tension that lies at the very centre of power relations in the state.[113] Importantly, the knowledges of law gained through mobility cut across the divide between mobility as resistance from the outside of law and from within law and therefore allow for more complex and multifaceted perspectives on law as resistance. Therefore, the chapter develops a more comprehensive understanding of movement and mobility as the method of studying and resisting law of the global North and outlines methodological and ethical concerns for studying such knowledges.

---

113 Simon Thorpe, 'In Defence of Foucault: The Incessancy of Resistance', *Critical Legal Thinking* (blog), 2 July 2012, https://criticallegalthinking.com/2012/02/07/in-de fence-of-foucault-the-incessancy-of-resistance/ (accessed 18.12.2022).

Chapter 1

Mobility as a quality of law

Introduction

This chapter introduces the concept of mobile law and challenges the perception of law's stability.[1] It provides theoretical underpinnings for further analysis, that will allow me to delve more deeply into different aspects of this complex and multifaceted relationship between law and mobility. I argue that approaching law as mobile is needed for a better understanding of power relations that are playing out in law, between laws, or between law, society, politics, and economy as a whole. In particular, the concept of mobile law allows better understanding of power relations that are embedded in human mobility[2] which govern the ways both humans and law move. To be sure, law's movements manifest in a variety of ways: through the movement of people carrying law, through jurisprudence, through the meetings of law, or through resistances, breakdowns, and transformations. It is important therefore, to pay attention to the movement of law and understand the theoretical and methodological implications that this movement has for studying and working with law.

If, as Thomas Nail and other scholars argue that motion is fundamentally constitutive of all beings,[3] law has to be mobile as well.[4] The one field where the mobility of law has been discussed early on is legal anthropology. As editors of the book *Mobile People Mobile Law* argue, "[t]hroughout history, law has always been mobile." Mobile law has been transported through trading relations as well as having moved during hegemonic expansions of states. Laws,

---

1 Olivia Barr, 'Movement. An Homage to Legal Drips, Wobbles and Perpetual Motion', in *Routledge Handbook of Law and Theory*, ed. Andreas Philippopoulos-Mihalopoulos, Routledge Handbooks (Abingdon, Oxon; New York, NY: Routledge, 2019), 139.
2 See also N De Genova et al., 'Minor Keywords of Political Theory: Migration as a Critical Standpoint A Collaborative Project of Collective Writing', *Environment and Planning C: Politics and Space*, 9 March 2021, 37.
3 Thomas Nail, *Being and Motion* (New York, NY: Oxford University Press, U.S.A., 2019), 2.
4 Barr, 'Movement. An Homage to Legal Drips, Wobbles and Perpetual Motion', 139.

sets of legal institutions, and entire legal systems were moved across national borders in all periods of history.[5] But law has not only been mobile by being moved through different territories – mobility has been also imprinted in law and legal practice. For instance, according to Emilia Mataix Ferrándiz "Roman jurists did not understand the world as static—their interest was not in taxonomy. Theirs was a world in motion. That motion was manifested in the different solutions that (…) reflect a conformity to law but allow a recognition of the gaps between social and legal facts."[6]

Why, then, does law presents itself as static? To be sure, it is difficult to notice the movement of law due to its traditional understanding as a tool of a state, usually itself considered as a stable form of societal organization.[7] The linkage of law with the nation-state and the state territory, that results in stabilising and solidifying law, is crucial for the construction of the modern nation-state where the nation, its identity, is perceived as something unified and singular.[8] In the contemporary definition of the nation-state in international law, the state consists of a government of people inhabiting a particular territory. To produce and maintain the *perception of stability* of the nation-state national and international law regulates the access to state membership and controls the movement across geographical borders. In other words, the perception of stability of the nation-state emerges from the attempt to define an inherently unstable concept of a nation, and law constitutes one of the tools to do so.[9] In addition, the democratic government is based on the rule of law, where law has to be clear, stable, public, and universal – features that hide the mobility of law.[10] The purpose of these features is to guarantee equality and non-discrimination. However, the guarantees are often not realized in concrete embodied, material situations. For that reason, as Andreas Philippopoulos-Mihalopoulos argues "…law always dissimulates its materiality, because of its apparent incompatibility between that and universality."[11] In this context, the response to the question – why is law not moving? – is simply that the stability of law is, first and foremost, a disguise that is caused by law's linkage with the

5   Franz von Benda-Beckmann, Keebet von Benda-Beckmann, and Anne Griffiths (eds.), *Mobile People, Mobile Law: Expanding Legal Relations in a Contracting World*, (Abingdon, Oxon; New York, NY: Routledge, 2005), 7.
6   Emilia Mataix Ferrándiz, *Shipwrecks, Legal Landscapes and Mediterranean Paradigms: Gone under Sea*, Mnemosyne Supplements History and Archaeology of Classical Antiquity, volume 456 (Leiden, The Netherlands; Boston: Brill, 2022), 69.
7   Barr, 'Movement. An Homage to Legal Drips, Wobbles and Perpetual Motion', 139.
8   Peter Fitzpatrick, *Law as Resistance: Modernism, Imperialism, Legalism* (Abingdon, Oxon; New York, NY: Routledge, 2008), 239.
9   Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press, 2008), 45.
10 Fitzpatrick, *Law as Resistance: Modernism, Imperialism, Legalism*, 169–170
11 Andreas Philippopoulos-Mihalopoulos, *Spatial Justice: Body, Lawscape, Atmosphere*, 1. publ, Space, Materiality and the Normative (Abingdon: Routledge, 2015), 36.

territory, without which a modern nation-state would not exist. The second reason is that the universal law disguises its own uneven operation in the actual, gendered, racialized, or classed bodies. Law is, therefore, mobile, but our habits of looking and thinking about law, as connected to the state, stabilize it. How to change these habits, "[h]ow might we learn to perceive movement in or as law?"[12] To answer this question, we need to follow what Thomas Nail urges: we need to understand how does law *move*? And, what can it *do* through this movement?[13] Exploring these questions more deeply, will allow to notice law's movement behind the disguise of stability.

In the present chapter, I first apply mobility lens to the relationship between law and the nation-state, that affects our dominant thinking about law as stable. With the use of the concept of the nation-state machine[14] I show how the nation-state itself is an unstable entity. It is produced through the processes of discursive and non-discursive practices that aim at homogenization and stabilization of the state. Law is one of such discursive practices that can sort people into categories and produce concepts such as a citizen or a foreigner. It can also regulate the movement of people or goods across national borders, consolidating the state and providing it with a stable form and identity.[15] Revealing the unstable quality of the state contributes to the shift of perception of law as mobile.

I then turn to discuss different ways that one can approach law as mobile. In *Mobile People Mobile Law*, which inspired the title of this book, the authors identify several modes of the movement of law, one of which is the embodiment or movement of law by both people and transnational organizations that are involved in making law mobile. Another one is embedded in law's interactions with other laws as well as with society, politics, and the economy. To this, I add another understanding of the mobility of law – that of mobility as a quality of law. These modes of law's movement should not be considered as separate because the embodiment of law is intimately linked with the decision making, jurisdiction or with mobility infrastructure. As Olivia Barr shows, law moves through patterns of both technical and material practice[16] and these can include jurisdiction, as well as walking or traveling with law. All these approaches, however, shift the focus from the objective and universal rules, and regulations to concrete cases, concrete legal decisions, and concrete bodies.

12   Barr, 'Movement. An Homage to Legal Drips, Wobbles and Perpetual Motion', 139.
13   Nail, *Being and Motion*, 124.
14   Gilles Deleuze and Felix Guattari, *Anti-Oedipus: Capitalism and Schizophrenia*, trans. Robert Hurley, Mark Seem, and Helen Lane, 6th printing (The Athlone Press, 2003), 142.
15   Manuel De Landa, *Assemblage Theory*, Speculative Realism (Edinburgh: Edinburgh University Press, 2016), 39.
16   Olivia Barr, *A Jurisprudence of Movement: Common Law, Walking, Unsettling Place* (Abingdon, Oxon; New York, NY: Routledge, 2016), 3.

In the last part of the chapter, I analyse the implications of the shift from stability to mobility of law. I particular, I show how such approach helps to change the perspective from the universal mobile subject to mobility's further concrete materializations in lives of those who are moving across international borders. This, then allows looking into the methods and strategies through which mobilities can resist, affect, or change law. As Andreas Philippopoulos-Mihalopoulos indicates, such spatiolegal operations are a necessary condition for justice.[17]

Nation-state machine

Thomas Nail's theory of ontological mobility is related to the concept of the machine developed by Gilles Deleuze and Felix Guattari, which means an ontological mobility of the world that is in a constant process of becoming. According to Deleuze and Guattari "…everything is production…."[18] Everything, from bodies to ideas, is machinic – it is created through continuous workings of various elements being disassembled and re-arranged again and again. This includes also the nation-state, which for Deleuze and Guattari is a social machine, "a megamachine, that codes the flows of production, the flows of means of production, of producers and consumers."[19] In other words, the state is an entity the properties and identity of which are produced by continuous interactions between its various elements such as persons, material and symbolic artefacts, and the ways they are regulated by rules or historical narratives.[20] As Manuel DeLanda explains, while all organizations undergo such regulation or coding, in the case of states coding encompasses the entire territory and all communities that inhabit it.[21] The state as a whole is; as such, relatively impermanent because it is based on contractual relations linked with the territory. Territorial states are, therefore, what is called an assemblage or "(…) a configuration of relationships among diverse sites and things,"[22] that include a variety of material and expressive elements, such as natural resources and the human populations that are defined by the borders[23] as well as expressivity of the landscapes or ways of expressing military power and political sovereignty.[24]

Identity or essence in these types of organizations is produced through the processes of discursive (coding) and non-discursive (territorialization) practices,

---

17 Philippopoulos-Mihalopoulos, *Spatial Justice*, 175.
18 Deleuze and Guattari, *Anti-Oedipus*, 4.
19 Deleuze and Guattari, 142.
20 De Landa, *Assemblage Theory*, 2, 20.
21 De Landa, 22.
22 George E. Marcus and Erkan Saka, 'Assemblage', *Theory, Culture & Society* 23, no. 2–3 (May 2006): 101–106, 102.
23 De Landa, *Assemblage Theory*, 35.
24 De Landa, 36.

both of which aim at homogenization and stabilization of the state. Coding, for instance, happens by sorting people into criminal, medical, or pedagogic categories in prisons, hospitals, or schools. These coding practices also include, for instance, the control of the movement of migrants, goods, money, or foreign troops across national borders.[25] Discursive practices also produce conceptual categories such as a citizen or a foreigner consolidating those sorted human materials and giving institutions a more stable form and identity.[26] But the state also consists of deterritorializing processes which affect the integrity of national frontiers, such as secession or a loss of territory on the one hand, and border-defying processes such as authorized and unauthorized human movement, on the other.[27] It is, therefore, misleading to view the nation-state and society as always already stable and progressing in a linear fashion from one form to another as they are in the process of constant territorialization and deterritorialization.[28]

Machinic quality of statehood is very well visible in international law, in the definition of a state in the 1933 *Montevideo Convention on the Rights and Duties of States*, where statehood is defined as an entity inherently based on the effective control of the permanent population inhabiting a defined territory. The nation-state, therefore, through the continuous processes of governing the population inhabiting its territory captures (regulates) the flows of natural and expressive components, flows of capital or population through its borders, to perpetuate itself over time.[29] The nation-state machine consists of different assemblages; for instance, a person and a passport, that together, with the border infrastructure, with the definition of citizenship in national law, constitute a relationship that is productive of the identity of the state as it is able to distinguish between those who belong and those who don't belong. Such connections are conceptualized, stabilized, normalized, and given an essence. To be sure, homogenization and stabilization of the nation-state fails as failure or deterritorialization is an inherent part of the operation of the nation-state machine.[30] In other words, social machines, in order to function must not function well.[31] In the case of statehood, this can be seen, for instance, through the example of human/passport assemblage described above. Here, the breaking down happens when borders are being crossed without documents. Refugees in particular constitute a threat to such perceived stability of a nation-state. Giorgio Agamben explains that a refugee, through an application for protection based on international instruments, automatically challenges the right of a state to decide who can enter and stay on its territory.

25   De Landa, 37.
26   De Landa, 38–39.
27   De Landa, 37.
28   De Landa, 37.
29   Paul Patton, *Deleuze and the Political*, 1 edition (Abingdon, Oxon; New York: Routledge, 2000) 104.
30   Deleuze and Guattari, *Anti-Oedipus*, 31.
31   Deleuze and Guattari, 152.

> If the refugee represents such a disquieting element in the order of the nation-state, this is so primarily because, by breaking the identity between the human and the citizen and that between nativity and nationality, it brings the originary fiction of sovereignty to crisis.[32]

At the same time, through the spectacle of borders, walls, and pushbacks, states attempt to reinforce the stability of their waning sovereignty.[33] The failure of the borders is, therefore, productive for the state as it indicates the state's territory and allows the state authorities to counteract through mobilization of the border police and legal apparatus that reinforce state sovereignty. The understanding of the machine as an entity that perpetually (re)produces itself through breaking down is particularly important to analyse the continuously dominant position of the nation-state despite the proclamations of waning sovereignty in a globalized world.[34] Citizenship and borders are crucial elements of constructing the identity of the nation-state as they feed in the processes of constant (re)production. Citizenship determines inclusion and serves to govern and control the movements to and from, as well as within the national territory, in other words, through borders. Borders and the processes of bordering in turn, maintain the illusion of stability and sovereignty through the creation of difference and exclusion.[35] Law's purpose is to define who is included and excluded from the territory of the state and in consequence to determine their rights and obligations. In the next sections of this chapter, I problematize this process by applying mobility lens to law's operations.

Mobility of law

Applying mobility lens to the nation-state revealed its unstable nature, allowing in turn to problematize the perceived stability of law. Mobility of law manifests itself in multiplicity of ways, through law's technicalities and materialities.[36] Law moves with people – people move law with them, law 'drips',[37] and different laws meet at the border. In this chapter I approach mobility as a quality of law understood very broadly, as encompassing law being moved around by mobile persons, law meeting with other laws at different places or borders but also as legal concepts being unstable themselves.

Analysing mobility of law we need, first, to focus on the ways law is embodied by different subjects that carry law with them, be it by walking, driving a

---

32 Giorgio Agamben, *Means without End: Notes on Politics* (Minneapolis: University of Minnesota Press, 2000), 20.
33 Wendy Brown, *Walled States, Waning Sovereignty*, 1 edition (New York: Cambridge, Mass: Zone Books - MIT, 2010).
34 Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages*, Updated edition (Princeton, NJ: Princeton University Press, 2008).
35 Sassen, 9.
36 Barr, *A Jurisprudence of Movement*, 3.
37 Barr, 'Movement. An Homage to Legal Drips, Wobbles and Perpetual Motion', 140.

tuk-tuk or a car, travelling on a dinghy from Libya to Sicily, or taking a flight from Helsinki to Las Vegas. To be sure, the positionality of the person who moves law with them affects their movement, as persons with a different passport, race, or gender move differently. Second, the movement of embodied law is facilitated by infrastructure, including the legal regulations and material infrastructure that can either speed up, slow down, or prohibit the movement of embodied law, again depending on the positionality of the person that moves with law. The point of view from the vehicles themselves provides a critical perspective on the governance of movement too.[38] Third, law embodied by people and moving with them meets with other laws, be it at the border, on indigenous lands, carrying colonial or neo-colonial relations. Fourth, law moves in jurisprudence, in the way how law constantly navigates between closeness and openness, through its universality and its manifestation in concrete legal decisions. Some of these judgments or decisions also move law forward and allow for emancipatory changes.

Embodiment of law

The mobility of people that embody law is the first instance of making law mobile. This concerns not only the mobility of those who cross international borders and carry their laws with them to other countries, but all of us moving as we attend to our own lives. As Mimi Sheller writes in *Mobility Justice*, human mobility does not only mean cross-border mobilities but includes also urban mobilities and micro-mobilities at the bodily scale.[39] Law is, therefore, not only embodied in all of us carrying our gender, race, class but also our inheritances, histories, and experiences. This affects how we move both amongst and with these positionalities.[40] In the context of international mobility this means that we are always carrying our jurisdictional status[41] but also that this status and, hence, our movement is affected by other aspects and features of our lives.

Existing literature, such as *Mobile People Mobile Law* focuses most often on law moving with people who cross international borders. The literature on migration usually describes one aspect of these processes – migrants take their law to the new country of domicile. This means that the customary or religious law of the migrant's place of origin, but to some extent also their national law does not lose its relevance after one move to a new place or country. This law is often seen as incompatible with the law of the receiving state, creating, as a result, *problems* for politicians, lawyers and for the

38 William Walters, 'Migration, Vehicles, and Politics: Three Theses on Viapolitics', *European Journal of Social Theory* 18, no. 4 (November 2015): 469–488.
39 Mimi Sheller, *Mobility Justice: The Politics of Movement in the Age of Extremes* (London; Brooklyn, NY: Verso, 2018), 41 (iBooks).
40 Barr, *A Jurisprudence of Movement*, 22.
41 Barr, 130.

migrants themselves.[42] In result, some laws are considered better than other laws and the hierarchies of laws are constructed to regulate the order of application of different types of laws.

To be sure, the role of the movement of people for the mobility of law concerns not only one-way movement from the country of origin to the country of destination. Literature on transnational migration shows how people called transmigrants[43] or long distance nationals[44] constantly maintain social relations between two or more homes,[45] which on the one hand may create problems concerning the right laws to be used in regulating various spheres of their lives, but also affect the laws in the countries of origins and countries of destination. Mobile laws and hierarchies created between different laws have effects on the host state population (for instance differently minoritized groups already present in the receiving countries),[46] as well as on those who are not transnationally mobile but feel and experience the effects of mobile law.[47] An example of the former effect is the concept of *evictability* coined by Huub van Baar who shows how securitization of migration has a spill over effect on Romani minorities who have been discriminated in comparison to those considered as mobile EU citizens.[48] This concerns not only deportations between the EU countries but also cycles of forced evictions from one place to another that the Roma people have been subjected to. In the case of the latter, mobility for work, for instance, has multifaceted financial, cultural, and economic effects on the countries of departure, including the emergence of transnational families, brain drain, or revenues, to mention the few. At the same time, migration policies set different opportunities for distinct populations that affect their possibility for transnational mobility.[49] For instance, securitization of migration and introduction of stricter laws in the countries of arrival affect the possibility of transnational mobility (for work or study) for those with less financial resources to do so in the countries of their origins. As Sager writes, "[c]oercion at the

42   Von Benda-Beckmann, von Benda-Beckmann, and Griffiths, *Mobile People, Mobile Law*, 15.
43   Alex Sager, 'Methodological Nationalism, Migration and Political Studies', *Political Studies* 64, no. 1 (2016): 45.
44   Andreas Wimmer and Nina Glick Schiller, 'Methodological Nationalism and beyond: Nation-State Building, Migration and the Social Sciences', *Global Networks* 2, no. 4 (October 2002): 301–334, 323.
45   Sager, 'Methodological Nationalism, Migration and Political Studies', 45; Marie-Claire Foblets, 'Mobility versus Law, Mobility in the Law? Judges in Europe Are Confronted with the Thorny Question "which Law Applies to Litigants of Migrant Origin?"', in *Mobile People, Mobile Law*.
46   Huub van Baar, 'Evictability and the Biopolitical Bordering of Europe', *Antipode* 49, no. 1 (2016): 212–230, 216.
47   See for instance Sager, 'Methodological Nationalism, Migration and Political Studies', 55.
48   van Baar, 'Evictability and the Biopolitical Bordering of Europe'.
49   Sager, 'Methodological Nationalism, Migration and Political Studies', 53.

border does not simply exclude people, but also upholds and shapes institutions in both countries," affecting transnational migration industry and infrastructure.[50] Securitization also stalls mobility and often enhances irregularity as those migrants who would usually circulate between their home and host countries, will, due to increased difficulties in travelling there and back, chose to overstay their visas in order not to risk a possibility of refusal of entry.[51] This is discussed in more detail in Chapter 3 on *Mobility as a violation of law*.

Beyond the research on cross-border mobility of people who are taking their laws with them, emerging research focuses also on the epistemological role of human movement for law. To break it down, it focuses on how the experiences of those who move affect the way how they understand and think about, apply, and resist law. Traditionally such research focused on intellectuals and artists[52] but more interest is nowadays directed also towards experiences of different groups of migrants.[53] This is visible, for instance, in what I have called elsewhere the third generation of exile studies[54] that focuses on the impact of the experience of forced displacement, and the role of migration in creating new knowledges and new theories. Exile studies have focused traditionally on historical academic displacement (such as, for instance, the German-Jewish scholars forced to leave Nazi Germany). The new focus of exile studies does not only bring forward the agency of the émigrés[55] and recognizes the role of affects and emotions in the process of knowledge production,[56] but includes also expanding field of knowledges produced outside Europe and epistemologies of contemporary migration that expands beyond the spheres of art and academia,

---

50 Sager, 55.
51 Thomas Nail, *Theory of the Border* (Oxford; New York: Oxford University Press, 2016), 176–177.
52 See for instance Laura Fermi, *Illustrious Immigrants: The Intellectual Migration From Europe 1930–1941* (Chicago and London: The University of Chicago Press, 1968); Mitchell G. Ash and Alfons Söllner, eds., *Forced Migration and Scientific Change: Émigré German-Speaking Scientists and Scholars after 1933* (Cambridge: Cambridge University Press, 1996); Lewis A. Coser, *Refugee Scholars in America: Their Impact and Their Experiences* (New Haven and London: Yale University Press, 1984); Claus-Dieter Krohn, *Intellectuals in Exile, Refugee Scholars and the New School for Social Research*, trans. Rita Kimber and Robert Kimber (Amherst: University of Massachusetts Press, 1993); Peter Burke, *Exiles and Expatriates in the History of Knowledge, 1500–2000*, The Menahem Stern Jerusalem Lectures (Waltham, Massachusetts: Brandeis University Press/Historical Society of Israel, 2017).
53 See for instance Elena Fiddian-Qasmiyeh, *Refuge in a Moving World: Tracing Refugee and Migrant Journeys across Disciplines* (London: UCL Press, 2020).
54 Magdalena Kmak and Heta Björklund, eds., *Refugees and Knowledge Production: Europe's Past and Present* (Abingdon, Oxon; New York: Routledge, 2022).
55 Kaius Tuori, *Empire of Law: Nazi Germany, Exile Scholars and the Battle for the Future of Europe* (Cambridge: Cambridge University Press, 2020), 11.
56 Paolo Boccagni and Loretta Baldassar, 'Emotions on the Move: Mapping the Emergent Field of Emotion and Migration', *Emotion, Space and Society* 16 (August 2015): 73–80.

encompassing for instance students[57] or humanitarian workers.[58] This aspect of mobility will be dealt with in Chapter 5 of this book, *Mobility as a method of producing legal knowledge*.

Infrastructure

It is not only human mobility that is making law mobile, but mobility of law can also be fostered by both epistemic and physical infrastructure. As authors of the *Mobile People Mobile Law* show, setting law in motion also takes place within certain epistemic communities, assembled in international organizations or development organizations such as the UN, multinational corporations, international NGOs, World Bank, or WTO. These organizations constitute important global epistemic infrastructure that allows transporting laws from "Western to developing countries."[59] They not only transport law across the globe, but they also establish themselves as important sources of law-making or important actors in restructuring localities from global perspectives.[60] For instance, in the chapter titled 'Mobile Law and Globalization: Epistemic Communities versus Community-Based Innovation in the Fisheries Sector,' Melanie G. Wiber looks at how reliance on epistemic communities of technical experts such as Northwest Atlantic Fisheries Organization have played a crucial role in generating global impacts in administrative law by transferring one management regime across global fisheries and impacted fisheries in the Scotia Fundy region in Canada.[61] Similarly, Ukri Soirila in his book *Law of Humanity Project* describes how humanitarian governance and humanity language has been spread through international organizations, for instance through jurisprudence of international courts or as part of international humanitarian missions in conflict and post-conflict societies taking over the role of the state and subordinating local administrative rule.[62] To be sure, such understanding of the

57 Céline Cantat, Ian M. Cook, and Prem Kumar Rajaram, eds., *Opening up the University: Teaching and Learning with Refugees*, Higher Education in Central Perspective: Practices and Policies, Volume 5 (New York: Berghahn Books, 2022); Yi'En Cheng, ed., *International Student Mobilities and Voices in the Asia-Pacific: Letters to Coronavirus* (Singapore: Springer Nature Singapore, 2022).

58 Nadine Hassouneh and Eliza Pascucci, 'Nursing Trauma, Harvesting Data: Refugee Knowledge and Refugee Labour in the International Humanitarian Regime', in *Refugees and Knowledge Production: Europe's Past and Present*.

59 Von Benda-Beckmann, von Benda-Beckmann, and Griffiths, *Mobile People, Mobile Law*, 13.

60 Ibid., 13.

61 Melanie G. Wiber, 'Mobile Law and Globalization: Epistemic Communities versus Community-Based Innovation in the Fisheries Sector', in *Mobile People, Mobile Law*.

62 Ukri Soirila, *The Law of Humanity Project: A Story of International Law Reform and State-Making*, Studies in International Law, volume 82 (Oxford, UK; New York, NY: Hart Publishing, an imprint of Bloomsbury Publishing, 2021), 90–100.

mobility of law through international infrastructure foregrounds certain type of knowledge that often enshrines only one particular perspective or political project – that of the global North.[63] In turn less or no focus is put on the movement of knowledge from the global South. Thomas Spijkerboer shows for instance the process or erasing sources of international migration law from the global South, such as the Supreme Court of Justice of Papua New Guinea's decision in *Namah v Pato* from 2016.[64]

However, physical infrastructure is perhaps the most intuitive element of studies on the emerging discipline of law and mobility. Launched in June 2018, *Michigan Journal of Law and Mobility*, for instance, recognizes the forthcoming changes, including the role of cars, trucks, or drones on transition towards new mobility that is intelligent, automated, and connected, which will not only transform the movement of people but also affect public and private spheres of societal movement. To be sure, law plays an important part in these infrastructural innovations, such as "intelligent, automated, and connected mobility systems" that will disrupt or redefine not only transportation law but also policing, property law, security, etc. Echoing the inaugural essay of the journal, these innovations and mobility systems will transform legal concepts and practices in far-reaching manners.[65]

The mobility revolution will surely have an impact on embodied mobilities where different positionalities affect the modes and possibilities for movement. A focus on the "global mobility infrastructure"[66] reveals the intimate relationship between law, the processes of global mobility management and mobility infrastructure, and notices the distinction between those mobilities that are being sped up and those that are being slowed down or stopped altogether.[67] This infrastructure encompasses three closely related elements:

> 1. Physical structures: air and sea ports; airplanes and ferries; hotels, restaurants, and other locations to cater to mobile people; roads and railroads to transport people to the major hubs that harbour and, in particular, airports have become; 2. Services: travel agencies, consular officials, visa intermediaries, hotel and catering personnel, people working in transport companies (airline and ferry companies, domestic transport to hubs); 3. Law: the liberalization of international people transport, especially in

---

63 Thomas Spijkerboer, 'The Geopolitics of Knowledge Production in International Migration Law', in *Research Handbook on the Law and Politics of Migration*, by Catherine Dauvergne (Edward Elgar Publishing, 2021), 184.

64 Spijkerboer, 172.

65 Daniel Crane, 'The Future of Law and Mobility', *Journal of Law and Mobility* 2018 (2018): 1–9.

66 Thomas Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalization of Migration Control', *European Journal of Migration and Law* 20, no. 4 (29 November 2018): 452–469.

67 Spijkerboer, 454.

aviation; the amendment of laws to allow for mergers of previously national transportation companies; change of visa regulations, partly tightening and partly liberalising control.[68]

The development of the global mobility infrastructure has fostered the expansion of human mobility, however as Spijkerboer points out, it also allowed the infrastructure to be a mode of distinction of movement that is based on race, gender, and class. Indeed, law plays an important part in the global mobility infrastructure and is intimately linked with the way how certain people and their means of movement are coded as mobile or immobile. This also affects the way infrastructure is fostering or banning movement, which is visible, for instance, at the border. Border emerges here not only as a certain place with the setup infrastructure that manages the flow of persons from one country to another, but also is embodied by a moving person or inscribed in a vehicle as a border zone. The border and its infrastructure are everywhere and are transforming the very nature of the border phenomenon speeding up the implementation of this new type of border – one that is "mobile, portable, and omnipresent."[69] Law, therefore, can be located at the physical border, manifesting itself within the physical infrastructure; it can be located within the city where police perform document checks or racial profiling; it is located in the vehicle, which as Walters shows, can amount to a mobile borderzone,[70] or as Shahram Khosravi writes, the border can be embodied in a racialized person who is stopped for border checks because of how they look.[71] The border therefore, together with the laws operating there, is productive and shapes the type of societies we are living in,[72] as discussed above in relation to the nation-state machine.

Meeting of laws

Law meets at the border, including the omnipresent and productive border described above. The meeting of laws takes place when a certain law, such as global or globalizing law, encounters national, local, or indigenous laws and enters a negotiation as to which law in the consequence of this encounter is accepted, rejected, or appropriated.[73] For legal anthropologists who work with

68 Spijkerboer, 455.
69 Achille Mbembe, *Necropolitics*, Theory in Forms (Durham: Duke University Press, 2019), 101; See also Ayelet Shachar, *The Shifting Border: Legal Cartographies of Migration and Mobility: Ayelet Shachar in Dialogue* (Manchester: Manchester University Press, 2020).
70 Walters, 'Migration, Vehicles, and Politics'.
71 Dr Shahram Khosravi, *'Illegal' Traveller: An Auto-Ethnography of Borders* (Palgrave Macmillan, 2011).
72 Nail, *Theory of the Border*.
73 Von Benda-Beckmann, von Benda-Beckmann, and Griffiths, *Mobile People, Mobile Law*, 2.

plurilegal systems, distinctions between different laws are crucial to study the way how law meets other law, and how law also encounter social, political, and economic domains across time and space.[74] "Transnational law becomes part of social settings in which it not only competes with and shapes existing state law, it competes with self-regulatory mechanisms, customary and some-times religious law."[75] The incoming law may find itself, therefore, in a setting when it can, on the one hand, be considered distinct and foreign and therefore rejected, while on the other hand become hybridized, creolized, or vernacular-ized or absorbed into the existing legal structures.[76] The meeting of different laws also emerges from the fact that people live multi-sited lives across national borders where different aspects of their own lives are regulated by laws of dif-ferent countries, according to rules of private international law. Law as such becomes transnationalized; hence, creating hegemony, fragmentation, and ambiguity, and functioning differently for some, who can negotiate between laws while others are barred from pursuing their legitimate claims.[77]

Therefore, law must be understood as not existing in abstract but in rela-tionality between persons or persons and society, which encompasses processes of law creation, expression, and transmission.[78] The relationality of law encompasses not only the meeting of laws in one body but also the meeting of people that embody laws in a certain space. Bodies encounter other bodies in a lawscape (interplay between law and space), and this encounter affects their rights.[79] The general question, then, which one can pose looking at transnational law from the mobility perspective that is attuned to different positionalities of legal subjects embodying different laws, is whether these laws meet well?[80] In liberal states, the meeting of laws in the lawscape has been regulated by universal laws guaranteeing equality and non-discrimination. However, as Hagar Kotef shows, the social contract is essentially a settler contract[81] – a contract between rational and liberal subjects. All those who are not considered rational and liberal, the savage or the *Other* has been excluded from the social contract, which necessarily affects the meeting of laws. This also has con-sequences for the right to mobility, which as we will see in the next chapter *Mobility as a right*, is embedded in the concept of citizenship and produces a distinction between liberal subjects engaged in *orderly* mobility and those

74   Ibid., 2.
75   Ibid., 9.
76   Ibid., 9–10.
77   Ibid., 18–19.
78   Dana Schmalz, *Refugees, Democracy and the Law: A Deficit of Rights*, Law and Migration (Abingdon, Oxon; New York, NY: Routledge, 2020), 57; Nanda Oude-jans, 'The Right Not to Have Rights: A New Perspective on Irregular Immigration', *Political Theory* 47, no. 4 (August 2019): 465; Philippopoulos-Mihalopoulos, *Spatial Justice*.
79   Philippopoulos-Mihalopoulos, *Spatial Justice*, 67.
80   Barr, *A Jurisprudence of Movement*, 43.
81   Kotef, *Movement and Ordering of Freedom*, 2.

whose mobility is produced and conceptualized as *disorderly*.[82] At the same time, however, relationality of law carries in itself a potential for resistance as I will show in Chapter 4.

Jurisprudence

Finally, the movement of law manifests itself in jurisprudence. For Olivia Barr, who conceptualizes law and mobility in such a manner, jurisprudence is a domain of thought concerned with "how to live with law, and how to create and engage lawful relations."[83] In other words, jurisprudence is concerned with relations between bodies and laws that move and meet in space – that which in the previous section was described as yet another element of mobility of law. Law must be open enough to encompass these multiple relations but also must be able to regulate and limit them. Together with the three perspectives on law and mobility described above, jurisprudence which in itself embodies mobility of law, allows us to understand even more clearly *how does law move*.

As Peter Fitzpatrick argues, the constant oscillation between laws' stability and responsiveness constitutes the quality of law.[84] On the one hand, law is a tool of a nation-state, with the tasks of regulating, limiting, or, in general, maintaining social order. The rule of law must be (at least has to be perceived as) "coherent, closed and concrete."[85] At the same time, law must be able to react to new situations in order to be able to regulate or contain them. As Fitzpatrick writes, "you cannot have a purely static determinate position (…) *The very effort to contain change and to appear constant requires responsiveness* [emphasis in the text]."[86] In other words, law must look static in order to fulfil the rule of law requirements. This feature, together with law's link to territoriality of a nation-state, contributes to why the mobility of law remains hidden. But law also has to be flexible in order to encompass all new situations – what is outside of it. It must take into consideration the complexity and diversity of social relations in order to be able to adapt to it, therefore the necessity to adapt excludes purely fixed and pre-existent law. As Fitzpatrick writes

> For law to rule, it has to be able to do anything – if not everything. It cannot, then simply, secure stability and predictability but must also do the opposite: it has to ensure that law is ever-responsive to change,

---

82 On differential mobility in relation to citizenship see for instance Dimitry Kochenov, *Citizenship*, The MIT Press Essential Knowledge Series (Cambridge, Massachusetts; London, England: The MIT Press, 2019).
83 Barr, *A Jurisprudence of Movement*, 81.
84 Fitzpatrick, *Law as Resistance: Modernism, Imperialism, Legalism*, 93.
85 Fitzpatrick, 93.
86 Fitzpatrick, 16.

otherwise law will eventually cease to rule the situation, which has changed around it.[87]

Law that does not respond to new situations would be completely static, it would turn, as Fitzpatrick argues, into a discipline, something to study rather than a living law. At the same time, if law did not have features fulfilling the rule of law criteria, it would stop being law and become mere politics.[88]

The mobility of law becomes, therefore, an inherent quality of law. In their book, *Foucault's law* Golder and Fitzpatrick directly use the concepts of *movement* or *on the move* when they write about law. They build their argument on the Michel Foucault's concepts of discipline and generative co-dependency of power and resistance, which I will discuss in more details in Chapter 4. As Golder and Fitzpatrick write, law, through jurisprudence, constantly oscillates between total stasis and total movement, being consequently constantly "on the move."[89] Whilst law must assume a definite content, it cannot remain tied to it and "must engage with what is other to it, with resistances and transgressions which challenge its position."[90] This happens through jurisprudence which is involved in creatively modifying existing legal principles or inventing new ones to fit particular cases, introducing, as Paul Patton writes, "*movement into abstractions* [emphasis mine]".[91] If law, for Fitzpatrick, subsists in between a determinate position and what is beyond it, then what moves law is the antinomy between these dimensions, combined with their necessity for each other that emerges from power and resistance co-dependency. "This is a movement ever beyond what is determinately positioned 'for the time being', yet also a movement of return to position, and it is in the decisive combining of these movements that law assumes a determinate force."[92] In the criticism of Golder and Fitzpatrick's analysis of law, Jacopo Martire writes, however, that such understanding of law (as operating on the margins where the negotiation for determinate position takes place by providing legitimacy to some phenomena on the one hand and limiting their excesses on the other) is too reductive. For Martire, law in modern societies takes a more important role. It does not only operate at the margins determining what is included and what is excluded, it is also central to power in a much deeper sense.[93] It constructs the universal subject of law upon which biopolitical strategies can be efficiently enforced. At

87 Fitzpatrick, 93.
88 Fitzpatrick, 93.
89 Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge-Cavendish, 2009), 78.
90 Golder and Fitzpatrick, 77.
91 Paul Patton, 'Immanence, Transcendence, and the Creation of Rights', in *Deleuze and Law*, ed. Laurent de Sutter and Kyle McGee (Edinburgh: Edinburgh University Press, 2012), 29.
92 Golder and Fitzpatrick, *Foucault's Law*, 171.
93 Jacopo Martire, *A Foucauldian Interpretation of Modern Law: From Sovereignty to Normalization and Beyond* (Edinburgh: Edinburgh University Press, 2019), 19.

the same time, it recodifies this subject in a standardized fashion, "producing a normalised population which can be reflected in the universality of law."[94] I will return to the discussion on universal subjectivity as created through law in the section below. It is however important at this moment to highlight that Martire's perspective, even though critical of Golder and Fitzpatrick's one, also presupposes the mobility of law, where law is constantly adaptive to real situations and responsive to its otherness.[95]

Law as such becomes, therefore, mobile through jurisprudence and *doing things with law*, revealing unsteady foundations below a superficially calm legal surface.[96] Alexandre Lefebvre argues that law has a mobile root that remains in constant change to adapt to new societal desires and interests as they develop over time. Judgments must necessarily be creative as they are based on these changing desires or interests.[97] With this understanding, jurisprudence guarantees the creativity of law and its ability to produce novel understandings and definitions that adapt rules to desires.[98] Law responding to ever-changing interests and desires exemplifies for Lefebvre a *differential repetition*. In such context, the rules of law have double existence – both actual (the law in books) and virtual (the possibility of law as adapted to new circumstances and according to what is legally important and relevant).[99] Each judgment that evokes (or actualizes) the rule must reinvent itself to respond to these interests and desires of contemporary society. "Each decision is therefore, at least minimally, a differentiation of law in that it performs a double and simultaneous adaptation of any rule according to both new situation and new desires"[100] modifying a "tissue of law that becomes ever differentiated, *ever invented*, over time [author's emphasis]."[101] In result, there is never only one pos- sible outcome of the formal interpretation of law. This is visible for instance within the field of European human rights and migration law. Thomas Spijkerboer shows how jurisdiction of the European courts (ECtHR and CJEU) even though in principle excludes colonial subjects from the full protection of human rights, does not always result in such excluding outcomes. Therefore, naming and exposing the underlying deep colonial structure orienting European human rights and migration law not only allows for its critique but can also affect future jurisprudence by affecting the outcome of formal interpretation of law.[102]

94   Martire, *A Foucauldian Interpretation of Modern Law*, 105.
95   Martire, 139.
96   Barr, 'An Homage to Legal Drips, Wobbles and Perpetual Motion', 143.
97   Alexandre Lefebvre, *The Image of Law: Deleuze, Bergson, Spinoza*, Cultural Memory in the Present (Stanford, Calif: Stanford University Press, 2009), 101.
98   Lefebvre, 106.
99   Lefebvre, 124, 145.
100 Lefebvre, 106.
101 Lefebvre, 106.
102 Thomas Spijkerboer, 'Coloniality and Recent European Migration Case Law', in *Migrants' Rights, Populism and Legal Resilience in Europe*, ed. Vladislava Stoya- nova and Stijn Smet, 1st ed. (Cambridge: Cambridge University Press, 2022): 117– 138, 137.

Golder, Fitzpatrick, Barr, and Lefebvre situate their analysis within the common law tradition. Mobility, however, is a feature of law in the civil law culture, and is visible in legislation and its consequences – it is a feature of whichever language and legal culture we look at. As Olivia Barr argues

> [t]his is because meanings move: they shift with time, within sentences and between interpretive locations. This is not so much movement as destination but rather an acknowledgement of the relentless and rather 'wobbly' activity of movement within law and its legal meanings, as meanings shift, sometimes subtly, sometimes drastically.[103]

The interconnectedness of the four modes of movement of law described above manifests itself in the relationship between mobility and spatiality. Law is always embodied, and it does not exist somewhere in the abstract, it is not manifested only in symbols and ideas but also, it needs to be carried by and within the bodies. The legal system is, in other words, characterized by the relationship between material and immaterial, as a field of knowledge, a space it operates in, as well as, the bodies the movement of which it regulates.[104] Materiality, the embodiment of law, is however often hidden from sight, and it appears as something else, such as freedom, desire, choice, or preference.[105] As soon as freedom and choice stop being abstract concepts and become situated in concrete bodies, their unequal operations are revealed, which must be then hidden from sight to retain the impression of universality. In what follows, I will investigate the implications of the mobility of law for the movement of embodied human beings.

Implications of mobile law

Implications of mobile law for human mobility will be unpacked in the forthcoming chapters of the book. In the remaining part of this chapter, I prepare the grounds for further analysis and briefly investigate the role of law in the creation of the universal mobile subject necessary for the functioning of the nation-state. The universal subject of law is then problematized through scrutiny of its further concrete materializations in the lives of those who are moving across international borders. This, then, allows looking into the methods and strategies through which mobilities can affect or change law. The first point I want to make is that a mobile turn in law allows the relationship between the construction of a universal subject and coloniality, and how it plays out in the case of human movement across borders to be made visible. The second point is the relationship between mobile law and the different forms and ways of understanding resistance.

103 Barr, 'An Homage to Legal Drips, Wobbles and Perpetual Motion', 143.
104 Philippopoulos-Mihalopoulos, *Spatial Justice*, 36.
105 Philippopoulos-Mihalopoulos, 69.

Universal subject of modernity/coloniality

I approach the topic of construction of the universal mobile subject with refer-
ence to Michel Foucault's work on law and subjectivity. Although the work of
Foucault has become paradigmatic for studies of subjectivity, it is claimed that
law has not been much present in his thought. However, as Jacopo Martire
argues in his recent book on the role of law in Michel Foucault's thought,
Foucault's law emerges as a primary tool of the normalising power relations.[106]
As I argued above, law performs a crucial role for stabilization of the nation-
state. In particular, it codes the flow of people and sorts it into different cate-
gories such as citizen or a foreigner – in other words it normalizes them. From
the perspective of the nation-state citizen is a norm against which the status of
all other human beings is assessed resulting in their inclusion or exclusion. It is
important, therefore, to focus on the conditions of the legal construction of the
modern universal subject vested with rights and obligations, in order to apply
to it the mobility lens later on in this book. Jacopo Martire's work on law in
Foucault's thought is very helpful in setting the stage for turning the universal
subject mobile.

As Martire argues, law in Foucault's thought is a *sui generis* apparatus
inscribing subjectivity within a triangle formed by power, knowledge, and
truth.[107] In concrete terms, modern law, on the one hand, makes possible the
workings of disciplinary or governmental power by prohibiting social divisions
and creating the universal subjects upon which the power (in a form of different
biopolitical strategies) can be efficiently enforced. On the other, discipline and
governmentality "constantly recodify the subject in a standardized fashion, thus
concretely producing a normalized population which can be reflected in the
universality of law."[108] Law, therefore, has a crucial role for the production of
universal subjectivity and construction of the modern citizen as a universal
subject of rights and obligations.[109] Looking at subjectivity through the mobi-
lity lens, however, one can see that the mobile subject is differently positioned
and able to exercise their mobility depending on their citizenship, gender, class,
or race. What we need to ask, is how universal subjectivity, constructed with
the help of law, materializes itself concretely through this differential mobility?
In other words, what types of mobile subjects are constructed in law and jur-
isprudence depending on who and how is moving in the contemporary globa-
lized world?

For Martire, the principal problem with modern law that affects the position
of a subject lies in the mismatch between the normalising role of law and the
post-modern world that is not normalizable: "law creates the universal subject
of rights, who is reflected in the normal subject of biopolitical regimes, and vice

106 Martire, *A Foucauldian Interpretation of Modern Law*.
107 Martire, 105
108 Martire, 105.
109 Martire, 111.

versa."[110] There is however a "mismatch between what remains a fundamentally normalizing legal discourse and an increasingly non-normalizable subjectivity."[111] For Martire, this constant movement between universalizing and normalizing role of law comes to the fore, particularly in contemporary times of liquid modernity. To be sure, it becomes particularly emphasized if looked at through the lens of mobility. Due to the diversity of human subjects and ongoing minoritization of the world[112] any normalizing attempt is poised to fail, undermining the normalizing foundations of law. In effect, law becomes a paradoxical apparatus that has been outgrown by the multitude of human life.[113]

Has there however always been a universal subject of law? For Martire, the demise of the universal subject is connected to societies' turn from disciplinary to control. Unlike in disciplinary societies, where the aim was to order people in time and space and make them seemingly homogenous, the individual in a control society becomes a *virtual* entity characterized by never-ending potentialities and in a never-ending process of self-creation and actualization. This situation is certainly at odds with the normalising paradigm that informs modern law.[114] To explain the turn to the control society and the crisis of modern law, Martire highlights the crucial role of the Other – as the one beyond the norm – in the construction of the modern subject that has been embedded in modern law. Paradoxically, however, through its recognition and access to rights, "[o]therness has started to progressively erode the image of commonality upon which universalistic claims of liberal legalism rest – a phenomenon accelerated by the rise of control society,"[115] leading to a fundamental Otherness of everyone's life.[116] This claim echoes what William Connolly calls "the minoritization of the world," where suddenly people living close to each other are not anymore so similar but have different ways of life, views, identities, or ethnicities contributing to the emergence of ontological differences.[117]

Leaving aside the argument about the turn towards the control society, however, it is crucial to keep in mind that it is not that the production of the universal subject has been suddenly distorted by the proliferation of difference in a contemporary globalized society. The diagnosis of the minoritization of the world is in principle a Western one and emerges with the increased presence of former colonial subjects in the global North. Martire himself points to the figure of the Other, the production of which has been necessary for the

---

110 Martire, 3.
111 Martire, 3.
112 William E. Connolly, *A World of Becoming* (Durham, NC: Duke University Press, 2011), 60.
113 Martire, *A Foucauldian Interpretation of Modern Law*, 134.
114 Martire, 105
115 Martire, 105.
116 Martire, 132.
117 Connolly, *A World of Becoming*, 60

construction of the universal subject. To be sure, the universal subject of law has always been a myth in modern law.[118] In particular, the Other to the norm, to which the modern law always refers to, has been inscribed into an embodied (colonial or formerly colonial) Other who is excluded from humanity and therefore, from becoming a subject of rights.

As Lucy Mayblin argues, modernity does not exist without coloniality.[119] The inclusion of coloniality into the discourse of modernity clarifies the construction of the universal subjectivity as always non-universal (always excluding the Other) and explains the implications of the dichotomy of modernity/coloniality for contemporary law. The development of the nation-state, and in consequence, law, in modernity is inescapably linked with coloniality. Nation states have been developed in relation to their otherness, in the same way as law has been developed in relation to its otherness.[120] The Othered of the nation has been the colonial, the savage, the uncivilized, and the creation of the nation-state has to be understood in that context as co-existing with the rejection and repression of the colonized people. This distinction has been embedded in law, which as Jacopo Martire writes became in modernity the crucial tool for subjectivation. Consequently, modern law has been an apparatus of subjectivation where the universal subject was in principle a European liberal subject.[121] The European liberal subject of rights took their law to the colonies and materially spread and inscribed law there,[122] and with it, the normalising subjectivity, deeming everyone else not encompassed by it. In the colonies law has been involved in the ordering of the colonized and in the distinction between the modern and the savage.[123] Even though, in principle in the colonies, the Other was normalizable and, as such, could potentially be included in the rights discourse, inclusion of all as subjects of rights would abolish the existence of the Other and therefore cause a failure of the modern notion of universality.[124] As Peter Fitzpatrick explains, modern imperialism has committed to transform the colonized subjects into the same subjects as the colonizers. At the same time, it has however constructed them as different, backward, or savage. "The figure of the colonized is thus inherently dissociated, called to be the same, yet repelled as different bound in an infinite

---

118 See for instance Fitzpatrick, *Law as Resistance: Modernism, Imperialism, Legalism*, 75; On a myth of equality between citizens, see Kochenov, *Citizenship*.

119 Lucy Mayblin, *Asylum after Empire: Colonial Legacies in the Politics of Asylum Seeking*, Kilombo: International Relations and Colonial Questions (London; New York: Rowman & Littlefield International, 2017), 26–27.

120 See Fitzpatrick, *Law as Resistance: Modernism, Imperialism, Legalism*, 76

121 Hagar Kotef, *Movement and the Ordering of Freedom: On Liberal Governances of Mobility*, Perverse Modernities (Durham, NC; London: Duke University Press, 2015).

122 Barr, *A Jurisprudence of Movement*, 133.

123 Fitzpatrick, *Law as Resistance: Modernism, Imperialism, Legalism*, 115

124 Fitzpatrick, 75.

transition which perpetually requires it to attain what is intrinsically denied to it."[125]

This reveals a paradox of the modern universal subject and the nation for the construction of which the universal subject is needed. For the nation to be universal, it has to exclude the Other and therefore fail in its universality.[126] The construction of the Other is therefore fundamental for the relationship between modernity and coloniality and the impact of this relationship on the legal production of the nation-state and the universal subject. As we can see, therefore, the paradox of law, which Martire discusses as a paradox of the control society, has always been inherently present and constitutive for the foundation of modern law. What we are seeing in other words is not that suddenly during the shift from disciplinary to control society, the subject stopped being universal and became liquid, full of potentialities, and constantly changing. This has arguably happened too. However, the subject of law has never been universal. This is a crucial argument that helps to explain the differential operation of modern law, which is primarily based on how the human subject is understood in law. In other words, it is not that the colonized people have been marked as different because they are different, but the colonial discourses made them different and later coded them as such[127] in order to make them constitutive to the modern law and the nation-state.

As already argued, the processes of coding colonized people as different happened through the movement of law. Even though law has been linked to the land and captured in the concept of sovereignty and territory, as well as in the features of the rule of law – the stability, generality, and certainty – law has been on the move and it still constantly moves in time and space in material forms.[128] Olivia Barr shows how in Australia, law has been first moved through the material processes of walking, camping, and burial to places that were primarily excluded from the colonial jurisdiction. To show this, Barr redescribes the narrative of the judgment of the New South Wales Court of Criminal Judicature of *R v. Powell* (1799) dealing with the death of two Aboriginal Darug boys, Lule Geo or Little George (11 or 12) and Jemmy (15 or 16) who were killed as a result of the earlier killing of two settlers, Hodgkinson and Wimbo. In *R v. Powell* case, the Court found five settlers guilty and convicted them of murder, granting them, however, bail and referring the case further to the Colonial Office.[129] The guilty were later acquitted. The circumstances of the case are the following: Hodgkinson and Wimbo were killed in the woods beyond the colonial frontier and a party was formed out of soldiers and settlers to find their bodies and provide them with a decent burial. Even though the

125 Fitzpatrick, 75.
126 Fitzpatrick, 76.
127 Mayblin, *Asylum after Empire*, 37.
128 Barr, *A Jurisprudence of Movement*, 130.
129 Barr, 127.

spread of colonial law has been very limited and hasn't reached beyond the settler frontier, it has moved there with the burial party. The imperial law has been moved to the woods being embodied by the soldiers and settlers and through the material instances of walking and camping with the dead men.[130]

Redescribing the narrative of *R v Powell* Barr puts particular attention to the *where* of the common law and poses important questions about the existence of the jurisdiction of the Colonial Court. Did the common law already exist in the woods beyond before the Court adjudicated the case? Or has it been retrospectively inserted there by the Court's jurisdiction? Her conclusion is that the burial party formed to retrieve the bodies of Hodgkinson and Wimbo has through its walking moved law into the woods beyond. Barr writes:

> A burial party walks, and as this burial party walks, common law moves. (…) Through the common law imagining of the subject carrying common law as they move, and through the utilization of jurisdiction as a relatively low-level technology that attaches to the surface, I argue that the institution of common law occurs through the movement of the burial party as it walks. Significantly, this is prior to the institutional marking of these events through the exercise of jurisdiction by the Court of Criminal Jurisdiction in *R v Powell*.[131]

In other words "as the burial party walks laws of empire moves."[132]

In consequence, without the act of walking as a legal action, law would have remained frozen and static as the authority, as sovereignty, and as territory.[133] Through the spread of jurisdiction by walking, however, the woods beyond became homogenized and turned into a sedentary form of the Australian nation-state and the subject became essentialized and othered. This is enshrined in Olivia Barr's narrative through the way in which the different bodies present in the narrative were buried. The burial party was formed to retrieve the bodies of Hodgkinson and Wimbo and provide them with a decent burial. However, the bodies of the Darug boys were buried in shallow graves, then dug up and left on the ground. By comparing the way the responsibility to bury the dead has manifested itself in the case of different subjects, Barr asks the question about the conduct of law: not only how does law move, but also can law move well? In the case of *R v Powell*, the law clearly did not move well. It prioritized the decent burial of the settlers but not of the Darug boys, especially as the five accused settler men were ultimately acquitted. The judgment of *R v Powell*, therefore, coded the difference between the settler and colonial subjects into the law. Following indigenous scholarship whereby colonialism is rooted in the

---

130 Barr, 108–149.
131 Barr, 133.
132 Barr, 133.
133 Barr, 109.

land and the dispossession of indigenous people,[134] the *R v. Powell* case shows how the common law has moved beyond the imperial frontier and colonized the earth, marking it as belonging to Australia. Through the colonization of the land and the jurisdiction of the colonial court that followed, law has become inscribed in the land and has stabilized and homogenized it into the nation-state. Law's movement to "the woods beyond" also contributed to the differentiation between the settlers and the colonized, as exemplified in the burials, and in the ultimate result of the *R v Powell*.

As I will show in the further chapters of the book, differentiation between the settlers and the colonized, that problematizes the existence of the universal legal subject, has also been inscribed in their capacity to move. I will show in particular how the universal subject of law fails in light of further concrete materializations of subjectivity of those who are moving across international borders. To be sure, applying the mobility lens to the movement of law and the creation of universal subject in modernity/coloniality reveals also an unequal capacity of movement of the European modern liberal subject and the colonized (or formerly colonized). The universal liberal subject was the one whose important quality was defined by *orderly* movement. At the same time subjectivity was denied to those considered to be moving in a *disorderly* fashion or not moving at all. Chapters 2 and 3 of this book will delve deeper into the construction of universal subject through law regulating citizenship and the role of borders, and the processes of bordering for the nation-state, in particular by applying the mobility lens to processes of inclusion and exclusion they perpetuate. In the final section of this chapter, I will turn towards the implications of the movement of law for conceptualising resistance.

Enabling resistance

Moving into the colonies and being inscribed into the land, in other words, being stabilized in the territory, as well as affecting the unequal capacity to move of settler and colonized subjects, is however only one side of the story of the mobility of law. For there is a potentiality in the movement of law as all stabilities are necessarily temporary. Homogenizing, macro perspective, is rooted in the forms and entities such as the nation-state, that are *perceived* as static and sedentary, as argued above. In turn, mobility does not produce essences. So, in the end, through the flows and leaks of law, through the movement of people, the meeting of laws, or the movement of law in jurisprudence, new understandings and operations of concepts can be created. For instance, unlike in the case of the burials in *R v. Powell* where the rights of the colonized Darug boys were ultimately abandoned, the burial, and the obligation

---

134 See for instance Clifford Atleo and Jonathan Boron, 'Land Is Life: Indigenous Relationships to Territory and Navigating Settler Colonial Property Regimes in Canada', *Land* 11, no. 5 (21 April 2022): 609.

to attend to the dead can result in mobilizations around the recognition of persons' legal status and challenges of the exclusionary laws.[135] Therefore, another side of the story of the movement of law is the potential of resistance that it generates. To be sure, the mobility of law cannot be analysed without reference to the otherness and the outside but also to resistance to the othering and excluding role of law. Thinking about law through the perspective of movement allows the imagining of alternative ideas and solutions.

Peter Fitzpatrick has been writing about law's potential for resistance extensively. As I discussed already, for Fitzpatrick, law constantly moves between the narrow and the broad interpretation of the norm. Mobility as resistance needs to be analysed in light of this movement and law's relationship with what is other to it. As Fitzpatrick writes:

> I have argued that we can better understand law as resistance if we see it in two dimensions. With one, law assumes a unified identity surpassing social relations. With the other, law is created in its integration with the diversity of social relations. This relational dimension of law supports resistance, but they can be undermined by law in terms of its surpassing dimension. However, the relational dimension of law returned the favour, as it were. It served to demarcate limits on law in its surpassing dimension. Law proved to be a potent mode of resisting law.[136]

What this means is that resistance in law is embedded in the movement as a quality of law. Yet, the movement as *differential repetition* constantly oscillates between limitation and regulation on the one hand and expansion on the other. Law surpasses law and resists law in a process of constant negotiation that takes place in jurisprudence, in the way how law is interpreted and applied daily. Sometimes, law can expand our understanding of social reality and provides us with emancipatory possibilities, and sometimes it narrows down our worlds and limits our rights. The scope of the possible resistance depends on the positionality of the person and whether the person is considered to move in an orderly and disorderly fashion.

Other modes of law's mobility discussed in this chapter too carry various potential for resistance against law. For instance, mobility as resistance is rooted in the act of movement itself. Crossing international borders against the law challenges the impermeability of borders and shows that human movement ultimately cannot be controlled. But movement of people also means movement of different laws and norms across the globe, that can affect the law in the place of arrival but also in the place of departure. In particular, the mobile subjects

135 Kim Rygiel, 'Dying to Live: Migrant Deaths and Citizenship Politics along European Borders: Transgressions, Disruptions, and Mobilizations', *Citizenship Studies* 20, no. 5 (2016): 545–560.
136 Fitzpatrick, *Law as Resistance: Modernism, Imperialism, Legalism*, 39.

bring with them the knowledges gained through mobility that not only can be included in the process of law-making but also contribute to the construction of new forms of belonging. Increased attention to knowledges and epistemologies from the global South can problematize the one-sided understanding of law as supporting the interests of the global North. In turn, the meeting of laws can help inscribe relationality into law bridging the gap between different laws, different legal categories, and legal positionalities. This may happen for instance, through emphasising shared rather than differing features of various subjects. Finally, differential repetition of law can create a space in between the openness and closeness of law shifting attention to the potentiality of the tension between the actual and the possible.[137] As Olivia Barr writes;

> Yet if we want colour in our worlds, if we want to notice the life in our pulsing blood, it is important to pay legal attention to the ever-motion of law's movements. In turn (...) it becomes possible to rethink law, and rethink contemporary legal thought. This is the promise of movement. This is the promise of law.[138]

I will discuss these potentialities for resistance more closely in Chapter 4.

To emphasize, however, the mobility of law which can provide tools for resistance and emancipatory change is not per se emancipatory. Even though the emancipatory potential is clearly present in law, it is not a given. For movement is not the same as progress or advancement. Movement in law is at best ambivalent – the mobility of law is simply a feature of law. But the movement of law may not be proceeding onwards, or in a specific direction, or towards a particular place.[139] The movement of law in jurisprudence always responds to the time and desires of society and these sentiments affect the direction towards which law moves. This is visible in how legal concepts are differently understood in different contexts, and how they are modified by events or shifts in what is accepted socially.

Conclusions

This chapter introduced the concept of mobile law and challenged the common perception of law's stability as caused by its relationship with the territorial nation-state and its position within the democratic government as a rule of law. I showed how the linkage of law with the nation-state and the state territory results in stabilising and solidifying law. At the same time, the perception of law's stability is constitutive to the production and the maintenance of the

---

137 Nanda Oudejans, 'The Right Not to Have Rights: A New Perspective on Irregular Immigration', *Political Theory* 47, no. 4 (August 2019): 447–474, 459.
138 Barr, 'An Homage to Legal Drips, Wobbles and Perpetual Motion', 146.
139 Barr, *A Jurisprudence of Movement*, 67.

perception of stability of the nation-state. In addition, the features of the rule of law, where law has to be clear, stable, public, and universal, hide the mobility of law through construction of the universal subject of law. Stability of law is therefore, a disguise that needs to be revealed by applying mobility lens to law.

In the first section of this chapter, I applied the mobility lens to the relationship between law and the nation-state, using the concept of the nation-state machine. Nation-state emerges here as an unstable entity produced through the processes of discursive and non-discursive practices of homogenization and stabilization. Law performs a crucial role in this process as one of such discursive practices. Revealing the unstable quality of the state, however, contributes also to the shift of perception of law as mobile.

In the second part of the chapter, I discussed different but interrelated ways of understanding law as mobile, such as the embodiment or movement of law by both people and transnational organizations; embeddedness of movement in law's interactions with other laws as well as with society, politics, and the economy; and mobility as a quality of law. All these approaches shift the focus from the objective and universal rules and regulations to concrete cases, concrete legal decisions, and concrete bodies.

In the last part of the chapter, I analysed the implications of the shift from stability to mobility of law. I showed that focus on mobility of law allows, in particular, for unsettling the universality of the legal subject and bringing to attention the inequality of movement of persons based on their citizenship, race, gender, or wealth. Setting law in motion has been also necessary for bringing into light the possibility of resistance and imagination of alternative legal futures. The analysis in this chapter provides, therefore, theoretical underpinnings for further analysis, that will allow me to delve more deeply into different aspects of the complex and multifaceted relationship between law and mobility. In the following Chapters 2 and 3 I will analyse how mobility is inscribed in the concepts of citizenship and borders and how these concepts use mobility as a tool for (re)production of the nation-state.

Chapter 2

Mobility as a right

Introduction

The chapter is interested in legal mechanisms producing mobilities and immobilities, contributing to the emergence of mobility as a right. In this chapter and Chapter 3, I critically analyse the role of law in relation to human mobility, which is traditionally understood as regulating the substantive and procedural conditions for movement and residence within and across national borders. I show how a shift of perspective – from the content of legal rules and procedures to their productive function reveals how law constructs both mobilities and immobilities. By focusing on mobility as a right in Chapter 2 and mobility as a violation of law in Chapter 3, this book follows the distinction between *orderly* and *disorderly* mobility and shows how this distinction has been constructed in law, including human rights law, and is supported by the global mobility infrastructure. Together with Chapter 1, Chapters 2 and 3 also show how a shift of perspective from static to mobile reveals the primary instability of institutions currently constitutive of orderly human mobility – that of a nation-state, citizenship, and borders – and how they remain in a constant process of construction and deconstruction, impacted by a shifting dynamic of mobility.

The focus of this chapter is on mobility as a right guaranteed and enhanced by the global mobility infrastructure, including *good* citizenship.[1] I start with the analysis of the role of citizenship for the right to the freedom of movement, its history, and its contemporary application. In international human rights law, the right to leave any country is asymmetric and does not correspond with the right to enter any country, except one's own. However, the right to leave may be limited in certain circumstances within the national legislation (for instance in the case of ongoing criminal procedure), and, at the same time, human rights or refugee law imposes certain obligations on states concerning non-citizens appearing at their borders (as for instance the obligation to *non-*

---

1   See for instance Dimitry Kochenov, *Citizenship*, The MIT Press Essential Knowledge Series (Cambridge, Massachusetts; London, England: The MIT Press, 2019), 174.

refoulement). I will demonstrate, the right to the freedom of movement is rooted in the modern/colonial concept of citizenship that has emerged as a norm, against which all other forms of legal status are currently being assessed,[2] and which, in consequence, affects the ability or the inability to move.

In line with the methodological approach of the book, I problematize what is traditionally called the right to the freedom of movement and show how the shift from the content to the productive function of law warrants calling it *mobility as a right* instead. From this perspective, mobility as a right, together with corresponding immobility, is managed and controlled through the construction of the institution of citizenship.[3] Following Nail's theory of kinopolitics, I approach citizenship as only temporary stability that fluctuates constantly in every polity.[4] Citizenship is an institution that has been historically constructed through the rules, including human rights law, governing the residence and movement of people between territories and through borders, created through the inclusion of some and exclusion of others, what Nail calls an expansion by expulsion.[5] I draw my analysis of citizenship from Hagar Kotef's genealogy of liberal subjectivity based on regulated and orderly movement as a condition for belonging.[6] In consequence, as Dimitri Kochenov argues, citizenship does not guarantee inclusion but rather undermines the idea of universal equality by differential belonging, by justifying exclusion and normalising discrimination.[7] By looking at citizenship through the lens of immobility I show how citizenship has been gendered, racialized, or minoritized, and how these facets affect the contemporary right to the freedom of movement.

In the first part of the chapter, I focus on the right to the freedom of movement as ordered, stable, and rooted in territorially constructed citizenship, and argue for the conceptual shift from the freedom of movement to mobility as a right. In the second part of the chapter, I analyse what this conceptual shift reveals: the productive function of international and national legal regulations on obtaining and losing citizenship that sets conditions for the mobility of some and immobility of others. As case studies, I use two sets of rules that recently gained prominence (1) allowing acquiring citizenship through investment, and (2) allowing removal or revocation of citizenship in the case of terrorist suspects or more generally when it is conducive to the public good.

2   Magdalena Kmak, 'The Right to Have Rights of Undocumented Migrants: Inadequacy and Rigidity of Legal Categories of Migrants and Minorities in International Law of Human Rights', *International Journal of Human Rights* 24, no. 8 (2020): 1201–1217.
3   Kochenov, *Citizenship*, 16.
4   See also Kochenov, 27.
5   Thomas Nail, *Being and Motion* (New York, NY: Oxford University Press, U.S.A., 2019).
6   Hagar Kotef, *Movement and the Ordering of Freedom: On Liberal Governances of Mobility*, Perverse Modernities (Durham, NC; London: Duke University Press, 2015).
7   Kochenov, *Citizenship*, 8

In this chapter and throughout the book I use the concept of citizenship rather than nationality. While these two are often used interchangeably, the latter is commonly referred to in public international law and the former is more frequently used in national legislation.[8] Historically, citizenship served to describe residents of metropolitan territory of colonial powers, and nationality was used to describe the inhabitants of colonial territories. Only citizens had the right to reside and execute their political rights in the metropolitan territory[9] The word *citizenship*, therefore, better corresponds to the aim of this chapter as it refers to the legal status of membership in a polity and access to rights, including the right to the freedom of movement.[10] It is therefore also more suitable for the discussion of mobility as a right of primarily Western or well-off citizens, emphasising its inherent inequality and legacy linked to colonialism.[11]

From the freedom of movement to mobility as a right

In traditional international migration law, freedom of movement has been celebrated as the "first and most fundamental of human liberties"[12] that is indispensable for the free development of a person. Understood as such, the freedom of movement has been analysed in contemporary public international legal scholarship with reference to the writings of authors such as Bodin, Grotius, Vattel, Puffendorf, Vittoria, Locke, and Rousseau that saw it as grounded in international morality and supportive of state sovereignty.[13] For instance early modern Spanish academic Francisco de Vitoria argued for the right to travel and live in other countries that cannot be prevented by the native population of these countries.[14] To be sure, the pronouncements of the freedom of movement were aimed at supporting colonial expansion of European states and the authors in question often worked as legal advisors for these states or, as

---

8   Dana Schmalz, *Refugees, Democracy and the Law: A Deficit of Rights*, Law and Migration (Abingdon, Oxon; New York, NY: Routledge, 2020), 48.

9   Ivan Shearer and Brian Opeskin, 'Nationality and Statelessness', in *Foundations of International Migration Law*, ed. Brian Opeskin, Richard Perruchoud, and Jillyanne Redpath-Cross (Cambridge: Cambridge University Press, 2012), 95–96.

10 Kochenov, *Citizenship*, 2–3.

11 Thomas Spijkerboer, 'Marathon Man and "Our European Way of Life"', *OpenDemocracy* (blog), 27 October 2020, https://www.opendemocracy.net/en/can-europe-make-it/marathon-man-and-our-european-way-life/ (accessed 18.12.2022).

12 Richard Perruchoud, 'State Sovereignty and Freedom of Movement', in *Foundations of International Migration Law*, ed. Brian Opeskin, Richard Perruchoud, and Jillyanne Redpath-Cross (Cambridge: Cambridge University Press, 2012), 126.

13 Perruchoud, 'State Sovereignty and Freedom of Movement', 126.

14 Karin de Vries and Thomas Spijkerboer, 'Race and the Regulation of International Migration. The Ongoing Impact of Colonialism in the Case Law of The European Court of Human Rights', *Netherlands Quarterly of Human Rights* 39, no. 4 (December 2021): 291–307, 293.

Grotius, for colonial enterprises such as the United East Indian Company.[15] Freedom of movement became in the thoughts of those thinkers 'a right limited only in certain cases, to prevent harm to natives.[16] Colonial subjects, through the right to metropole citizenship were included (nominally) in the freedom of movement but their citizenship cannot be compared to that of colonizers.[17] Similarly, as Hagar Kotef shows, their movement was conceptualized as *different* or *worse* from that of Europeans.[18]

Kotef argues in *Movement and Ordering of Freedom*[19] that mobility and movement linked with coloniality played a crucial role in shaping modern liberal subjectivity. Kotef shows, how historically, the liberal (colonising) subject could not have been separated from its corporeal dimension – the capacity for movement – which together with other conditions, such as material, racial, geographic, and gender, linked freedom to the movement of only some subjects.[20] Within such understood liberal freedom of movement, mobility became an *ordered* or stable movement, leading to the formation of a liberal subject as epitomising an ordered freedom.[21] At the same time, other(ed) subjects, "African, indigenous Americans, or Asians, as well as women or paupers, keep appearing in the texts of liberal thinkers as either too stagnant or too mobile," thus, not fitting into the European liberal subjectivity.[22] Unequal national and global mobility has been considered incompatible with liberal and democratic ideas that are embedded in the concept of citizenship,[23] Kotef shows how these inequalities are not an exception from the liberal freedom of movement, but its part and parcel and are linked with colonial expansion.

Unequal capacity for movement as linked with colonialism and racial subjugation has oriented the contemporary understanding of the freedom of movement.[24] During the process of decolonization, the right to metropole citizenship became gradually removed and the former colonial subjects were turned into (undesired) foreigners.[25] The unequal capacity for movement as a feature of European liberal subject, remained however a distinctive feature of contemporary

15   de Vries and Spijkerboer, 293–295.
16   de Vries and Spijkerboer, 296.
17   Kochenov, *Citizenship*, 8.
18   Kotef, *Movement and the Ordering of Freedom*, 9.
19   Kotef, *Movement and the Ordering of Freedom*.
20   Kotef, 5.
21   Kotef, 9.
22   Kotef, 9.
23   Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Cambridge, Mass: Harvard University Press, 2009); Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership*, (Princeton, NJ: Princeton University Press, 2008).
24   Kochenov, *Citizenship*, 99.
25   de Vries and Spijkerboer, 'Race and the Regulation of International Migration. The Ongoing Impact of Colonialism in the Case Law of The European Court of Human Rights', 198.

mobility, rooted in differential concept of citizenship. Indeed, also today, the Western citizen is generally the most mobile, but their mobility is regulated and often related to stability and sedentarism,[26] and is constitutive of liberal communities as nations and states.[27]

The freedom of movement that is understood as an orderly and regulated mobility has; therefore, not only gained ideological and political importance (with the premises and conditions changing throughout the centuries as shown, for instance, by John Torpey in *The Invention of the Passport*[28]) but has consequently also developed into a right in international law.[29] The principle of the freedom of movement has been included in contemporary human rights instruments, in particular, article 13 of the UDHR[30] and has been later included in numerous other human rights treaties.[31] The principle of free movement has been traditionally understood in international law as being composed of three elements: 1) the right to leave any country, including one's own; 2) the right to enter or return to own country; and 3) the right of everyone "lawfully within the territory of a State to enjoy the liberty of movement and freedom to choose his or her residence within that territory."[32] Therefore, it is clear that in such an understanding, the right to the freedom of movement is not symmetrical, and a right to leave any country does not correspond to the right to enter a country of choice, except only ones' own country. Moreover, only those lawfully residing in the country are granted the freedom to move and can have a choice of the place of their residence. In order to understand better the inequality of the freedom of movement it is important to turn to the definition of the concept of one's own country, that is tightly related with the concept of citizenship.

Own country

The concept of "his or her own country," rooted in statehood and citizenship, becomes, therefore, crucial for shaping the right to the freedom of movement, pointing to its territorialism and sedentarism. Citizenship's link with territory[33]

---

26 Kotef, *Movement and the Ordering of Freedom*, 10; see also Didier Bigo and Elspeth Guild, 'Policing in the Name of Freedom' in *Controlling Frontiers: Free Movement into and within Europe* (London: Routledge, 2016), 3.
27 Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press, 2008), 44.
28 John C. Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (Cambridge: Cambridge University Press, 2000).
29 Perruchoud, *State Sovereignty and Freedom of Movement*, 129.
30 1) Everyone has the right to freedom of movement and residence within the borders of each State; 2) Everyone has the right to leave any country, including his own, and to return to his country.
31 See for instance article 12 of the ICCPR or article 1, protocol 4 to the ECHR.
32 Perruchoud, *State Sovereignty and Freedom of Movement*, 129.
33 Article 1of the Montevideo Convention on Rights and Duties of States, 1933.

has been based on the dependence of the states (that emerged as principal right holders on their territories) on the original title to the territory held by their people.[34] The state, in turn, granted the people access to a territory (and later formal and substantive rights) through the institution of citizenship. At the same time, however, the development of states depended on obtaining from its citizens the means necessary for the states' own reproduction. In consequence, states monopolized the regulation of the right of entry and residence of citizens in their own territory in order to control their means and resources.[35] Citizenship; therefore, does not only define the position of a person in the state of residence, their rights, and obligations. Rather, in the context of the freedom of movement, citizenship also defines their ability to travel abroad and to return back to their own state.[36] It is, therefore, a meaningful category of membership that is part and parcel of a world organized around statehood and territorial sovereignty, which is a basis for security, identity, and opportunity[37] as well as the right to the freedom of movement. To be sure, the mobility lens allows us to perceive the essence of citizenship as the determinant of the rights to enter, reside and not to be deported from a particular territory.[38]

In international law, the obligations towards one's own citizens are not in principle extended to non-citizens, against whom the state may exercise its rights without limits resulting from any prior rights such as the original title for the territory.[39] Consequently, the definition of a state in international law is based not only on the relationship between the government and the people within its borders, but also on the distinction between citizens and foreigners, those with the right to reside and those whose right to enter and reside is subjected to the sovereign power of states. Citizenship, therefore, emerges as an analytically divided concept, that represents both the internal relations of the national community and the need to maintain its boundaries. Understanding this double function of citizenship requires, as Linda Bosniak points out, "making sense of the endless interplay between commitments to inclusion and boundedness in national discourse and institutions."[40] This dividedness also forms the basis of the principle of freedom of movement as accompanied by the doctrine of sovereign migration control.[41] Foreigners, unlike citizens, are not

---

34   Enrica Rigo, 'Citizens despite Borders: Challenges to the Territorial Order of Europe', in *The Contested Politics of Mobility: Borderzones and Irregularity*, ed. Vicki Squire (Abingdon, Oxon; New York: Routledge, 2012), 211.

35   Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State*, 13.

36   Perruchoud, *State Sovereignty and Freedom of Movement*, 93.

37   Ayelet Shachar, 'The Birthright Lottery: Response to Interlocutors', *Issues in Legal Scholarship* 9, no. 1 (24 January 2011), 1.

38   Kochenov, *Citizenship*, 126.

39   Rigo, 'Citizens despite Borders: Challenges to the Territorial Order of Europe', 155.

40   Linda Bosniak, 'Making Sense of Citizenship', *Issues in Legal Scholarship* 9, no. 1 (24 January 2011), 3.

41   de Vries and Spijkerboer, 'Race and the Regulation of International Migration. The Ongoing Impact of Colonialism in the Case Law of The European Court of Human Rights', 300.

able to claim the countries as their own, and in consequence claim the full right to enter and reside on their territory, with limited exceptions defined as "special ties" or "close and enduring connection" with these countries,[42] or derived from the human rights instruments, most important of which is the prohibition of *refoulement*.[43] The right to the freedom of movement, emerges, therefore, as a stable and ordered institution, dependent on the preceding allocation of people among territorial states, primarily through the institution of citizenship, coupled with the recognition of the extended sovereign right of states to control entry and residence of foreigners within their territory.

Mobility as a right

This international legal system of the freedom of movement constitutes a blueprint for orderly mobility and, consequently, access to legal protection. This system however has its roots in modernity/coloniality which is characterized by the inequality of citizenships among states. Based on the formal equality of states in international law, citizenships of all states should be equal for the purpose of the freedom of movement and the citizens of these states should be able to benefit from the right to the freedom of movement without discrimination. In practice, inequality among citizenships significantly limits the ability to move by the majority of people around the globe. The operation of what Ayelet Shachar calls a "birthright lottery" – the political membership allocation system that is based on birth – results in unequal distribution of the basic life chances around the globe as well as unequal access to the freedom of movement and opportunity of mobility, that remains regulated and constrained by the global mobility infrastructure, including borders and passports.[44] Coupled with the visa regimes and other mobility restrictions primarily targeting citizens of former colonies,[45] the birth right citizenship effectively immobilizes a significant part of the global world population while promoting or even speeding up the mobility of others,[46] usually citizens of Europe, the Anglophone West, and some of the East and South-East Asian countries such as Japan, Singapore, Malaysia, or

---

42 See however the General Comment no. 27 of the Human Rights Committee: CCPR General Comment No. 27: Article 12 (Freedom of Movement).

43 See for instance Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law*, Oxford Studies in European Law (Oxford, UK: Oxford University Press, 2016).

44 Shachar, 'The Birthright Lottery', Kochenov, *Citizenship*, 49.

45 Spijkerboer, 'Marathon Man and "Our European Way of Life"'. Thomas Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control', *European Journal of Migration and Law* 20, no. 4 (29 November 2018): 452–469.

46 Katja Franko Aas, '"Crimmigrant" Bodies and Bona Fide Travelers: Surveillance, Citizenship and Global Governance', *Theoretical Criminology* 15, no. 3 (August 2011): 331–346.

South Korea.[47] In consequence, the mobility of citizens of some countries across the globe is facilitated with such measures as visa waivers, special mobility arrangements, or fast-tracking at the border crossing points for the holders of certain biometric passports. In turn, the great majority of the global South, former colonies and former socialist states (except those who joined the EU) experience various levels of obstacles for their mobility[48] and in consequence are unable to access the territories of the global North as they need visas that are often very costly and with a limited chance of receiving one upon application.[49] As the Guardian columnist Nesrine Malik writes "[t]he passports at the top of the Henley index allow the holder to visit almost 200 countries without securing a visa in advance. The lower down, like the Sudanese one I was born with, must pass through the eye of a needle before being permitted to enter the majority of countries. Applicants face almost unscalable walls of bureaucracy and suspicion, comical demands for paperwork and, often, humiliation and refusal."[50] The almost complete control over access to the global mobility infrastructure is shown; for instance, by only three out of 10,000 passengers arriving at European airports from outside of the EU arrive without the necessary documentation.[51]

Importantly, in this context, citizenship, not only determines the conditions for the regulated and orderly movement of people among nation-states, but it is also characterized by the mobility of the minority, and immobility of the majority of the human population.[52] Citizenship also allows for forceful reallocation of those who remain outside the limited right to the freedom of movement (those who move in a non-orderly fashion) back to their assigned states. William Walters calls this practice a technology of citizenship; the aim of which is "the compulsory allocation of subjects to their proper sovereigns" and maintenance of a vision of the world as divided into national communities.[53] Taking this point of view means that the legal and normative framework of citizenship, and in consequence the freedom of movement, depends in practice

---

47 'The Henley Passport Index', accessed 24 August 2022, https://www.henleyglobal.com/passport-index/ranking.
48 Kochenov, *Citizenship*, 128.
49 Thomas Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalization of Migration Control', *European Journal of Migration and Law* 20, no. 4 (29 November 2018): 452–469, 458.
50 Nesrine Malik, 'Only a Country as Complacent as the UK Could Give up Its Border Privilege so Easily', *The Guardian*, 8 January 2022, https://www.theguardian.com/commentisfree/2022/aug/01/uk-border-privilege-low-ranking-passport-brexit-international-travel (accessed 18.12.2022).
51 Spijkerboer, 'The Global Mobility Infrastructure', 461.
52 As shown by UN Population Division migrants constitute 3.6% of global population.
53 William Walters, 'Deportation, Expulsion, and the International Police of Aliens', *Citizenship Studies* 6, no. 3 (2002): 265–292, 282.

not only on formal membership in a state, but also on the measures taken to control migration, such as expulsion or deportation.[54]

The technology of citizenship, together with border technology as based on the doctrine of sovereign control of migrants (which I am going to describe in more details in Chapter 3) serves to manage the mobility of groups already separated into citizens and foreigners. This is done by the process of sorting, ranking, and then filtering mobility into a differentiated hierarchy of more or less permissible and more or less prohibited mobilities[55] contributing to the perceived stability of the nation-state machine,[56] which through expansion by expulsion[57] produces and reproduces various types of legal entities, such as citizens, desired foreigners, refugees, or irregular migrants, that remain in a dynamic relationship to one another. The stability is constructed through the normalising concept of citizenship, against which all other legal statuses are being assessed, resulting in inclusion of some and exclusion of others.[58] The normalising citizenship requires, at the same time, these *others* to function.[59] However, the *Others* do not exist outside the state and are often a necessary part of it.[60] Citizenship, therefore, should be defined in relation to otherness that encompasses the multiplicity of relationships between different groups.[61] In particular, citizenship defined in this way is based on the assumption that some are law-abiding, honourable; therefore, more valuable, and better, as opposed to those considered to be strangers, outsiders, or bad citizens[62] towards whom various measures are being undertaken in order to limit or expedite their mobility. Brubaker calls this technology of citizenship "a powerful instrument of social closure"[63] with its internal and external dimensions. Whereas the

54 Bridget Anderson, Matthew J. Gibney, and Emanuela Paoletti, 'Citizenship, Deportation and the Boundaries of Belonging', *Citizenship Studies* 15, no. 5 (2011): 547–563.
55 Simone Abram et al., 'The Free Movement of People around the World Would Be Utopian: IUAES World Congress 2013: Evolving Humanity, Emerging Worlds, 5–10 August 2013', *Identities* 24, no. 2 (4 March 2017): 123–155, 146.
56 Gilles Deleuze and Felix Guattari, *Anti-Oedipus: Capitalism and Schizophrenia*, trans. Robert Hurley, Mark Seem, and Helen Lane, 6th printing (London: The Athlone Press, 2003), 142.
57 Thomas Nail, *The Figure of the Migrant*, 1 edition (Stanford, California: Stanford University Press, 2015); Thomas Nail, *Theory of the Border* (Oxford; New York: Oxford University Press, 2016); Nail, *Being and Motion*, 120.
58 Kmak, 'The Right to Have Rights of Undocumented Migrants: Inadequacy and Rigidity of Legal Categories of Migrants and Minorities in International Law of Human Rights'.
59 Engin F. Isin, *Being Political: Genealogies of Citizenship* (Minneapolis: University of Minnesota Press, 2002), 4.
60 Isin, 30.
61 Isin, 29.
62 Isin, 35–36.
63 Rogers Brubaker, *Citizenship and Nationhood in France and Germany*, 6. print (Cambridge, Mass.: Harvard Univ. Press, 2002), x.

internal dimension is based on the inclusion of citizens who are granted privileges in contrast to foreign residents, the external dimension is based on an exclusion that allows states inter alia, to draw a line between citizens and potential immigrants.[64]

It becomes clear, considering this analysis, that the right to the freedom of movement as defined in international law, means in practice that mobility is a right (or even a privilege) of citizens of some states that can practice orderly and regulated mobility. Such mobility is juxtaposed to immobility or forced (expedited) mobility of (often gendered, racialized, or minoritized[65]) others. The conceptual shift from migration to mobility in studying law regulating movement allows also to fully capture this operation of a technology of citizenship which is productive of both mobilities and corresponding immobilities. In what follows, I focus on the normative aspect of citizenship, its acquisition and loss, and, in particular, the most recent development of national and regional regulations shifting the direction of the development and the meaning of technology of citizenship, which in consequence, contribute to further strengthening of mobility as a right of only some.

The changing law on citizenship

Ayelet Shachar calls citizenship perhaps the most important goods and opportunity-allocating institution of the modern era. As she emphasizes, however, citizenship is not a natural phenomenon, – "Rather, it is a human-made regime of legal entitlement that our citizenship laws perpetuate and then disguise under the cloak of a natural given."[66] Similarly, Enrika Rigo points out that the order of citizenship linked with the nation-state territory has always been an artificial construction and cannot be limited to natural facts such as birth within a particular geographic area.[67] To be sure, citizenship has been more and more disconnected from territoriality and access to rights.[68] Yet, citizenship continues counterfeiting its stability and abstract equality through its insistence on the link with presumably equal status of states in international law as well as *national values* or *political community*.

As discussed above, birth remains a dominant way of acquiring citizenship, but the concrete rules for its acquisition, determined by the nation-states, constantly change around the globe.[69] I will not focus in detail on the dominant

---

64   Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State*, 154–157; Marc Morjé Howard, *The Politics of Citizenship in Europe* (Cambridge: Cambridge University Press, 2009), 3.
65   For the discussion on the relationship of mobility and immobility see Sheller, *Mobility Justice*.
66   Shachar, 'The Birthright Lottery', 24 January 2011, 4.
67   Rigo, 'Citizens despite Borders: Challenges to the Territorial Order of Europe', 210.
68   Kochenov, *Citizenship*, 135–142.
69   Kochenov, 112.

national rules on acquisition and a loss of citizenship as they are extensively described elsewhere.[70] It is important to emphasize, however, that when it comes to the regulation of the acquisition of citizenship, it has been traditionally conceptualized as based on the genuine link between the person and the state. However, as Kochenov underlines, citizenship is rather based on the abstract and random connection between an individual and the state authority – the birthright lottery.[71] The connection arises, in principle, by birth to parents who are citizens of a particular state (*ius sanguinis*), by birth on the territory of the state (*ius soli*), or by a combination of the two. The recent tendency of states to change the mode of acquisition from *ius soli* to *ius sanguinis* shows that citizenship is indeed a birth right that does want to have less and less to do with migration.[72] In turn, naturalization is a confirmation of the formation of a relationship with the state, which usually occurs as a result of living in a given territory for a given period of time, by learning the language of a given country and getting to know its culture, customs, or functioning of the political system. The act of naturalization is often used to reinforce the *essence* of citizenship.[73] A person aspiring to naturalization must, therefore, often prove that they are connected with the state by passing certain exams (including those that are supposed to prove the adherence to *state values*) or participating in citizenship award ceremonies often serving to construct culturally exclusionary and cohesive citizenship identities.[74] There are also situations in which this relationship with the state breaks down as a result of losing contact with a country or as a result of a specific behaviour of a citizen, e.g., service in the armed forces of a foreign country.

Within these premises, the actual regulations, such as the permission for and consequences of double citizenship, the length of residence required to consider the link with the state as sufficient, and the question of *national values* that citizenship encompasses have been often dependent on the historical conditions and political development of the states, in particular, on the history of colonialism and early processes of democratization.[75] For instance, the former

---

70 Perruchoud, 'Nationality and Statelessness'; Peter Spiro J., 'Citizenship, Nationality, and Statelessness', in *Research Handbook on International Law and Migration*, ed. Vincent Chetail and Céline Bauloz, Research Handbooks in International Law (Cheltenham, UK: Edward Elgar, 2014); Kochenov, *Citizenship*.

71 For extensive criticism of the requirement of the genuine link as determined by the International Court of Justice in the Nottebohm case (Nottebohm (Liehtenstein v. Guatemala), 6 April 1955) see Kochenov, *Citizenship*, 114–120.

72 Ranabir Samaddar, *The Postcolonial Age of Migration* (Abingdon, Oxon; New York: Routledge, 2020), 13.

73 For critical analysis of the politics of naturalization see Kochenov, *Citizenship*, 227–231.

74 Anne Macduff, 'Performing Legal and National Identities: Australian Citizenship Ceremonies and the Management of Cultural Diversity', *Social & Legal Studies*, 32 (2): 197–215, 2.

75 Howard, *The Politics of Citizenship in Europe*.

colonial powers were more open for relationships with the outside world; therefore, these relationships, even though exploitative and unjust, required more open migration and citizenship policies. On top of this, those countries that had already democratized in the 19th century were more likely to develop a conception of national identity that tolerated, even though reluctantly, the inclusion of foreigners as members of their societies.[76] Many former colonial powers, however, have been, during the era of decolonization but also later, limiting the right for the acquisition of citizenship for citizens of their former colonies, enacting what has been called "racial citizenship."[77] A very notable example is that of the UK in the context of its accession to the EU. Nadine El-Enany shows how the EU's conditions for the UK's accession encompassed the requirement to limit non-white residents and citizens in the UK and led to significant legal changes narrowing down the access to UK citizenship by residents of the former colonies.[78] A similar process took place in the context of the creation of the USA in the wake of its war with Mexico. The Treaty of Guadalupe Hidalgo of 1848 established the US border at the River of Rio Grande and granted it the territories of present-day California, Nevada, Utah, New Mexico, most of Arizona and Colorado, and parts of Oklahoma, Kansas, and Wyoming. The treaty, in article VIII granted the population inhabiting these annexed territories the right to choose to leave or to stay and for those who stay, to acquire US citizenship. However, even though the treaty had effectively rendered annexed Mexicans "legally white," they would remain "socially non-white" in the eyes of Americans.[79] In particular, after the annexation, mestizos and afromestizos living in the annexed territories were routinely adjudged as racially ineligible for citizenship. Afromestizos became governed by the Black code and Indians were denied citizenship and lost control of lands.[80]

To be sure, while it is a sovereign state's competence to decide who can become a citizen, and the doctrine of sovereign control of migration has vested states with rights to control movement, international law has been to a certain extent restricting the freedom of states to regulate citizenship and mobility, in particular in order to avoid statelessness.[81] These interferences are still limited however and international law mostly deals with the consequences or effects of

76   Howard, 37.
77   Harsha Walia, Robin D.G. Kelley, and Nick Estes, *Border and Rule: Global Migration, Capitalism, and the Rize of Racist Nationalism* (Chicago: Haymarket Books, 2021), 171.
78   Nadine El-Enany, *(B)Ordering Britain: Law, Race and Empire*, 2020; on coloniality of EU citizenship and borders see also Enrica Rigo, 'Citizenship at Europe's Borders: Some Reflections on the Post-Colonial Condition of Europe in the Context of EU Enlargement', *Citizenship Studies* 9, no. 1 (February 2005): 3–22.
79   Sherally Munshi, 'Unsettling the Border', *UCLA Law Review* 67, no. 6 (2021 2020): 1748.
80   Munshi, 1748.
81   Perruchoud, 'Nationality and Statelessness', 97.

attribution of citizenship when not in accordance with international conventions, international custom, or general principles of law,[82] such as the right of habitual residents to access citizenship, and prohibition of discrimination based on the citizenship laws and practice.[83] The boundaries of citizenship become also more permeable by changes in citizenship on the levels both above and below the state, including regional regulations such as the EU citizenship (primarily linked with the freedom of movement in the Area of Freedom, Security, and Justice)[84], simplified access to naturalization as in the case of South America[85] and local, novel developments on the levels of cities or municipalities.[86] Writing about the EU, Thomas Faist observes that these developments indicate the multiplication of the borders of citizenship creating new lines of differentiation both among citizens of the EU and between citizens and non-citizens.[87] In the context of the freedom of movement of the EU citizens for instance, their movement is either advantaged or disadvantaged based on their economic means.[88] At the same time, the deprivation of national citizenship has an impact on the citizenship of the EU and due to that, the rights of the member states in relation to granting and removing citizenship are more limited. As the CJEU decided in the *Rottman* case, even though national citizenship remains within the matter of the sovereignty of the EU member states any decision of its revocation requires observation of the principle of proportionality.[89]

The continuous changes in conditions for obtaining citizenship as well as changes in the institutional or regional approaches to citizenship such as those regulated in the EU law require treating citizenship as – what the theory of kinopolitics calls – temporary stability, or even, as, instability. According to Saskia Sassen, citizenship remains an incompletely theorized contract between the state and the citizen. This incompleteness makes it possible for a such

---

82 Perruchoud, 97.
83 Spiro, 'Citizenship, Nationality, and Statelessness', 286.
84 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, p. 77–123.
85 Diego Acosta Arcarazo, *The National versus the Foreigner in South America: 200 Years of Migration and Citizenship Law*, Law in Context (Cambridge, UK; New York, NY: Cambridge University, 2018).
86 Thomas Faist, 'Local and Transnational Citizenship', *Europa Ethnica* 76, no. 1–2 (2019): 12–15, 12. See also Didier Bigo and Elspeth Guild, *Controlling Frontiers: Free Movement into and within Europe*.
87 Faist, 15.
88 Elspeth Guild, 'Who is entitled to move?' in *Controlling Frontiers: Free Movement into and within Europe* (Abingdon, Oxon: Routledge, 2016): 14–48.
89 Janko Rottman v Freistaat Bayern, No. C-135/08 (Court of Justice of the European Union 3 February 2010).

highly formalized institution to accommodate change, in other words, to respond to this change (whether induced by changed conditions, new subjectivities, or new instrumentalities) without sacrificing its formal status.[90] However, the stability of the formal status is often considered as citizenships' natural state. As Rainer Bauböck recently wrote, "[t]he broad new literatures on citizenship of minorities or on citizenship as a practice of contestation in social movements generally assume national citizenship as a stable background."[91] When viewed through the lens of the theory of kinopolitics – which approaches the political, societal, and cultural phenomena from the perspective of movement, and considers the figure of the migrant as the primary political subject,[92] – the current shape of citizenship appears historically contingent and, as a result, temporary. Therefore, the reasons behind such formation of citizenship as static requires scrutiny. Perspective on citizenship needs to be broadened by examining how citizenship, presumably stable, is gradually shifting, what different forms it acquires, and which purposes it serves.

To be sure, recent state practices indicate a disconnection of politics and practices of citizenship from its *perceived* function as a basis for equality and dignity.[93] On the one hand, citizenship has been losing its link with territory and rights leading to arguments of the hollowing up of citizenship.[94] The requirement of a genuine relationship between the person and the state as a basis for citizenship has been disqualified in jurisdiction and legal doctrine.[95] In addition, new practices emergence of the commodification of citizenship, i.e. granting it to those who are ready to invest certain amounts of money in the economy of the state of the new citizenship (the so-called *ius pecuniae*, citizenship for investments or cash-for-citizenship schemes). Citizenship has been also losing its meaning as a condition for access to not only civil and social but also political rights.[96] On the other hand, citizenship continuously functions as a tool for differential exclusion based on race, gender, or class. An example is a process of precarization of citizenship leading to its revocation in situations *conducive to the public good*, despite persons' strong relationship with the

90 Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages*, Updated ed. edition (Princeton, NJ: Princeton University Press, 2008), 277.
91 Rainer Bauböck, 'Summary: Global, European and National Questions About the Price of Citizenship', in *Debating Transformations of National Citizenship*, ed. Rainer Bauböck, IMISCOE Research Series (Cham: Springer International Publishing, 2018), vii.
92 For the discussion on the role of the figure of the migrant see Nail, *The Figure of the Migrant*.
93 Kochenov, *Citizenship*, xii.
94 Peter Spiro J., 'Cash-for-Passports and the End of Citizenship', in *Debating Transformations of National Citizenship*, ed. Rainer Bauböck, IMISCOE Research Series (Cham: Springer International Publishing, 2018), 17.
95 Kochenov, *Citizenship*, 115–116.
96 Kochenov, 247.

state.[97] All these changes point to the shift in the citizenship's role towards a tool for enhancing the mobility of some and a tool for control of movement and residence of others.

Commodification of citizenship

Margaret Somers in *Genealogies of Citizenship* warns about tilting the emphasis of citizenship towards the rules of the market. Market as an arbiter of moral authority recalibrates citizenship from that of social inclusion and membership to conditional inclusion or exclusion based on worth.[98] To be sure, this observation is relevant not only to the access to rights but also to the freedom of movement associated with citizenship. The turn towards the commodification of citizenship that I discuss in this section indicates that citizenship is considered primarily as a resource for mobility[99] and the recent controversial practices of citizenship by investment are the clearest illustration of this tendency.

Citizenship by investment is not a new practice and its history dates back to the 1980s when a federation of two Caribbean islands, St. Kitts and Nevis, after gaining independence from Great Britain, was forced to find contributors to the limited state budget. The current laws of St. Kitts and Nevis award to those investing US $ 250,000 to the confectionery industry or $ 400,000 to the real estate business, numerous privileges including citizenship and visa-free travel to over 80 countries worldwide.[100] Citizenship in return for investment is generally granted either on the basis of the discretion of the authorities or on the basis of special programmes specifying the requirements, in particular the sum of the investment, that must be met by the investor in order to be naturalized. It is interesting that in some cases, an investor may acquire citizenship without an obligation to reside in the territory of a given state. Although a residence requirement exists in most countries that grant naturalization in return for investment (such as Canada, the United States, the United Kingdom, Belgium, Australia, and Singapore), some countries allow citizenship to be acquired, regardless of any link between the state and the naturalized person.[101] Such

97 Elspeth Guild, *Security and Migration in the 21st Century* (Cambridge: Polity Press, 2009); Magdalena Kmak, 'Mnogość Obywatelstw: Studium Nad Dominującymi i Mniejszościowymi Dyskursami Prawnymi', in *O Prawach Człowieka. Księga Jubileuszowa Profesora Romana Wieruszewskiego* (Warszawa: Wolters Kluwer, 2017): 395–408.

98 Margaret R. Somers, *Genealogies of Citizenship: Markets, Statelessness, and the Right to Have Rights*, Cambridge Cultural Social Studies (Cambridge, UK; New York: Cambridge University Press, 2008), 4.

99 Rainer Bauböck, ed., *Debating Transformations of National Citizenship*, IMISCOE Research Series (Cham: Springer International Publishing, 2018), 3.

100 See http://stkitts-citizenship.com (accessed 13 April 2023).

101 Jelena Dzankic, 'The Pros and Cons of Ius Pecuniae: Investor Citizenship in Comparative Perspective' (Florence: European University Institute, Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, 2012), 1.

regulations exist in the already mentioned Caribbean countries, such as: Dominican Republic, St. Kitts and Nevis, and Antigua and Barbuda. Recently, however, similar regulations have also appeared in some European countries, such as Hungary, Austria, and Cyprus.[102]

The EU countries mentioned are interesting examples of changes in nationality laws, which were introduced in 2013 in the aftermath of the financial crisis and the collapse of the banking sector. The Cypriot authorities have adopted new laws with the aim, on the one hand, to keep investors within and prevent transfers of remaining assets to other countries and attract new investors. As a result, those who lost EUR 3 million during the crisis could automatically obtain Cypriot citizenship. At the same time, new and more favourable criteria were introduced for obtaining citizenship in exchange for investments – both lower financial requirements and the possibility of naturalization without it being linked to the public interest, requiring neither residence in Cyprus nor a good character.[103] Following the criticism and corruption accusations, Cyprus has recently announced the plan to subject the applications to the due diligence requirements and introduce a cap on the number of citizenships granted.[104]

Such and similar regulations fit into so-called flexible citizenship practices, that encompass strategies and actions by groups of mobile professionals looking for ways around and benefits from the legal regimes of individual countries by choosing different places to invest, work, or live.[105] The new regulations on citizenship by investment also point to the emergence of a group of so-called good or desirable citizens, whose *value* is determined not on the basis of a genuine relationship with the state or behaviour in accordance with the values of a given state, but like in Cyprus, only on the basis of the financial resources that they are ready to invest in the economy of a chosen country. A traditionally required *genuine link* with the state turns therefore into a business contract

102 Jelena Dzankic, 'Citizenship by Investment: Can Money Buy Citizenship?', *European Union Democracy Observatory on Citizenship* (blog), 15 February 2012, https:// globalcit.eu/citizenship-by-investment-can-money-buy-citizenship/ (accessed 18.12.2022); Jelena Dzankic, 'Investor Programs: Attempting to Cure the Struggling European Economies? I', *Citizenship in Southeast Europe* (blog), 14 December 2012, http://www.citsee.eu/blog/investor-programs-attempting-cure-struggling-europea n-economies (accessed 18.12.2022); Magdalena Kmak, 'Mnogość Obywatelstw: Studium Nad Dominującymi i Mniejszościowymi Dyskursami Prawnymi', in *O Prawach Człowieka. Księga Jubileuszowa Profesora Romana Wieruszewskiego* (Warszawa: Wolters Kluwer, 2017): 395–408.
103 Nicos Trimikliniotis, 'Report on Citizenship Law: Cyprus' (EUDO Citizenship Observatory, 2015).
104 Helen Smith, 'Cyprus to Step up Security Checks in Cash-for Citizenship Scheme', *The Guardian*, 23 May 2018. https://www.theguardian.com/world/2018/may/23/cyp rus-to-step-up-security-checks-in-cash-for-citizenship-scheme (accessed 13.04.2023).
105 Christian Joppke, 'The Inevitable Lightening of Citizenship', *European Journal of Sociology / Archives Européennes de Sociologie* 51, no. 01 (2010): 9–32.

in which money, not a person, needs to reside in the country of citizenship.[106] As a result of such a contract, naturalized citizens can enjoy the rights granted to them by the new state of citizenship, including, for example, in the case of citizenship being granted by European countries, access to the four freedoms of the EU common market.[107]

The proliferation of such schemes in recent years points towards the importance of citizenship as a resource for mobility,[108] with its value existing primarily in the mobility rights attached to passports and certain super-citizenships.[109] Such a scheme reveals the functions of citizenship as a tool for differential inclusion, hidden behind its *traditional* features that encompass the rootedness in a community, long-lasting residence, or participation in political and social life.[110] Interestingly, this process is coupled with increased state efforts to bring back the meaning of citizenship as a link with the state based on the tests and requirements for integration.[111] Crucially, however, these schemes exacerbate existing inequalities, by enhancing the distributive unfairness that encompasses mobility, tax exemptions, highly skilled migrant schemes, ethnic citizenship policies,[112] or even the ability to go around the restrictive protection laws and practices for those who are able to pay for it. In this context, interesting developments have followed the escalation of the Russian war against Ukraine in 2022.

Due to the sanctions against Russia and its citizens the possibility to apply for an investor citizenship scheme in the EU has become limited. Therefore, acquiring citizenship of other states such as Vanuatu or the Caribbeans has become even more attractive. Companies assisting in acquiring such citizenship have published advertisements directed at Russian citizens about the possibility to apply for citizenship through an investment of a minimum sum of 100,000 USD.[113] The

106 Ayelet Shachar, 'Dangerous Liaisons: Money and Citizenship', in *Debating Transformations of National Citizenship*, ed. Rainer Bauböck, IMISCOE Research Series (Cham: Springer International Publishing, 2018), 9–10.

107 Dzankic, 'Investor Programs: Attempting to Cure the Struggling European Economies? I'; Kmak, 'Mnogość Obywatelstw: Studium Nad Dominującymi i Mniejszościowymi Dyskursami Prawnymi'.

108 Bauböck, *Debating Transformations of National Citizenship*, 3; Spiro, 'Cash-for-Passports and the End of Citizenship', 17–18.

109 Kochenov, *Citizenship*, 247.

110 Chris Armstrong, 'The Price of Selling Citizenship', in *Debating Transformations of National Citizenship*, ed. Rainer Bauböck, IMISCOE Research Series (Cham: Springer International Publishing, 2018), 25.

111 Roxana Barbulescu, 'Global Mobility Corridors for the Ultra-Rich. The Neoliberal Transformation of Citizenship', in *Debating Transformations of National Citizenship*, ed. Rainer Bauböck, IMISCOE Research Series (Cham: Springer International Publishing, 2018), 30.

112 Bauböck, *Debating Transformations of National Citizenship*.

113 'Programs of Residence Permit and Citizenship by Investment in the European Union Are Suspended for Russians', *Immigrant Invest*, 28 February 2022, https://immigrantinvest.com/insider/sanctions-statement-en/ (accessed 18.12.2022).

Council of the EU has recently proposed a partial suspension of the visa waiver agreement with Vanuatu that will limit such possibility.[114] But interestingly it is not only those who seek for more comfortable living conditions who are targeted by such companies. Advertisements are directed, for instance, also to those that have unsuccessfully applied for refugee status in EU countries such as Germany, proposing as a solution applying for Vanuatu citizenship granting those unsuccessful asylum seekers a right of a non-visa Schengen entry to the EU that is coupled with the ability to set up business there.[115]

These examples show that the increase of mobility and rights of some happens at times where the mobility of the rest of the populations (often the sedentary population of the same non-democratic countries those benefiting from cash-for-citizenship schemes are coming from) becomes more and more limited and contentious, what Shachar calls the "'restrictive turn' with respect to ordinary immigration and naturalization."[116] This observation points us back to the earlier discussed birthright citizenship debate, and the role of citizenship as the technology of management of the global population rooted in regulated and stable mobility. In this sense, citizenship itself becomes an element of the global mobility infrastructure that guarantees access and smooth travel with the support and facilitation of this infrastructure.

Precarization of citizenship

Granting citizenship for investment is not the only trend in the recent development of citizenship laws. Parallel to it, one can observe practices of extending the possibility to deprive citizenship in connection with certain behaviour, that results in the emergence of a group of *bad* or undesired citizens. As Audrey Macklin highlighted recently, "[a]fter decades in exile, banishment is back," pointing to the most recent practices of denationalization.[117] In this section of the chapter I show how recently proposed or adopted laws in France and the UK have resulted in the unequal treatment between naturalized citizens and those who obtained citizenship by birth,[118] as well as the precarization of

114 Council of the European Union, 'Council Decision on the Partial Suspension of the Application of the Agreement between the European Union and the Republic of Vanuatu on the Short-Stay Viza Waiver', Pub. L. No. 6190/22 (2022).

115 'Vanuatu Citizenship: How Political Refugees Get Freedom to Travel around the World and Start Their Own Business', *Immigrant Invest*, https://immigrantinvest.com/cases/vanuatu-passport-for-politician-en/ (accessed 18.12.2022).

116 Shachar, 'Dangerous Liaisons: Money and Citizenship', 7.

117 Audrey Macklin, 'The Return of Banishment: Do the New Denationalization Policies Weaken Citizenship?', in *Debating Transformations of National Citizenship*, ed. Rainer Bauböck, IMISCOE Research Series (Cham: Springer International Publishing, 2018), 163.

118 Gerard-René de Groot and Maarten P. Vink, 'Loss of Citizenship: Trends and Regulations in Europe', Comparative Report (European University Institute, Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, 2010), 27.

citizenship as such. Although such practices are not new,[119] one can recently observe their return and intensification.

Most countries have laws that allow for the loss or termination of citizenship in situations where it has been granted to a person based on fraud or other irregularities in the process of obtaining it. The laws of some countries also allow deprivation of citizenship in situations where a person is particularly disloyal to the state, such as involvement in voluntary military service in a foreign army or behaviour seriously prejudicial to the state's interests.[120] However, recent practices of deprivation of citizenship point to a revitalized practice aimed at conceptualizing citizenship as a privilege and using the law on citizenship as a tool of migration policy facilitating exclusion.[121] Two notable examples of such understood citizenship are presented below: a discussion on the changes to the law on citizenship in France, and legal regulations adopted in the last decade in Great Britain.[122] These case studies are by no means exceptional as the debates on the revocation of citizenship have taken place for instance in connection with those citizens of European countries who joined ISIS.

In France, after the riots in Grenoble in 2010, the then-president, Nicolas Sarkozy, expressed the need to amend the provisions on citizenship in order to allow the revocation of French citizenship from citizens of foreign origins who break the law.[123] This proposal was made despite the fact that French law, since the First World War, allows the deprivation of citizenship of certain categories of people.[124] In particular, pursuant to Article 25 (1) of the French Civil Code, as amended in 2005, a naturalized citizen may be deprived of French citizenship in four cases: (1) conviction for an ordinary or serious criminal offence against the essential interests of the Nation or for a serious offence constituting an act of terrorism; (2) convictions for activities constituting a crime against public administration committed by a person holding a public office; (3) convictions for avoiding obligations under the public service code; and (4) engaging in activities incompatible with the status of French and detrimental to the interests of France, and beneficial to another country.[125] The 2005 amendments also aimed to extend the possibility of depriving naturalized

119 Sandra Mantu, *Contingent Citizenship: The Law and Practice of Citizenship Deprivation in International, European, and National Perspectives* (Nijmegen, 2014).

120 de Groot and Vink, 'Loss of Citizenship: Trends and Regulations in Europe'. See also article 7(1)(d) of the European Convention on Citizenship

121 Mantu, *Contingent Citizenship: The Law and Practice of Citizenship Deprivation in International, European, and National Perspectives*, 13.

122 See also Kmak, 'Mnogość Obywatelstw: Studium Nad Dominującymi i Mniejszościowymi Dyskursami Prawnymi'.

123 Mantu, *Contingent Citizenship: The Law and Practice of Citizenship Deprivation in International, European, and National Perspectives*, 207–208.

124 Mantu, 191.

125 French Civil Code 2005, Article 25(1) quoted after EUDO Citizenship Observatory (accessed 25 February 2021).

citizens of citizenship by prolonging the period allowing for it from 10 to 15 years from granting citizenship.[126]

Despite such a broadly defined power, the French government influenced by the Grenoble speech prepared two new legislative initiatives to introduce a legal basis for granting the authorities the possibility of depriving naturalized citizens of this status on the grounds of polygamy, fraud of the social security system, irregular work or serious misconduct, as well as homicide of a public official.[127] According to Sandra Mantu, President Sarkozy's aim was to highlight the specific nature of French citizenship and define it as a privilege to be earned. He thus emphasized the lack of assimilation and the unworthiness of having French citizenship by those who took part in the riots.[128] Similar arguments relating to morality, French values, and principles, as well as pointing to a threat to the internal security of the state from naturalized citizens were made during the discussions on the proposed changes in the French parliament. However, most of these changes were deemed unconstitutional.[129] Also, the amendment to the constitution, proposed by President Hollande after the terrorist attacks in November 2015, did not find support in the French parliament.[130] The proposed amendments, discussions, and reactions to them serve as examples of the currently dominant discourse on citizenship. On the one hand, they confirm the tendency to define citizenship by indicating behaviour inconsistent with certain national values, and on the other hand, they strengthen the trend towards treating citizenship as a tool of migration policy. The working of such a strategy will be discussed in more details in the next chapter.

Deprivation of citizenship is also widely regulated in the UK law. As in France, the current law has its roots in regulations aiming at revocation of citizenship from citizens of hostile countries, as well as the regulation of citizenship of the inhabitants of the colonies.[131] Important changes to the law on citizenship were initiated by the Act on Citizenship of 1981, which changed the rules for the acquisition of citizenship by replacing *ius soli* with *ius sanguinis* and depriving British citizens of the Commonwealth and Hong Kong of residence in the UK. Although this Act did not introduce new grounds for deprivation of citizenship, its adoption has been called a beginning of the process of

126 Sandra Mantu, 'Deprivation of Citizenship in France', Enacting European Citizenship (Centre for Citizenship, Identities and Governance, Faculty of Social Sciences, The Open University, UK, 2010).
127 Mantu, *Contingent Citizenship: The Law and Practice of Citizenship Deprivation in International, European, and National Perspectives*, 208.
128 Mantu, 208.
129 Mantu, 208–209.
130 Kim Wilsher, 'Hollande Drops Plan to Revoke Citizenship of Dual-National Terrorists', *The Guardian*, 30 March 2016, https://www.theguardian.com/world/2016/mar/30/francois-hollande-drops-plan-to-revoke-citizenship-of-dual-national-terrorists (accessed 18.12.2022).
131 Mantu, *Contingent Citizenship: The Law and Practice of Citizenship Deprivation in International, European, and National Perspectives*, 139–146.

shaping the principles of granting and depriving citizenship as an element of the state's migration policy and treating citizenship not as a right but as a privilege,[132] similar to France. Subsequent changes to the regulations took place in 2002, 2004, 2006, 2014 and introduced additional legal bases allowing for the deprivation of citizenship.[133]

In particular, the legislation adopted after the London attack in July 2006 allowed for denaturalization in situations conducive to the public good.[134] This amendment to the *Act on Immigration, Asylum and Nationality* made clear the intention to use the Law on Nationality as a wide-ranging initiative against terrorism consequently linking migration to terrorism as such.[135] In 2014, the possibility of depriving citizenship was further extended by allowing denaturalization even in a situation where the person would end up stateless. Pursuant to the 2014 *Immigration Act*, the Secretary of State may make such a decision for the benefit of the public good, when the behaviour of a citizen is seriously prejudicial to the vital interests of the state and in a situation where there are reasonable grounds to believe that the person may acquire the citizenship of another country.[136] The presented grounds for denaturalization should be assessed in relation to the changes adopted in 2004, which removed the suspensive effect from appeals against decisions to deprive of nationality. According to commentators, the new rules combined with the practice of the British authorities, often issuing deprivation decisions when a person is outside the country, could limit the right to a fair trial and judicial protection, as well as the freedom of movement of these citizens.[137] In addition, according to Mantu, the fact that decisions on deprivation of citizenship are issued to those who are suspected, and not convicted of criminal offences, may indicate the political basis of these decisions.[138] One such widely discussed case in the UK recently is the case of revocation of citizenship of Shamima Begum who at the age of 15 travelled (or has been trafficked) from the UK to Syria to join the Islamic State.

132 Chandra Talpade Mohanty, Ann Russo, and Lourdes Torres, eds., *Third World Women and the Politics of Feminism* (Bloomington: Indiana University Press, 1991), 26–28; El-Enany, *(B)Ordering Britain*.
133 Mantu, *Contingent Citizenship: The Law and Practice of Citizenship Deprivation in International, European, and National Perspectives*, 13.
134 Mantu, 55.
135 Sandra Mantu, 'Deprivation of Citizenship in the United Kingdom', Enacting European Citizenship (Centre for Citizenship, Identities and Governance, Faculty of Social Sciences, The Open University, UK, 2009), 20.
136 David Anderson, *Citizenship Removal Resulting in Statelessness: First Report of the Independent Reviewer on the Operation of the Power to Remove Citizenship Obtained by Naturalization from Persons Who Have No Citizenship*, 2016.
137 Amanda Weston, 'Deprivation of Citizenship – by Stealth', *Institute of Race Relations* (blog), 9 June 2011, https://irr.org.uk/article/deprivation-of-citizenship-by-stealth/ (accessed 18.12.2022); Macklin, 'The Return of Banishment: Do the New Denationalization Policies Weaken Citizenship?'
138 Mantu, *Contingent Citizenship: The Law and Practice of Citizenship Deprivation in International, European, and National Perspectives*, 20–23.

Begum was then married to an ISIS fighter with whom she had three children, all of whom died. After the defeat of ISIS, she was captured and detained in one of the displacement camps. In the most recent decision, the UK Supreme Court has not allowed Begum to return to the UK to continue challenging the decision on revocation of her citizenship for reasons of national security.[139]

The given examples show that the practice of citizenship, apart from the division into citizens and foreigners, also reinforce a division into *good* and *bad* citizens, based on values rather than on the formal abstract status. For instance, cases such as Shamima Begum's and other cases of women joining the Islamic State, show both racialized and gendered dimension of citizenship. In this discourse women who left Western countries to associate themselves with Islamic terrorism are considered as voluntarily abandoning Western values and in consequence, being affectively racialized as others.[140] In addition, since this has resulted in them giving birth or living in dire circumstances in the camps with their children, they have transgressed ideas about how *good mothers* should behave. Their exclusion from citizenship or the right to return is, therefore, due to their behaviour that is not in accordance with the expected societal roles. Their access to human rights protection, in particular the right to be repatriated from the displacement camps such as al-Hol by the countries of citizenship, has been very limited. This right has been usually juxtaposed to that of the children whose best interest warrant repatriation. Even though, some human rights monitoring bodies have recently tried to challenge the approach adopted by many states against the repatriation of women, the discussion remains centred on deservingness and skews the focus from the rights of women towards the vulnerability of children.[141] These and other examples show that oftentimes the belonging of racialized or gendered citizens are being based on higher expectations for the standard of behaviour creating a category of second-class citizens[142] that is intergenerational and imposed by the withholding of citizenship and mobility.

The main consequence of these changes for the right to the freedom of movement derive from already discussed substantive inequality between national citizenships that is enhanced by the rules of international law on the

139 Dan Sabbagh, 'Shamima Begum Loses Fight to Restore UK Citizenship after Supreme Court Ruling', *The Guardian*, 26 February 2021, https://www.theguardian. com/uk-news/2021/feb/26/shamima-begum-cannot-return-to-uk-to-fight-for-citizen ship-court-rules (accessed 18.12.2022).
140 Sanna Mustasaari, 'Affective Constructions of Justice: ISIS-Families and the Law in the Finnish Public Debate', *Oñati Socio-Legal Series* 11, no. 4 (2021): 1036–1065.
141 *L.H. et al v. France*, Nos 79/2019 and 109/2019 and *F.B. et al v. France*, No. 77/2019, (Committee on the Rights of the Child 30 September 2020); *S.N. et al. v. Finland*, No. 100/2019, (Committee on the Rights of the Child 12 September 2022); *H.F. and Others v. France*, Nos 24384/19 and 44234/20, (European Court on Human Rights 14 September 2022 (Grand Chamber)).
142 Lucia Zedner, 'Citizenship Deprivation, Security and Human Rights', *European Journal of Migration and Law* 18, no. 2 (17 June 2016): 238.

prohibition of statelessness (that is not always followed, such as in the case of the UK described above). The limitation of the revocation of citizenship to those who would not become stateless (and in consequence that would not allow for the ascription of a person to a proper sovereign) assumes the equality and as Audrey Macklin claims, fungibility of citizenships.[143] The static perspective on the international legal rules on anti-statelessness and on deprivation of citizenship assumes that as long as an individual retains nationality somewhere, denationalization does not pose any human rights problems.[144] A shift towards the mobility perspective, that focuses not on the formal rules of acquiring and deprivation of citizenship, but the life chances and ability to move based on this citizenship reveals, that behind the formally equal rules on nationality, the consequences of denationalization perpetuate the unequal strength of citizenships, and similarly to citizenship by investment results in the citizenship that guarantees mobility as a right. In consequence, these changes coupled with the discourse of citizenship as a privilege strengthen the unequal right to mobility for some and immobility for others.

Conclusions

The purpose of this chapter was to look at the legal regulation of the concept of citizenship that contribute to the formation of the right to mobility. Through the conceptual shift from the right to the freedom of movement to mobility as a right, this chapter showed not only how the right to mobility had been regulated and ordered, but also how law constructs both mobilities and immobilities and contributes to the technology of citizenship. From this perspective, citizenship, together with the institutions of migration law help to maintain the world as divided into territorial nation-states.

In the first part of this chapter, I analysed the role of citizenship for the asymmetric right to freedom of movement, its history, and its contemporary application. I demonstrated, how the right to the freedom of movement is rooted in the modern/colonial concept of citizenship that has emerged as a norm and which, in consequence, affects the ability or the inability to move. I problematized what is traditionally called the right to the freedom of movement and showed how the shift from the content to the productive function of law warrants calling it *mobility as a right* managed and controlled through the construction of the institution of citizenship. I also discussed how citizenship does not guarantee inclusion but rather undermines the idea of universal equality by differential belonging, by justifying exclusion and normalising discrimination.

In the second part of the chapter, I analysed what the conceptual shift from the right to the freedom of movement to mobility as a right had revealed: the

---

143 Macklin, 'The Return of Banishment: Do the New Denationalization Policies Weaken Citizenship?', 169.
144 Macklin, 170.

productive function of international and national legal regulations on obtaining and losing citizenship that sets conditions for the mobility of some and immobility of others. As case studies, I used two sets of rules that allow acquiring citizenship through investment and allow for removal or revocation of citizenship in the case of terrorist suspects or more generally when it is conducive to the public good. Through these examples I demonstrated differentiating function of citizenship contributing to enhancing the mobility of some and controlling movement and residence of others.

This chapter, together with the previous and next ones, show how a shift of perspective from static to mobile reveals the primary instability of institutions currently constitutive of orderly human mobility – that of a nation-state, citizenship, and borders – and how they remain in a constant process of construction and deconstruction, impacted by the shifting dynamic of mobility. In particular, the following Chapter 3 continues exploring the mobility and movement of law through the relationship between the nation-state, citizenship, mobility, and migration, focusing on *mobility as a violation of the law*.

Chapter 3

Mobility as a violation of law

Introduction

In this chapter I focus on state sovereignty, borders, and the processes of bordering, which serve as an engine of the nation-state machine.[1] Whereas in the previous chapter I focused on the modes of inclusion, this chapter deals with its necessary opposite, an exclusion. Citizenship means inclusion into the community of the state. The existence of the community, however, presupposes its boundedness and is constructed in the relation to what is outside of it and; as such, is not included.[2] The privileged mobility of citizens has been necessarily juxtaposed with restrictions or exclusions of other forms of mobility, both within and across borders – that of vagabonds, beggars, criminals, or migrants. Citizenship, therefore, cannot be discussed separately from borders and the processes of distinction – inclusion- and exclusion-making or bordering – that take place there.

Both processes of inclusion and exclusion I discuss in this book are connected with the distinction between *orderly* and *disorderly* mobility in modernity/coloniality.[3] Orderly mobility, and corresponding *mobility as a right*, is a feature and a right of those with the top tier citizenships. Their movement is, subsequently, privileged in international law and facilitated through the global mobility infrastructure.[4] In turn, citizens of former colonies as well as many former socialist countries have been excluded

---

1   Thomas Nail, *Theory of the Border* (Oxford; New York: Oxford University Press, 2016); Magdalena Kmak, 'Migration Law as a State (Re)Producing Mechanism', in *Migration, Identity, and Belonging: Defining Borders and Boundaries of the Homeland* (Abingdon, Oxon: Routledge, 2020).
2   Linda Bosniak, 'Making Sense of Citizenship', *Issues in Legal Scholarship* 9, no. 1 (24 January 2011), 3.
3   Hagar Kotef, *Movement and the Ordering of Freedom: On Liberal Governances of Mobility*, Perverse Modernities (Durham, NC; London: Duke University Press, 2015).
4   Thomas Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalization of Migration Control', *European Journal of Migration and Law* 20, no. 4 (29 November 2018): 452–469.

from mobility rights.[5] Their mobility has been characterized (but also constructed) as *disorderly* and often criminalized and illegalized.[6] Mobility is, therefore, a resource that not everyone is able to access and use.[7] It is facilitated by the mobility infrastructure and constitutes a technology of governance over different types of subjects who are moving, being moved, are partially or fully immobilized.[8]

The technology of governance with mobility as a mode of distinction has had a productive function for the nation-state that is particularly important under globalization, and that blurs the distinction between inside and outside and in consequence exposes the nation-state's ontological instability. The governance happens through coding (with the means of law) of mobility as desired or undesired, the former considered a privilege and the latter always already a violation of law. The latter either needs to be prevented or channelled for useful purposes[9] through the migration regime. These two modes of mobility, *mobility as a right* and *mobility as a violation of law*, are being conceptually differentiated to justify the distinction. As Thomas Spijkerboer writes, "[w]hen cross-border movement is presented as desirable, the concept of mobility is used, while when it is considered problematic or potentially unwanted, the term migration is used. In that sense, migration is the annoying little sibling of mobility."[10] These legal categories and conceptions not only represent the world, but also construct it by forming our consciousness, where they become naturalized.[11] Applying a mobility lens highlights the process of distinction-making and their naturalization through law and destabilizes these conceptions and categories.

Chapter 3 traces the operation of the contemporary form of the machinic statehood in a globalized world that is based on the multiplication of borders[12] and the processes of bordering, that enable the state to both reproduce and reinvent itself through positing migration at its centre.[13] This is not a new process.

5   Dimitry Kochenov, *Citizenship*, The MIT Press Essential Knowledge Series (Cambridge, Mass.; London, UK: The MIT Press, 2019), 127–128.
6   See for instance Katja Franko, *The Crimmigrant Other: Migration and Penal Power*, Key Ideas in Criminology (Abingdon, Oxon; New York, NY: Routledge, 2020).
7   N De Genova et al., 'Minor Keywords of Political Theory: Migration as a Critical Standpoint – A Collaborative Project of Collective Writing', *Environment and Planning C: Politics and Space*, 9 March 2021, 40.
8   De Genova et al., 38.
9   Ranabir Samaddar, *The Postcolonial Age of Migration* (Abingdon, Oxon; New York: Routledge, 2020); Sandro Mezzadra and Brett Neilson, *Border as Method, or, the Multiplication of Labor*, 2013.
10 Spijkerboer, 'The Global Mobility Infrastructure', 453.
11 Anne Macduff, 'Performing Legal and National Identities: Australian Citizenship Ceremonies and the Management of Cultural Diversity', *Social & Legal Studies*, 17 May 2022, 5.
12 Mezzadra and Neilson, *Border as Method, or, the Multiplication of Labor*.
13 Kmak, 'Migration Law as a State (Re)Producing Mechanism'.

Historically the nation-state as a modern/colonial institution has been reinforcing itself through slavery or through asylum legislation[14] and it continues to reinforce itself by upkeeping the legacies of colonialism, the construction of the Other, and the failing *civilising mission* that are all crucial for its existence. This system is constructed jointly through legitimizing and illegitimizing movement and monopolization of measures to propel or control it. Bordering happens primarily at the geographical borders of the nation-state but borders also move within and outside of state territory.[15] Differently positioned borders constitute a meeting place of the multiplicity of laws determining the status of the person, their belonging, and non-belonging, which determines the existence of rights related to movement.[16] Moving law outside the border aims to avoid such legal encounters and in consequence prevent the emergence of any obligations towards those on the move.[17]

In the first part of this chapter, I focus on the meaning and a function of borders for nation-states and law. I then focus on the origins and implications of the international legal doctrine of sovereign control of migration.[18] Sovereign control of migration happens at the geographical borders of the state and increasingly within and outside the state. I argue that this doctrine does not only enforce the right to control mobility but turns certain mobilities into a *violation of law*. In particular, this doctrine contributes to differential exclusions of various groups of mobile persons and together with *mobility as a right* perpetuates the distinction of mobility into orderly and disorderly.

In the second part of the chapter, I show examples of how *mobility as a violation of law* is being maintained in international and national law of the global North through the different forms of bordering – or distinction-making – as coded in migration law. The over-encompassing role of migration law is to strengthen

---

14 Lucy Mayblin, *Asylum after Empire: Colonial Legacies in the Politics of Asylum Seeking*, Kilombo: International Relations and Colonial Questions (London; New York: Rowman & Littlefield International, 2017).

15 Ayelet Shachar, *The Shifting Border: Legal Cartographies of Migration and Mobility: Ayelet Shachar in Dialogue* (Manchester: Manchester University Press, 2020), 20.

16 Olivia Barr, *A Jurisprudence of Movement: Common Law, Walking, Unsettling Place* (Abingdon, Oxon; New York, NY: Routledge, 2016), 43.

17 Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen, eds., *Human Rights and the Dark Side of Globalization: Transnational Law Enforcement and Migration Control*, Routledge Studies in Human Rights (Abingdon, Oxon; New York, NY: Routledge, 2017), 5.

18 Karin de Vries and Thomas Spijkerboer, 'Race and the Regulation of International Migration. The Ongoing Impact of Colonialism in the Case Law of The European Court of Human Rights', *Netherlands Quarterly of Human Rights* 39, no. 4 (December 2021): 291–307; Thomas Spijkerboer, 'Coloniality and Recent European Migration Case Law', in *Migrants' Rights, Populism and Legal Resilience in Europe*, ed. Vladislava Stoyanova and Stijn Smet, 1st ed. (Cambridge: Cambridge University Press, 2022), 117–138; Thomas Spijkerboer, 'The Geopolitics of Knowledge Production in International Migration Law', in *Research Handbook on the Law and Politics of Migration*, by Catherine Dauvergne (Cheltenham, UK: Edward Elgar Publishing, 2021), 172–188.

state legitimacy and sovereignty exposed as unstable by the processes of globalization. State legitimacy lies, therefore, not in sovereignty, but it is rather sovereignty that requires constant reinforcement for its legitimacy and relevance.[19] That happens through the multifaceted processes of bordering, securitization, or criminalization, that take place within and outside the territory of the state and affect not only their legal status but also all aspects of migrant lives. Some of these processes can be described as overspill of migration law into other areas of law – into citizenship law (already discussed in Chapter 2) and into criminal law – turning these laws into migration control measures.[20] Through these analyses the chapter builds a basis for further discussion in the book on the possibility of resistance to the nation-state as constructed through modernity/coloniality.

From the sovereign right to control migration towards mobility as a violation of law

Borders

Thomas Nail in his *Theory of Border* illustrates, with the example of the US-Mexico border, the ontology of borders in general. Criticising border theorists and analysts who consider the US-Mexico border as a failure, Nail argues that such critique presumes the consistency and logic in the way power operates. As he writes however, "[t]he opposite is true: power functions primarily in and through its conflicts, mobilities, instabilities, and hybridity. It is (…) kinological. Thus, the question is not 'Is this border a success or failure?' but 'How does it move?'"[21] For Nail, society is a product of such kinological operation of borders that are in turn reproduced by the society.[22] In particular, borders serve the purpose of territorial delimitation and stabilization of the nation-states, and that stability and homogeneity needs to be then maintained through the continuous operation of borders. Law, operating at international, national, or local levels determines the function of borders and regulates cross-border movement, but it is also itself implicated in bordering.

In international law, borders serve as the delimitation of the territories of states and from this perspective contribute to the construction of the state as a material entity. Territoriality of statehood is crucial, and a loss or a prospective loss of territory, as in the recently discussed case of the low-lying island states, is considered to be a major factor contributing to the possible loss of their statehood.[23]

---

19 Samaddar, *The Postcolonial Age of Migration*, 52.
20 Magdalena Kmak, 'Migration Law as a State (Re)Producing Mechanism'.
21 Nail, *Theory of the Border*, 166.
22 Nail, 4.
23 For the discussion on the continuity of the state in the case of loss of territory see for instance Michel Rouleau-Dick, 'Competing Continuities: What Role for the Presumption of Continuity in the Claim to Continued Statehood of Small Island States?', *Melbourne Journal of International Law* 22, no. 2 (December 2021): 357–382.

Whereas states can function without effective government, it is difficult to imagine a state without territory. The dominance of the territoriality of statehood has immobilized the state and elevated the meaning and the role of borders in international law. Delimitation of borders, including maritime delimitation is crucial for the state, and for access to and control of resources, and border disputes constitute the topic of a great bulk of judgments by international courts such as the International Court of Justice.[24] Olivia Barr captures the relationship between law and territory in the nation-state as follows

> … think of sovereignty, territory and the nation-state. What image do they evoke about the place of law? Is it stable? Is it moving? Is it neither? One common image projected by sovereignty, territory and the state is an image of a certain physical place of law: a steady place that a state-based law calls home; a legal home supported by a landscape named 'territory',[25]

where the state and law presents itself as impenetrably stable.[26] Importantly, borders determine the material space of the state, therefore, also the space of both law and values of the nation-state community, stabilising both in that territorially delimited space. Sherally Munshi illustrates the relationship between territory, borders, law, and values by analysing the formation of the southern border of the US in the 19th century, where the desire to expand the territory was not coupled with the desire to include the indigenous population of Mexico into the state. Discussing the provisions of the treaty of Guadalupe Hidalgo between the USA and Mexico,[27] Munshi shows how individual American Southern States were recognized as states only when the majority of their population became white.[28] In this way the borders of the US have been confirmed only when the people within them represented certain values (linked to whiteness) that were considered crucial for the state.[29] Borders do not only serve the entities such as the nation-state but can perform similar functions on a regional level. In the EU for instance, one notable example of value indication is the portfolio of one of the new Commissioners of the EU, first titled as "Protecting" and later "Promoting the European Way of Life." In the portfolio, the European Way of Life is built around solidarity, peace of mind, and security and it aims to juxtapose European values with those represented by incoming

---

24 Jan Klabbers, *International Law*, 1st ed. (Cambridge: Cambridge University Press, 2013), 237.
25 Barr, *A Jurisprudence of Movement*, 140.
26 Barr, 144.
27 Treaty of Guadalupe Hidalgo (2 February 1848).
28 Sherally Munshi, 'Unsettling the Border', *UCLA Law Review* 67, no. 6 (2021 2020): 1720–1767, 1748.
29 Munshi, 'Unsettling the Border'.

irregular migrants using the indicator of legal status as a determinant of the persons' adherence to these values.[30]

To produce and maintain the stability of the state (or other entities such as the EU) and its values, the territorially bound law needs to determine and maintain the distinction between the inside and the outside, both by regulating access to citizenship (as discussed in Chapter 2) and residence and controlling the movement across geographical borders. Law facilitates both inclusion and exclusion of different groups of people in states. Various modern measures and procedures aimed at controlling the crossings of international borders and making the crossings orderly emerged in the mid-19th century, including passports and numerous other requirements for movement – such as financial or insurance-related. These measures were adopted by states with the purpose of *embracing their citizens*, in other words keeping them within the state territory, in order to extract from them resources necessary for the functioning of the state.[31] At the same time, these measures supported the power of sovereign states to control movement of non-citizens in or out of their territory, contributing to the stable image of the state as a closed entity.

Traditionally, border control happens at the geographical borders of the state. States, with the increased ability, through manpower or technology, to control their borders were able for instance to introduce travel documents and perform their checks at designed crossing points.[32] Increasingly, however, also as a result of the globalization processes, broadly understood borders have moved both inside and outside of the state territory,[33] contributing to reconstitution of sovereignty by states through construction of their capacities at different societal levels.[34] This includes for instance, use of rhetorical and cultural borders separating insiders from outsiders within the state territories, physical reinforcement of geographical borders through border securitization and militarization, and deterritorialization and externalization of borders[35] through various forms of deterrence. To describe these processes, Ayelet Shachar uses the terminology of mobility in order to show the operation of such "shifting border" defined as a set of legal techniques and innovations that

30 Magdalena Kmak and Eliza Pascucci, 'Eurooppalaizen Elämäntavan Suojeleminen', *Politiikasta.Fi* (blog), 11 July 2019, https://politiikasta.fi/eurooppalaizen-elamantava n-suojeleminen/ (accessed 18.12.2022).
31 John C. Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (Cambridge: Cambridge University Press, 2000), 12.
32 Torpey.
33 Didier Bigo and Elspeth Guild, 'Policing in the Name of Freedom' in *Controlling Frontiers: Free Movement into and within Europe* (Abingdon, Oxon: Routledge, 2016), 1–13.
34 Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages*, Updated ed. edition (Princeton, NJ: Princeton University Press, 2008), 416.
35 Nancy A. Wonders, 'Sitting on the Fence – Spain's Delicate Balance: Bordering, Multiscalar Challenges, and Crimmigration', *European Journal of Criminology* 14, no. 1 (1 January 2017): 7–26, 9.

regulate the movement of people.[36] Through these measures, borders become "moveable," or turn into a transportable legal wall that "variably shrinks, expands, disappears, and reappears across space and time in the service of managed and selective migration and mobility regimes,"[37] in order to enforce order on mobility.

Sovereign control of migration

Borders together with the institution of citizenship contribute, therefore, to the process of sorting, ranking, and then filtering mobility into a differentiated hierarchy of more or less permissible and more or less prohibited mobilities[38] contributing to the perceived stability of the nation-state,[39] which through expansion by expulsion[40] produces and reproduces various types of legal entities, such as citizens, desired foreigners, refugees, or irregular migrants, that remain in a dynamic relationship to one another. The prerogative of states to control the mobility of foreigners is considered to be a well-established principle of international law. The principle was however first spelled out only in the mid-19th century.[41] As the US Supreme Court underlined in the case of *Nishimura Eiku* from 1891

> [i]t is accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.[42]

The principle of sovereign control over the movement of foreigners to and within state territory became a dominant principle of international law limited only by certain exceptions as regulated in international refugee or human rights law. As the ECtHR in *Abdulaziz Cabalez and Balkandali* underlined in 1985 "as a matter of well-established international law and subject to its treaty

---

36 Shachar, *The Shifting Border*, 7.
37 Shachar, 20.
38 Nicolas De Genova, 'Debate: The Free Movement of People around the World Would Be Utopian', 146, http://www.nicholasdegenova.net/13.html.
39 Gilles Deleuze and Felix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia*, trans. Brian Massumi, 1st ed. (Minneapolis: University of Minnesota Press, 1987).
40 Thomas Nail, *The Figure of the Migrant*, 1 edition (Stanford, California: Stanford University Press, 2015); Nail, *Theory of the Border*; Thomas Nail, *Being and Motion* (New York, NY: Oxford University Press, USA., 2019), 120.
41 For the criticism see de Vries and Spijkerboer, 'Race and the Regulation of International Migration. The Ongoing Impact of Colonialism in the Case Law of The European Court of Human Rights', 300.
42 Nishimura Eiku v. United States, No. 142 US 651 (Supreme Court of the United States 1891).

obligations, a State has the right to control the entry of non-nationals into its territory."[43]

The importance of this doctrine for the regulation of contemporary mobility lies, as de Vries and Spijkerboer argue, in its development along the processes of the gradual abolition of slavery in the USA. The abolition of slavery required additional labour but at the same time raised concerns over the increased presence of foreign workers of different race (Chinese) and its effect on the white population.[44] Ultimately, these developments led to asserting the rights of states to control migration and the Chinese Exclusion legislation became widespread also in other countries where the presence of foreigners raised similar concerns as in the USA.[45] The importance of the doctrine lies also with its connection to the processes of decolonization accompanied by limitation of the rights of former colonial subjects to acquire the citizenship of the metropole state. The doctrine became, therefore, a tool to limit or exclude the presence of citizens of former colonies who were now treated as undesired foreigners.[46] For these reasons, as de Vries and Spijkerboer argue, the application of the doctrine of sovereign control of migration by the ECtHR in the case of *Abdulaziz Cabalez and Balkandali* constitutes discrimination based on race.[47] In this case the Court confirmed the right of states to grant preferential treatment to immigrants with *close links* with them (based on nationality or ancestry) even though these criteria "had been introduced with the foreseeable and, in all likelihood, intended consequence of restricting the immigration of non-whites."[48]

The doctrine of sovereign control of migration does not function, therefore, as a neutral principle. It constitutes a tool of distinction based on nationality and race, upkeeping the legacies of coloniality/modernity[49] and generating unequal capacities for mobility. Together with the principle of *mobility as a right* the doctrine of sovereign control contributes to division of world mobility into orderly and disorderly. The distinction between orderly and disorderly mobility constitutes the backbone of the contemporary nation-state system and orients the perception of statehood, community, and law as stable. To produce and maintain the *perception of stability* of the nation-state national and international law regulates the access to state membership and controls the

---

43   Abdulaziz, Cabales, and Balkandali v UK, No. 9214/80; 9473/81; 9474/81 (European Court of Human Rights 28 May 1985) para 67.
44   de Vries and Spijkerboer, 'Race and the Regulation of International Migration. The Ongoing Impact of Colonialism in the Case Law of The European Court of Human Rights', 296–97.
45   de Vries and Spijkerboer, 297.
46   de Vries and Spijkerboer, 298.
47   de Vries and Spijkerboer, 299; Spijkerboer, 'The Global Mobility Infrastructure', 467.
48   de Vries and Spijkerboer, 'Race and the Regulation of International Migration. The Ongoing Impact of Colonialism in the Case Law of The European Court of Human Rights', 301.
49   Mayblin, *Asylum after Empire*, 30.

movement across geographical borders. This system operates through the concept of citizenship (discussed in the previous chapter) and the global mobility infrastructure. The nation-state monopolizes the legitimate means of movement and supports the movement of those that are included as desirable. The privileged mobility of those with top tier passports has been necessarily juxtaposed with restrictions or exclusions of other forms of *disorderly* mobility through the limited access to the means of movement.[50] I argue that mobility of people labelled as disorderly is always already a potential violation of law that must be prevented through the existing legal apparatus, that also includes limitation of access to rights protection.[51]

Legal construction of refugee mobility in the EU and European human rights law serves as an illustration of this process. As Chimni[52] and Mayblin[53] argue, through its original territorial limitation to refugees coming from Europe (that has only been removed through the 1967 Protocol Relating to the Status of Refugees) the refugee regime has been designed to exclude colonial and former colonial people from protection. The exclusion has been supported by the so-called *myth of difference* – constructing the ideal refugee as a white, male, and anti-Communist, and asylum seekers and refugees from the outside of Europe as ultimately different from that ideal refugee.[54] As both Chimni and Mayblin show, however, the basis for persecution has not been different, and the groups of white refugees and refugees from former colonial countries should not have been distinguished. Despite this similarity, access to asylum of people arriving form the former colonies has been increasingly limited in laws of the countries in the global North. As a result many have been forced to use irregular means to access protection. Such a constructed refugee regime serves not only the purpose of protection but also the distinction and exclusion coding of some of the asylum seekers as orderly and others as disorderly based on markers such as citizenship or race and regulating their access to global mobility infrastructure and protection based on these distinctions.

An example of the differential coding of refugee mobility is, what can be called, a double-faced figure of a refugee.[55] Here the figure of a refugee becomes fragmented based on their orderly or disorderly mobility. As I argued earlier,

50 Spijkerboer, 'The Global Mobility Infrastructure'.
51 On the impact of coloniality and racialization on access to human rights see de Vries and Spijkerboer, 'Race and the Regulation of International Migration. The Ongoing Impact of Colonialism in the Case Law of The European Court of Human Rights'; Spijkerboer, 'Coloniality and Recent European Migration Case Law'.
52 B.S. Chimni, 'The Geopolitics of Refugee Studies: A View from the South', *Journal of Refugee Studies* 11, no. 4 (1 January 1998): 350–374.
53 Mayblin, *Asylum after Empire*.
54 Chimni, 'The Geopolitics of Refugee Studies', 351.
55 Magdalena Kmak, 'Between Citizens and Bogus Asylum Seekers: Management of Migration in the EU through the Technology of Morality', *Social Identities* 21, no. 4 (2015); Mezzadra and Neilson, *Border as Method, or, the Multiplication of Labor*, 144.

subjectivity is intimately linked with mobility and the type of mobility also affects inclusion. Whereas those moving in an orderly fashion can be included, excessive mobility marks persons as Others and prevents their full inclusion. I argue that in the EU, the inclusion of asylum seekers is either enhanced or prevented depending on where they come from and consequently how orderly their movement is. Such understanding fuels the fragmentation of refugee subjectivity into the (orderly) genuine refugee and (disorderly) bogus asylum seeker. The genuine refugee is the one that follows the law and moves in an orderly fashion. Often, they wait to be moved, through the resettlement procedure, although exceptions are being made in certain circumstances (such as in the case of persons fleeing the war in Ukraine in 2022 or Angela Merkel's decision from 2015 that allowed persons in a refugee situation from Syrian registered elsewhere in Europe to come to Germany). From the modernity/ coloniality perspective the genuine refugee is, therefore, *civilizable*[56] because they can be put into the form of the orderly movement. In consequence they become subjects of rights. The bogus asylum seeker on the other hand is *uncivilizable* because of their unregulated movement. The bogus asylum seekers that takes their lives into their own hands (for instance by crossing a border without permission) are outside of the orderly movement that characterizes the liberal subject. In consequence, the bogus asylum seeker is excluded from being the subject of rights. In other words, rights become rewards for those who fit the demands of orderly movement – who are the right kind of mobile subjects.

This reasoning is very clearly visible in the recent controversial judgment of the ECtHR in *N.D. & N.T.* case that dealt with the question of collective expulsions based on article 4 of the Protocol no. 4 to the ECHR.[57] In *N.D. & N.T. v. Spain*, the ECtHR has considered the legality of forced return by Spain of a group of about 75 persons that have crossed the border of Spain in the Melilla enclave in Morocco. The Grand Chamber has reversed the earlier judgment of the lower Chamber stating that Spain has violated article 4 of Protocol 4 of the European Convention. In the final judgment, the Grand Chamber argued that by forcefully returning the group of migrants who entered Melilla by climbing the fence, Spain has not violated the obligations of the Human Rights Convention but rather used their sovereign right to control migration. According to the arguments outlined by the Court, Spain should not be responsible for providing rights to those who have through their own action violated the Spanish law. In other words, the expulsion is a result of these persons' own *culpable act* for which the Government of Spain does not take responsibility. As the Court argued, these migrants chose to cross the fence despite having numerous opportunities to enter Spain, including the

---

56 Peter Fitzpatrick, *Law as Resistance: Modernism, Imperialism, Legalism* (Abingdon, Oxon; New York, NY: Routledge, 2008), 75. See also discussion on modern universal subject in Chapter 1.

57 N.D. and N.T. v. Spain, No. 8675/15; 8697/15 (European Court of Human Rights 13 February 2020).

possibility to apply for asylum at the border crossing point of Beni Enzar.[58] In a notable passage the Court stated that

> In so far as the Court has found that the lack of an individualized proce-
> dure for their removal was the consequence of the applicants' own conduct
> in attempting to gain unauthorized entry at Melilla (…), it cannot hold the
> respondent State responsible for not making available there a legal remedy
> against that same removal.[59]

In other words, the Court had made an exception to the prohibition of collec-
tive expulsions in the ECHR by claiming that unlawful behaviour by migrants
might exclude Spain's responsibility for collective nature of an expulsion.

What follows from this decision of the ECtHR, is that the access to rights guar-
anteed in the ECHR is dependent on the lawful or unlawful behaviour of the appli-
cants – the access to human rights is only granted to those who move in an orderly
fashion. Access to rights is, therefore, not universal and based on human dignity but
depends on the persons' own conduct and good behaviour. The focus of judges on
the conduct of the migrants, instead of the obligation of Spanish authorities to
comply with the ECHR has shifted the emphasis from the rights of individuals
towards the sovereignty of the state. As Sergio Carrera comments, "[t]he Grand
Chamber's choice to first assess whether the individual is worthy of human rights
contradicts Article 1 ECHR and the Strasbourg Court mandate to impartially and
independently supervise States parties' compliance with everyone's human rights
within their jurisdiction."[60] The distinction between orderly and disorderly mobility
as rooted in modernity/coloniality explains therefore the gap between the theoretical
rights-bearing human and the lived reality of the Other who struggles to access the
right to asylum.[61] The figure of the colonized (or formerly colonized) is thus inher-
ently dissociated. It is called to be the same and therefore have equal access to rights,
yet it is denied such equality in concrete situations due to its disorderly mobility.[62]

Irredeemable Other

Mobility of the *uncivilizable* bogus asylum seeker is always already constructed
as a *violation of law*. I argue that through various restrictive measures, that do

---

58 In reality, however, as the number of the NGOs participating in the case claimed,
    such option was very much limited and available practically only to those who
    arrive there from the Middle East (Syria). Others, mostly from Sub-Saharan Africa,
    would not be able to effectively apply for the protection.
59 N.D. and N.T. v. Spain paragraph 242.
60 Sergio Carrera, 'The Strasbourg Court Judgement "N.D. and N.T. v Spain": A
    "carte Blanche" to Push Backs at EU External Borders?', Working Paper (Migration
    Policy Centre, 2020), vii.
61 Mayblin, *Asylum after Empire*, 39.
62 Fitzpatrick, *Law as Resistance: Modernism, Imperialism, Legalism*, 75.

not only affect cross-border travel but spread into other human activities and take over political, social, economic, and cultural spheres of life,[63] a subjectivity of *Irredeemable Other* is constructed. Irredeemable Other is an alter ego of the always already included European liberal subjectivity – a migrant that is always already excluded from and as a principle unable to fit into the host societies. The figure of always excluded Other has been conceptualized in migration literature for instance as "illegal" subjectivity by Catherine Dauvergne[64] or the subjectivity of the "Crimmigrant Other" by Katja Franko.[65] As Dauvergne writes, in case of these subjects, illegality becomes an identity of its own, homogenizing those on the move, removing any difference and individuality, including the reasons to migrate or being on the move. It produces a globally coherent view that there are proper and improper reasons to migrate[66] turning some mobility into essentially desirable and orderly and other into essentially undesirable and disorderly.

The *illegal* or *crimmigrant* subjectivity is ascribed to certain groups of people, but not to others despite statistical evidence often showing the opposite. For instance, even though the biggest group of overstayers in Australia have been British citizens not migrants from the global South,[67] the latter group is usually portrayed as violating Australia's migration laws. Similarly, Estonians, who are EU Citizens, rather than other groups of third-country nationals, have been the biggest group of those held in detention and expelled from Finland.[68] Finally, as data from before Russia's full-scale aggression on Ukraine in 2022 show, the largest groups among enforced removals and detected *illegal* stays in the EU countries have concerned Ukrainian and Albanian citizens;[69] thus, going against the dominant narratives that portray racialized migrants or those from outside the EU as the culprits of migration law violations.[70] To be sure, disorderly movement can also be discussed as a behaviour of EU Citizens moving within the EU Area of Freedom, Security and Justice, that arguably is not

---

63 Spijkerboer, 'The Global Mobility Infrastructure', 468.
64 Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge: Cambridge University Press, 2008).
65 Franko, *The Crimmigrant Other*.
66 Dauvergne, *Making People Illegal*, 18.
67 Tom Geoghegan, 'The British Illegal Immigrants', *BBC News*, 2 February 2005, http://news.bbc.co.uk/2/hi/uk_news/magazine/4226949.stm (accessed 18.12.2022).
68 Jukka Könönen, 'Legal Geographies of Irregular Migration: An Outlook on Immigration Detention', *Population, Space and Place* 26, no. 5 (July 2020): 4.
69 Könönen, 3.
70 See however work on coloniality and racialization of migrants from Post-Soviet countries: Daria Krivonos and Lena Näre, 'Imagining the "West" in the Context of Global Coloniality: The Case of Post-Soviet Youth Migration to Finland', *Sociology* 53, no. 6 (December 2019): 1177–1193; Daria Krivonos, 'Migrations on the Edge of Whiteness: Young Russian-Speaking Migrants in Helsinki, Finland' (Helsinki, University of Helsinki, 2019).

always based on a *well-informed or planned manner*[71] but often spontaneously as exploration or adventure.[72]

To be sure, such construction of illegality and criminality functions as a constitutive for identity building in contemporary Europe.[73] The figure of the *illegal migrant*, the *bogus asylum seeker*,[74] or the *Crimmigrant Other* serves, through their exclusion from rights as result of their *illegal* status or *criminal* behaviour, the homogenization and stabilization of the nation-state through measures aimed at their exclusion. The nation-state and state sovereignty are powered and maintained not only through creation and maintenance of borders but also through the failure of borders and the construction and maintenance of illegality. In *Making People Illegal*, Catherine Dauvergne shows how illegality that is produced by law is particularly important for sovereignty and globalization because through violation of the border regime it ultimately defines the scope of the sovereign power.[75] In other words, the nation-state and state sovereignty are produced by borders, and the processes of bordering and the failure of borders in preventing crossing is needed to maintain the distinctions produced by these borders. This happens on the one hand through the implication of law in constructing *illegal* migration, and on the other in how it functions as a tool deployed to confront it, strengthening territorial entities encompassed by these borders. An excellent example of these processes is; for instance, the USA where on the one hand the immigration system has been described as broken and constantly failing while at the same time migration has been reframed by the previous Trump administration in terms of white nationalism and a threat not only to the physical security of white Americans but the survival of the nation itself.[76] Similarly, at the EU level, unauthorized migration is portrayed as a security threat while the measures adopted to combat it have risen to new levels of complexity strengthening the process of EU integration.[77] We can see, therefore, that what I call disorderly mobility as enshrined in the figure of Irredeemable Other is necessary for nation-states to fake their stability and reinforce their sovereignty. The need for the *illegal*[78] or *criminal migrant*[79] as a necessary element of a sovereign state is sometimes even openly expressed by the authorities. For instance, the informants in Katja Franko's interviews with

71 UN General Assembly, 'Global Compact for Safe, Orderly and Regular Migration', Pub. L. No. A/RES/73/195 (2018).
72 I am grateful to Stephen Phillips for this point.
73 Franko, *The Crimmigrant Other*, 13.
74 Kmak, 'Between Citizens and Bogus Asylum Seekers: Management of Migration in the EU through the Technology of Morality'; Monica Den Boer, 'Moving between Bogus and Bona Fide: The Policing of Inclusion and Exclusion in Europe', in *Migration and European Integration: The Dynamics of Inclusion and Exclusion*, ed. Robert Miles and Dietrich Thränhardt (London: Associated University Press, 1995).
75 Dauvergne, *Making People Illegal*, 48.
76 Munshi, 'Unsettling the Border', 1723.
77 Franko, *The Crimmigrant Other*, 136.
78 Dauvergne, *Making People Illegal*.
79 Franko, *The Crimmigrant Other*.

representatives of the Norwegian police recognize a growing need for the "production" of immigration-related criminal cases.[80]

But the figure of the Irredeemable Other functions also, as Katja Franko argues, as a tool of externalization of discomfort and being blamed for lowering or getting rid of the moral responsibility for human rights violations[81] in order to maintain the unequal mobility privileges of other groups that exercise their mobility.[82] In other words, these figures of *illegal* or *crimmigrant Others* are constructed in order to justify the removal of rights from racialized migrants that goes beyond strictly defined migration control measures, and also often include differential or particularly harsh treatment in comparison with treatment usually directed towards citizens. This approach is visible for instance in the case of Eastern Europeans in Norway, towards whom, as Franko shows, authorities demand the infliction of a higher level of pain and harsher conditions of detention in order to achieve deterrence.[83] She quotes an interviewed police officer who says: "For Eastern Europeans, prison is like a hotel where they get a daily allowance."[84] This shows that simple immobilization of those who are not mobile in an orderly fashion is not punishment enough, but requires additional harsh elements, spiralling into continuous demand for a higher standard of behaviour for the protection of rights (for instance excluding human rights protection in cases of *culpable conduct*) and harsher treatment (pushbacks or externalization of protection, etc.) for lack or perception of lack of such behaviour. Such a process of harsher and harsher treatment and exclusion of Irredeemable Other in turn orients the production and reproduction of the nation-state. In the next section, I will show more concretely how mobility that is turned into a violation of law is an engine fuelling the operation of the nation-state machine in times of globalization. This happens through the multifaceted processes of bordering.

The processes of bordering

Mobility as a violation of law is produced and maintained in international and national law of the global North through various measures of migration control such as expulsion or prevention of arrival. The over-encompassing role of migration law in the global North is to strengthen state legitimacy and sovereignty exposed as unstable by the processes of globalization and minoritization. State legitimacy lies, therefore, not in sovereignty, but it is rather sovereignty that requires constant reinforcement for its legitimacy and relevance.[85] Legal measures are directed both towards those who have already entered the territory of the state (such as detention, expulsions, entry bans, and revocation of

80   Franko, 63.
81   Franko, 18.
82   Franko, 19.
83   Franko, 73.
84   Franko, 73.
85   Samaddar, *The Postcolonial Age of Migration*, 52.

citizenship) but also, they are increasingly aimed at prevention of arrival, including pushbacks and other external deterrence measures that limit access to mobility such as strict requirements for family reunification. Whereas some of these measures exclude mobile individuals from existing rights, other aims to distance those aiming to arrive physically from the state and through this, to prevent the rights and state responsibility to emerge.[86]

In Europe and in the EU but also in other regions of the global North sovereignty has been increasingly reinforced through measures of securitization of territory and borders[87] and criminalization of migration,[88] increased deterrence,[89] externalization,[90] and offshore processing[91] as well as the increased importance of migration law

86 Goodwin-Gill, Guy & McAdam, Jane, *The Refugee in International Law*, (Oxford: Oxford University Press, 2007), p. 408.
87 Didier Bigo, 'Security and Immigration: Toward a Critique of the Governmentality of Unease', *Alternatives: Global, Local, Political* 27, no. 1 suppl (1 February 2002): 63–92; Jef Huysmans, *The Politics of Insecurity: Fear, Migration and Asylum in the EU*, New edition (Abingdon, Oxon: Routledge, 2006); Mary Bosworth and Mhairi Guild, 'Governing Through Migration Control Security and Citizenship in Britain', *British Journal of Criminology* 48, no. 6 (1 November 2008): 703–719; Mehrnoosh Farzamfar, 'The Implications of the Securitization of Immigration upon the Right to Seek Asylum in the European Union: An Interdisciplinary Legal Analysis' (Helsinki, University of Helsinki, 2021), https://helda.helsinki.fi/bitstream/handle/10138/334434/farzamfar_mehrnoosh_dissertation_2021.pdf?sequence=1&izallowed=y (accessed 10.12.2022); Bigo and Guild, *Controlling Frontiers*; Elspeth Guild, *Security and Migration in the 21st Century* (Cambridge: Polity Press, 2009).
88 Anna Aliverti, 'Making People Criminal: The Role of the Criminal Law in Immigration Enforcement', *Theoretical Criminology* 16, no. 6 (2012): 417–434; European Union Agency for Fundamental Rights, 'Criminalization of Migrants in an Irregular Situation and of Persons Engaging with Them', 2014, https://fra.europa.eu/sites/default/files/fra-2014-criminalisation-of-migrants_en.pdf (accessed 18.12.2022); Didier Bigo, 'Criminalization of "Migrants": The Side Effect of the Will to Control the Frontiers and the Sovereign Illusion', in *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, ed. Barbara Bogusz et al. (Leiden: Martinus Nijhoff Publishers, 2004); Elspeth Guild, 'Criminalization of Migration in Europe: Human Rights Implications' (Office of the Commissioner for Human Rights, Council of Europe, 2010), CommDH/IssuePaper (2001)1; Franko, *The Crimmigrant Other*; Maria Joao Guia, Maartje van der Woude, and Joanne van der Leun, eds., *Social Control and Justice: Crimmigration in the Age of Fear* (The Hague; Portland, OR: Eleven International Publishing, 2013).
89 Thomas Gammeltoft-Hansen and Nikolas F. Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy', *Journal on Migration and Human Security* 5, no. 1 (March 2017): 28–56; Stephen Phillips, 'Nordic Exceptionalism or a Well-Trodden Path? Asylum Policy Lessons From the US and Australia', *Retfaerd* 1 (2023): 55–68.
90 David FitzGerald, *Refuge beyond Reach: How Rich Democracies Repel Asylum Seekers* (New York, NY: Oxford University Press, 2019); Thomas Gammeltoft-Hansen, *Access to Asylum International Refugee Law and the Globalization of Migration Control* (Cambridge: Cambridge University Press, 2013).
91 'Denmark Asylum: Law Passed to Allow Offshore Asylum Centres', *BBC News*, 6 March 2021, https://www.bbc.com/news/world-europe-57343572 (accessed 18.12.2022);

overspilling into other areas of law.[92] These measures are interrelated. According to Gammeltoft-Hansen and Tan, deterrence and exterritorialization measures fall into categories of: non-admission policies limiting access to the asylum procedure; non-arrival measures preventing access to the territory of asylum states through migration control; offshore asylum processing and relocation of refugees to third countries; criminalization of irregular migration and human smuggling; and indirect deterrence measures intended to make the asylum country less attractive.[93] On the one hand, these bordering measures are *spatial*, as they govern the movement of mobile persons from one geographical point to another or immobilize the mobile person in one place. On the other hand, their effect is also *temporal* as it often reaches into the future with the aim of preventing both intended and yet unplanned mobility.[94] Whereas these measures are aimed at the exclusion of various categories of mobile persons that are not encompassed by *mobility as a right*, they particularly target those subjectivized as Irredeemable Others. The operation of these measures has often been conceptualized in scholarship with the use of a 'Fortress Europe' metaphor,[95] that recently in particular has been applied in relation to various legal, digital, and material wall-building,[96] as well as other political, economic, and cultural discourses,[97] juxtaposing them with the freedom of movement of the EU citizens.[98] At the same time the body of scholarship has shown how these measures of securitization, criminalization, and externalization of migration are not meant to stop but rather produce differential mobility and channel it to specific places and ends (for instance as labour) contributing to the maintenance of the EU as a political entity.[99]

'Operation Sovereign Borders' (Australian Government), accessed 15 September 2022, https://osb.homeaffairs.gov.au (accessed 18.12.2022).

92 Kmak, 'Migration Law as a State (Re)Producing Mechanism'.

93 Gammeltoft-Hansen and Tan, 'The End of the Deterrence Paradigm?', 34.

94 See for instance Jukka Könönen, 'Borders in the Future: Policing Unwanted Mobility through Entry Bans in the Schengen Area', *Journal of Ethnic and Migration Studies*, 31 January 2022: 1–18.

95 Jukka Könönen, 'Muuttoliikkeiden Hallinta Ja Hallitsemattomuus: Huomioita Rajojen Ja Liikkumisen Suhteista Euroopassa', *Tiede & Edistys*, no. 4 (1 April 2015): 333–351, 334.

96 Ashley Binetti Armstrong, 'You Shall Not Pass! How the Dublin System Fueled Fortress Europe', *Chicago Journal of International Law* 20, no. 2 (1 January 2020): 332–383, 363–364.

97 Jiska Engelbert, Isabel Awad, and Jacco Van Sterkenburg, 'Everyday Practices and the (Un)Making of "Fortress Europe": Introduction to the Special Issue', *European Journal of Cultural Studies* 22, no. 2 (April 2019): 133–143, 134.

98 See chapter 2 of this book; Also Elia Zureik and Mark B. Salter (eds), *Global Surveillance and Policing: Borders, Security, Identity* (Abingdon, Oxon: Routledge, 2012), 234.

99 Enrica Rigo, *Rajojen Eurooppa* (Helsinki: Like, 2009); Sandro Mezzadra and Brett Neilson, *Border as Method, or, the Multiplication of Labor*, 2013; Thomas Nail, *Theory of the Border* (Oxford; New York: Oxford University Press, 2016); Ranabir Samaddar, *The Postcolonial Age of Migration* (Abingdon, Oxon; New York: Routledge, 2020).

Securitization, and criminalization

In the EU, securitization and criminalization of migration have been embedded in the foundational narrative of the EU,[100] and have over the time of the deepening of European integration, gradually moved migration rules towards greater externalization and deterrence.[101] Security studies defined securitization as a speech-act with the use of which a particular audience is convinced that a certain matter constitutes an unprecedented threat requiring customized policy measures to defy it.[102] Further, the critical security studies has shown how securitization happens also through policies and legal measures.[103] Extensive scholarship shows how through legal, political, or discursive measures certain groups always already represent a threat, and their movement needs to be stopped even before they are able to arrive within the jurisdiction of the state. In turn criminalization, including criminalization of migration means the management of migration via the application of substantive criminal law and criminal prevention and enforcement mechanisms.[104] The phenomena of both securitization and criminalization of migration and the interrelation between administrative and criminal law in the context of migration have been extensively researched,[105] and recently also conceptualized as *crimmigration* – a multifaceted relationship between migration and criminal law that attained such a level of hybridity to be considered a new form of control – a crimmigration control.[106] The debate on crimmigration originated in the US,[107] but there has been an increased focus on this topic in the EU as well, where it has

100 Magdalena Kmak, 'Limits of Sovereignty?: Rethinking the Conflict between Human Rights and Immigration in the European Union', *Finnish Yearbook of International Law* 20, no. 2009 (2011): 53–81.

101 'Communication from the Commission on a New Pact on Migration and Asylum', Pub. L. No. COM(2020) 609 final (2020).

102 Thierry Balzacq, 'A Theory of Securitization: Origins, Core Assumptions, and Variants', in *Securitization Theory: How Security Problems Emerge and Dissolve*, ed. Thierry Balzacq (Abingdon, Oxon: Routledge, 2011); Farzamfar, 'The Implications of the Securitization of Immigration upon the Right to Seek Asylum in the European Union: An Interdisciplinary Legal Analysis', 95.

103 Bigo, 'Security and Immigration'.

104 Valsamis Mitsilegas, *The Criminalization of Migration in Europe: Challenges for Human Rights and the Rule of Law*, SpringerBriefs in Law (Cham Heidelberg: Springer, 2015), 2.

105 Guild, *Security and Migration in the 21st Century*; Maartje van der Woude, Vanessa Barker, and Joanne van der Leun, 'Crimmigration in Europe', *European Journal of Criminology* 14, no. 1 (1 January 2017): 3–6; Bosworth and Guild, 'Governing Through Migration Control Security and Citizenship in Britain'.

106 Katja Franko Aas, 'The Ordered and the Bordered Society: Migration Control, Citizenship, and the Northern Penal State', in *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (Oxford, UK: Oxford University Press, 2013), 25.

107 Juliet P. Stumpf, 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power', *American University Law Review* 56 (2006).

been linked with securitization.[108] In particular, scholars in the European context have approached crimmigration more broadly, not ascribing it any rigid definition, but considering it as a *sensitizing* concept – or a lens – through which legal and political developments in migration law and migration control practices can be analysed.[109]

Scholars have shown over the years[110] how through concrete laws and policies, migration is being constructed as a security threat, that has to be fended off by yet another measure or technology designed to cope with that threat,[111] that not only serves political interests[112] but that also strengthens the sovereignty of the nation-state as such.[113] In concrete terms, law contributes to securitization and criminalization of migration through *illegalization* – coding of increasing number of categories relating to migration as outside the law – and then regulating measures aiming at crackdown on *illegal migration*.[114] Likewise, coding migration-related offences (which are usually regulated in administrative law) as crimes increases criminalization of migration, and of persons and groups supporting them.[115] The numerous accounts by scholars and human rights monitoring bodies referred to above show how these processes contribute to the narrative of securitization and criminalization that has permeated the discussion on migration in particular concerning the migration understood in the global North as undeserved mobility.

Looking through the prism of orderly and disorderly mobility, both securitization and criminalization of borders and mobility in the EU and globally has to be seen as rearticulation of colonial distinctions.[116] To be sure, many distinctions constructed through the process of bordering have colonial origins and were used to regulate the movement of slaves.[117] Simone Browne shows how corporeal markers were linked with the right to travel across the border between the US and Canada in the document called the *Book of negroes* – the

---

108 van der Woude, Barker, and van der Leun, 'Crimmigration in Europe'; Guia, Woude, and Leun, *Social Control and Justice*.

109 See for instance Maartje A.H. van der Woude, Joanne P. van der Leun, and Jo-Anne A. Nijland, 'Crimmigration in the Netherlands', *Law & Social Inquiry* 39, no. 3 (1 September 2014), 561.

110 Louise W. Holborn, 'The Legal Status of Political Refugees, 1920–1938', *The American Journal of International Law* 23, no. 4 (1938), 689; Hannah Arendt, *The Origins of Totalitarianism* (New York: A Harvest Book, Harcourt Inc., 1985), 288.

111 Bigo and Guild, *Controlling Frontiers*; Bigo, 'Security and Immigration'; Huysmans, *The Politics of Insecurity*.

112 Bigo, 'Security and Immigration'.

113 Dauvergne, *Making People Illegal*.

114 Dauvergne, 48.

115 European Union Agency for Fundamental Rights, 'Criminalization of Migrants in an Irregular Situation and of Persons Engaging with Them'.

116 Lucy Mayblin and Joe Turner, *Migration Studies and Colonialism* (Cambridge: Polity Press, 2020), 144.

117 Simone Browne, *Dark Matters: On the Surveillance of Blackness* (Durham, NC: Duke University Press, 2015).

first US governmental policy document for regulation of migration. According to the document the movement and immobility of slaves depended on the bio-markers of the bodies including race, gender, disability, and other markers that allowed for surveillance and determined both movement and immobility.[118] These measures have developed into modern processes of bordering and control, that do not include only citizens of former colonies[119] and can affect national minorities such as Roma in the EU Member States.[120] They nevertheless often follow the lines of racialized colonial ranking that is also coupled with assessment of security risks, securitization, and criminalization.[121]

Externalization

A more general tendency can be observed recently of migration control measures to move outside the territorial jurisdiction of states, with the aim of diffusing or relieving the state of the legal liability and human rights obligations towards those on the move.[122] State responsibility arises in principle when the person appears at the border and claims their willingness to enter the country, for instance, for tourism or to seek asylum (although the jurisdiction can also arise outside of the state territory when the state has effective control over the place or a person[123]). Crossing the border into the state (even if in an irregular manner) is in principle an indication that the person is within the jurisdiction of that state.[124] In order to prevent the emergence of jurisdiction, states adopt measures enumerated above that aim at the externalization of control of the movement of migrants, in particular through access to the global mobility infrastructure.[125] The scope of this access differs, and it is easier for those at the top of the Henley Passport Index and more difficult for those at the bottom of the list.[126] Visas and measures such as various entry/exit control systems,[127] interoperable databases, or entry bans are, therefore, the most straightforward means of filtering wanted and unwanted mobility. For those who are not able

---

118 Browne, 25.

119 Krivonos and Näre, 'Imagining the "West" in the Context of Global Coloniality'.

120 Huub van Baar, 'Evictability and the Biopolitical Bordering of Europe', *Antipode* 49, no. 1 (2016): 212–230.

121 Franko, *The Crimmigrant Other*, 127.

122 Gammeltoft-Hansen and Vedsted-Hansen, *Human Rights and the Dark Side of Globalization*, 5.

123 In reference to migration and save and rescue at sea see Hirsi Jamaa and Others v Italy, No. 27765/09 (European Court of Human Rights 23 August 2012).

124 N.D. and N.T. v. Spain.

125 Spijkerboer, 'The Global Mobility Infrastructure'.

126 'The Henley Passport Index', https://www.henleyglobal.com/passport-index/ranking (accessed 24.08.2022).

127 Migration and Home Affairs, 'Entry/Exit System (EES)', https://home-affairs.ec.europa.eu/policies/schengen-borders-and-viza/smart-borders/entry-exit-system_en (accessed 16.09.2022).

to obtain visas, or for those that are forced to flee persecution, war, or unrest, other measures are being adopted, such as overseas processing centres, that aim at preventing them from reaching state territories and in consequence from getting within their jurisdiction. Jurisdiction serves these measures, for instance, by limiting the state responsibility for asylum claims only to those lodged at official border crossing points[128] while excluding protection in the case of culpable conduct.[129] These are examples of the number of legal, political, and financial measures constituting the global mobility infrastructure, that are being used to prevent people from reaching the border, notwithstanding the human rights violations this entails. As Spijkerboer writes,

> [f]aced with this dilemma, the countries in the global North have decided to have the best of both worlds. Instead of controlling access to their territory, they have sought to control access to the global mobility infrastructure—regardless of territory.[130]

These measures, therefore, simultaneously uphold the conception of *fixed* territoriality when it comes to guaranteeing access to rights while switching to an increasingly *mobile/elastic/flexible* conception of the border when it comes to restricting access to rights.[131] The purpose is to reinforce orderly movement, where the border moves outside of the territory of the state in order to implement orderly departure and admission programmes.[132] In consequence, these measures not only exclude or limit state jurisdiction but also allow using the imaginary of the Irredeemable Other to strengthen the nation-state without the need of having such framed mobile persons physically present. The latter examples encompass such legal measures as career sanctions, readmission agreements, or migration-related partnerships, such as Better Migration Management Programme, part of the EU Emergency Trust Fund for Africa[133] as well as measures leading to externalization of protection for instance the already mentioned Australian Pacific Solution or UK's agreement with Rwanda. In consequence of these policies and regulations those who are forced to leave their countries for safety or who are looking for improvement of their lives more generally, often are forced to use, what Spijkerboer calls, shadow mobility infrastructure.[134]

---

128 M.K. and Others v. Poland, No. 40503/17, 42902/17 and 43643/17 (European Court of Human Rights 23 July 2020).
129 N.D. and N.T. v. Spain.
130 Spijkerboer, 'The Global Mobility Infrastructure', 456.
131 Shachar, *The Shifting Border*, 68.
132 Shachar, *The Shifting Border*.
133 Harsha Walia, Robin D.G. Kelley, and Nick Estes, *Border and Rule: Global Migration, Capitalism, and the Rise of Racist Nationalism* (Chicago: Haymarket Books, 2021), 161.
134 Spijkerboer, 'The Global Mobility Infrastructure', 461.

It is argued that, through the securitization and digitalization of external borders, the EU has become a *poster child* of the border security/industrial complex.[135] This includes a set of policy, legal, digital, and material measures the operation and interoperability of which contributes to the increasing emphasis on border procedures. These procedures include new digital and automated border crossing systems with the aim on the one hand to help "*bona fide* third-country nationals to travel more easily"[136] while at the same time increasing controls over visa overstayers as well as those apprehended in connection with an unauthorized external border crossing. These measures also include those disembarked following a search and rescue operation at sea and persons who have made an application for international protection at external border crossing points or in transit zones but do not fulfil the conditions for entry.[137]

As commentators claim, many of those measures are planned with reduced or unclear procedural safeguards and are directed toward people who are forced to use irregular means of travel due to the proliferation of deterrence measures. As Mehrnoosh Farzamfar shows, the processes of securitization at both legislation and implementation levels in the EU and the Members States are taking a leading role in making meaningless the right to seek asylum as enshrined in article 18 of the European Charter of Fundamental Rights, through denial of access to the asylum procedure.[138]

EU Eastern border

These measures have contributed to the ongoing humanitarian and human rights crisis at the EU's Southern and Eastern borders partially also exacerbated by the implication of the EU border agency Frontex in the human rights violations in the Mediterranean.[139] Furthermore, the ongoing crisis has also been recently worsened by the COVID-19 pandemic as well as Belarus' participation in migrant smuggling,[140] temporarily putting into question the right to

135 Steve Peers, 'Giving Back Control: British Travel to the EU after Brexit', *EU Law Analysis*, 24 July 2022, http://eulawanalysis.blogspot.com/2022/07/giving-back-control-british-travel-to.html (accessed 18.12.2022).
136 Migration and Home Affairs, 'Entry/Exit System (EES)'.
137 Migration and Home Affairs.
138 Farzamfar, 'The Implications of the Securitization of Immigration upon the Right to Seek Asylum in the European Union: An Interdisciplinary Legal Analysis', 6.
139 'EU Border Agency Frontex "Covered up" Greek Pushbacks: Reports', *Euractive.Com*, 29 July 2022, https://www.euractiv.com/section/justice-home-affairs/news/eu-border-agency-frontex-covered-up-greek-pushbacks-reports/ (accessed 18.12.2022).
140 Vanessa Gera, Monika Scislowska, Geir Moulson, 'EU accuses Belarus of "trafficking" migrants toward border', APNews, 11 November 2021, https://apnews.com/article/european-union-belarus-europe-poland-migration-ee8912d6998a95f421c97b7c99e06f55 (accessed 19.04.2023).

territorial asylum in the global North.[141] The stricter measures particularly affected, however, the racialized migrants and asylum seekers.[142] In this context, the unprecedented situation of pushbacks at the Polish-Belarusian border as a result of a migrant smuggling operation deserves a closer look. I focus on the EU Eastern border because the differential response of Polish authorities towards asylum seekers aiming to cross the border from Belarus and Ukraine illustrates the broader distinction between orderly and disorderly mobility in the EU. Whereas during the COVID-19 pandemic and later following the escalation of Russia's war against Ukraine the Polish border has been almost completely closed to asylum seekers from Muslim countries, asylum seekers from Belarus as well as economic migrants and refugees from Ukraine were allowed to enter.[143]

It is important to mention that the non-acceptance of an asylum application by the Polish Border Guards at the border with Belarus in violation of domestic and international law is not a new phenomenon, but a part of a wider ongoing policy of Polish authorities aiming at denying entry to racialized foreigners coming from the territory of Belarus.[144] This policy has; nevertheless, reached a level of human rights and humanitarian crisis in the summer of 2021 when Polish authorities legalized pushbacks in violation of Poland's human rights obligations, first in the *Implementing Act* of 20 August 2020 and then in amendment to the *Aliens Act* of 17 September 2020.[145] Legal measures were also accompanied by the introduction of a state of emergency in 115 border municipalities that effectively restricted media freedom as well as banned activists, lawyers, and medical and humanitarian organizations from entering the border area.[146] In consequence, the people forced by the Belarussian authorities to cross the border into Poland were stopped and forcibly pushed back to the Belarussian side where they were again brutally forced to re-enter Poland, sometimes numerous times. Some people were stranded in the forests near the

141 Daniel Ghezelbash and Nikolas Feith Tan, 'The End of the Right to Seek Asylum? COVID-19 and the Future of Refugee Protection', *International Journal of Refugee Law* 32, no. 4 (31 December 2020): 668–679.
142 Witold Klaus, 'The Porous Border Woven with Prejudices and Economic Interests. Polish Border Admission Practices in the Time of COVID-19', *Social Sciences* 10, no. 11 (13 November 2021): 435.
143 Witold Klaus, 'The Porous Border Woven with Prejudices and Economic Interests. Polish Border Admission Practices in the Time of COVID-19', *Social Sciences* 10, no. 11 (13 November 2021): 435.
144 Monika Szulecka, 'The Undermined Role of (Domestic) Case Law in Shaping the Practice of Admitting Asylum Seekers in Poland', *European Journal of Legal Studies*, no. Special Issue-Adjudicating Migrants' Rights: What Are European Courts Saying? (11 May 2022): 202.
145 Grupa Granica, 'Humanitarian Crisis at the Polish-Belarusian Border', 21 December 2021, 10, https://www.grupagranica.pl/files/Grupa-Granica-Report-Humanitarian-crisis-at-the-Polish-Belarusian-border.pdf (accessed 18.12.2022).
146 Grupa Granica, 3.

border for weeks without access to food, water, and medical assistance.[147] Grupa Granica (a social movement involving Polish NGOs mobilising against the inhuman treatment of migrants at the border) in their report from December 2021 described the activities of the polish authorities as *roundups and illegal expulsions*.[148] Documented human rights violations by Belarusian and Polish authorities included various forms of physical and psychological abuse, such as intimidation, coercion of dangerous actions and arbitrary detention, collective expulsions, denial of access to food, water, shelter, medical assistance and access to protection procedures and the right to effective legal remedy. These measures resulted in deaths, and inhuman and degrading treatment.[149] Even though the pushbacks based on the *Implementing Act* of 20 August 2020 have been considered to be against Polish law first by the Regional Court in Bielsko Podlaskie,[150] followed by judgments by other courts, including Regional Administrative Court in Białystok,[151] the judgments have not been implemented. This is often juxtaposed by the admission of people fleeing war in Ukraine after 24 February 2022. It remains to be seen, however, how the approaches to refugees and asylum seekers that I described in this chapter will evolve, in the EU at least. As a result of the ongoing Russian war on Ukraine, over 5.3 million refugees from Ukraine arrived in the EU within the first three months of the war[152] prompting the EU to launch for the first time the Temporary Protection Directive.[153] Addressing the European Parliament in September 2022, the European Commission President Ursula von der Leyen said "Our actions towards Ukrainian refugees must not be an exception. They can be a blueprint for going forward."[154] Judging from the ongoing humanitarian crisis at the Southern and Eastern EU borders, but also recent decisions on building

---

147 Grupa Granica, 4.

148 Grupa Granica, 5.

149 Grupa Granica, 'Humanitarian Crisis at the Polish-Belarusian Border'.

150 Sąd Rejonowy w Bielsku Podlaskim, VII Zamiejscowy Wydział Karny w Hajnówce 22 March 2022, VII Kp 203/21.

151 Wojewódzki Sąd Administracyjny w Białymstoku, Wydział II, 15 September 2022, II SA/Bk 492/22

152 Frontex, '5.3 Million Ukrainians Have Entered EU since the Beginning of the Invasion', 6 February 2022, https://frontex.europa.eu/media-centre/news/news-release/5-3-million-ukrainians-have-entered-eu-since-the-beginning-of-invasion-HbXkUz (accessed 18.12.2022).

153 Council of the EU, 'Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences Thereof', Pub. L. No. 2001/55/EC (2001).

154 Jennifer Rankin, '"Putin Will Fail and Europe Will Prevail," EU Chief Tells MEPs', *The Guardian*, 14 September 2022, https://www.theguardian.com/world/2022/sep/14/putin-will-fail-and-europe-will-prevail-eu-chief-tells-meps (accessed 16.09.2022).

more border walls,[155] it remains yet to be seen whether the experiences from 2022 will generate any meaningful changes in the EU refugee policies.

Externalization of protection

The inhuman and degrading treatment of migrants resulting from pushbacks at the Polish-Belarusian border is of course not an unprecedented or isolated case, but yet another example of the proliferation of deterrence measures including pushbacks and externalization of asylum in the EU and in other parts of the global North. As Stephen Phillips argues, these practices are not new and date back to the measures adopted in the 1930s and 1940s, and later to the Haitian Refugee Crisis in the US in the 1980s and 1990s where the United States directly returned Haitian asylum seekers to Haiti without processing their claims or detained them in the Guantanamo Base.[156] The Australian model of offshore processing that currently stands as a blueprint for externalization originates from these measures and is based on the one hand on deterrence campaigns such as, for instance, the information campaign of the Australian Operation Sovereign Borders[157] directed towards those that haven't yet set on their journeys. On the other hand, it includes interception at sea and mandatory detention at remote locations like Manus Island of Papua New Guinea of those who decided to travel to Australia by boat. The system implicates Australia in human rights violations. For instance, the practice of detention as such, and conditions in the Australian-run detention centre have been considered in 2016 by the Supreme Court of Justice Papua New Guinea as being in breach of the detainees' right to personal liberty under the Papua New Guinea constitution.[158]

In Europe measures aimed at limiting the numbers of arrivals of asylum seekers or limiting them to certain nationalities only have been proliferating recently through such measures as the EU-Turkey deal.[159] Measures directly aiming at

---

155 Agence France-Presse in Helsinki, 'Finland Passes Law to Bolster Border Fence with Russia', *The Guardian*, 7 July 2022, https://www.theguardian.com/world/2022/jul/07/finland-passes-law-to-bolster-border-fence-with-russia (accessed 17.12.2022).
156 Christopher Mitchell, 'U.S. Policy toward Haitian Boat People, 1972–93', *The ANNALS of the American Academy of Political and Social Science* 534, no. 1 (July 1994): 69–80; Stephen Phillips, 'Nordic Exceptionalism or a Well-Trodden Path? Asylum Policy Lessons From the US and Australia', *Retfaerd: Nordisk Juridisk Tidsskrift* 1 (2023): 55–68.
157 'Operation Sovereign Borders'.
158 Azadeh Dastyari and Maria O'Sullivan, 'Not for Export: The Failure of Australia's Extraterritorial Processing Regime in Papua New Guinea and the Decision of the PNG Supreme Court in Namah (2016)', *Monash University Law Review* 42, no. 2 (2016): 308–338; For the discussion of the importance of the judgment of the Supreme Court of Papua New Guinea see also Spijkerboer, 'The Geopolitics of Knowledge Production in International Migration Law'.
159 'EU-Turkey Statement' (European Council, 18 March 2016), https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/ (accessed 13.11.2019).

exterritorialization akin to those in Australia, have been however fairly recent. For instance, Denmark announced its goal to receive zero asylum seekers in January 2021, aiming only to host refugees through the UN quota system.[160] In June of that year, The Danish parliament adopted a law setting the externalization of protection scheme for relocation of asylum seekers outside of the EU,[161] (updated later to make exception for the refugees from Ukraine[162]). Similarly, in April 2022 the UK signed an agreement with Rwanda allowing for relocation to Rwanda of all those arriving in the UK irregularly with limited or no possibility to return to the UK even if granted a positive decision on refugee status.[163] Despite the cancellation of the first flight to Rwanda in June 2022 as a result of the *interim measures* decision by the ECtHR as well as domestic legal challenges and protests,[164] the UK government is committed to continue with the scheme, even if this would cause a withdrawal from the ECHR.[165] Justifying the purpose of the scheme, the Danish Minister for Immigration and Integration said, "[w]e are not against refugees coming to Denmark. Not at all. […] It must be *orderly and regulated* [emphasis mine]."[166] These developments provide yet another example of the measures that are based on, and perpetuate, the division of mobility into two modes: orderly and disorderly. In this case, however, certain (disorderly) mobility has not only been limited but rather banished through exclusion and the outsourcing of refugee protection to third countries.[167] Harsha Walia calls these and other measures, such as the US-Canada Safe Third Country Agreement and other similar bilateral agreements (such as for instance between US and Mexico, Guatemala, El Salvador, or Honduras), as being in itself a method for

160 The Local, "Danish prime minister wants country to accept 'zero' asylum seekers", 22 January 2021. Available at: https://www.thelocal.dk/20210122/danish-prime-m inister-wants-country-to-accept-zero-asylum-seekers/. (accessed 18.12.2022).

161 'Denmark Asylum: Law Passed to Allow Offshore Asylum Centres'.

162 'Denmark Had a Goal of Zero Asylum Seekers Until Ukraine Was Invaded by Russia', *Schengen Visa News*, 31 March 2022, https://www.schengenvisainfo.com/ news/denmark-had-a-goal-of-zero-asylum-seekers-until-ukraine-was-invaded-by-r ussia/ (accessed 18.12.2022).

163 'Factsheet: Migration and Economic Development Partnership', *Home Office in the Media*, 14 April 2022, https://homeofficemedia.blog.gov.uk/2022/04/14/factsheet-m igration-and-economic-development-partnership/.

164 Nadeem Badshah, 'Protesters across UK Decry "Heinous" Rwanda Deportation Plan', *The Guardian*, 16 July 2022, https://www.theguardian.com/politics/2022/jul/16/protes ters-across-uk-decry-heinous-rwanda-deportation-plan (accessed 29.08.2022).

165 Joseph Lee and Doug Faulkner, 'Rwanda Asylum Flight Cancelled after Legal Action', *BBC News*, 15 June 2022, https://www.bbc.com/news/uk-61806383 (acces sed 29.08.2022).

166 'Tesfaye Gives Greece Pat on the Back for Low Asylum Rates', *Nord News*, 23 August 2021, https://nord.news/2021/09/23/tesfaye-gives-greece-pat-on-the-back-for- low-asylum-rates/ (accessed 29.08.2022).

167 A move considered xenophobic by the African Union 'Press Statement On Denmark's Alien Act Provision to Externalize Asylum Procedures to Third Countries' (African Union, 8 February 2021), https://au.int/en/pressreleases/20210802/press-statement-denma rks-alien-act-provision-externalize-asylum-procedures (accessed 18.12.2022).

imperialism in the contemporary era.[168] These measures aim to obstruct, deter, or avert the arrival of people in refugee situation and those seeking asylum,[169] and for that purpose to extend the border to other countries, beyond the so-called *migrant-receiving nations* in the global North,[170] continuously proliferating distinctions, originating from coloniality, between good and bad, desired and undesired or orderly and disorderly migration.

Overspill of migration law into other areas of law

Besides the measures aimed directly at controlling and preventing migration, other legal regulations, and practices that, while not initially aimed at migration control *sensu stricto*, also function as border control and mobility prevention. I call this phenomenon an overspill of migration law and claim that the aim of such an over-encompassing role of migration law is to strengthen state sovereignty in times of globalization.[171] In particular, they reorient the emphasis back onto migration control, that as I discussed, has been considered as a last bastion of sovereignty able to stabilize the nation-state as a territorially bound closed community. One of these measures is already the discussed overspill of migration law into citizenship law. Another one is an overspill of migration law into criminal law.[172] Applying the crimmigration lens to these two practices allows us to see how they serve as a tool for bordering. For instance, as scholars have argued, citizenship serves through deprivation practices as a measure of terrorist prevention and punishment.[173] As I discussed in Chapter 2, the undesired persons, usually those that had acquired citizenship through naturalization, can be deprived of citizenship if they conduct themselves in manners seriously prejudicial to the interests of the state or to its security. State membership is in their case probatory and can be revoked through punishment.[174] As Lucia Zedner writes in her analysis of the practices of citizenship deprivation in the UK,

168 Walia, Kelley, and Estes, *Border and Rule*, 89.

169 Jeff Crisp, 'Externalization and the Erosion of Refugee Protection', *University of Melbourne*, 25 November 2019, https://arts.unimelb.edu.au/school-of-social-and-political-sciences/our-research/comparative-network-on-refugee-externalization-policies/blog/externalization-and-the-erosion-of-refugee-protection (19.09.2022).

170 Inka Stock, Ayşen Üstübici, and Susanne U. Schultz, 'Externalization at Work: Responses to Migration Policies from the Global South', *Comparative Migration Studies* 7, no. 1 (December 2019): 48; Phillips, 'An examination of deterrence and access to asylum through law, rhetoric and experience'.

171 Kmak, 'Migration Law as a State (Re)Producing Mechanism'.

172 Stumpf, 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power'; Katja Franko Aas and Mary Bosworth, *The Borders of Punishment: Migration, Citizenship, and Social Exclusion*, 1 edition (Oxford, UK: Oxford University Press, 2013); van der Woude, Barker, and van der Leun, 'Crimmigration in Europe'.

173 Lucia Zedner, 'Citizenship Deprivation, Security and Human Rights', *European Journal of Migration and Law* 18, no. 2 (17 June 2016): 222–242.

174 Franko, 78.

a resort to immigration law in the case of terrorist threats derives in part from the impulse to combat terrorism by any available legal means but also from a tendency to cast foreigners as a threat, even though there is no empirical evidence that naturalized citizens pose a greater threat to security than citizens by birth.[175]

The second is migrantization of criminal law as an element of crimmigration practices. Through this process migration law overspills into criminal law in which criminal law acquires a role of border control. This concerns, for instance, cases when a common crime is a basis for immigration detention[176] or more broadly when criminal law is used in order to facilitate the deportation of a foreigner.[177] Importantly, such practices often reveal differing state responses to crime and crime prevention depending on a person's immigration status[178] ranging from reintegration into society for those with formal status to territorial exclusion of those without status. Researchers have shown how similar and relatively minor offences (such as possession of a small dose of marijuana or begging[179]) result in a fine in the case of citizens and expulsion in the case of a foreigner.[180] Such practices contribute to the overspill of migration law into criminal and citizenship laws, and the development of what Franko calls *bordered penality* where the penal system functions as a border control measure.[181] For Franko, *bordered penality* serve on the one hand as an expression of sovereignty and on the other as an element of the global mobility regime where people are being dispatched to their countries of origin and immobilized there.[182]

These measures, together with pushbacks, externalizations, and offshore processing show how the nation-states, remaining constantly in flux need to be supported by the regulation of belonging through differential mobility. Thanks

175 Zedner, 'Citizenship Deprivation, Security and Human Rights', 236.
176 Juliet P. Stumpf, 'The Process Is the Punishment in Crimmigation Law', in *The Borders of Punishment: Migration, Citizenship and Social Exclusion* (Oxford, United Kingdom: Oxford University Press, 2013): 367–419, 66–68.
177 Aliverti, 'Making People Criminal: The Role of the Criminal Law in Immigration Enforcement'.
178 Magdalena Kmak, 'Crimmigration and Othering in the Finnish Law and Practice of Immigration Detention', *No Foundations Journal*, no. 15 (2018).
179 'Denmark: National Court Rules against Human Rights Judgement in Migrant Begging Case', 31 August 2022, https://ec.europa.eu/migrant-integration/news/denmark-national-court-rules-against-human-rights-judgement-migrant-begging-case_en (accessed 18.12.2022).
180 Aleksi Seilonen and Magdalena Kmak, 'Administrative Detention of Migrants in the District Court of Helsinki' (Helsinki: University of Helsinki, 2015), http://www.helsinki.fi/law-and-other/publications/detention-monitoring-report.pdf (accessed 15.06.2017); Jukka Könönen, 'Borders in the Future: Policing Unwanted Mobility through Entry Bans in the Schengen Area', *Journal of Ethnic and Migration Studies*, 31 January 2022, 1–18.
181 Katja Franko Aas, 'Bordered Penality: Precarious Membership and Abnormal Justice', *Punishment & Society* 16, no. 5 (December 2014): 520–541, 521.
182 Aas, 531–532.

to these processes the state, even though it has undergone a foundational change as an entity, continues to constitute the main form of the societal organization critical for the globalization processes.[183] Nevertheless, despite these restrictive measures, mobility cannot be fully ordered and regulated. Persons on the move also navigate around different legal categories, challenge and resist them but also use them for their own purposes. In the next two chapters, this book indeed shifts from conceptualizing mobility in a form of a right or a violation of law and focuses, instead, on ways to challenge the productive function of global mobility infrastructure.

Conclusions

In this chapter I focused on state sovereignty, borders, and the processes of bordering operating as an engine of the nation-state machine. I traced the operation of contemporary form of the machinic statehood in a globalized world that is based on the multiplication of borders and the processes of bordering, that enable the state to both reproduce and reinvent itself through positing migration at its centre. In this chapter, mobility of some groups of people is conceptualized as a violation of law, based on the distinction between the proper or improper reasons to migrate, that are related to citizenship, race, gender, or wealth. I argue that the migration law of the global North has been complicit in proliferating these distinctions through numerous discriminatory and exclusionary measures and practices that prevent or limit the mobility of certain categories of people or exclude them from protection. In addition, through legal, political, or discursive measures of securitization and criminalization, already certain groups always represent undesired mobility, and their movement needs to be stopped even before they are able to arrive within the jurisdiction of the state. Together with Chapter 2, this chapter shows how liberal subjectivity is enshrined in orderly movement and the *illegal* subjectivity in disorderly movement. To be sure, any such portrayal of subjectivity obscures the productive role of law in the construction of this freedom/illegality distinction. Law, through securitization and criminalization of certain forms of movement and certain groups of racialized, gendered, and classed persons maintain the sovereignty of the state.

   In the first part of this chapter, I focused on the meaning and function of borders for the nation-states and law. I then focused on the origins and implications of the international legal doctrine of sovereign control of migration arguing that this doctrine does not only enforce the right to control mobility but turns certain mobilities into a *violation of law*. In particular, this doctrine contributes to differential exclusions of various groups of mobile persons and together with *mobility as a right* perpetuates the distinction of mobility into orderly and disorderly.

183 Sassen, *Territory, Authority, Rights*.

In the second part of the chapter, I showed how *mobility as a violation of law* is being maintained in international and national law of the global North through the different forms of bordering – or distinction-making – as coded in migration law. The over-encompassing role of migration law is to strengthen state legitimacy and sovereignty exposed as unstable by the processes of globalization. That happens through the multifaceted processes of bordering, securitization, or criminalization, that take place within and outside the territory of the state and affect not only their legal status but also all aspects of migrant lives. Some of these processes can be described as overspill of migration law into other areas of law – into citizenship law (already discussed in Chapter 2) and into criminal law – turning these laws into migration control measures. The state is, therefore, not a reason for, but rather a result of, the processes of bordering and controlling mobility. State identity and sovereignty then are created and maintained through the perpetuation of the machinic processes of production, dissolution, and (re)production of different types of borders that themselves can be thought about with relation to mobility and movement.

Through these analyses the chapter builds a basis for further discussion in the book on the possibility of resistance to the nation-state as constructed through modernity/coloniality. We cannot escape the paradox of continuous processes of inclusion and exclusion as necessary for the nation-state, which through these processes fakes its stability and adjusts itself to contemporary times. As I will discuss in the next chapter, however, the ways that processes of inclusion and exclusion function and the type of nation-states that are constructed through them can sometimes be derailed and changed. To be sure, the contemporary nation-state is only one form of many that are possible. The type of relationship between law and mobility is therefore crucial for the formation of the future state. The meeting of laws and what happens at the (broadly) understood border is where the battle takes place.

Chapter 4

Mobility as a resistance to law

Introduction

The division of the world into sovereign states as rooted in modernity/coloniality only allows for a certain type of mobility, that is intimately linked to the container-like concept of a nation-state with citizenship as a basis for membership. The substantive law of the global North is construed in such a manner that not only embodies, but also produces the distinction between people served by the global mobility infrastructure on the one hand, and the people who are denied access to this infrastructure for the reason of their citizenship, wealth, race, or gender on the other. Mobility of those considered global liberal subjects is streamlined with the aid of the mobility infrastructure. Others are essentialized as not modern, illiberal, and disorderly – the Irredeemable Other, the mobility of whom needs to be stopped or channelled towards specific ends such as cheap labour. The law of the global North regulating mobility is substantively exclusionary. There is law for those who enjoy access to the global mobility infrastructure and there is a different kind of law for those who are denied such access.[1] I argue that the access to the global mobility infrastructure comes, therefore, with a full-fledged protection of international law, in the form of a right to life, right to liberty and security, right to private and family life, health and other rights. Shadow mobility infrastructure comes with arbitrariness, denial of justice, instrumentalization, or death.

In the previous chapters, I analysed the unequal capacity for movement as characteristic of different mobile subjects of law. I showed how the forms of mobility that are not streamlined and orderly are not only considered a violation of state sovereignty and law, that implements it, but also how they are

---

1 Thomas Spijkerboer, 'Marathon Man and "Our European Way of Life"', *Open-Democracy* (blog), 27 October 2020, 466, https://www.opendemocracy.net/en/can-europe-make-it/marathon-man-and-our-european-way-life/ (accessed 18.12.2022); Thomas Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control', *European Journal of Migration and Law* 20, no. 4 (29 November 2018): 452–69, 466–467.

produced by this law in order to support and stabilize the nation-state. In the remaining part of the book, I shift focus from the static state and law that needs to be continuously reinforced to mobile subjects and approach mobility as resistance. Chapter four, building on the findings of chapters two and three, poses a question on the possibility of resistance to the institutions of citizenship, state, and borders, both from within and from outside law. It is followed by chapter five which takes a closer look at one of the inherent elements of power-resistance relation – mobile knowledges and experiences as a way forward towards mobility justice. The questions I ask in this chapter concern the conceptualization of the gap between the legal measures as codified in law and their implementation in concrete cases that has been a subject of numerous scholarly publications, in particular within the fields of critical legal studies and the field of law and society.[2] In this chapter, I conceptualize this gap as a space where speaking colloquially, things can happen. Gap, in other words, is a space where law itself also moves and its emancipatory or limiting potential can materialize. I have so far, in this book, been analysing this gap as seen from the perspective of orderly and disorderly movement, where the gap is much narrower in cases of orderly movement and much wider in cases of disorderly movement. The latter becomes so wide at times that it turns into pure violence where law ceases to exist.[3]

This chapter follows the substantive and structural division introduced by this book where the dominant thoughts, practices, and the forms of ordering of human mobility as orderly and disorderly are introduced first, and the alternative ideas and measures are introduced later. The chapter conceptualizes two levels of resistance: (1) resistance against law as part of the national order of things and the global mobility infrastructure and (2) resistance against the national order of things in itself. By resistance against law, I understand both legal challenges in forms of complaints and appeals, strategic litigation, changes in legislation in result of jurisdiction or lobbying. By resistance against the national order of things, I understand on the one hand international mobility despite and against the exclusionary law of the global North. On the other hand, I explore the possibility of challenging the national order of things through legislative changes and the legal practice itself, particularly through redefinition of legal rules and regulation affecting identities and subjectivities of mobile persons that have an impact on normative standards of mobility.

The order of chapters in this book does not mean, however, that I consider resistance as secondary and reactionary to the bordering and othering measures. In the first part of the chapter, I define resistance as an inherent and necessary

2   Reza Banakar, *Normativity in Legal Sociology: Methodological Reflections on Law and Regulation in Late Modernity* (New York, Dordrecht, London: Springer, 2015).
3   Nanda Oudejans, 'The Right Not to Have Rights: A New Perspective on Irregular Immigration', *Political Theory* 47, no. 4 (August 2019): 447–474, 456–457.

element of every power relation[4] and resistive tension as constitutive for power relations embedded in the differential international mobility.[5] I argue that in order to understand the potential of mobility as resistance, mobility needs to become a central focus of the power relation between law and the people on the move.[6]

In the second part of the chapter, I discuss the relationship between law and resistance in the context of orderly mobility, focusing on traditional ways of mobilizing law within the limits of the nation-state and its borders. Here I discuss the role of human rights instruments in challenging the national order of things. In particular, I analyse access to human rights protection by Irredeemable Others through the prism of the right to have rights and the initiatives aiming at humanising the law. I argue that protection in a form of human rights can be effectively claimed primarily by those who move in an orderly fashion and are, therefore, already included into the global mobility infrastructure where refusal of entry or expulsion is an exception. In such cases, migrants can call on human rights for their defence. In the context of the disorderly movement, rights are often linked with migrants' own conduct and are only available on a minimal level often in a form of humanitarian protection,[7] and mostly to those particularly vulnerable.[8]

In the third part of the chapter, I move, therefore, to discuss law and resistance in the context of disorderly mobility, where mobility resists law from the outside. In other words, I focus on mobility as a material act of resistance against law, rooted in the act of movement itself. I analyse the implications of the acts of resistance for law itself. In this context I analyse the role of the *Sans-Papiers* movements and discuss the role of performative acts of belonging for legal categories such as citizenship. In particular, I focus on the autonomy of migration,[9] the acts of everyday citizenship[10] creating, in the words of Jacques Rancière, dissensus through politicising the

4   Michel Foucault, *The History of Sexuality: The Will to Knowledge: The Will to Knowledge v. 1*, trans. Robert Hurley, New Ed edition (Harmondsworth: Penguin, 1998), 95.
5   Simon Thorpe, 'In Defence of Foucault: The Incessancy of Resistance', *Critical Legal Thinking*, 2 July 2012, https://criticallegalthinking.com/2012/02/07/in-defence-of-foucault-the-incessancy-of-resistance/ (accessed 18.12.2022).
6   Samaddar, *The Postcolonial Age of Migration*, 233.
7   Deanna Dadusc and Pierpaolo Mudu, 'Care without Control: The Humanitarian Industrial Complex and the Criminalization of Solidarity', *Geopolitics*, 17 April 2020, 1–26.
8   For discussion on particular vulnerability in the jurisdiction of ECHR see Fabio Macioce, 'Undocumented Migrants, Vulnerability and Strategies of Inclusion. A Philosophical Perspective', *Constellations* 25 (2018).
9   De Genova, *The Borders of 'Europe'*.
10 Nyers and Rygiel, *Citizenship, Migrant Activism and the Politics of Movement*; Rigo, 'Citizens despite Borders: Challenges to the Territorial Order of Europe'.

gap between the human and the citizen and constructing the object of rights in the in-between position.[11]

Finally, in the fourth part of this chapter, I deconstruct the distinction between resistance from within and outside law by reference to the mobility of law and its potential for emancipatory change. I tap into new ways of thinking about law and mobility, and I discuss projects aiming on the one hand to make human rights law more inclusive and on the other referring to performative behaviours and rethinking existing concepts that regulate human mobility in a new emancipatory light. Even though some of the existing proposals primarily focus on rethinking the role of sovereignty and strengthening law's universality within the contemporary system of nation-states, others do recognize and respond to the mobility paradigm building on mobility as an emancipatory force in itself. In this section I focus on the right to have rights[12] and the right not to have rights,[13] concepts such as illegal[14] or transgressive citizenship,[15] as well as, the right to social membership,[16] and belonging based on distributive justice.[17] This chapter looks particularly at the scholarship scrutinizing changes and redefinitions of legal rules and regulations affecting normative standards in general,[18] as well as at identities and subjectivities, as they are moving together with mobile persons.[19] In chapter five I then focus on one such perspective – emancipatory change that can be enhanced through advancing mobile knowledges.

Mobility as resistance

Following Michel Foucault, I understand resistance as an inherent and necessary element of every power relation including the relations that involve or are based on law. As Foucault writes in the *History of Sexuality*, "[w]here there is power, there is resistance, and yet, or rather consequently, this resistance is

11 Rancière, *Dissensus*.
12 Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law*; Gündoğdu, *Rightlessness in an Age of Rights*; Dana Schmalz, *Refugees, Democracy and the Law: A Deficit of Rights*, Law and Migration (Abingdon, Oxon; New York, NY: Routledge, 2020).
13 Oudejans, 'The Right Not to Have Rights'.
14 Rigo, 'Citizens despite Borders: Challenges to the Territorial Order of Europe'.
15 Rygiel, 'Dying to Live: Migrant Deaths and Citizenship Politics along European Borders: Transgressions, Disruptions, and Mobilizations'.
16 Carens, *The Ethics of Immigration*.
17 E. Tendayi Achiume, 'Migration as Decolonization', *Stanford Law Review* 71 (2019): 1509–1574.
18 Toivanen, 'Beyond Legal Categories of Indigeneity and Minority-Ness: The Case of Roma and Falling in-Between'; Kmak, 'The Right to Have Rights of Undocumented Migrants: Inadequacy and Rigidity of Legal Categories of Migrants and Minorities in International Law of Human Rights'.
19 Franz von Benda-Beckmann, Keebet von Benda-Beckmann, and Anne Griffiths, *Mobile People, Mobile Law: Expanding Legal Relations in a Contracting World*.

never in a position of exteriority in relation to power."[20] In other words, power functions in a relational manner, with the points of resistance as an inherent element of these relations present everywhere and traversing both social divisions and unities.[21] Importantly, resistance is never external to power. As Foucault writes,

> (…) there is no single locus of great Refusal, no soul of revolt, source of all rebellions, or pure law of the revolutionary. Instead there is a plurality of resistances, each of them a special case: resistances that are possible, necessary, improbable; others that are spontaneous, savage, solitary, concerted, rampant, or violent; still others that are quick to compromise, interested, or sacrificial; by definition, they can only exist in the strategic field of power relations.[22]

Mobility as resistance consists therefore of plurality of macro and micro practices against the immobilized law and immobilizing national order of things. It is a refusal to support the division of the world into nation-states that through differential borders and boundaries prevent people from moving and through their legislation and practices force the people on the move to use the insecure means of movement. On a microlevel this may mean a legal action, a protest, re-application for refugee status, different forms of solidarities with irregularized migrants, or simply a refusal to leave.

Understanding mobility as a form of resistance also presumes that mobility and the *figure of the migrant* can replace stasis of citizenship and the category of a *Citizen* as a starting point for critical analysis.[23] In his essay *The Subject and Power*, Foucault writes,

> I would like to suggest another way to go further toward a new economy of power relations, a way which is more empirical, more directly related to our present situation, and which implies more relations between theory and practice. It consists of taking the forms of resistance against different forms of power as a starting point.[24]

This does not simply mean that resistance comes first in a power-resistance relationship, but that such resistive tension is *constitutive* and lies at the very centre of power relations themselves.[25] Therefore, in conceptualizing mobility as a form of resistance, mobility needs to become a central focus of the power

---

20 Foucault, *The History of Sexuality*, 95.
21 Foucault, 96.
22 Foucault, 95–96.
23 Thomas Nail, *The Figure of the Migrant*, 1 edition (Stanford, California: Stanford University Press, 2015), 233.
24 Michel Foucault, 'The Subject and Power', *Critical Inquiry* 8, no. 4 (1982): 780.
25 Thorpe, 'In Defence of Foucault: The Incessancy of Resistance'.

relation between law and the people on the move. This concerns both shifting focus to mobility of people and mobility of law.

The primacy of human mobility over state law and borders has been conceptualized by scholars and activists that promote the concept of autonomy of migration. In such understanding, mobility is a primary form of movement that is later turned into migration through the processes of bordering.[26] The legal and other measures of migration governance ignore, however, the autonomous characteristic of migration and its inherently subversive nature that continuously resists control practices.[27] Therefore, migrants' resistance cannot be conceptualized as being solely reactionary to the practices of bordering as it also anticipates many of the control measures. Samaddar, paraphrasing Foucault, claims in this context that "the relation between control and escape is one of temporal difference: escape comes first."[28]

In turn, focus on the mobility of law opens up possibilities to challenge perceived stability of law as related to law's territoriality as well as stability of legal concepts and emphasizes law's relationality. For instance, non-orderly mobility is not only a product, but also in itself a resistance to the national order of things having its origins in modernity/coloniality milieu.[29] At the same time, law, carried by people, moves across the globe and this can affect law in the place of arrival but also in the place of departure. In addition, mobile subjects bring with them the knowledges gained through mobility that not only can be included in the process of law-making but also contribute to the construction of new forms of belonging. Increased attention to knowledges and epistemologies from the global South can problematize the one-sided understanding of law as supporting the interests of the global North. Borders as perceived from the mobility perspective stop being only spaces and processes of distinction-making but meeting places where relationality can be inscribed into law, bridging the gap between different laws, different legal categories, and legal positionalities. This may happen for instance, through emphasising shared rather than differing features of various subjects. In turn, movement as a quality of law implies constant negotiation between openness and closeness that can expand our understanding of social reality and provide us with emancipatory possibilities but can sometimes narrow down our worlds and limit our rights. Differential repetition of law can create a space in between the openness and closeness of

26 See for instance Nicholas De Genova, ed., *The Borders of 'Europe': Autonomy of Migration, Tactics of Bordering* (Durham, NC: Duke University Press, 2017).
27 Didier Bigo and Elspeth Guild, 'Policing in the Name of Freedom' in *Controlling Frontiers: Free Movement into and within Europe* (Abingdon, Oxon: Routledge, 2016), 1–13, 3–4
28 Samaddar, *The Postcolonial Age of Migration*, 233.
29 Lucy Mayblin, *Asylum after Empire: Colonial Legacies in the Politics of Asylum Seeking*, Kilombo: International Relations and Colonial Questions (London; New York: Rowman & Littlefield International, 2017), 26–27.

law shifting attention to the potentiality of the tension between the actual and the possible.[30]

Centring mobility as primary in human mobility – law relationship opens up possibilities for reinterpretation of this relationship. In the context of traditional legal remedies, this may mean asking questions on types of legal actions that are possible if we chose to stay within the system of the nation-states. What kind of protection is available both nationally and through the system of international human rights law? To what extent remedies such as legal challenges, complaints and appeals, strategic litigation, changes in legislation in result of jurisdiction or lobbying, can improve the position of mobile subjects and enhance mobility justice? What kind of tools are needed in order to uncover and challenge the deep colonial structure orienting European human rights and migration law that could affect future jurisprudence?[31] But focus on human mobility as primary subjectivity poses another set of questions for law. In particular, it opens up a discussion about a possibility of a different system of global ordering built around mobility. For law, this means asking first of all, if law carries an emancipatory potential that could overcome the national order of things as we know it? In other words, can law itself be used as resistance by destabilising its own premises and principles such as citizenship and statehood? In what follows I discuss mobility's potential for multiple forms of resistance (from within and outside law) that can form and re-form mobility – law relationship.

Mobility as resistance from within law

The most conventional approach to resist against legal measures ordering mobility as welcomed or prohibited is that of using available domestic and international legal remedies for challenging the broadly understood policies of *non-entrée*. In instances of international mobility, a special role is played by the international human rights instruments as they are traditionally positioned as challenging the national order of things. In conventional understanding, by acceding to the human rights instruments, states voluntarily limit their sovereignty over their territory and take upon themselves to follow their human rights obligations towards those within their jurisdiction. At the same time, in the context of human mobility, states retain their power to decide who can enter and remain on their territory with certain specified exceptions according to the doctrine of sovereign control of migration.[32] As I discussed earlier,

---

30 Oudejans, 'The Right Not to Have Rights', 459.
31 See for instance Thomas Spijkerboer, 'Coloniality and Recent European Migration Case Law', in *Migrants' Rights, Populism and Legal Resilience in Europe*, ed. Vladislava Stoyanova and Stijn Smet, 1st ed. (Cambridge: Cambridge University Press, 2022), 117–138, 137.
32 Abdulaziz, Cabales, and Balkandali v UK, No. 9214/80; 9473/81; 9474/81 (European Court of Human Rights 28 May 1985), para. 67

however, due to this systems' roots in modernity/coloniality, the rights that are linked with international mobility, despite being universal in principle, are in practice the rights attached to orderly mobility. Even though human rights belong in principle to all within a territory and/or jurisdiction of the state-parties to international legal instruments, encompassing also those moving *disorderly* and not following the *rules* of the states, the protection offered by these instruments in practice is often not as effective. In many cases, the access to rights depends on the persons' nationality, race, their legal status, or the activity they are engaged in. One can argue that the system of human rights protection consists, therefore, of two parallel legal systems that operate alongside each other but are separated from one another and apply to people depending on whether their mobility is considered as orderly or disorderly.[33] Whereas one group has their mobility enhanced, access to protection, family rights and health provided, the others are excluded and must use alternative channels and ways to move around. In particular, as cases such as *M.K. v. Poland*[34] and *N. D. & N. T. v Spain*[35] show, only orderly applications for refugee status are encompassed by the human rights instruments, and with the concept of the culpable conducts asylum seekers who apply for the protection *en masse*, in a *disorderly* fashion and not at the designed border crossing point have been excluded from that protection. From this perspective, only *orderly* mobility can be effectively controlled by the state and only transgressions of sovereignty *on the terms of the state* are tolerated. Gregor Noll illustrates the precarious position in access to rights of those with undocumented or semi-undocumented status – therefore those that I in this book describe as moving in disorderly fashion. In the article *Why Human Rights Fail to Protect Undocumented Migrants* Noll argues that undocumented migrants' capacity to appear as beneficiaries of their human rights obligations is strictly limited to their being detainable and ultimately removable.[36] What Noll means is that a distinction between physical and jurisdictional presence is crucial for access to rights. For instance, in situations such as health emergency, the hospital might notify the immigration authorities about a patient without the right to reside. This happens because being present on the territory of a country without a right to be there and claiming human rights cannot happen without acknowledging that one is within the boundaries of that country that one had crossed or where one

33 See for instance the discussion of this distinction by Spijkerboer, 'Marathon Man and "Our European Way of Life"'; Thomas Spijkerboer, 'The Global Mobility Infrastructure'; Spijkerboer, 'Coloniality and Recent European Migration Case Law'.

34 M.K. and Others v. Poland, No. 40503/17, 42902/17 and 43643/17 (European Court of Human Rights 23 July 2020).

35 N.D. and N.T. v. Spain, No. 8675/15; 8697/15 (European Court of Human Rights 13 February 2020).

36 Gregor Noll, 'Why Human Rights Fail to Protect Undocumented Migrants', *European Journal of Migration and Law* 12 (2010): 241–272, 250.

remained without a legal basis. This behaviour in consequence challenges the national order of things, reveals the instability of the state and borders, and triggers a corrective reaction stabilising the state.

This is, of course, not to say that all migrants are always excluded from legal remedies and also, conversely, that migrants can never be treated differently from citizens.[37] To be sure, there are also examples where the national or international courts introduced measures that effectively protect rights of irregularized migrants. In the context of the jurisdiction of ECtHR this encompasses for instance cases of expulsions or so called "Dublin" cases (*T.I. v. the United Kingdom*[38] or *M.S.S v. Belgium and Greece*[39]) pushbacks (*Hirsi Jamaa v. Italy, M.K. v. Poland*[40]) or externalization of refugee protection as in the recent *interim measures* decision in *N.S.K v. The UK*.[41] Protective measures are also being adopted in countries, regions, or cities in a form of so called "firewalls," that aim to safeguard undocumented migrants from being immediately referred to the police or immigration officer while in hospital, school or at a workplace.[42] Some undocumented migrants live relatively well and safe without a residence or work permit, and do not even intend to legalize their stay.[43]

At the same time legal remedies available are not sufficient to challenge differential treatment in law, either because states can mobilize more resources to argue their claims than those available to migrants, or they limit access to legal protection; because the judgments are not implemented,[44] or implemented so that measures pronounced as violating existing laws are legalized in national legislation;[45] or because the litigation is limited to procedural or technical

---

37 For the discussion on human rights of migrants see for instance Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law*, Oxford Studies in European Law (Oxford, UK: Oxford University Press, 2016).

38 T.I. v the United Kingdom, No. 43844/98 (European Court of Human Rights 3 July 2000).

39 M.S.S. v. Belgium and Greece, No. 30696/09 (European Court of Human Rights 21 January 2011).

40 M.K. and Others v. Poland.

41 N.S.K v. the United Kingdom, No. 28774/22 (European Court of Human Rights 14 June 2022).

42 François Crépeau and Bethany Hastie, 'The Case for "Firewall" Protections for Irregular Migrants: Safeguarding Fundamental Rights', *European Journal of Migration and Law* 17, no. 2–3 (24 June 2015): 157–183.

43 Nanda Oudejans, 'The Right Not to Have Rights', 454

44 Monika Szulecka, 'The Undermined Role of (Domestic) Case Law in Shaping the Practice of Admitting Asylum Seekers in Poland', *European Journal of Legal Studies*, no. Special Issue-Adjudicating Migrants' Rights: What Are European Courts Saying? (11 May 2022): 171–209.

45 Alice Edwards, 'Tampering with Refugee Protection: The Case of Australia', *International Journal of Refugee Law* 15, no. 2 (1 April 2003): 192–211; See also Daniel Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World*, 1st ed. (Cambridge: Cambridge University Press, 2018), 86–99.

grounds.[46] States are also engaged in what Gammeltoft-Hansen and Vedsted-Hansen call "creative legal thinking" working "in between the normative structures established by international human rights treaties, exploiting inter-pretative uncertainties, overlapping legal regimes, reverting on soft law stan-dards or establishing novel categories and concepts on the basis of domestic or other parts of international law."[47]

Limitations of the rights of migrants in the EU law, even though structural, have been visible in particular after 2015 and the so-called refugee and migration crisis.[48] Such cases as already discussed *N.D. & N.T. v. Spain*[49] and *A.A and Others v. North Macedonia*[50] are telling examples of lack of access to protection by mobile persons characterized as moving disorderly. These cases, by making human rights protection dependant on the *proper* behaviour, put to question the role of the ECtHR as protector of human rights of all as located in their dignity. Paraphrasing Noll, the presence on the territory of a person who moved there in a disorderly fashion only points towards this disorderly movement that is against the national order of things. Critical migration scholars argue that in such cases, the human rights framework functions only as a minimum protection from the worst excesses of dehumanization without guaranteeing substantive equality.[51] For them, the human rights or humanitarian protection measures do not resist law but, rather, are inherently linked with securitization and criminalization of migration, as well as externalization of protection. In other words, these laws and protection measures are not remedies but, rather, parts of the broader system of deterrence. Oftentimes, they shift responsibility for protection from all to only some, considered the most vulnerable.[52] As Polly Pallister-Wilkins shows, the humanitarian infrastructure (both material, such as the externalized refugee camps or immaterial, such as increased use of vulnerability screening – for instance the IOM vulnerability model or UNHCR Vulnerability Screening Tool) is not a response to but part and parcel of the secur-itization of migration and externalization of protection. She argues that humanitar-ian responses mask, rather than remedy underlying injustices[53] introducing measures

---

46 Lucy Mayblin, *Asylum after Empire*, 173.
47 Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen, eds., *Human Rights and the Dark Side of Globalization: Transnational Law Enforcement and Migration Con-trol*, Routledge Studies in Human Rights (Abingdon, Oxon; New York, NY: Rou-tledge, 2017), 6.
48 Spijkerboer, 'Coloniality and Recent European Migration Case Law', 117
49 N.D. and N.T. v. Spain.
50 A.A. and Others v. North Macedonia, No. 55798/16 (European Court of Human Rights 7 May 2022).
51 Mayblin, *Asylum after Empire*, 172; Nadine El-Enany, *(B)Ordering Britain: Law, Race and Empire*, 2020.
52 See the discussion on the role of particular vulnerability in Macioce, 'Undocumented Migrants, Vulnerability and Strategies of Inclusion. A Philosophical Perspective'.
53 Polly Pallister-Wilkins, *Humanitarian Borders: Unequal Mobility and Saving Lives* (London: Verso Books, 2022).

developed to secure "imminently mobile populations (...) for the maintenance of liberal order alongside and through the securing of life."[54]

The access or lack of access to rights by persons in a refugee situation, undocumented migrants, and others whose movement is considered disorderly, has been discussed widely in a body of scholarship on the *right to have rights* inspired by the work of Hannah Arendt and building upon her analysis of the relationship between statelessness and access to rights in the context of World War II and the Holocaust.[55] This body of scholarship scrutinizes access to rights as a right in itself being granted to all irrespective of their citizenship and residence – a moral right to membership that must be enshrined in positive rights.[56] It also engages among others with the position and ability of human rights instruments to provide protection to migrants in an undocumented situation or those without state protection. For some, law is not able to provide protection and there is a need to use non-legal ways or remedies to emphasize one's own existence here and now.[57] Others embark on a search of the law and legal theoretical angle that would show that such protection is still available and can be implemented.[58]

How to, then, discuss resistance in the context of the *right to have rights*? In the thought of Arendt, the concept of the right to have rights is a response to the failure of protection of refugees outside their own states.[59] As Arendt writes in *The Origins of Totalitarianism* the Rights of Men

---

54 Polly Pallister-Wilkins, 'Hotspots and the Geographies of Humanitarianism', *Environment and Planning D: Society and Space* 38, no. 6 (December 2020): 991–1008, 993; On political voice within humanitarian government of refugees see also Schmalz, *Refugees, Democracy and the Law*.

55 Ayten Gundogdu, *Rightlessness in an Age of Rights* (Oxford University Press, 2015); Nanda Oudejans, 'The Right to Have Rights as the Right to Asylum', *Netherlands Journal of Legal Philosophy* 43, no. 1 (March 2014): 7–26; Nanda Oudejans, 'The Right Not to Have Rights: A New Perspective on Irregular Immigration', *Political Theory* 47, no. 4 (August 2019): 447–474; Seyla Benhabib, 'From the "Right to Have Rights" to the "Critique of Humanitarian Reason"', in *Exile, Statelessness, and Migration*, Playing Chess with History from Hannah Arendt to Izaiah Berlin (Princeton University Press, 2018), 101–124; Melissa Stewart, '"A New Law on Earth" Hannah Arendt and the Vision for a Positive Legal Framework to Guarantee the Right to Have Rights', SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 1 February 2021); Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford: Oxford University Press, 2012).

56 Schmalz, *Refugees, Democracy and the Law*, 53.

57 Jacques Rancière, 'Who Is the Subject of the Rights of Man?', *The South Atlantic Quarterly* 203, no. 2/3 (2004): 297–310.

58 Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law*; Stewart, '"A New Law on Earth" Hannah Arendt and the Vision for a Positive Legal Framework to Guarantee the Right to Have Rights'.

59 Oudejans, 'The Right to Have Rights as the Right to Asylum', 10.

[…] had been defined as 'inalienable', because they were supposed to be independent of all governments; but it turned out that the moment human beings lacked their own government and had to fall back upon their minimum rights, no authority was left to protect them and no institution was willing to guarantee them.[60]

Therefore, according to Arendt, refugees' enjoyment of rights and freedoms is limited spatially, and through displacement from their countries of origin, refugees lose this protection. By being excluded from the protection of their own government, refugees are considered "legal freaks"[61] who are out of place and who without inclusion into their own community don't have a right to enjoy human rights as such. This right is dependent on the polity's decision to include them, in particular, to grant them asylum or refugee status. As Arendt writes, the refugee "breaks into the political scene as the alien which (…) reminds us of the limitations of human activity – which are identical with the limitations of human equality."[62] The limitation of equality has its roots in the need to negotiate belonging to the community which is particularly problematic in the case of persons seeking asylum. As Nanda Oudejans explains, for Arendt, refugees bring *disorder* to the national order and an *orderly* freedom of movement is only thinkable in a world divided by borders where the primary responsibility for rights protection is based on the countries of origin.[63] Demanding rights protection within or against the host countries goes, therefore, against the national order of things and challenges the conceptualization of mobility into orderly and disorderly. The remedy, in conventional understanding, has been usually thought as being dependent on the inclusion into the polity, that should encompass all with the claim to social membership.[64] This is very much linked with development of human rights within the framework of what Ukri Soirila calls "the law of humanity project."[65] The law of humanity is a radically altered, "humanized" version of international law that has developed during the first two decades after the end of the Cold War. It was then when international law posited humans and their dignity as the primary subject of the legal order which turned the role of the state into the trustee, fiduciary, or official

60   Hannah Arendt, *The Origins of Totalitarianism* (New York: A Harvest Book, Harcourt Inc., 1985), 291.
61   Arendt, 278.
62   Arendt, 301.
63   Nanda Oudejans, 'What Is Asylum? More than Protection, Less than Citizenship', *Constellations* 27, no. 3 (September 2020): 533.
64   Joseph H. Carens, *The Ethics of Immigration*, 1. issued as an Oxford Univ. Press paperback (Oxford; New York; Melbourne; Madrid; Toronto: Oxford University Press, 2015), 53.
65   Ukri Soirila, *The Law of Humanity Project: A Story of International Law Reform and State-Making*, Studies in International Law, volume 82 (Oxford, UK; New York, NY: Hart Publishing, an imprint of Bloomsbury Publishing, 2021).

of humanity.[66] The main developments within the law of humanity project were the breakthrough and solidification of the position of human rights that have in turn influenced development of human security as enshrined in the Responsibility to Protect doctrine, and international humanitarian law, and hence, significantly increased the position of individuals in international law and their inclusion on the level of states.

At first look, such focus on individual rather than a state should support the giving away of the national order of things, and result in an equal protection of individuals notwithstanding their citizenship, race, gender, or wealth as it included humanity and a human dignity as a superior principle of international order. However, as I discussed throughout this book, humanization of international law has not remedied the inequalities that have been rooted in the concept of international law as a product of the modernity/coloniality.[67] On the structural level, as Soirila shows,[68] despite the focus on dignity in an attempt to overcome differential treatment of individuals, human rights were at the same time used as tools to keep previously colonized states in check to protect the right to private property[69] and the free trade.[70] Similarly, managerialism along with neoliberalism contributed to the diminution of the law of humanity project and has been sourcing a way of acting from the colonial practices. As Soirila writes, the managerial ideas and techniques used by the UN and at the other instances of the international governance, "were first tested in the colonial context, as a form of indirect rule of a small number of colonial rulers over the indigenous majority."[71] On the one hand, on the level of effective inclusion and the claim to social membership, the rights protection erodes the acceptable understanding of the legal subject that is, in principle, based on citizenship and other markers such as race.[72] At the same time, law that considers citizenship as a norm is not able to offer any solution that would redefine the legal subject outside the contours of citizenship. Simon Behrman shows how initial resistance towards unjust migration laws, trying to nevertheless locate their actions within the existing legal frameworks, ends up reproducing the laws and enforcement measures that provoked their initial resistive action.[73]

66 Soirila, 2.
67 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, 1st ed. (Cambridge: Cambridge University Press, 2005).
68 Soirila, *The Law of Humanity Project*, 82.
69 Ntina Tzouvala, 'Invested in Whiteness: Zimbabwe, the von Pezold Arbitration, and the Question of Race in International Law', *Journal of Law and Political Economy* 2, no. 2 (1 August 2022).
70 Soirila, *The Law of Humanity Project*, 82.
71 Soirila, 135.
72 Jacopo Martire, *A Foucauldian Interpretation of Modern Law: From Sovereignty to Normalization and Beyond* (Edinburgh: Edinburgh University Press, 2019), 105.
73 Simon Behrman, *Law and Asylum: Space, Subject, Resistance* (Abingdon, Oxon; New York, NY: Routledge, 2018), 175.

The question, then, that needs to be asked is whether modern law can accept granting rights to those whose, due to their citizenship, legal status, race, or gender, are not considered modern and liberal – for instance, those who behave in an unorderly fashion by arriving *en masse* at the border asking to be included? For this, law and rights would have to overcome its origins based on various forms of distinction and stop participating in the further processes of distinction making. In consequence, it would also have to effectively delink the right to have rights from the national framework of protection and link it with mobility. This would mean defining community as going beyond citizenship or universalized subject and striving to encompass everyone.[74] Therefore, we can see that the attempts to humanize law and take responsibility for protection of rights and human security from the state to the international level has not, and cannot, result in granting protection to *disorderly* migrants. In consequence, despite the attempts to do away with various forms of distinction by doing away with the state, the problem of distinguishing between those who deserve and do not deserve protection remains. Should we; then, as Soirila claims, return to the state and its laws as the means to generate the emancipatory change? I will come back to this question in the last section of the chapter where I discuss the role of mobility in opening up spaces of resistance within law. Before that, in the next section, I will discuss the role of mobility as resistance from outside law to the national order of things. From such perspective it is not the human rights law but mere mobility and presence in a state that one is not ascribed a place in, that constitutes an act of resistance against the global system of orderly mobility.

Mobility as resistance from outside law

In this book, I conceptualize disorderly movement, both precluding and reacting to measures aiming to regulate mobility and expel it or capture it as labour, as resistance to the national order of things. To be sure, the type of movement (orderly v. disorderly) affects the resistive potential of mobility. However, I want to neither criticize migrants moving *disorderly* nor romanticize them as vanguards of change and a counterforce to the national order of things. Rather, I am interested in the function or position of mobility as such, and its potential for resistance, particularly, in the real examples of resistance against the current legal and political framework. This concerns extra-legal means of resistance such as irregular residence, travel, or work, strikes or various extra-legal forms of solidarity such as sanctuary spaces or support in crossing borders. These behaviours are oftentimes reactions to discriminatory laws and the lack of effective legal protection and access to legal status that I described in chapter three, but also originate from the autonomous decision to move despite existing

---

74   Seyla Benhabib, *The Reluctant Modernism of Hannah Arendt*, New ed, Modernity and Political Thought (Lanham, Md: Rowman & Littlefield, 2003), 185.

obstacles. By challenging existing laws, they expose inequalities that are embedded in the concept of modern citizenship and unequal capacities for movement[75] linked to it. They also, through mobile persons acting *as if* having equal rights to move and belong, have the potential to change the social, political, and legal reality. Unlike resistance from within law, that has to operate according to the rules of the nation-state, mobility as resistance from outside law is rooted in the act of movement itself. The very fact of mobility across borders is a critique per se and transgression of a system where movement is regulated based on citizenship and exclusively defined by territorial affiliation. As highlighted in the No Border Manifesto, "For every migrant stopped or deported, many more get through and stay, whether legally or clandestinely. Don't overestimate the strength of the state and its borders. Don't underestimate the strength of everyday resistance."[76] Therefore, even though the nation-state machine works through the broken system of differential inclusion and exclusion, the migrant within such a system is also an agent of resistance. From such perspective, the unauthorized migrant, is

> neither a problem nor a crisis, neither a criminal nor a source of human capital, nor an object of humanitarian pity. Instead, she comes as a political agent, someone whose movement might lead us beyond the deadening impasses of border nationalism and colonial capitalism.[77]

To be sure, the most often brought up example of resistance against the national order of things is the *Sans-Papiers* movement, originating in the 1970s in France in reaction to limitations of the rights of migrant workers.[78] The movement which gained national and international prominence in the mid 1990s became crucial for the conceptualization of the agency and position of migrants in an undocumented situation who have been living and working in Europe. Importantly, *Sans-Papiers* claimed a new subjectivity, deriving not from their *illegal* status as *clandestins* but based on a right to belong as derived from the right of movement and the duties owned by France to former colonial subjects.[79] They expressed the claim of the primacy of mobility and own agency over laws and borders:

75 For the discussion on the unequal capacities for movement see Mimi Sheller, *Mobility Justice: The Politics of Movement in the Age of Extremes* (London; Brooklyn, NY: Verso, 2018).

76 Tamara Carauş and Elena Paris, eds., *Migration, Protest Movements and the Politics of Resistance: A Radical Political Philosophy of Cosmopolitanism* (Abingdon, Oxon; New York: Routledge, 2019), 15.

77 Sherally Munshi, 'Unsettling the Border', *UCLA Law Review* 67, no. 6 (2021 2020): 1720–1767, 1725.

78 Behrman, *Law and Asylum: Space, Subject, Resistance*, 198. For a discussion of other refugee and migrant protests and movements see for instance Schmalz, *Refugees, Democracy and the Law*, 106–107.

79 Behrman, 202; Anne McNevin, *Contesting Citizenship: Irregular Migrants and New Frontiers of the Political* (New York; Chichester, UK: Columbia University Press, 2011), 113.

When we migrants decided to leave Africa, we did so as free women and free men. Some said that we were victims of hunger, wars, poverty, that we were forced to flee. This is often true. But we always decided to travel because we had a goal, we want to be able to hold our future in our own hands. When we chose to migrate, we wanted to free ourselves from the division between rich and poor, Europeans and Africans, free ourselves from a system of exploitation that has no borders but creates borders and wages wars in order to use our needs and our ideas, both in Africa, and in Europe.[80]

At the same time, they criticized the coloniality of the migration control in Europe. As one of the founders of the movement, Madjiguène Cissé reflected:

The issue of immigration … is a larger one … of the relationship between the countries of the north and those of the south. And I would go further, and speak of Third World debt. I tell myself that all is linked, the whole repressive apparatus that has existed in France for the past 20 years to control the flow of migration, not only in France but also in Europe. The fact that Europe has become a fortress and has barricaded itself against those who are coming from the South is not by chance but is something that appears as a result of a globalized economic policy … It is the [Global North] that dictates policies in our countries and now that … the crisis is taking place [in the Global North], they barricade themselves off and no longer want us.[81]

Sans Papiers conceptualized their mobility as not only resistance to unequal distribution of citizenship and labour, by exercising their agency, but also as the demand to belong. By doing so, they challenged the closeness and exclusiveness of the existing communities based on a territorial understanding of citizenship and its rootedness in modernity/coloniality. Behrman argues that the strength of the movement lied in *Sans-Papiers'* refusal of legal categorizations imposed upon them but also challenging the premise that they must use existing legal means to support their individual right to stay in France.[82] I will discuss the implications of this approach to law in the next section.

Different forms of claiming and performing belonging and citizenship have further been proposed and discussed in academic literature.[83] Indeed, citizenship

80   Cited in McNevin, *Contesting Citizenship*, 112.
81   Cited in Behrman, *Law and Asylum: Space, Subject, Resistance*, 204.
82   Behrman, 4.
83   Engin F. Isin, *Being Political: Genealogies of Citizenship* (Minneapolis: University of Minnesota Press, 2002); Nira Yuval-Davis, *The Politics of Belonging: Intersectional Contestations*, 1 edition (London: SAGE Publications Ltd, 2011); McNevin, *Contesting Citizenship*; Engin F. Isin and Greg Marc Nielsen, eds., *Acts of Citizenship* (London; New York: New York: Zed Books Ltd.; Distributed in the USA by

is created not only through the dominant legal and political discourses, and people such as undocumented migrants, refugees, and foreigners in general also participate in shaping the state community. The rigid division between citizens and foreigners resulting from the territorial sovereignty of states is being contested in many ways and often remains nuanced and opaque. As Engin Isin argues, belonging cannot be categorized through a binary distinction between citizen/non-citizen and there will always be people, situations, or categories that escape the territorial order of citizenship by introducing alternative solutions.[84] Citizenship, thus, is constructed in this literature as the starting point for actions aimed at opposing the machinery of the nation-state that classifies some as citizens and others as migrants, refugees, or persons without citizenship. Similarly, for Saskia Sassen, the key contributors to these changes are "outsiders and the excluded one, who continuously subject the citizenship to the new types of claims across time and space."[85]

   In legal scholarship, the work of Enrica Rigo on *illegal citizenship*[86] is an example of conceptualising the role of informal citizenship practices for law by redefining citizenship on the basis of mobility, not borders.[87] For Rigo, migrants in an undocumented situation question, through declaration of affiliation with the society, the features of this very society such as confinement or exclusivity based on a territorial understanding of citizenship.[88] This brings, yet again, the discussion on the right to have rights that is claimed in this case through informal and performative acts of resistance. Concepts such as illegal citizenship or Jacques Rancière 's concept of *dissensus* is brought in as responses to Arendt's condition of lack of rights due to the lack of own place. For Rancière, dissensus means a lack of agreement to the existing order of things, that provides the space for those who are not included (not granted a right to speak out and be counted) and to act as if they have such rights. Strikes and protests politicize the gap between the human and the citizen, and through behaving as if they are part of the society, migrants in an undocumented situation start to count. For Rancière "[t]he gap between man and the citizen (...) is here transformed into the true site of politics and right-bearing,"[89] where politics is understood as the process in which the position of those excluded, the

Palgrave Macmillan, 2008); Ayelet Shachar, 'The Birthright Lottery: Response to Interlocutors', *Issues in Legal Scholarship* 9, no. 1 (24 January 2011): 2.

84 Isin, *Being Political*, 30; Isin and Nielsen, *Acts of Citizenship*.

85 Saskia Sassen, 'Making Membership', *Issues in Legal Scholarship* 9, no. 1 (24 January 2011): 6.

86 Enrica Rigo, 'Citizens despite Borders: Challenges to the Territorial Order of Europe', in *The Contested Politics of Mobility: Borderzones and Irregularity*, ed. Vicki Squire (Abingdon, Oxon; New York: Routledge, 2012), 204.

87 Rigo, 'Citizens despite Borders: Challenges to the Territorial Order of Europe'.

88 Rigo, 204; Magdalena Kmak, '"The Ugly" of EU Migration Policy: The Role of the Recast Reception Directive in Fragmentation of the Refugee Subject', in *Europe at the Edge of Pluralism* (Cambridge: Intersentia, 2015), 96.

89 Rancière, 'Who Is the Subject of the Rights of Man?', 305.

"part that has no part" is brought into light and where what does not have a business to be heard or seen becomes visible and comprehensible.[90] In other words, the subject of rights is constructed in the position in-between the *human* and the *citizen*.[91] By demonstrating the gap in the universal human rights protection system and then acting as if those rights are granted to them, the migrants become subjects of politics and strive to be included in the society.[92] For instance Kim Rygiel uses a concept of transgressive citizenship to define practices of nationality that disrupts the functioning of the state, national, or identity boundaries in order to "create alternative ways of thinking about and practicing citizenship."[93]

To be sure, such examples of resistance and disturbance of the concept of citizenship demonstrate on the one hand, the unstoppable human mobility and instability of legal concepts regulating belonging. On the other hand, however, they pose serious ethical questions about the fairness of such an argument, and its use as a response to tangible struggles of migrants for recognition and rights protection. In the work of Rancière, the discussion on the right to have rights is taken further by recognizing the agency of migrants themselves who are here portrayed as active individuals rather than victims of the system of statehood and the national order of things, that their mobility can challenge citizenship also after migrants' death.[94] However, the problem in Rancière and other works that focus on the performative citizenship and claiming own rights to belong is two-fold. First, these conceptions situate the right to have rights not as being innate and depending on the dignity of the person but rather, as depending on the ability to claim and enact them,[95] also if enacting them ends by death.[96] The second problem relates to the precarity, in other words, insecurity, and vulnerability' of such *illegal* or performed citizenship. To be sure, precarity as similar to other conditions shared by humanity, such as vulnerability,[97] has been too conceptualized as able,

90 Marcus Gunneflo and Niklas Selberg, 'Discourse or Merely Noize? Regarding the Disagreement on Undocumented Migrants', *European Journal of Migration and Law* 12 (2010): 173.

91 Todd May, *The Political Thought of Jacques Rancière: Creating Equality* (Edinburgh: Edinburgh University Press, 2008), 142.

92 Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law*, 128–129.

93 Kim Rygiel, 'Dying to Live: Migrant Deaths and Citizenship Politics along European Borders: Transgressions, Disruptions, and Mobilizations', *Citizenship Studies* 20, no. 5 (2016): 547.

94 Kim Rygiel, 'Dying to Live: Migrant Deaths and Citizenship Politics along European Borders: Transgressions, Disruptions, and Mobilizations', *Citizenship Studies* 20, no. 5 (2016): 545–560.

95 Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law*, 132.

96 Kim Rygiel, 'Dying to Live'.

97 For the discussion on vulnerability see Martha Albertson Fineman, 'Equality, Autonomy, and the Vulnerable Subject in Law and Politics', in *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, Gender in Law, Culture, and Society (Aldershot, UK: Ashgate, 2013).

through building alliances, to engender resistance against systemic structures through which it operates.[98] Here, the distinction is made between the conditions that are precarious in result of processes such as bordering and othering described in chapter three, and precarity itself as being or generating resistance have been presented as a toolbox or a proposition that "unfolds as an unfixed processes of summing up, engaging and recombining distinct circumstances and emerging problematics […]," allowing us to rethink the limits of labour and citizenship.[99] Therefore, some authors call for investigating not precarity as a concept but, rather, of "practices of precarity" by studying both migrant and citizen precarity as shared condition that invites reflection on the political and social belonging to the state and society more generally.[100] As these authors claim, such approach shifts the boundaries between the migrant and the citizen, and reposition them according to different criteria than formal citizenship. Thanks to such change in perspective, one can think of the potential of the practices of precarity for de-Migranticization[101] – focusing on conditions and position of migrants as part of the greater scheme of the society.[102] Some scholars; however, point out that, in comparison with citizens, migrants, in particular migrants with undocumented or semi-documented status, represent the *quintessence of precarity* that, on the one hand, puts migrants in most disadvantaged position but at the same time can teach us in the West the new forms of solidarities and resistance that challenge the national order of things[103] and represent the logic of mobility rather than borders.

However, such approach may, nevertheless, lead to great costs for migrants living in such conditions, who develop deep connections to places and communities where they are not allowed to stay.[104] This may result in deep *fractures*

98 Carl-Ulrik Schierup and Martin Bak Jorgensen, eds., *Politics of Precarity: Migrant Conditions, Struggles and Experiences* (Studies in Critical Social Sciences, 2017), 6.
99 Maribel Casas-Cortés, 'A Geneology of Precarity: A Toolbox for Rearticulating Fragmented Social Realities In and Out of the Workplace', in *Politics of Precarity: Migrant Conditions, Struggles and Experiences*, ed. Carl-Ulrik Schierup and Martin Bak Jorgensen (Studies in Critical Social Sciences, 2017), 47.
100 Carl-Ulrik Schierup and Martin Bak Jorgensen, 'From "Social Exclusion" to "Precarity". The Becoming-Migrant of Labour: An Introduction', in *Politics of Precarity: Migrant Conditions, Struggles and Experiences*, ed. Carl-Ulrik Schierup and Martin Bak Jorgensen (Studies in Critical Social Sciences, 2017), 7.
101 For the discussion on the concept see Janine Dahinden, 'A Plea for the "de-Migranticization" of Research on Migration and Integration', *Ethnic and Racial Studies* 39, no. 13 (20 October 2016): 2207–2225.
102 I will return to the discussion on shared precarity in the context of knowledge production in chapter five.
103 Nicos Trimikliniotis, Dimitris Parsanoglou, and Vassilis Tsianos, 'Mobile Commons and/in Precarious Spaces: Mapping Migrant Struggles and Social Resistance', in *Politics of Precarity: Migrant Conditions, Struggles and Experiences* (Leiden: Brill, 2017).
104 Bridget Anderson, Matthew J. Gibney, and Emanuela Paoletti, 'Citizenship, Deportation and the Boundaries of Belonging', *Citizenship Studies* 15, no. 5 (2011): 547–563.

between the actual experience of social connectedness and the undocumented status, in particular, in case of people who are being expelled from countries where they lived many years or decades in the community and were vested with other rights despite lack of legal residence status, such as voting or work.[105] Ayelet Shachar quotes an interview conducted by ethnographer Susan Coutin with a person deported from the US after living there for more than four decades:

> I was ready to serve my country, I was a registered voter, I voted for governor of CA, I voted for presidents, my whole life was over there, my wife, my kids, I was a total American. I was an American in my heart, my mind. And for them to just uproot me, and just throw me [away]… I've been *banished* from my country.[106]

This example shows that it is not ethical to expect migrants to keep living in a limbo of inclusion and acceptance without legal recognition and legal protection, with their life contingent on their lack of legal status becoming known to the authorities that may or may not lead to detention and expulsion. In this sense, the long-term effects of mobility as resistance to law that operates from its outside lead to an inhumane and insecure living condition. Even though, the long-term residence could possibly become a basis for the right to residence permit based on the right to privacy as enshrined for instance in the article 8 of the ECHR, the threshold for such protection is very high. ECtHR in cases concerning so called *settled migrants* recognizes the totality of social ties between the migrant and the community as contributing to their private life and in consequence becoming a basis for the right of the migrant to call the country as their own. The existing jurisprudence however takes the threshold for protection of settled migrants very high, in particular in the situation of irregularized residence.[107]

To be sure, these examples of mobility as resistance from outside law do push concepts such as citizenship, residence permit and work permit to their limits. They expose the gap between the rights of migrants as prescribed in law and their implementation in practice. More importantly they also shift focus from the gap itself to the connections and relations that emerge when different laws, and different personal circumstances meet, that can have a meaning also for law. Criticising Jacques Rancière for excluding the possibility for legal action as part of *dissensus*, Alison Kesby claims that even though law is a part of the ruling order "(…) it can also be about establishing

---

105 Shachar, 'The Birthright Lottery', 8.
106 Shachar, 10.
107 European Court for Human Rights, 'Guide on Article 8 of the European Convention on Human Rights', 31 August 2022, paras 288–289, https://echr.coe.int/Documents/Guide_Art_8_ENG.pdf; Pormes v. the Netherlands, No. 25402/14 (European Court for Human Rights 28 July 2020) (accessed 18.12.2022).

relationships."[108] Instead of focusing on the gap itself, one should look into "reciprocity between persons in a political community".[109] Rights should be

> conceived relationally (...) in the sense of establishing relationships where previously there were none, of seeking to establish a relationship between, on the one hand, a particular conception of humanity posited by the law and, on the other, the excluded claimants.[110]

Therefore, emancipation could and should happen through the legislative change and the legal practice itself in a political community.[111] In what follows, I will engage in such proposition and discuss the possibility of emancipation through law as resistance to the national order of things.

Mobile law as resistance

So far, I have discussed the limitations of the existing legal system in its ability to provide effective protection against racialization and discrimination but also precarity that is often connected with attempts to enact citizenship and belonging outside or against law. Can modern law recognize and challenge its own origins and deep colonial structure and at the same time retain sufficient legitimacy allowing it to provide effective protection? Nadine El-Enany argues that measures aimed at inclusion of racialized people on the terms of colonial state and with the use of law rooted in colonialism will continue to perpetuate the differential categorization, and differential inclusion. Law and adjudication will remain, therefore, implicated in colonial practices and any adequate response to be taken has to be based on recognition of coloniality embedded within the origins of the state and legal system.[112] Lawyers and legal scholars need to be aware of how law and the legal recognition process, such as instances of migration or citizenship procedures, reinforce rather than challenge the legitimacy of the colonial state.[113] As El-Enany writes, "... people seeking political and economic security in Britain do so out of necessity, as an essential response to having been politically and economically persecuted *by* Britain."[114] At the same time, even a legal system having its origins in colonialism produces decisions that provide protection of rights of racialized migrants.[115] This realization requires a two-pronged approach to law in order for it to be an effective tool for recognition but at the same time also to challenge its own colonial

---

108 Kesby, *The Right to Have Rights*, 137
109 Schmalz, *Refugees, Democracy and the Law*, 73.
110 Kesby, *The Right to Have Rights*, 137
111 Kesby, 137; Schmalz 73
112 El-Enany, *(B)Ordering Britain*, 222.
113 El-Enany, 223.
114 El-Enany, 224.
115 Spijkerboer, 'Coloniality and Recent European Migration Case Law', 137.

origin. Whereas legal practitioners need to play the law and focus on support-
ing access to rights and the greater inclusion of migrants into rights protection,
access to housing, support, or health, the migration studies need to reorient
themselves towards deracializing and decolonizing migration and refugee
law.[116]

Coming to terms with this duality of playing the law game and resisting it at
the same time emerges not only as an ethical project, but I also believe is the
most creative application of legal scholarship. Scholars of law and migration
have been developing new ways of thinking about law and mobility, discussing
projects aiming to, on the one hand, make the human rights law more inclusive,
and on the other, rethinking existing concepts in a new, emancipatory light. To
be sure, many of these measures still aim at advancing human rights protection
within the system of the national order of things. These proposals primarily
focus on rethinking the role of sovereignty and strengthening law's universality
within the contemporary system of the nation-states and international law.
Some of these emancipatory projects do, however, recognize and respond to the
mobility paradigm building on mobility as an emancipatory force in itself.

Many of the projects aiming at enhancing the right to have rights, the right to
the freedom of movement, or the right to belong, are based on universality of law
and general responsibility for the access to rights and recognition of inherent
similarity of all human beings, their suffering, vulnerability, and precarity. We can
see, for instance, increased reference to the work of French philosopher Emmanuel
Levinas[117] and his ethics of the Other stemming from the concept of the Face as a
locus of universality of rights[118] and responsibility for alterity rather than homo-
geneously defined community.[119] The face-to-face encounter necessarily generates
responsibility of a State as an ethical rather than political subject, as the Face car-
ries politics beyond self-interest.[120] To be sure, such ethical responsibility in itself
does not create rights and would need to be supported by political institutions and
sanctions limiting sovereignty, such as creation of enforceable rights which are
enshrined in positive law, granting the right both in a substantive way and proce-
durally through measures of implementation and sanctions.[121] Analysing the

---

116 El-Enany, (B)Ordering Britain, 228.
117 Jeff Pruchnic, 'Postcritical Theory? Demanding the Possible', *Criticism* 54, no. 4,
   (2012): 637–657, 640.
118 Nathan Bell, '"In the Face, a Right Is There": Arendt, Levinas and the Phenomen-
   ology of the Rights of Man', *Journal of the British Society for Phenomenology* 49,
   no. 4 (2 October 2018): 291–307, 300.
119 Dorota A. Gozdecka, '"Barbarians" and "Radicals" against the Legitimate Com-
   munity? - Cultural Othering through Discourses on Legitimacy of Human Rights',
   No Foundations Journal, no. 15 (2018): 101–126, 103; William Paul Simmons,
   Human Rights Law and the Marginalized Other, 1st ed. (Cambridge: Cambridge
   University Press, 2011).
120 Bell, '"In the Face, a Right Is There"', 305.
121 Stewart, '"A New Law on Earth" Hannah Arendt and the Vision for a Positive
   Legal Framework to Guarantee the Right to Have Rights', 118; Sylvie Da Lomba

necessary legal guarantees of the right to have rights in a context of statelessness, Melissa Stewart situates legitimacy of such guarantees in universality as not connected to nation-states and citizenship. Stuart claims that such development "must include a creation and protection of legal personhood at the international level for all individuals, including the stateless and those who are nationals or residents of states that are not state parties to international human rights treaties."[122] This would require creation of legal measures that would on the one hand guarantee the right to citizenship, and at the same time allow individuals irrespective of citizenship or nationality to bring claims for protection of their rights against the states. Such approach would obviously require reimagining and limiting state sovereignty and there has been a number of proposals to reconceptualize sovereignty as responsibility to humanity[123] and sovereign states as trustees[124] or fiduciaries of humanity[125], or more generally to strengthening the law of humanity project.[126] In all these conceptions, humanity becomes a fundament of responsibility that in the context of mobility would mean, for instance, creating certain obligations towards those who are not citizens or provide them with universal right to the freedom of movement.[127] An argument for general human rights to interstate migration, as developed by Joseph H. Carens is based on the importance of the general and equal freedom of movement for guaranteeing individual autonomy, equality of opportunity, and substantive economic, social, and political equality at the global level.[128]

These proposals do not suggest completely doing away with traditional notions of sovereignty but, rather, suggest reimagining sovereignty, while acknowledging the somewhat utopian nature of their ideas.[129] A less utopian idea is an attempt to re-examine sovereignty from the perspective of interdependence proposed by Ian Kysel and Chantal Thomas in reference to the world's co-dependence as highlighted recently by the COVID-19 pandemic. Kysel and Thomas call this perspective a new organicism that is "(…) grounded in the idea that the universe is intrinsically interconnected while also

and Saskia Vermeylen, 'Ethical Vulnerability Analysis and Unconditional Hospitality in Times of COVID-19: Rethinking Social Welfare Provision for Asylum Seekers in Scotland', *International Journal of Law in Context*, 6 June 2022, 7.

122 Stewart, 177.

123 David Luban, 'Responsibility to Humanity and Threats to Peace: An Essay on Sovereignty', 2020.

124 Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders', *American Journal of International Law* 107, no. 2 (April 2013): 295–333.

125 Evan J. Criddle and Evan Fox-Decent, *Fiduciaries of Humanity: How International Law Constitutes Authority* (Oxford: Oxford University Press, 2016).

126 Soirila, *The Law of Humanity Project*.

127 Carens, *The Ethics of Immigration*.

128 Carens.

129 Stewart, '"A New Law on Earth" Hannah Arendt and the Vision for a Positive Legal Framework to Guarantee the Right to Have Rights', 178.

characterized by fundamental unpredictability."[130] The ethics of new organicism that is grounded in such interconnection undermines the absolutist conceptions of sovereignty and contributes to building the politics of interdependence. In this context any future migration law must abandon the commitment to absolute sovereignty as "no one is safe unless everyone is safe."[131] The movement towards such development could be built upon, as Kysel and Thomas argue, the development of soft laws. As soft law brings a dynamic element to the static field of international law,[132] it could make a push against the absolutist view of sovereignty and serve as a catalyst for mobilization and, in time, lead to the development of formal legal obligations. To be sure, the already existing examples of emancipatory soft law measures point to such solutions. For instance, the Inter-American Principles on the Human Rights of Migrants, Refugees, Stateless Persons and Victims of Trafficking (Inter-American Principles)[133] call for protection of the number of rights beyond any existing human rights instrument in guaranteeing the rights of migrants, such as cross-border justice and safe return, right to health, work, just and favourable working conditions, liberty, and security of person or a right of access to territory for child migrants regardless of whether they are refugees. They also recognize a prohibition against discriminatory or arbitrary expulsion, or affirm individualized refugee status determination as a necessary safeguard.[134] In addition, the COVID-19 pandemic has seen other developments that seek to improve and protect the rights of migrants such as expert-drafted Principles of Protection for Migrants, Refugees, and Other Displaced Persons (14 Principles) calling for encompassing all migrants with such rights as the right to non-discrimination, health, privacy, and non-return to harm, among others.[135] Despite a non-binding nature of these documents the formulation of rights of migrants goes beyond the existing human rights standards, and as the authors claim, could set more progressive standards of protection in the future.

All these measures engage with the existing human rights instruments and aim for strengthening protection granted based on these instruments. In other words, they all aim at bringing back the emancipatory promise of the law of humanity. Ukri Soirila proposes four steps of saving the law of humanity that are also reflected in other work on emancipatory role of law in the context of migration: (1) attention to the power relations embedded in legal concepts; (2) engagement with struggles at the grassroot level and connecting them with international institutions; (3) rethinking the role *of* the state and return to the

---

130 Ian M. Kysel and Chantal Thomas, 'The Contested Boundaries of Emerging International Migration Law in the Post-Pandemic', *AJIL Unbound* 114 (2020): 352.
131 Kysel and Thomas, 352.
132 Schmalz, *Refugees, Democracy and the Law*, 156–157.
133 Kysel and Thomas, 351.
134 Kysel and Thomas, 352.
135 Kysel and Thomas, 352.

battle *for* the state; and (4) a call for international lawyers to accept and grasp power in order to enforce the vision of a better world.[136] Particularly in the context of the use of human rights, Soirila points out that many grassroot movements had been using human rights in a very place-based, contextual way, often constituting "another kind of human rights, aimed at building radical alternatives to the received models of markets and democracy." For these movements, humanity language is, however, "a partial, fragmentary, and a sometimes useful tool of mobilization" rather than a sole language of resistance and emancipation.[137]

Some similar suggestions were raised by scholars who instead of rethinking the law of humanity project and enhancing the politics of recognition call for both discursive and practical reformulation of migration law that would recognize the role of law in generating dispossession and lead to redistribution of wealth accumulated via the colonial dispossession, that can also be executed through migration.[138] For instance Nadine El-Enany stresses the need to question legal language and legal concepts, such as *host states, citizens, third country nationals, refugees*, and *migrants*, that contribute to the strengthening of the nation-state with its colonial origin and orientation.[139] In my own work, I have also argued for unsettling legal concepts such as minority through experimenting with existing legal categories revealing their rigidity and dependence on the nation-state system.[140] Other scholars call for the redistribution of privilege based on the citizenship.[141] In particular, E. Tendayi Achiume calls for redistribution of rights as a form of retribution or decolonization through migration where migrants act as political agents exercising their rights equally with the citizens of the colonial countries.[142] In particular, Achiume argues for rethinking the meaning of the post-colonial state by shifting the understanding of persons from post-colonial countries as strangers that excludes them from the right to mobility even before they decide to migrate. Due to the specificity and strength of ties between the colonial powers and their former colonies, migrants from once colonized countries are not strangers because they are part of the self of the colonial power, they have contributed and continue contributing to its identity in a way that makes them part of that state. In result, they cannot be considered as strangers and denied the right to migrate to these countries.[143]

---

136 Soirila, *The Law of Humanity Project*, 149–159.
137 Soirila, 151.
138 El-Enany, *(B)Ordering Britain*, 227.
139 El-Enany, 228.
140 Magdalena Kmak, 'The Right to Have Rights of Undocumented Migrants: Inadequacy and Rigidity of Legal Categories of Migrants and Minorities in International Law of Human Rights', *International Journal of Human Rights* 24, no. 8 (2020): 1201–1217.
141 Shachar, 'The Birthright Lottery'.
142 Achiume, 'Migration as Decolonization', 1510.
143 Achiume, 1549.

This approach renegotiates the definition of *one's own country*. Therefore, instead of expanding the rights of nonnationals to territorial admission and political inclusion, in other words, acting within the framework of the existing nation-states rooted in colonialism, these nonnationals should be exempted from the exclusionary laws and policies of the nation-states due to their coming from the postcolonial states.[144] To be sure, they are to form the First World citizenship as a matter of corrective, distributive justice[145] that should be based on the scope and level of exploitation of the colonial countries according to the following algorithm:

> For any given First World Country X, the nature of its decolonial admission and inclusion obligations to Third World migrants from Country Y depends on the extent of exploitative benefit or advantage Country X derives from neo-colonial empire and the extent of subordination or disadvantage that a given migrant endures by virtue of being a national of Country Y.[146]

According to Achiume, such approach could generate different legal modes of political membership that is more ethical and possibly more sustainable in comparison to the current one based on the exclusive concept of citizenship.[147]

Can the change of concepts and experimentation with discursive categories as well as calls for redistributive citizenship and the battle for the new post-colonial state shift our understanding of a nation-state or would it only amount to an intellectual exercise without practical meaning for those affected by the practices of bordering? This concerns law in particular, as its emancipatory potential often remains very much limited. Law is often slow in recognising already existing realities that differ from those regulated by it, and which law is not able to narrow down. For legal scholar Davinia Cooper, already, realising that law is not able to capture the reality allows for thinking about alternative laws.[148] This understanding is particularly important when approaching the nation-state which can appear, together with its laws, as static, monolithic; hence, determining life of the people in its territory without any option for escape. Such perspective allows one to notice that the nation-state is both durable and static, but at the same time it is also unstable, plural, and contradictory and can create hybrid realities.[149] In order to unsettle the monolith of the state, Davinia Cooper proposes the concept of acting *as if* that through

144 Achiume, 1515.
145 Achiume, 1553.
146 Achiume, 1560.
147 Achiume, 1569.
148 Davina Cooper, 'Towards an Adventurous Institutional Politics: The Prefigurative "as If" and the Reposing of What's Real', *The Sociological Review* 68, no. 5 (September 2020): 893–916, 893.
149 Cooper, 894.

prefigurative thinking that encompasses already existing realities can sometimes lead to creation of rights. One example of such a possibility is, for instance, acting or behaving like an owner or a parent that may result in the creation of legal rights of ownership or parenthood.[150] As Cooper writes, "…acting 'as if' can sometimes bring into being the missing elements of authority, recognition, science, or entitlement required to make an enactment 'real'."[151] Approaching the nation-state from this prefigurative perspective may reveal, through decentring the nation-state as a paradigmatic form, a possibility for stretching and cutting this form into other, different shapes of societal organization.[152] This can be done also through law, which, even though encoding certain values, presumptions and expectations about social life is itself unstable and not able to fully control social meaning. For Cooper, assuming that law and the *as if* are antithetical to one another negates the operation of legal practice which through jurisprudence may introduce de facto changes into de jure statuses.[153] This approach, therefore, brings in the existing realities into law and creates alternative discourses not in the *future* but in the *now*,[154] that can give a boost to emancipatory political actions. At the same time, through such actions, the conditions of possibility for them to happen are changing and that allows a significant reimagination of the environment in which these actions are set "so that a social, scientific, ethical and political 'otherwise' justifies, validates, normalizes and holds up the actions undertaken." This in time may lead to the situation where the impossibility of a change that acting prefiguratively tackles, is diminished.[155]

The discussion on prefiguration is closely linked to discussions on *rights to have rights* that this chapter circulates around, that emphasize the importance of claiming the rights that one does not have or rethinking legal concepts, so they correspond with existing reality. As Ayten Gündoğdu writes, the new rights claims raised by persons with an undocumented status should be treated as declarations that did not have prior authorization, but bring to view new subjects and rights that could not have been accommodated by normative framework of the earlier period.[156] Such new claims operate within the irreconcilable opposites that characterize the mobile world we are living in: "the concern with stability and the spirit of the new".[157] Gündoğdu situates her claim for new rights in the inescapable tension between human rights and the institutions established to guarantee them, that arises on the one hand because institutions can turn against the very rights that they were supposed to uphold

150 Cooper, 897.
151 Cooper, 897.
152 Cooper, 899.
153 Cooper, 902.
154 Cooper, 907.
155 Cooper, 897.
156 Gündoğdu, *Rightlessness in an Age of Rights*, 198.
157 Gündoğdu, 160.

but also, on the other, because human rights can be mobilized for the purpose of challenging existing institutional orders and proposing new ones.[158] This is another way of revealing the unstable nature of all stabilities that can be derailed and pushed towards new directions or new openings. To be sure, the way to push towards the change can also happen through bringing new meaning into old challenges. Analysing the movement of *Sans-Papiers* invoking French revolutionary symbols to justify their acts, Gündoğdu argues that they augment the principle of *equaliberty* (epitomising the tension between equality and liberty[159]) not only by affirming the Rights of Man but also challenging them by drawing attention to the violent colonial exclusions that went hand in hand with this universalist discourse. As Gündoğdu points out, *Sans Papiers*' amendment of the revolutionary beginning can be seen in their public statements that directly tie the colonial past to the rights claims they make.[160]

To be sure, the resistive tension between challenging the legal system and using its potential for emancipatory change has been at the core of the *Sans-Papiers* movement.[161] *Sans-Papiers* have challenged the existing legal system through re-establishing themselves as active subjects and rejecting the subjectivities imposed on them by the law. Their refusal to engage with law, as well as refusal of the pressure to accept legal categories as a basis of their differential exclusion, paradoxically restored their own legal protection. The movement became effective on a practical level with successful resistance of deportations and regularization of the tens of thousands of people who would otherwise remain without documents if they would simply follow individualized legal procedure. As Behrman argues, opening up the questions of belonging, access to rights and the colonial legacy "increased the legitimacy of the claim to stay and to be legally regularized (…) paradoxically, this could only be achieved by extending the parameters of the question beyond the law."[162] Rights therefore are intimately linked to political visibility and political recognition and the right to have rights requires both law and politics operating in a non-hierarchical relationship.[163]

Refusal to become engaged with law may also strengthen the law itself as it recognizes its instability and tolerates those who do not even aspire for legal recognition. In her article *The Right Not to Have Rights,* Oudejans theorizes the situation where migrants themselves are not interested and do not aspire for legal recognition and their presence, as such, is also *tolerated* by law; in other

158 Gündoğdu, 210.
159 Étienne Balibar and Étienne Balibar, *Equaliberty: Political Essays* (Durham, NC: Duke University Press, 2014).
160 Gündoğdu, *Rightlessness in an Age of Rights*, 199.
161 Behrman, *Law and Asylum: Space, Subject, Resistance*, 144.
162 Behrman, 145; See also Maja Sager, 'Struggles Around Representation and In/Visibility in Everyday Migrant Irregularity in Sweden', *Nordic Journal of Migration Research* 8, no. 3 (1 September 2018), 175.
163 Schmalz, *Refugees, Democracy and the Law*, 57.

words, law applies to them by no longer applying. This approach shifts the focus from challenging law towards accommodation of irregularity by law. The question that Oudejans poses is

> what concept of law can accommodate the presence of irregular immigrants (i) without necessarily reducing them to a naked life struggling to survive or assigning them a political agency and (ii) without taking recourse to force and violence to restrain the movement and presence of irregular immigrants?[164]

In other words, how to think about the legal system within which immigrants are *not legally included*, but *not removed from the polity* that excludes them.[165] Such ability of law to function outside of the inclusion-exclusion divide in the situation when the presence of migrants does not result in diminution of public order and a destruction of law[166] does not destroy the legal system, but allows for the life in the tension of law's mobility between violence and politics. Oudejans, similarly as Gündoğdu, builds her argument on fleshing out the possibility and potentiality of the legal change. She sees a way out exactly in this form of potentiality, in the tension between the actual and the possible.[167] This is exactly the moment where the mobility of law itself can be brought into discussion, that requires balancing between what is potential and what is impossible.[168] Here, law that applies by no longer applying stays within the area of potentiality rather than impossibility.[169] As Oudejans writes, law stays in its ability not to be, it maintains its actuality through a form of suspension. The fact that sovereignty is able to maintain its own im-potentiality[170] both in the case of the right not to have rights but also in the case where *Sans-Papiers* refuse to engage with existing legal categories has significance as it shows first of all that life does not have to be annexed by law but, rather, that it is irreducible to a legal status.[171] Second, the irregularized migrant can rather be seen as "*playing the law*." By doing this the irregularized migrants exercise a choice between violent repression that goes beyond law or laws underperformance.[172] By the practice of playing the law individuals do not consider or even notice law as the source of restraint, therefore, do not strive for legal inclusion.[173] At

---

164 Oudejans, 'The Right Not to Have Rights', 449.
165 Oudejans, 450.
166 Oudejans, 454.
167 Oudejans, 459.
168 Oudejans, 459.
169 Oudejans, 460.
170 Oudejans, 461.
171 Oudejans, 462.
172 Oudejans, 463; see also Helen Schwenken, '"The EU Should Talk to Germany" Transnational Legal Consciousness as a Rights Claiming Tool among Undocumented Migrants', *International Migration* 51, no. 6 (December 2013): 132–145, 2.
173 Oudejans, 467.

the same time, law does not lose its strength of meaning because its own withdrawal is part of its operation. It does not need to bring itself to the verge of violence.

Oudejans builds her argument on the concept of varying degrees of legalism taken from the scholarship of Judith Shklar. On the one hand, not everything is or can be regulated by law and at the same time the forms of behaviour that disregard law do not bring chaos, disorder, and collapse of the legal system.[174] "Shklar's idea of varying degrees of legalism; thus, offers an in-route for understanding the potentiality of the law in terms of an underenforcement of immigration laws in which the law maintains itself in no longer applying."[175] This approach both strengthens law, and at the same time it acknowledges that human life cannot be reduced to it because it is also structured through other relations such as friendship, love, and solidarity which can serve as better safeguards than law.[176] Through ignoring or refusing to follow the law, law itself is paradoxically strengthened as uncovering of its instability does not lead to law's depreciation but leads to accept its mobile core.

Conclusions

At the beginning of this chapter, I asked whether it is possible to remedy the system based on distinction into orderly and disorderly mobility with the recourse to law that is in its substance exclusive and rooted in modernity/coloniality. In other words, I was interested whether there can be a shift from static justice based on territory and borders towards mobility justice. I approached mobility as a form of resistance towards the national order of things both from the inside and from the outside of law as well as through the interconnection of the two. To be sure, any distinction between inside and outside is in the context of mobility an artificial one, rooted in thinking about law and human rights in the static way. For law operates through definitions and categories that are not and cannot be fully determined. They remain mobile and their meaning can change, depending on the possibility that has not yet materialized and that might materialize given the societal readiness for change. All these openings on the one hand give some space for questioning arbitrary and historically contingent legal categories, and at the same time allow to inquire into the limits of the emancipatory potential of law.

In the first part of the chapter, I defined resistance as an inherent and necessary element of every power relation characterized by resistive tension between mobility and stasis that is revealed through bringing to light law's mobility. In the second part of the chapter, I discussed the relationship between law and resistance in the context of orderly mobility, focusing on traditional ways of

174 Oudejans, 467.
175 Oudejans, 468.
176 Oudejans, 468.

mobilizing law within the limits of the nation-state and its borders. I argued that protection in a form of human rights can be effectively claimed only by those who move in an orderly fashion while in the context of the disorderly movement, rights are often linked with migrants' own conduct and are only available on a minimal level often in a form of humanitarian protection, and mostly to those particularly vulnerable.

In the third part of the chapter, I moved to discuss law and resistance in the context of disorderly mobility, where mobility becomes an act of resistance against law rooted in the act of movement itself. I analyse the implications of the acts of resistance for law itself in particular taking into consideration *Sans-Papiers* movements and discuss the role of performative acts of belonging for legal categories such as citizenship. Finally, in the fourth part of this chapter, I deconstructed the distinction between resistance from within and outside law by reference to the mobility of law and its potential for emancipatory change. I tapped into new ways of thinking about law and mobility, focusing on four interconnected ways of conceptualizing mobility as resistance to law: emphasising shared humanity, the potential of prefiguration, role of conceptual change, and conceptualizing the gap between law and practice as space for mobility and change. Even though some of the existing proposals primarily focus on rethinking the role of sovereignty and strengthening law's universality within the contemporary system of nation-states, others do recognize and respond to the mobility paradigm building on mobility as an emancipatory force in itself.

Importantly, the discussion in this chapter also poses the ethical question of who should be acting in an emancipatory fashion? Is it a role of migrants, who through bringing new forms of solidarities to the global North teach us about equality, or is it the role of citizens of the Western states to change the ways we enact inclusion? This requires conceptual change in the way we think about law and legal scholarship; in particular, bringing an ethics of interconnection to law. On the one hand we need to support inclusion but also at the same time we need to resist the system that is inherently exclusive and operates as a form of inclusion that is conditional or differential. One of the solutions is to understand the access to rights as part of retributive justice that aims to remedy the ills caused by colonialism. At the same time, we need to focus on how law already accepts and includes all forms of difference, even if it means choosing not to act against its own violations. This means living in the tension between what law can regulate and what it cannot, between stability and mobility in law, that the result of activities ignoring or resisting the use of law can paradoxically strengthen law and allow for emancipatory change. This analysis leads me to two paths of action. The first is demigrantization of the right to have rights which comes out of the law of humanity project but takes seriously the equality and shared humanity of all people and result in a battle for the new state. The second is bringing in new knowledges and epistemologies rooted in decolonial thinking; in particular, the epistemologies from the South.

In the final chapter of this book, I embark on rethinking legal subjectivity as based in mobility, by focusing on legal subject as the one that moves rather than the one that stays put. This legal subject brings with them the knowledges gained through mobility that can contribute to the construction of the new system of belonging. The various ways of bringing new knowledges include so called mobile commons, knowledges that emerge through teaching and learning with refugees or the role of refugee academics. I argue that these knowledges need to be incorporated on all stages of law making and law application. This, I claim may be the future of the legal change and emancipation.

Chapter 5

Mobility as a method of legal knowledge production

Introduction

Judith Shklar, whose concept of varying degrees of legalism I discussed in the previous chapter, had herself experienced exile as she flew with her family from Riga to the USA during World War II.[1] This experience has also, according to commentators, affected her scholarship. Scholars of Shklar's work link her experience of exile and immigration with her academic work. Seyla Benhabib argues that "Shklar developed and actively promoted a certain habitus of and view that have their roots in her experience of exile and emigration (…)."[2] In particular, Shklar's experience of the threat of two totalitarianisms (Nazism and Stalinism) has prompted her to focus in her work on the need to rethink contemporary problems in light of this experience. She understood the need to rethink political theory in modern liberal democracy, to abandon great systems, ideas, and theorems, and bring political theory closer to the social and political realities of modern society.[3] As Ashenden and Hess write, "[t]he exile perspective allowed her to explore various key questions for political thought – conditions for submission to rules, political obligation, and so on – from a different angle."[4]

In this chapter, I argue that the experience of exile, displacement, or migration, like in the case of Shklar but also many others, provides a lens through which one could address the position and role of migrants and those people called refugees in contemporary societies, including questions related to navigating the space in-between the actual and the possible. To be sure, it is not possible to bridge the gap in the modern law rooted in modernity/coloniality

---

1 Samantha Ashenden and Andreas Hess, eds., *Between Utopia and Realism: The Political Thought of Judith N. Shklar*, 1st edition, Haney Foundation Series (Philadelphia: University of Pennsylvania Press, 2019), 7.
2 Seyla Benhabib, *Exile, Statelessness, and Migration: Playing Chess with History from Hannah Arendt to Izaiah Berlin* (Princeton: Princeton University Press, 2018), 144.
3 Ashenden and Hess, *Between Utopia and Realism*, 9.
4 Ashenden and Hess, 14.

and to fully include those excluded from modern subjectivity due to their disorderly mobility. Reza Banakar argues that the conflicts that we encounter in modernity as dualities, antinomies, and dichotomies, like the one between us and others, are built into modernity and modern law in particular. "The 'gap' is, thus, part of the reality of modern law—part of its definition."[5] As a possible way forward, Banakar suggests that the focus should be

> shifted away from attempts to close the 'gap' and moved towards the examination of the interplay between law as a system of legal rules, practices, doctrines, and decisions, on the one hand, and as a form of experience, a specific sphere of social action and an institutionally-based form of socio-cultural practice, on the other.[6]

As Shklar argues, the law is limited in what it can do and it also is not able to respond to every social need.[7] For instance, in order to understand injustice, one would need to identify, recognize, and listen to victims of injustice as a more effective method than striving for a perfect state of justice and constant betterment of laws.[8] It is, therefore, through the analysis of the experience of law against the plethora of everyday experiences that one can understand better the function of law in society and identify possible avenues for coping with the gap and with a life in-between the actual and the possible.

My main argument in this book is that mobility affects the purpose and the scope of law, but it is also imprinted in its epistemological and ontological qualities. In particular, new knowledges can be generated through the experience of movement, and the experience of law regulating that movement. In this chapter, I focus specifically on the role of the experience of mobility for law, and I argue for the need for inclusion of legal knowledges based on mobility in law and policymaking. To be sure, critical migration scholars call for grounding belonging and inclusion in migrant experiences of injustice and foregrounding the knowledges that this experience generates as tools to foster justice.[9] This chapter turns, therefore, towards analysing law as experience. In particular, it focuses on the role and meaning of knowledges that are produced

---

5   Reza Banakar, *Normativity in Legal Sociology: Methodological Reflections on Law and Regulation in Late Modernity* (New York; Dordrecht; London: Springer, 2015), 54.
6   Banakar, 54.
7   Nanda Oudejans, 'The Right Not to Have Rights: A New Perspective on Irregular Immigration', *Political Theory* 47, no. 4 (August 2019): 447–474, 468.
8   Ashenden and Hess, *Between Utopia and Realism*, 13.
9   E. Tendayi Achiume, 'Migration as Decolonization', *Stanford Law Review* 71 (2019), 1509–1574; Vítor Lopes Andrade et al., 'Queering Asylum in Europe: A Survey Report' (Brighton: University of Sussex, 2020), https://www.researchgate.net/profile/Nuno-Ferreira-27/publication/342961863_Queering_Asylum_in_Europe_A_Survey_Report/links/5f0f6cdb45851512999bd22a/Queering-Asylum-in-Europe-A-Survey-Report.pdf (accessed 26.10.2021).

through the experience of mobility for emancipatory changes of law and legal practice. By *mobile knowledges* I not only understand the overall knowledges, experiences, and skills that persons in a refugee situation, and migrants had before leaving their home countries, but also those knowledges that they acquire in transit and in the country of destination. These knowledges have been conceptualized by scholars as collective pools of resources – the communities of knowledge[10] or mobile commons[11] – that help to navigate life in transit and life in the host country. Moreover, they at the same time allow us to question the system of management of mobility, the global mobility infrastructure, that generates these experiences and to move beyond stable, ahistorical, and deeply ingrained conceptualizations of human mobility and ideas of political community on which they are built, such as the distinction between a citizen and a foreigner. This can only happen, however, if these experiences are viewed as contemporary manifestations of historical developments of ideas regarding belonging and identity, which are rooted in the stable concept of the nation.[12]

I argue that in order to understand and benefit from the full potential of mobile knowledges rooted in experiences of movement and displacement, one needs to put attention on the following aspects of mobile knowledges. First, is historical and follows an argument that dominant ideas are maintained by the control of knowledge and by the deployment of stable concepts such as state, nation, and community. Bringing historicized knowledges produced by and for refugees show that these dominant and stable concepts and narratives are not self-evident. Foregrounding minoritized ways of knowing can, when given enough attention, be the basis of new forms of political action.[13] The second aspect is linked with the first one and based on the understanding that legal concepts and legal rules are not stable, but mobile and contingent. This also concerns typologies of various categories of migrants that emerged in international law and that are rooted in historical, political, and often highly value-loaded contexts.[14] Rethinking legal concepts that are used in the context of

---

10 Tekalign Ayalew Mengiste, 'Refugee Protections from Below: Smuggling in the Eritrea-Ethiopia Context', *The ANNALS of the American Academy of Political and Social Science* 676, no. 1 (March 2018): 57–76.
11 Nicos Trimikliniotis, Dimitris Parsanoglou, and Vassilis S. Tsianos, *Mobile Commons, Migrant Digitalities and the Right to the City* (London: Palgrave Macmillan UK, 2015); Nicos Trimikliniotis, Dimitris Parsanoglou, and Vassilis Tsianos, 'Mobile Commons and/in Precarious Spaces: Mapping Migrant Struggles and Social Resistance', in *Politics of Precarity: Migrant Conditions, Struggles and Experiences* (Leiden: Brill, 2017).
12 Prem Kuman Rajaram, 'Refugee and Migrant Knowledge as Historical Narratives', in *Refugees and Knowledge Production: Europe's Past and Present*, ed. Magdalena Kmak and Heta Björklund (Abingdon, Oxon: Routledge, 2022), 38.
13 Rajaram, 41.
14 Günter Bierbrauer, 'Toward an Understanding of Legal Culture: Variations in Individualism and Collectivism between Kurds, Lebanese, and Germans', *Law & Society Review* 28, no. 2 (1994): 73.

mobility such as the nation-state, citizen or foreigner allows for rethinking the legal position of people that are categorized according to these concepts. Finally, the third aspect is the use of individual and communal knowledges rooted in mobility in practice, in particular by translating them into legal and political language.[15] This can mean, for instance, that migrants and those people called refugees take part in the legislative or consultative processes but it can also include collaborative research methods[16] or such academic projects, as rewriting existing jurisprudence from the perspective of migrants and people in a refugee situation,[17] that can foreground alternative imaginaries of legal systems.

Through the focus on mobile epistemology or mobile knowledges, this chapter juxtaposes methodological nationalism and the state-based concept of belonging[18] with communities of knowledges that encompass not only knowledges of law but also experiences of living and acting with, along, or against the law.[19] By countering the official knowledges, mobile knowledges contribute to the resistive tension that lies at the very centre of power relations in the state.[20] Importantly, the knowledges of law gained through mobility cuts across the divide between mobility as resistance from the outside of law and from within law and, therefore, allow for more complex and multifaceted perspectives on law. Staying with the mobile and contingent knowledges that unsettle the dominant categories can also generate new legal strategies. This chapter, therefore, analyses particular forms of resistance to the static concept of the nation-state that is generated by mobile knowledges and emphasizes both the agency of mobile individuals, and approaches mobility though a novel perspective as a method of studying law.[21]

After conceptualizing the epistemological role of mobility for knowledge production in general, the chapter takes on juxtaposing the dominant and mobile

15 Ukri Soirila, *The Law of Humanity Project: A Story of International Law Reform and State-Making*, Studies in International Law, volume 82 (Oxford, UK; New York, NY: Hart Publishing, an imprint of Bloomsbury Publishing, 2021), 151.
16 See for instance Malene H. Jacobsen, 'Practical Engagements in Legal Geography: Collaborative Feminist Approaches to Immigration Advocacy in Denmark', *Area* 53, no. 4 (December 2021): 595–602.
17 See for instance 'Rewriting Jurisprudence: Centring Refugee and Migrant Lived Experience', https://law.anu.edu.au/rewriting-jurisprudence-centring-refugee-and-m igrant-lived-experience (accessed 18.12.2022).
18 Andreas Wimmer and Nina Glick Schiller, 'Methodological Nationalism and beyond: Nation-State Building, Migration and the Social Sciences', *Global Networks* 2, no. 4 (October 2002): 301–334.
19 See also Ayse Güdük and Ellen Desmet, 'Legal Consciousness and Migration: Towards a Research Agenda', *International Journal of Law in Context* 18, no. 2 (June 2022): 213–228.
20 Simon Thorpe, 'In Defence of Foucault: The Incessancy of Resistance', *Critical Legal Thinking*, 2 July 2012, https://criticallegalthinking.com/2012/02/07/in-de fence-of-foucault-the-incessancy-of-resistance/ (accessed 18.12.2022).
21 See such argument developed by Konuk, 'Jewish-German Philologists in Turkish Exile: Leo Spitzer and Erich Auerbach'.

knowledges. In particular, in reference to previous chapters of this book, it recounts the dominant knowledges of migrants and people in a refugee situation that are perpetuated by media and politicians. Then, in the third section the chapter turns toward the development of legal knowledges by the exiled, displaced, and refugee scholars in history and currently. Scholars and scientists, in particular, due to the specificity of their work often reflect on and translate their own experiences into scientific theories, including theories of the state, society, and law.[22] Mobile knowledges, however, are not produced only by intellectuals. For instance, knowledge on border crossing routes, informal economies, and survival strategies is continuously produced and shared through word of mouth or digitally by people on the move, fostering resistance to the processes of exclusion and bordering.[23] For that reason, in the following section this chapter shifts its focus from traditionally understood scientific knowledges to the broader scope of communities of knowledge, in particular, to the ways law is being understood and embodied by persons on the move and directly affected by it. Finally, this chapter develops a more comprehensive understanding of movement and mobility as a method of studying and resisting law and outlines methodological and ethical concerns for studying such knowledges.

Epistemological role of mobility for law

In her letter to Ruth Woodman Russell from 9 December 1945 Professor Louise W. Holborn, unable to participate in the faculty meeting, shared her comments on the changes in the curriculum in history and social sciences of the Pine Manor Junior College for Women where she was teaching:

> Two aspects of general education seems to me particularly significant for them [students]: the introduction to the broad areas of general knowledge and human experience, and the elucidation of their relationship one to another. Both seem to me of the utmost importance in the preparation of our students for fruitful living both as individuals and as citizens.[24]

Holborn, an early feminist, and a political refugee from Nazi Germany considered learning from experience as crucial and became a pioneer of refugee studies who focused extensively on the legal and factual position of refugees under the League

---

22 See for instance Tuori, *Empire of Law: Nazi Germany, Exile Scholars and the Battle for the Future of Europe*; Ash and Söllner, *Forced Migration and Scientific Change: Émigré German-Speaking Scientists and Scholars after 1933*.

23 Trimikliniotis, Parsanoglou, and Tsianos, 'Mobile Commons and/in Precarious Spaces: Mapping Migrant Struggles and Social Resistance'.

24 Louise W. Holborn, 'Letter to Ruth Woodman Russell', Archival document, 12 September 1945, Schlesinger Library on the History of Women in America, Harvard Radcliffe Institute.

of Nations and the UN. According to Emilyn Brown, an archivist from the Schle-singer Library at Harvard "[m]embership records, notes, and interviews confirm that Holborn drew critical parallels between her experience and the issues faced by international refugees."[25] Holborn's self-reflection and her research activities show that the knowledges produced through the experience of mobility and movement have meaning for how the system of migration management, including law, is constructed, structured, and understood.

Mobility as a mode of knowing, or the production of knowledge through mobility is not a new field of study and the movement or circulation of human beings has been recognized as a necessary element of the transfer of valuable knowledge.[26] New directions in research have emerged, however, that focus more comprehensively on the knowledges produced through the experience of exile or displacement, or through the experience of movement itself. To be sure, this also concerns the role of mobile knowledges for law. Beyond the research on cross-border mobility of people who are taking their laws with them, which I discussed in Chapter 1, emerging research focuses also on the epistemological role of mobility for law, which focuses on how the experiences of those on the move affect how they understand and think about, apply, and resist law. This is visible, for instance, in the third gen-eration of exile studies[27] that focus on the impact of the experience of refuge or forced displacement for knowledge, and the role of migration in creating new knowledges and new theories by combining experiences and previously unrelated ideas.[28] Exile studies have focused traditionally on his-torical academic displacement (such as for instance of German-Jewish scho-lars forced to leave Nazi Germany). The new focus of exile studies does not only bring forward the agency of the émigrés and recognizes the role of affects and emotions in the process of knowledge production,[29] but also includes the expanding field of knowledges produced outside Europe and epistemologies of contemporary migration that expands beyond the spheres

---

25 Magdalena Kmak, 'From Law's Discourse on Refugees to Refugees' Discourse on Law', *Redescriptions: Political Thought, Conceptual History and Feminist Theory* 24, no. 2 (16 December 2021): 110–128, 117.

26 See for instance Peter Burke, *A Social History of Knowledge II: From the Encyclo-paedia to Wikipedia* (Cambridge: Polity Press, 2012); Peter Burke, *Exiles and Expatriates in the History of Knowledge, 1500–2000*, The Menahem Stern Jerusalem Lectures (Waltham, Mass.: Brandeis University Press/Historical Society of Israel, 2017).

27 Magdalena Kmak and Heta Björklund, eds., *Refugees and Knowledge Production: Europe's Past and Present* (Abingdon, Oxon; New York: Routledge, 2022), 4.

28 Kaius Tuori, *Empire of Law: Nazi Germany, Exile Scholars and the Battle for the Future of Europe* (Cambridge: Cambridge University Press, 2020), 20.

29 See for instance Paolo Boccagni and Loretta Baldassar, 'Emotions on the Move: Mapping the Emergent Field of Emotion and Migration', *Emotion, Space and Society* 16 (August 2015): 73–80.

of art and academia, encompassing, for instance, students[30] or humanitarian workers.[31]

Challenging the dominant forms of knowledge

The exiled or displaced knowledges often can challenge dominant knowledges of and ways of thinking about migration, that is generated within the overarching master frame of the nation-state that increasingly tends to perceive migrants as *security risks* or *hybrid threats*,[32] or a resource that can be used to counter the demographic crisis, in particular remedying economic dependency ratio.[33] These narratives are rooted in a perspective that I discussed in Chapters 2 and 3, where citizenship is a norm not only in the legal understanding of who has a right to enter and reside in the state but also in the understanding of security risks or capabilities and skills. Typically, migrants' presence is considered as generating higher risks than citizens and at the same time, migrants are perceived as having a lack of skills – language, knowledge of the domestic labour market, or the domestic ways of working.[34] Another level of discourse on migration varies between presenting them as *illegal migrants* or *illegals*, victims, and heroes,[35] or saviours. From this perspective, Bergholm and Toivanen have identified five dominant narratives or knowledges about refugees that dominate in European policy and media space:

> The first narrative sees refugees or migrants as the *source* of the 'crisis' and the problems Europe is facing. The second takes a managerial role in stressing how the 'flows' and 'streams' of refugees need to be controlled and *managed*. The third is describing the refugees as *vulnerable objects* that

30 Céline Cantat, Ian M. Cook, and Prem Kumar Rajaram, eds., *Opening up the University: Teaching and Learning with Refugees*, Higher Education in Central Perspective: Practices and Policies, Volume 5 (New York: Berghahn Books, 2022); Yi'En Cheng, ed., *International Student Mobilities and Voices in the Asia-Pacific: Letters to Coronavirus* (Singapore: Springer Nature Singapore, 2022).

31 Nadine Hassouneh and Eliza Pascucci, 'Nursing Trauma, Harvesting Data: Refugee Knowledge and Refugee Labour in the International Humanitarian Regime', in *Refugees and Knowledge Production: Europe's Past and Present*, ed. Magdalena Kmak and Heta Björklund (Abingdon, Oxon; New York: Routledge, 2022).

32 Rajaram, 'Refugee and Migrant Knowledge as Historical Narratives', 40.

33 Bea Bergholm and Reetta Toivanen, 'Narratives on "refugee Knowledge" in the Institutions of Europe', in *Refugees and Knowledge Production: Europe's Past and Present*, ed. Magdalena Kmak and Heta Björklund (Abingdon, Oxon; New York: Routledge, 2022), 53.

34 Bergholm and Toivanen, 53.

35 Karina Horsti, 'Hope and Despair: Representations of Europe and Africa in Finnish News Coverage of "Migration Crisis"', *Communication Studies*, 2008, 3–25; Mervi Leppäkorpi, 'In Search of a Normal Life: An Ethnography of Migrant Irregularity in Norther Europe' (Joensuu, University of Eastern Finland, 2021), 279.

need to be taken care of; this applies especially to women and children, so the fourth narrative, refugees as a potential *security threat*, is mainly applied to men. The fifth sees refugees as a potential source of help or even *saviours* for Europe in terms of a (cheap) labour force and means of correcting Europe's unbalanced age-dependency ratio [emphases by the authors].[36]

As Bergholm and Toivanen argue, these five dominant narratives that are based on stereotyping and homogenizing migrants, taken together prevent the possibility of seeing refugees and migrants as people with multifaceted skills and perspectives that we could learn from, whose knowledges can be included into changing dominant agendas in Europe.[37] One example of such skill recognition and redefinition of the dominant narrative comes from Finland and concerns a shortage of labour due to the closure of external borders during the COVID-19 pandemic, which significantly affected food production. One of the few justified exceptions from the limitation of movement related to work "(...) *that is important for the functioning of society or security of supply*, requires work tasks to be carried out by persons from another country, and cannot tolerate delay [emphasis by the author]."[38] In this context, the concepts such as *borders*, and *security* acquired a completely different meaning. During the pandemic, the borders must be open for third-country nationals to secure the supply of food. Ukrainian seasonal workers, previously considered unskilled, have been, therefore, reconceptualized as critical workers and persons with skills necessary for Finland.[39]

To be sure, the dominant views on the role and the meaning of migration can be more easily problematized, but also redefined in the context of an unprecedented crisis that, on the one hand, can highlight and strengthen existing inequalities and problems, but also allow for quicker changes in existing practices. In many other cases, in order to deconstruct dominant narratives, one needs to turn to the narratives provided by migrants and people in a refugee situation, linking their contemporary experiences with historical processes. I follow here Prem Kumar Rajaram who shows how unified, dominant, majoritarian narratives and experiences are constructed through historical processes of policing and exclusion of minoritarian experiences and narratives.[40] According to Rajaram, "knowledge production by subaltern groups may denaturalize the state-nation-community triad and the ways of seeing and thinking they

---

36 Bergholm and Toivanen, 'Narratives on "refugee Knowledge" in the Institutions of Europe', 55.
37 Bergholm and Toivanen, 63.
38 Daria Krivonos, 'Ukrainian Farm Workers and Finland's Regular Army of Labour', 30 April 2020, https://raster.fi/2020/04/30/ukrainian-farm-workers-and-finlands-regular-army-of-labour/ (accessed 18.12.2022).
39 Krivonos.
40 Rajaram, 'Refugee and Migrant Knowledge as Historical Narratives', 41.

encourage."[41] Referring to Foucault's concept of "local critique" as a response to generalizing and universalizing tendencies and knowledges, Rajaram argues that to challenge the dominant narratives through the subjugated knowledges means to foreground the historical experiences behind stable concepts.[42]

> Alternative knowledge about or by people known as refugees is at its most striking when read as markers of these complex historical relations. This means reading knowledge about or by people called refugees not as 'refugee knowledge', but as expressions of a condition of marginalization or subjugation that has historically been important in stabilising the concepts we use to arrange how we live together and are governed (…).[43]

However, such minoritized narratives have been pre-emptively dismissed or devalued both historically and nowadays as not modern and not relevant for contemporary societies. For example, Rajaram brings two types of narratives – the historical narratives of tea plantation workers in Colonial India and current narratives of admissions of displaced people into higher education institutions in Europe, and how they differ from the dominant narratives about colonized people and migrants with skills.[44] For instance, discussing the silencing of Oraons' narratives of their working experiences at colonial tea plantations in Chota Nagpore, Rajaram recovers "antagonistic historical experiences" that have generated the resistance of Oraons against the colonists. These narratives have been however dismissed as impossible to be initiated by the colonized people themselves. For British colonial authorities, Oraons' resistance must have been induced by a third party, in this case, suspected German missionaries. Thus, by naming the Oraon workers as backward and primitive their agency at resisting colonial oppression was denied to them.[45] Similarly, in the context of the admission to higher education nowadays, people with a refugee background are not perceived as having knowledges and skills to study but rather their knowledges and skills are devalued during the admission policies, and they themselves are portrayed as a set of problems that have to be addressed through the various integration measures. In the context of these groups of people, Rajaram argues that the entry into a university of marginalized groups (including people problematized as "refugees" requiring integration) who are aware of the historical conditions behind their marginalization has the potential

---

41 Rajaram, 40.
42 Rajaram, 41.
43 Rajaram, 42.
44 Prem Kuman Rajaram, 'Refugee and Migrant Knowledge as Historical Narratives', in *Refugees and Knowledge Production: Europe's Past and Present*, ed. Magdalena Kmak and Heta Björklund (Abingdon, Oxon: Routledge, 2022).
45 Rajaram, 46.

to help us rethink the relationship of universities and education, and the role of the university in the public sphere.[46]

In light of the exclusion, dismissal, or devaluation of migrant and refugee knowledges and experiences, knowing and not knowing becomes itself a matter of multifaceted inclusion and exclusion, also in the context of the legal process such as the refugee status determination procedure. Ali Ali points out two consequences of the exclusion of knowledges that had become visible in his interviews with queer asylum seekers in Helsinki – diminution of one's own knowledge and experience in the face of a court hearing, and diminution of the person's identity and experience as a result of the negative decision related to the refugee status. As Ali writes, interviewed asylum seekers saw their own culture and origin as shameful and prevent them from receiving refugee status. I will quote here Ali recounting his discussion with Ido concerning a forthcoming court hearing,

> 'I'm a son of tribes – I do not know how to speak with judges.' Said Ido, with an air of panic, a few weeks before the court hearing regarding his appeal against the state's rejection of his asylum claim. He added anxiously, 'I do not have the education for that.' I asked Ido if speaking about waiting in permanent anxiety for recognition of his need to stay in Finland (and fear of being deported back to Iraq) required education. Ido didn't even seem to dwell on my comment. He insisted that the main issue was to convince the judge that he was 'gay'.[47]

In this context, as Ali argues, Ido's stigmatized culture prevents any imagination for possibilities of living beyond exclusion and othering.[48] On the other hand, the lack of legal recognition of the protection claim seems to exclude the asylum seekers also from their own community, stigmatising them as "fake cases." Ali shows how the official rejection of the claim for international protection on the grounds of sexual orientation or gender identity often amounts to the discrediting and condemnation of persons seeking asylum who are seen by fellow persons in a refugee situation as abusing the refugee procedure and "spoiling" the image of LGBTQ+ asylum seekers. This happens despite the well-recognized difficulty and procedural shortcomings affecting, in multifaceted ways, and translating complicated experiences of displacement into a coherent story of a well-founded fear of persecution based on sexual identity.[49] As these examples show, exclusion of the knowledges plays out on both individual and

46 Rajaram, 47.
47 Ali, 'Reframing the Subject. Affective Knowledges in the Urgency of Refuge', in *Refugees and Knowledge Production: Europe's Past and Present*, eds. Magdalena Kmak and Heta Björklund (Abingdon, Oxon; New York: Routledge, 2022), 190–191.
48 Ali, 191.
49 Ali, 168; see also *Queering Asylum in Europe*.

collective levels. In the following section, I will look at concrete examples of knowledges generated through the experience of exile and how they can challenge the dominant narratives about migrants and refugees.

From knowledges about refugees towards communities of knowledge

Academic narratives

As one of the most famous exile intellectuals, Palestinian American scholar Edward Said wrote in *Reflections on Exile,*

> [m]odern Western culture is in large part the work of exiles, émigrés, refugees. In the United States, academic, intellectual, and aesthetic thought is what it is today because of refugees from fascism, communism, and other regimes given to the oppression and expulsion of dissidents.[50]

I argue that by analysing the role of exile and displacement for the development of scientific knowledge, we can shift perspective from static, institutionalized settings of knowledge production to mobile and minoritarian forms of knowledge formed through the experience of movement. As Aslı Vatansever, a displaced scholar from Turkey explains, displacement is an experience creating a "particularly paradoxical moment for subjectivity, that alters one's existential conditions as well as one's way of viewing the world and the self."[51] It channels a "discursive and epistemological breakaway from the conventional modes of thinking", and it is also "assumed to be enriching in terms of intellectual subjectivity".[52]

  I have analysed the role of historical figures in the development of scientific knowledges elsewhere. In particular, I've been studying the experiences of legal scholars displaced from Nazi Germany in the USA.[53] Even though most of these scholars tend to remain silent about their experiences, some of them have reflected on and accounted for them, including Louise Holborn whom I have

50 Edward W Said, *Reflections on Exile and Other Literary and Cultural Essays* (London: Granta, 2001), 180.
51 Aslı Vatansever, *At the Margins of Academia: Exile, Precariousness, and Subjectivity* (Leiden: Brill, 2020), 8.
52 Vatansever, *At the Margins of Academia*, 148. Kmak and Björklund, *Refugees and Knowledge Production: Europe's Past and Present*, 1.
53 Magdalena Kmak, 'The Impact of Exile on Law and Legal Science 1934–1964', in *Roman Law and The Idea of Europe* (Bloomsbury Academic, 2019); Magdalena Kmak and Mehrnoosh Farzamfar, 'Personal and Academic Narratives of Exiled and Displaced Scholars', in *Refugees and Knowledge Production: Europe's Past and Present*, ed. Magdalena Kmak and Heta Björklund (Abingdon, Oxon; New York: Routledge, 2022); Kmak, 'From Law's Discourse on Refugees to Refugees' Discourse on Law'.

already mentioned above, as well as Hannah Arendt or Paul Tillich. Very often, however, scholars either do not realize the impact of these experiences on their work or do not reflect on them, remaining mostly silent. For instance, Otto Kirchheimer a legal scholar and a Marxist lawyer who in the US became a professor of Political Science at Columbia University has not discussed his experience at all. He, however, wrote in 1959 a detailed chapter on the definition of asylum[54] included in his later book *Political Justice*, where he located asylum "at the crossroads of national and international law, compassion and self-interest, raison d'etat and human capacity for shame."[55] That chapter, according to Alfons Söllner points to Kirchheimer's reflection on his own experiences that have been translated into his writings on asylum.[56]

To be sure, it is difficult to assess the impact of mobility on law in the case of historical figures who do not directly take up the importance of their experiences and attach them to a particular meaning. As Kaius Tuori analyses the role of the experience of exile in the work of German-Jewish Roman Law scholar Fritz Schulz, such a shift under the exilic conditions might be visible in a change of the focus or the type of research. Coming to such conclusions only on the basis of studying scholars' scientific work is not necessarily enough to link experience with research. As Tuori writes, Schulz's scholarship may be considered as representing a fairly straightforward example of scholarly change. For instance, Schulz's early work was technical in character, primarily focusing on the legal analysis of texts and their origins. Starting from his book *Principles of Roman Law*, however Schulz's works includes covert and open political themes, including the fundamental aspects of the legal system "in ways that can be construed to be prompted by the Nazi takeover of power and the way in which it influenced the legal system." Tuori expresses, however, a doubt whether this is enough to argue for scientific change generated by exile experience. "As a result, [Schulz's] work shows what can be described as a textbook case of the exile process. Or does it?"[57] I find this expression of a doubt a telling example of the difficulties of studying the impact of the experience of displacement on developing new knowledge. It is clear, that the experience of exile or displacement does not automatically create the conditions to produce new ideas and knowledges. It requires certain personal attributes, coupled with certain suitable legal and socio-economic conditions as well as the need for a person's engagement with the changing parameters of their mode of being in the world and the ability to cope with the loss of their former coordinates in life.[58] Some persons in a refugee

---

54 Otto Kirchheimer, 'Asylum', *American Political Science Review* 53, no. 4 (December 1959): 985–1016.
55 Kirchheimer, 'Asylum', 352
56 I am grateful to Alfons Söllner for this comment during our conversation in Helsinki in 2018.
57 Tuori, *Empire of Law: Nazi Germany, Exile Scholars and the Battle for the Future of Europe*, 75.
58 Aslı Vatansever, *At the Margins of Academia: Exile, Precariousness, and Subjectivity* (Leiden: Brill, 2020), 148.

situation are able to adopt such perspectives and insist on their presence in the world,[59] through speaking up, storytelling, "artistic transposition of individual experiences" and inserting oneself into the world,[60] but others don't.

However, I believe that such expression of experience through storytelling or other means, even though methodologically difficult to identify, can provide the counter-narrative that can be used to displace the dominant discourses on refugeeness rooted in victimization, securitization, and the nation-state as such. At the same time, one should not expect displaced scholars to actually reflect on their experiences or feel disappointed when such a connection cannot be found. I have fallen into this trap while visiting the archives of the German and Jewish Intellectual Émigré Collections at SUNY Albany, which include archival materials from the life and work of *inter alia* Otto Kirchheimer, Arnold Brecht, and Reinhardt Bendix. I was very disappointed that the archival materials instead of profound reflections of their experiences, included to a large extent work-related correspondence, conference, talk, and dinner invitations, with occasional complaints on the amount of administrative or teaching duties preventing one from conducting their own research. This is a typical example of the romanticization of exile and displacement that Aslı Vatansever so warns against in her book.[61] When possible to identify, however, these storytelling and narrative processes, can become transformative not only for the author but also for the listener, "who gains access to alternative visions of not only past, but also future."[62]

To be sure, an ongoing interest exists in identifying such narrative processes, and that can be seen from the development and transformation of exile studies over the years. Whereas the first generation of works is mostly biographical in its focus,[63] the second generation of exile studies explores the role of scholars in the revitalization of existing and creation of new scientific disciplines, such as political science[64] or international relations.[65] Finally, most recently, one can

59 Hannah Arendt, 'We Refugees', in *The Jewish Writings*, ed. Jerome Kohn and Ron H. Feldman (New York: Schocken Books, 2007).
60 Cindy Horst and Odin Lysaker, 'Miracles in Dark Times: Hannah Arendt and Refugees as "Vanguard"', *Journal of Refugee Studies* 34(1) (2019): 67–84, 72.
61 Vatansever, *At the Margins of Academia*.
62 Horst and Lysaker, 'Miracles in Dark Times', 73.
63 See for instance Laura Fermi, *Illustrious Immigrants: The Intellectual Migration from Europe 1930–1941* (Chicago and London: The University of Chicago Press, 1968).
64 Alfons Söllner, 'From Public Law to Political Science? The Emigration of German Scholars after 1933 and Their Influence on the Transformation of a Discipline', in *Forced Migration and Scientific Change: Émigré German-Speaking Scientists and Scholars after 1933* (Cambridge: Cambridge University Press, 1996).
65 Renato Camurri, 'The Exile Experience Reconsidered: A Comparative Perspective in European Cultural Migration during the Interwar Period', *Transatlantica. Revue d'études Américaines. American Studies Journal*, no. 1 (9 July 2014), https://transatlantica.revues.org/6920 (accessed 18.12.2022); Felix Rösch, *Émigré Scholars and the Genesis of International Relations* (Houndmills, Basingstoke: Palgrave Macmillan, 2014).

observe a shift of focus from biographical and more passive narratives to ones bringing forward the agency of the émigrés and the role of this agency for knowledge production,[66] which I argue contributes to the third generation of exile studies.[67] This can, for instance, refer to scholars' direct reflections on their experiences. At the same time, the lack of such direct reflection does not preclude these scholars from contributing to new knowledges; for instance, through more contextualized analysis of their writings.

In one of my articles, I have analysed the writings on the topic of refugee status by Louise Holborn, Otto Kirchheimer, and Hannah Arendt.[68] In their written texts, all three authors identify a shift or a paradigm change in the conceptualization of refugee status and refugee condition that took place during their lives – from being persecuted for what one *does* to being persecuted for what one *is*.[69] For instance, Kirchheimer writes in his text on asylum:

> The Armenian survivor of Turkish massacres, the Russian 'bourgeois' of the 1920's, the conscript soldier of the anti-Soviet 'White' armies, the European Jew in Hitler's Europe, the Spanish conscript who fought on the loyalist side in the civil war, the member of an ethnic minority proscribed in the USSR in World War II – all these exiles ran from the threat of being penalized for what they were, not for what they had done, were doing or intended to do. Their appearance gave the word asylum a new connotation and let the authorities of the countries of refuge to put a different construction upon it.[70]

As they further write, due to this shift, the scope of protection that states and international institutions were able to offer was inadequate for meeting the needs of great numbers of persons that were displaced during the First and the Second World Wars.[71] This also generated difficulties in the legal processes of distinguishing *bona fide refugees* and those who were not considered political refugees;[72] thus, leaving many that should actually be included in the definitions without legal recognition.[73] Because of the lack of protection by their own

66 Tuori, *Empire of Law: Nazi Germany, Exile Scholars and the Battle for the Future of Europe*, 11.
67 Kmak and Björklund, *Refugees and Knowledge Production: Europe's Past and Present*, 4.
68 Kmak, 'From Law's Discourse on Refugees to Refugees' Discourse on Law'.
69 Arendt, 'We Refugees', 264.
70 Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Westport: Greenwood Press, 1980), 353–354.
71 Louise W. Holborn, *Refugees: A Problem of Our Time. The Work of the United Nations High Commissioner for Refugees, 1951–1972* (Metuchen, NJ: The Scarecrow Press, Inc., 1975), xvi.
72 Louise W. Holborn, 'The Legal Status of Political Refugees, 1920–1938', *The American Journal of International Law* 23, no. 4 (1938): 680–703, 686.
73 Holborn, 687.

states, and without the over-encompassing legal regime that allow for their protection by other states,[74] displaced refugees were considered as an anomaly living in no-man's land[75] or as "legal freaks."[76] Therefore, as the numbers of those in exceptional situations or considered an anomaly in the nation-state system grew to exponential numbers, their required special protection and security could only be granted by the international humanitarian organization.[77]

Arendt, Holborn, and Kirchheimer in their writing also describe a conflict between humanitarian or moral considerations,[78] and political interests[79] when providing protection to refugees, which results in the need for constant negotiation between the two. Kirchheimer writing about asylum argues that the institution is "[s]ituated at the crossroads of national and international law, compassion and self-interest, raison d'etat and human capacity for shame;" thus, requiring mediation between these elements.[80] This constant negotiation between politics and humanitarianism presupposes the limit in the willingness of states to provide protection, mostly related to a prospective burden refugees would generate for the receiving country.[81] This, in turn, results in securitization, imprisonments, and expulsions,[82] and adds emphasis on control rather than protection.[83] This brief analysis[84] shows the emergence in the writings of these scholars of an image of refugees who are in need of humanitarian protection, yet are marked as suspicious or a security threat, and therefore need to be controlled. This very much resembles the contemporary narratives on refugees that I have outlined in Chapter 3. Perhaps a careful study of these voices and discourses early on could have helped to reflect on the consequences of the emerging refugee regime as the issues related to the refugee protection emphasized above, have remained problematic and embedded in contemporary refugee law and politics.[85]

---

74 Hannah Arendt, *The Origins of Totalitarianism* (New York: A Harvest Book, Harcourt Inc., 1985), 297.
75 Claudena Skran and Carla N. Daughtry, 'The Study of Refugees before "Refugee Studies"', *Refugee Survey Quarterly* 26, no. 3 (2007): 27.
76 Arendt, *The Origins of Totalitarianism*, 278.
77 Skran and Daughtry, 'The Study of Refugees before "Refugee Studies"', 28.
78 Louise W. Holborn, 'The League of Nations and the Refugee Problem', *The Annals of the American Academy of Political and Social Science* 203 (1939): 124–135, 134.
79 Holborn, 'The Legal Status of Political Refugees, 1920–1938', 689; Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends*, 353.
80 Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends*, 352.
81 Holborn, 'The Legal Status of Political Refugees, 1920–1938', 683; Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends*, 386.
82 Holborn, 'The Legal Status of Political Refugees, 1920–1938', 689.
83 Simon Behrman, *Law and Asylum: Space, Subject, Resistance* (Abingdon, Oxon; New York, NY: Routledge, 2018).
84 For more in-depth analysis see Kmak, 'From Law's Discourse on Refugees to Refugees' Discourse on Law'.
85 Kmak.

Another take on historicising knowledges is to put together historical and contemporary experiences that transcend simple comparisons between these two. To be sure, the conditions of historical and contemporary academic displacements are to some extent similar, but also remain very different as the current refugee scholars are subject to a "perfect storm of difficult conditions" both as academics and migrants, which creates for them a uniquely precarious situation.[86] At the same time, one can identify similarities in the biographies and in academic narratives despite incomparable situated experiences. In my other work, I have argued for the benefit of working with both historical and contemporary narratives as contemporary scholars can often find answers to questions one would want to ask from historical figures, but could not, due to silences or lack of relevant biographical and archival materials. On the other hand, the impact of displacement on the production of academic knowledge in the case of contemporary scholars could most likely only be seen from the perspective of time as in the case of historical figures.[87] The biographies of historical figures could, for instance, orient the interview questions. At the same time, the issues that arose from the interviews could serve as an inspiration for investigating the biographies of the historical figures.[88] For instance in my work I was able to identify overlapping themes that emerged both from writings by historical figures and from the interviews, such as experience and conditions in the country of exile, refuge, or residence, the development of the scholar's academic career and scholarly identity in conditions of displacement, and finally issues related to human rights, justice, and the need to act in response to conditions that have contributed to displacement.[89]

Communities of mobile knowledges

To be sure, it is not just academics or *intellectuals* who are able to generate new knowledges through their experience of displacement or movement. Migrants and refugees also produce and share knowledges, including via digital connectivity. Migration requires continuous decision-making and knowledge gathering before and during the process of movement. This happens through the exchange of knowledge and information between people plotting their mobility trajectories.[90] As Pedro Magalhães and Laura Sumari write

86 Carol Bohmer, 'Refugee Scholars Then and Now', in *Refugees and Knowledge Production*, by Magdalena Kmak and Heta Björklund, 1st ed. (Abingdon, Oxon: Routledge, 2022), 128.

87 Kmak and Farzamfar, 'Personal and Academic Narratives of Exiled and Displaced Scholars'.

88 Kmak and Farzamfar.

89 Kmak and Farzamfar, 114.

90 Katie Kuschminder, 'Before Disembarkation: Eritrean and Nigerian Migrants Journeys within Africa', *Journal of Ethnic and Migration Studies* 47, no. 14 (26 October 2021): 2360–3275, 3262.

> [s]tudying migration provides an important opportunity to examine processes of knowledge production precisely because migrants are people who have moved out of their 'usual environment' and have to deal with many forms of the 'unknown' to survive in their everyday lives while in transit and in new locations.[91]

I argue that it is particularly important to include migrant and refugee experiences in studying and researching law as well as in various policy and law-making processes. This is because persons applying for asylum and recognized as refugees not only produce and share knowledges of their everyday experiences, but also are themselves experts in the refugee or migration experience. Therefore, it is of utmost importance to consult this experience when assessing whether the laws and policies adequately address their claims.[92] To be sure, employing socio-legal approaches rather than doctrinal ones in studying the rights of migrants is useful for exploring law as applied in intersectional context, for instance studying the relationship between law, sexuality, and gender in the refugee status determination procedure.[93] Authors of a study focusing on experiences of SOGI asylum seekers argue that a solely doctrinal positivist approach focusing on case law would not have been sufficient to identify problems, inconsistencies, or even possible good practices in the refugee status determination procedure in the case of these applicants.[94] Interviews with asylum seekers at varying stages of their refugee journey and during the refugee procedure helped authors to identify the shortcomings, biases, or injustices in the refugee procedure (such as lack of specific procedures for SOGI asylum seekers, long duration of the refugee status determination process, imbalances of power, bias, lack of cultural awareness, and poor quality of legal advice, but also many others) and to formulate suggestions for change.[95]

Beyond the expertise of their own refugee experience that can contribute to identifying injustices in the refugee procedure, migrants and asylum seekers take part in the creation of what Tekalign Ayalew Mengiste calls "communities of knowledge," encompassing the knowledges that emerge through the multi-faceted, dispersed and fluid translational milieu of migration and mobility. For Mengiste, "communities of knowledge" means the

> diverse and dynamic strategies collectively devised and mobilized by migrants, their co-travellers, families and friends settled en route and in the

---

91 Pedro T. Magalhães and Laura Sumari, 'Methodological Nationalism and Migration Studies', in *Refugees and Knowledge Production*, by Magdalena Kmak and Heta Björklund, 1st ed. (Abingdon, Oxon: Routledge, 2022), 30.
92 Danisi et al., *Queering Asylum in Europe*, 25; Ashenden and Hess, *Between Utopia and Realism*.
93 Danisi et al., *Queering Asylum in Europe*.
94 Danisi et al., 24.
95 Danisi et al., 252.

diaspora, and friendly strangers and diverse facilitators to reduce risks in clandestine journeys and who allow for successful transits, while not discounting the violence and suffering encountered by migrants and refugees on their paths.[96]

One of the examples of such "community of knowledge" that is created across the travelled distance are so called "mobile commons" – a community of knowledge that links precarious mobilities with digital transformations,[97] and as the authors argue, these commons are crucial for the production of social life across the distance.[98] Since the commons mean natural and cultural resources that belong to communities or humanity and the ways to govern such resources, mobile commons are a new look at the nature and the role of these common resources.

> The *mobile commons* as such exist only to the extent that they are commonly produced by all the people in motion who are the only ones who can expand its content and meanings. This content is neither private, nor public, neither state-owned nor part of civil society discourse in the traditional sense of the terms; rather the mobile commons exist to the extent that people use the trails, tracks, or rights and continue to generate new ones as they are on the move [authors' emphasis],[99]

challenging and subverting the official and unofficial borders. In other words, mobile commons are praxis that operate at the informal level of the everyday existence of migrants living on the fringes of society that challenges urban spaces making them contested and reshaping them according to the contingent politics of everyday life.[100]

To be sure, such reliance on shared knowledges and other's help is often a necessity due to the lack of official information or knowledge. One of the interviewees in the book *Queering Asylum in Europe* describes how the lack of any information about the procedure in Italy causes confusion and harm and undermines asylum seekers' chances in obtaining protection:

> We come here the first time, as asylum seekers, we know nothing about the Italian system or anything. Then, like just I think within a week they gave us piece of paper to fill with our data and everything about our stories. A lot of us do not even know what we are writing. Some are still sick, very,

---

96 Ayalew Mengiste, 'Refugee Protections from Below', 63; Magalhães and Sumari, 'Methodological Nationalism and Migration Studies', 30–31.
97 Trimikliniotis, Parsanoglou, and Tsianos, *Mobile Commons, Migrant Digitalities and the Right to the City*, 12.
98 Trimikliniotis, Parsanoglou, and Tsianos, 12.
99 Trimikliniotis, Parsanoglou, and Tsianos, 53.
100 Trimikliniotis, Parsanoglou, and Tsianos, 99.

very sick, they have other people write it for them. Some have other people advise them, ah don't write this, write this, and it is not right. They make blunders, big mistake. (…) Then they submit it, without nobody educating them about the concept of the form they are filling. (…) You cannot even get a copy of that form – you have just few days to submit it, and that's this. (…) They photostated [photocopied] the form (…) 'go and write your story, go and write' (…) What can you write? (…) Then later, you start judging the same person by what the person wrote when his or her head was not in a stable state. It's not good. They should encourage them and inform them the minute they get here. Give them time to understand. Let them ask questions also.[101]

Channelling information through the communities of knowledge without an understanding of the legal provisions, others' legal status, or changes in the legislation may also have triggered sharing wrong information. Mervi Leppä-korpi in her doctoral dissertation studying interactions between irregularized migrants and their various civil society supporters in Hamburg, Stockholm, and Helsinki writes:

In interviews as well as during the participant observations, I was con-stantly confronted with misinformation about the relation between work and permits. Some of it related to ideas about 'European law' or, more concretely, expectations about harmonized legislation between the coun-tries of European Union (…). Other important source of misinformation was other migrant's experiences in earlier years or in different legal situa-tions. Misinformation about the possibilities of working was one of the most difficult ones to correct when people sought advice for their legal situation. Remarkably, many irregularized individuals were resistant to information if their expectations about access to the labour market had been overly optimistic.[102]

A lack of understanding of the administrative context of one's own case when presenting it to those who have the resources to advance it in relevant public instances, such as lawyers, might make a significant difference to the future of the person's case. For instance, discussing with a lawyer the right to work while not mentioning other issues such as a serious illness could prevent the person from regularising their status on the basis of such illness.[103] Similarly, lack of knowledge on the SOGI identity as a basis of persecution or focusing only on

101 Carmelo Danisi et al., *Queering Asylum in Europe: Legal and Social Experiences of Seeking International Protection on Grounds of Sexual Orientation and Gender Identity*, IMISCOE Research Series (Cham: Springer Nature, 2021), 168.
102 Leppäkorpi, 'In Search of a Normal Life: An Ethnography of Migrant Irregularity in Norther Europe', 134.
103 Leppäkorpi, 216.

one basis for protection, despite the intersectional asylum claim might prevent the person from having their case comprehensively considered. On a larger scale, such a lack of information and understanding may also lead to the general perception of the protection needs among different groups of asylum seekers, contributing to the "persisting culture of disbelief,"[104] and devaluation of refugee knowledges and experiences that I have discussed above. As researchers write, even though based on the conducted interviews the majority of interviewed migrants would fulfil criteria for refugee status or subsidiary protection. In many cases, their claims are rejected for reasons of disbelief in the risk of persecution in their country of origin, disbelief in claimants SOGI status, the argument of the possibility of internal relocation and that SOGI claimants could return to their home countries and be safe by living discretely.[105] This devaluation of knowledges that may seriously harm the rights of asylum seekers and other migrants are therefore countered by the communities of knowledge that support migrants in their everyday lives. There is a need to foreground, in various spheres of life, the shared and common knowledges and recognize the qualifications and skills of migrants. "[T]he subaltern can and indeed *do* speak; they speak back, but most importantly they act and inscribe social struggles."[106] Migrants for instance may argue for new forms of solidarities and connectivities that can reshape the dominant modes of citizenship[107] and challenge the culture of disbelief or belonging despite it. In the context of the *Sans-Papiers* movement Behrman argues that it could possibly have been the first-hand experience of extreme limitations of law as a tool for resisting the French migration policies that allowed the *Sans-Papiers* movement to be so successful.[108] They brought forward the narratives of belonging that could not have been contained within law and that paradoxically resulted in having their legal rights recognized.[109] Similarly, in the context of higher education, there is a need to depart from assessing qualifications and undervaluing non-European degrees and focus on learning and the actual levels of knowledge that refugees bring with them. This too highlights the historical embeddedness of these processes in the history of coloniality.[110]

> Knowledge production by and for refugees that is done in relation to these historical problems can demonstrate how hegemonies are not self-evidently dominant, they rely on struggles with residual and emergent ways of

104 Danisi et al., *Queering Asylum in Europe*, 313.
105 Danisi et al., 317.
106 Trimikliniotis, Parsanoglou, and Tsianos, 'Mobile Commons and/in Precarious Spaces: Mapping Migrant Struggles and Social Resistance', 239.
107 Trimikliniotis, Parsanoglou, and Tsianos, 239.
108 Behrman, *Law and Asylum: Space, Subject, Resistance*, 226.
109 Behrman, 240–245.
110 Rajaram, 'Refugee and Migrant Knowledge as Historical Narratives', 49.

knowing that can, if given enough attention, be the basis of new forms of political action.[111]

   In the final section of this chapter, I will focus on the methodology and ethics of working with and foregrounding mobile knowledges.

Methodology and ethics of studying mobile knowledges

I have argued so far that the role of mobile knowledges can be considered emancipatory when the historical, ontological, and practical aspects of these knowledges are taken into consideration. In this section, I look at the methodological and ethical implications of studying and using the knowledges generated by migrants and persons in refugee situation within academia, by the migrant supporting organizations and institutions, and by migrants and refugees themselves. When arguing for the inclusion of mobile knowledges and recognising their value for emancipatory change, the primary methodological and ethical question concerns who is considered an expert, how the knowledges are being collected, who uses and interprets these knowledges, and for what purpose. I argue that the emancipatory potential of mobile knowledges, including legal consciousness, can only emerge through a genuine "nothing about us without us" approach.[112] Any other approach risks reproducing historical processes of controlling and silencing knowledges that do not fit into dominant narratives. In particular, when foregrounding mobile knowledges, it is important to put attention on whether they are genuinely considered expert knowledges and whether even those knowledges or behaviours that are not considered right, or strategic from the dominant perspective are recognized as expert or valuable knowledge.

Who is an expert?

To be sure, migrants and people commonly called refugees are the best experts of their own experiences. Whereas migrants may not understand all nuances of the legal procedures, they do have a lot to report about both shortcomings and good practices of those procedures.[113] These knowledges can and should be translated into legal language.[114] This can mean, for instance, that mobile persons themselves, or alongside NGOs and other experts take part in the legislative or consultative processes, at national and international level.[115] As an

---

111 Rajaram, 50; See also Cantat, Cook, and Rajaram, *Opening up the University*.
112 See for instance Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford: Oxford University Press, 2012), 134.
113 Danisi et al., *Queering Asylum in Europe* 25.
114 Soirila, *The Law of Humanity Project*, 151.
115 See for instance Dana Schmalz, *Refugees, Democracy and the Law: A Deficit of Rights*, Law and Migration (Abingdon, Oxon; New York, NY: Routledge, 2020).

example, refugee participation has been referenced in the Global Compact on Refugees within the multi-stakeholder and partnership approach.[116] It can also mean different forms of research projects in critical jurisprudence or grounded in prefigurative thinking; for instance, projects aimed at rewriting existing jurisprudence from the perspective of migrants and refugees, that can foreground alternative imaginaries of legal systems and new forms of membership.[117]

Nevertheless, migrant participation in both legislation and legal research requires careful ethical consideration, in particular taking into account power relations when it comes to who is representing what types of knowledges.[118] As Leppäkorpi argues, referring to "migrant knowledges" becomes counterproductive when different interest groups such as researchers or NGOs emphasize their own goals and interests that reproduce the injustices related to *who speaks in the name of whom* and *who is an expert in the particular context*.[119] For instance, from the perspective of reporting human rights violations or other forms of injustices the power relations between different interest groups may reproduce the essentialized distinction between the violators, the passive and innocent victims, and the experts, where migrants' rights organizations as experts speak in the name of passive vulnerable migrants against the state as a rights violator, even if such course of action is based on mutual understanding.[120] Another problem may result from the fact that the knowledges that these organizations gain and later reproduce as expert work, are based only on information gathered from those seeking support from these organizations, which may skew their understanding of the scale, importance or generally the nature of the problem. This may lead to misunderstanding and misrepresentation of migrants' needs and interests in legislative processes.[121]

Particularly problematic is the use of migrant knowledges and experiences to gain expertise through an extractive relationship where migrant stories sustain organizations[122] or academic careers. As Leppäkorpi writes, "[t]he role of the administration and care within services transform seamlessly in association with professionalism as experts in the context of legislation."[123] Often organizations, institutions or researchers not only build their expertise but also perform their work and gather knowledge by using the underpaid or unpaid work

116 UN General Assembly, 'Global Compact on Refugees', Pub. L. No. A/RES/73/151 (2018), paras 3, 34, 106.
117 'Rewriting Jurisprudence: Centring Refugee and Migrant Lived Experience', https://law.anu.edu.au/rewriting-jurisprudence-centring-refugee-and-migrant-lived-experience (accessed 18.12.2022).
118 See Schmalz, *Refugees, Democracy and the Law*, 154, 161.
119 Leppäkorpi, 'In Search of a Normal Life: An Ethnography of Migrant Irregularity in Norther Europe'.
120 Leppäkorpi, 274.
121 Leppäkorpi, 277.
122 Leppäkorpi, 'In Search of a Normal Life: An Ethnography of Migrant Irregularity in Norther Europe', 274.
123 Leppäkorpi, 282.

of refugees as part of increasingly privatized and outsourced aid models.[124] As Nadine Hassouneh and Eliza Pascucci show in their research with people in a refugee situation from Syria working for international humanitarian NGOs in Jordan, gaining and producing knowledges about other refugees and their needs relies on those who have access to refugee communities and oftentimes have limited mobility themselves and, therefore, are dependent on underpaid work conditions. As Hassouneh and Pascucci write, "[m]any of those we met (…) referred to their limited access to mobility rights – through passports and visas – as a crucial determinant in their precarious working conditions, as well as in their relational construction as racialized subjects."[125] This points to inherent inequality between different forms of knowledges that these organizations reproduce. Similar problems persist also in academia. As Mayblin and Turner underline, Western scholars "write with authority about anywhere" and at the same time, those from outside these regions are often only allowed to write about *particular places* that Keguro Macharia calls as "being area-studied"[126] and Vatansever a "thematic apartheid."[127] In the same manner, the Peace Academics displaced in Europe highlight how they are "persistently expected to give talks, interviews, and lectures and do research on Turkey exclusively – regardless of their actual disciplines and research interests."[128]

What is an accepted knowledge or action?

In the context of mobile knowledges, in addition to the question of the expertise and its value, there is a question of the validity of mobile knowledges, activities, or campaigns; in particular, if they are not considered to be the most strategic, useful, or beneficial from the point of view of dominant knowledges. As I had already mentioned, in the case of academics, the useful knowledge may be the one that provides more information about their country of origins. In the context of legal procedure, this tendency is enshrined in the culture of disbelief. But such devaluation of knowledge may also concern what is important for migrants and when, as well as, how they prefer to advance their argument. For instance, as I discussed in the previous chapters, some migrants do not consider their lack of legal status as being the main point of concern or prefer to focus on the right to work first before even securing legal status. In addition, many do work and live fulfilling lives without the legal status itself.[129] One telling

---

124 Hassouneh and Pascucci, 'Nursing Trauma, Harvesting Data: Refugee Knowledge and Refugee Labour in the International Humanitarian Regime', 203.
125 Hassouneh and Pascucci, 208.
126 Lucy Mayblin and Joe Turner, *Migration Studies and Colonialism* (Cambridge: Polity Press, 2020); Keguro Macharia, 'On Being Area-Studied: A Litany of Complaint', *GLQ: A Journal of Lesbian and Gay Studies* 22, no. 2 (2016): 183–189.
127 Vatansever, *At the Margins of Academia*, 56.
128 Vatansever, 57.
129 Oudejans, 'The Right Not to Have Rights', 454.

example comes from Mervi Leppäkorpi's work who shows how migrants decide not to get engaged in activist and advocacy work because they do not consider such work productive in light of structural inequalities:

> We never really even considered participating. Besides this being out of our focus… I mean, if we oppose the nation-state, why would we participate in reforming it? The whole demand focused on a minor detail. Living sans-papiers is an awfully complex and complicated situation and minor improvements in rights may help certain individuals in difficult situations. But this derails the debate about the statuslessness. What comes after hospital? More grey economy and new sub-sub-sub-contracts in shady rental market. The threat of deportation does not vanish. I mean, of course we would not oppose it. But the whole debate was about the suffering individuals, and not about the migration regime as the main factor of their misery (Migrant Solidarity activist in interview, 2014).[130]

As Leppäkorpi comments, for these migrant organizations, participation in formal legislative processes is not considered emancipatory and "utopia is something else."[131]

What do those knowledges do?

Dominant ideas and structures are maintained by the control of knowledge production and by the deployment of the concepts that have been stabilized and naturalized such as state-nation-community mentioned by Rajaram. Mobile knowledges produced by and for people in the situation of displacement or those on the move have therefore a potential to make these dominant and stable concepts and narratives less self-evident and changeable. Minoritized ways of knowing can, therefore, if given enough attention, become a basis for different forms of resistance.[132] For instance, the refusal to participate in law-making as expressed in the statement by the Migrant Solidarity activist above is a refusal to participate in the existing system of racialization and exploitation enshrined in the system of global mobility infrastructure based on essentialized differentiation and exclusion of different groups of people. At the same time, insistence on work-based identity by other groups of migrants may be interpreted as reproduction of neoliberal forms of citizenship or may be a way to simply play

---

130 Leppäkorpi, 'In Search of a Normal Life: An Ethnography of Migrant Irregularity in Northern Europe', 271–272.
131 Mervi Leppäkorpi, 'In Search of a Normal Life: An Ethnography of Migrant Irregularity in Northern Europe' (Joensuu, University of Eastern Finland, 2021), 272; See also the discussion on Sans-Papiers movement in Simon Behrman, *Law and Asylum: Space, Subject, Resistance* (Abingdon, Oxon; New York, NY: Routledge, 2018).
132 Rajaram, 'Refugee and Migrant Knowledge as Historical Narratives', 41.

the dominant narratives in order to find one's own place and live a "normal life."[133]

To be sure, the development of one's identity in a condition of refuge or displacement is a multifaceted process that, on the one hand, deprives the individual of some aspects of their agency or of some constituents of themselves. At the same time, encountering different variations of the self creates conditions for forging new forms of agency and identity that is rooted in both own and shared experiences.[134] Writing about the experiences of de-subjectivation and re-subjectivation by Academics for Peace, Aslı Vatansever argues that the experience of academic precarity, shared between displaced scholars at risk and many local researchers at Western universities may stimulate new forms of subjectivity that transcend the binary logic of the opposition between self and other. Referring to Rosi Braidotti's work on nomadism, Vatansever argues that such new subjectivity can emit a sense of shared identity or being in it together.[135] One of Vatansever's informants has expressed their approach to their conditions as a displaced precarious academic and an attempt of re-subjectivation in such a manner:

> What I am trying to do now is to mobilize my intellect and the intellectual activities that I value, so that I can continue to pursue those activities anywhere in the world. And this sank in: I am trying not to make any life plans depending on a place, an institution, or a country anymore. I internalized the knowledge that anything can happen anytime. Thus, I am trying to come up with ideas for intellectual activities that I can continue to do wherever I should go in the world.[136]

To be sure an expression of the in-betweenness and belonging to anywhere in the world has also been expressed by historical figures such as lawyer – turned scholar of international relations John Herz who has called himself a traveller between all worlds.[137] For Vatansever, adopting the perspective of nomadic identity[138] could possibly lead to new collective and innovative modes of resistance against the structural conditions of precarity. In particular, as Rosi Braidotti argues in her book *Nomadic Theory*, nomadic perspective or nomadic identity can become a response to the concurrent presence of contradictory phenomena such as simultaneous enhancement and restriction of mobility that

133 Leppäkorpi, 'In Search of a Normal Life: An Ethnography of Migrant Irregularity in Northern Europe'.
134 Vatansever, *At the Margins of Academia*, 62.
135 Vatansever, 80.
136 Vatansever, 111.
137 Jana Puglierin, 'Towards Being a "Traveller between All Worlds"', *International Relations* 22, no. 4 (2008): 423.
138 Rosi Braidotti, *Nomadic Theory: The Portable Rosi Braidotti* (New York: Columbia University Press, 2012).

produce schizophrenic results and paradoxical situations which not only coexist with each other but also strengthen and support one another.[139] To be sure, nomadic theory and nomadic identity may allow for a different way of understanding the processes of coding and recoding migration and mobility from the perspective of the nation-state and generate resistance to the processes of racialization and precarization through dismantling dominant subjectivities and proposing at the same time sustainable alternatives. This undoing of subjectivities and identities produced by them happens through the process of nomadic becoming, which starts with recognition of existing inequalities and strives to use them in order to propose affirmative and transformative changes. According to Braidotti, "[b]ecoming nomadic means that one learns to reinvent oneself and one desires the self as a process of transformation."[140] The starting point of this process of becoming differs depending on whether one starts from the majoritarian or minoritarian position. For the majority, the process can only begin with undoing their dominant position. "For real-life minorities however, the pattern is different: women, blacks, youth, postcolonial subjects, migrants, exiled, and homeless may first need to go through an 'identity politics' – of claiming a fixed location." In other words, they need to recognize their position and emphasize their specificity as a starting point for the process of redefining subjectivities.[141] Such strategy was adopted for instance by *Sans-Papiers* who claimed a new subjectivity, deriving not from their *illegal* status as *clandestins* but based on a right to belong as derived from the right of movement and the duties owed by France to former colonial subjects.[142] Ultimately, however, challenging those subjectivities and dismantling identities happens amidst constant tensions between the processes of stabilising identities and fragmenting it, as a result of the process of working on the self.[143] The desire to belong in a multiple manner has, therefore, a potential that can transcend the classical bilateralism of binary identities such as those of us and others or citizen and a foreigner.[144]

However, the aim of the processes of de-subjectivation and re-subjectivations that stem from mobile knowledges and experiences is not only a change of the self of a person in the condition of refuge or displacement, but a change of majoritarian selves. Becoming ethical[145] in the face of mobile knowledges

139 Braidotti, 11–12.
140 Braidotti, 42.
141 Braidotti, 41.
142 Behrman, *Law and Asylum: Space, Subject, Resistance*, 202; Anne McNevin, *Contesting Citizenship: Irregular Migrants and New Frontiers of the Political* (New York: Columbia University Press, 2011), 113.
143 Rosi Braidotti, Claire Colebrook, and Patrick Hanafin, eds., *Deleuze and Law: Forensic Futures* (Basingstoke: Palgrave Macmillan, 2009), 55.
144 Braidotti, *Nomadic Theory*, 322.
145 Rosi Braidotti, 'The New Activism: A Plea for Affirmative Ethics', in *Art and Activism in the Age of Globalization*, ed. Lieven De Cauter, R. De Roo, and Karel Arnaut (Rotterdam: nai010 uitgevers/publishers, 2012), 264–270.

requires as such a recognition of the injustices embedded in the contemporary system of the nation-states rooted in modernity/coloniality and undertaking activities aiming towards addressing these injustices. For instance, in the context of research, it is essential that the new scholarship within the broad field of migration studies does not reproduce the dominant modes of knowledge production, and seriously treats ethical implications of conducting work within the field of migration studies.[146] Doing research requires constant and continuous self-reflexivity regarding multiple positionalities and power (a)symmetries but also questioning the naturalized role of the nation-state as orienting scientific disciplines. In particular, numerous challenges emerge in research that focus on displaced migrants and refugees, that include, for instance, the power relations embedded in the context of the research, the precarious legal statuses, and vulnerable positions that many migrants might be in (that also do not amount to essentialising these precarities and vulnerabilities) and also importantly the politicization of migration issues in society at large.[147] In the context of humanitarian work and research, this may include re-evaluation of the working conditions of migrant researchers, recognition of their work, data stewardship as well as data sharing and data protection.[148] Finally, in the context of teaching, this may mean including educational programmes for refugees and recognition of the diverse experiences,[149] skills, and competences of students and learners – ideas enshrined in diverse projects on inclusive higher education such as the Open Learning Initiative[150] or Inclusive Higher Education[151] that argue for the creation of inclusive educational programmes for learners,[152] or initiatives such as Call to Action: Dismantling Antiblackness in Finnish Higher Education.[153]

Conclusions

In this chapter, I have analysed mobile knowledges as a particular form of resistance to the static concept of the nation-state. Such perspective emphasizes

146 Johanna Leinonen et al., 'Ethics of Studying Forced Migration: Critical Questions to Consider', *Liikkeessä Yli Rajojen* (blog), 21 December 2020, https://liikkeessaylira jojen.fi/ethics-of-studying-forced-migration-critical-questions-to-consider/ (18.12.2022).
147 Leinonen et al.
148 Hassouneh and Pascucci, 'Nursing Trauma, Harvesting Data: Refugee Knowledge and Refugee Labour in the International Humanitarian Regime', 210.
149 Bell Hooks, 'Essentialism and Experience', *American Literary History* 3, no. 1 (1991): 172–183.
150 'Open Learning Initiative', accessed 16 November 2022, https://olive.ceu.edu.
151 'Designing and Supporting Inclusive Practices in Higher Education', accessed 16 November 2022, https://inclusivehe.eu/en/.
152 Cantat, Cook, and Rajaram, *Opening up the University*, 7.
153 'Dismantling Antiblackness in Finnish Higher Education (Call to Action)', Raster.fi, 22 November 2021, https://raster.fi/2021/11/22/dismantling-antiblackness-in-finnish-u niversities-call-to-action/, accessed 26 April 2023.

both the agency of the mobile persons and approaches mobility through a novel perspective as a method of studying and producing law. This chapter argues for more emphasis on a direction in research that studies more comprehensively the knowledges produced through the experience of forced displacement and migration, or the knowledges facilitating the movement itself.

In this chapter I first conceptualized the epistemological role of mobility for knowledge production in general and then turned to juxtaposing the dominant and mobile knowledges. I recounted the dominant knowledges of migrants and refugees that are perpetuated by media and politicians, seeing migrants as a source of crises or flows, that need to be managed, as vulnerable objects that need to be helped, as a security threat, or as saviours in times of demographic crisis. These knowledges were then juxtaposed with mobile knowledges by the people on the move, in particular, to the ways law is being understood, researched, and embodied by persons on the move and directly affected by it. In the last part of the chapter, I developed a more comprehensive understanding of movement and mobility as the method of studying and resisting law and outlined methodological and ethical concerns for studying such knowledges.

Through the focus on mobile epistemology or mobile knowledges, this chapter juxtaposed methodological nationalism and the state-based concept of belonging with communities of knowledges that encompass not only knowledges of law but also experiences of living and acting with, along, or against the law. By countering the official knowledges, mobile knowledges contribute to the resistive tension that lies at the very centre of power relations in the state. Importantly, they cut across the divide between mobility as resistance from the outside of law and from within law and, therefore, allow for more complex and multifaceted perspectives on law, unsettle the dominant categories, and generate new legal strategies. Importantly, mobile knowledges and experiences have a potential to not only support re-subjectivation of the mobile persons themselves, but also contribute to a change of majoritarian selves – becoming ethical in the face of mobile knowledges requires as such a recognition of the injustices embedded in the contemporary system of the nation-states rooted in modernity/coloniality and undertaking activities aiming towards addressing these injustices.

Conclusions

The aim of this book has been to fill in the gap in research on the relationship between law and mobility and understand the multifaceted ways in which law and mobility function together. The point of departure for this task was migration law, traditionally understood as a tool to regulate human movement across borders and territories, and to define the rights and limits related to such movement. The shift of perspective changed the focus from the narrow subject of migration towards the concept of mobility encompassing the processes, effects, and consequences of movement in a globalized world.[1] In particular, this new perspective emphasizes the constitutive role that mobility has for law but also the differential mobility as a product of law. In concrete terms, the book focuses on legal regulations and legal institutions such as nation-state or citizenship as fundamentally unstable and in constant process of construction and deconstruction; existing power-relations between different laws and regulations; movement and also corresponding (im)mobilities that are generated by law; and law as known to or experienced by mobile persons themselves. The book responds to an increasing interest in the movement of law. As Olivia Barr argued "(…) the relationship between law and movement has shifted from no relationship to an unseen and hidden one, to one of destinations, and finally to one of relentless and constant activity."[2] Yet, the work on *mobile law*, that looks at complexities and interrelations between the regimes of human mobility and law has not been very extensive.[3]

1 Peter Adey, ed., *The Routledge Handbook of Mobilities* (Abingdon, Oxon: Routledge, 2014).
2 Olivia Barr, *A Jurisprudence of Movement: Common Law, Walking, Unsettling Place*, 2016.
3 See however recently initiated University of Michigan *Journal of Law and Mobility* focusing on the relationship between transportation and mobility technologies as well as automated and connected mobility systems, as well as for instance Franz von Benda-Beckmann, Keebet von Benda-Beckmann, and Anne Griffiths, *Mobile People, Mobile Law: Expanding Legal Relations in a Contracting World* (Abingdon, Oxon; New York, NY: Routledge, 2005); Hagar Kotef, *Movement and the Ordering of Freedom: On Liberal Governances of Mobility*, Perverse Modernities (Durham, NC; London: Duke University Press, 2015); Barr, *A Jurisprudence of Movement*, 2016;

Law has been presenting itself as static due to its traditional understanding as a tool of a state, usually itself considered as a stable form of societal organization.[4] The linkage of law with the nation-state and the state territory, that results in stabilising and solidifying law, has been crucial for the construction of the modern nation-state where the nation, its identity, is perceived as something unified and singular.[5] To produce and maintain the *perception of stability* of the nation-state national and international law regulates the access to state membership and controls the movement across geographical borders. In other words, the perception of stability of the nation-state emerges from the attempt to define an inherently unstable entity which is a state, through various legal and other measures.[6] In addition, the perceived stability of law is also a result of the function of law in the democratic state, that is based on the rule of law, where law has to be clear, stable, public, and universal. These features also hide the mobility of law. The purpose of these features is to guarantee equality and non-discrimination; however, these guarantees are often not realized in concrete embodied, material situations.[7] The stability of law is, first and foremost, a disguise that is caused by law's linkage with territory, without which a modern nation-state would not exist. The second reason is that the universal law disguises its own uneven operation in the actual, gendered, racialized, or classed bodies. The aim of this book has been therefore to understand how the law moves and what it does through this movement.

Theoretically, the book is located within the broad field of mobility studies[8] that understand mobility, movement, and circulation as the ontological and epistemological condition of our societies.[9] I have referred in particular to the

Olivia Barr, 'An Homage to Legal Drips, Wobbles and Perpetual Motion', in *Routledge Handbook of Law and Theory*, ed. Andreas Philippopoulos-Mihalopoulos, Routledge Handbooks (Abingdon, Oxon; New York, NY: Routledge, 2019); Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge-Cavendish, 2009); Peter Fitzpatrick, *Law as Resistance: Modernism, Imperialism, Legalism* (Abingdon, Oxon; New York, NY: Routledge, 2008); Andreas Philippopoulos-Mihalopoulos, *Spatial Justice: Body, Lawscape, Atmosphere*, (Abingdon, Oxon: Routledge, 2015).

4   Olivia Barr, *A Jurisprudence of Movement: Common Law, Walking, Unsettling Place* (Abingdon, Oxon; New York, NY: Routledge, 2016), 139.

5   Peter Fitzpatrick, *Law as Resistance: Modernism, Imperialism, Legalism* (Abingdon, Oxon; New York, NY: Routledge, 2008), 239.

6   Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge: Cambridge University Press, 2008), 45.

7   Andreas Philippopoulos-Mihalopoulos, *Spatial Justice: Body, Lawscape, Atmosphere*, 1. publ, Space, Materiality and the Normative (Abingdon, Oxon: Routledge, 2015), 36.

8   Mimi Sheller and John Urry, 'The New Mobilities Paradigm', *Environment and Planning A: Economy and Space* 38, no. 2 (February 2006): 207–226; Peter Adey, ed., *The Routledge Handbook of Mobilities* (Abingdon, Oxon: Routledge, 2014).

9   Mimi Sheller, *Mobility Justice: The Politics of Movement in the Age of Extremes* (London; Brooklyn, NY: Verso, 2018), (iBooks) 62.

theory of kinopolitics developed by Thomas Nail,[10] that argues for the primacy of movement and implies the need for tracing the processes that construct static forms – such as state, citizenship, or border – as being stable and, in consequence, reveal their unstable nature and understand the purpose and effect of their operation in a particular point of time. This approach has been coupled with the theory of mobility justice developed by Mimi Sheller,[11] that "focuses attention on the politics of unequal capabilities for movement, as well as on unequal rights to stay or to dwell in a place."[12] In other words, the book approached mobility critically challenging the modern understanding of mobility as *freedom*.[13] From the perspective of postcolonial and decolonial approaches to mobility,[14] it must be disentangled from *freedom* and be understood as a technique for governing different forms of movement. The use of mobility as a theoretical lens reveals therefore the power structure embedded in regulation of mobility in the global North orienting the practices and policies related to movement.[15] In particular, the book shows how such institutions as borders and citizenship in combination with the global mobility infrastructure as well as social constructs such as race, gender, or class produce and maintain unequal mobility for the benefit of the global North. At the same time the book has also been interested in the resistive tension in relationship between law and mobility and approached mobility as a tool to open spaces of resistance both within and outside law.

In order to understand and problematize the construction of unequal mobility in law the book first applied the mobility lens to the relationship between law and the nation-state. It showed how the nation-state itself is an unstable entity produced through the discursive practices and processes of de-territorialization and re-territorialization. Law is one of such discursive practices that can sort people into categories and produce concepts such as a citizen or a foreigner. Law can also regulate the movement of people or goods across national borders, consolidating the state and providing it with a stable form and identity.[16] Revealing the unstable quality of the state contributed to the shift of perception of law as mobile. I have identified four interrelated modes of the movement of law: through the movement of people embodying law;

10   Thomas Nail, *Being and Motion* (New York, NY: Oxford University Press, U.S.A., 2019).
11   Sheller, *Mobility Justice*.
12   Sheller, 31 (iBooks).
13   N De Genova et al., 'Minor Keywords of Political Theory: Migration as a Critical Standpoint A Collaborative Project of Collective Writing', *Environment and Planning C: Politics and Space*, 9 March 2021, 3.
14   N De Genova et al., 'Minor Keywords of Political Theory: Migration as a Critical Standpoint. A Collaborative Project of Collective Writing', *Environment and Planning C: Politics and Space*, 9 March 2021, 3.
15   De Genova et al., 40.
16   Manuel De Landa, *Assemblage Theory*, Speculative Realism (Edinburgh: Edinburgh University Press, 2016), 38–39.

through the movement of concepts in transnational or international organizations; through law's interactions with other laws as well as with society, politics, and the economy; as well as in mobility as a quality of law. Applying mobility lens to nation-state and law has helped to change the perspective from the universal mobile subject to mobility's further concrete materializations in the lives of those who are moving across international borders. It also allowed enquiry into the methods and strategies through which mobilities can resist, affect, or change law.

The problematization of the concept of the *universal mobile subject* revealed the distinction between *orderly* and *disorderly* mobility – a legacy of modernity/coloniality[17] – constituting the backbone of the contemporary nation-state system and orienting our perception of statehood, community, and law as stable. This system operates through the juridico-political concept of citizenship and the regulation of access to membership and belonging. Citizenship both embeds and produces the distinction between modern and (formerly) colonial subjects through determining their differential ability to move and to be included into community. Citizenship means inclusion into the community of the state; however, the existence of the community, and its boundedness necessarily requires what is outside of it and at the same time cannot be included.[18] This reveals a paradox of the modern universal subject and the nation-state for the construction of which the universal subject is needed. For the nation to be universal, it has to exclude the Other and, therefore, fails in its universality.[19] The nation-state monopolizes legitimate means of movement and supports the movement of those that are included as desirable members of the nation.[20]

In Chapters 2 and 3 I showed how the privileged mobility of citizens has been necessarily juxtaposed with restrictions or exclusions of other forms of mobility, both within and across borders, through the restricted access to the means of movement or the global mobility infrastructure. I problematized what has been traditionally called the right to the freedom of movement and showed how the shift from the content to the productive function of law warrants calling it *mobility as a right* instead. From this perspective, mobility as a right, together with corresponding immobility, is managed and controlled through the institution of citizenship.[21] Citizenship has been historically constructed through the rules governing the residence and movement of people between territories and

---

17 Lucy Mayblin, *Asylum after Empire: Colonial Legacies in the Politics of Asylum Seeking*, Kilombo: International Relations and Colonial Questions (London; New York: Rowman & Littlefield International, 2017), 30.

18 Linda Bosniak, 'Making Sense of Citizenship', *Issues in Legal Scholarship* 9, no. 1 (24 January 2011), 3.

19 Fitzpatrick, *Law as Resistance: Modernism, Imperialism, Legalism*, 76.

20 Thomas Nail, *Theory of the Border* (Oxford; New York: Oxford University Press, 2016), 146.

21 Dimitry Kochenov, *Citizenship*, The MIT Press Essential Knowledge Series (Cambridge, Massachusetts; London, England: The MIT Press, 2019), 16.

through borders, including some and excluding others. Approaching citizenship from perspective of mobility undermines the idea of universal equality between citizens by shifting focus towards differential belonging, justifying exclusion and normalising discrimination between different human beings based on their link with concrete nation-states. By looking at citizenship through the lens of (im) mobility I showed how citizenship has been gendered, racialized, or minoritized, and how these facets affect the contemporary right to the freedom of movement.[22] In Chapter 3 I shifted focus from *mobility as a right* towards *mobility as a violation of law*. In particular, the chapter focused on the origins and implications of the international legal doctrine of sovereign control of migration,[23] that applies at the geographical borders of the state but also increasingly within and outside the state. I argued that this doctrine does not only enforce the right to control mobility but turns certain mobilities into a *violation of law*. In particular, this doctrine contributes to differential exclusions of various groups of mobile persons and together with mobility as a right perpetuates the distinction of mobility into orderly and disorderly. I also showed how mobility as a violation of law has been maintained in international and national law of the global North through the different forms of distinction-making coded in migration law. The over-encompassing role of migration law has been to strengthen state legitimacy and sovereignty exposed as unstable by the processes of globalization. I showed that it is not so that state legitimacy is grounded in sovereignty, but it is rather sovereignty that requires constant reinforcement for its legitimacy and relevance.[24] That happens through the multifaceted processes of bordering, securitization, or criminalization, that take place within and outside the territory of the state and affect not only their legal status but also all aspects of migrant lives. Some of these processes can be described as overspill of migration law into other areas of law – into citizenship law and into criminal law – turning these laws into migration control measures.

Through these analyses on mobility as a right and mobility as a violation of law I have built a basis for further discussion in the book on the possibility of resistance to the nation-state as constructed through modernity/coloniality. To be sure, applying mobility lens to stabilized legal concepts and revealing their

22 Sheller, *Mobility Justice*.
23 Karin de Vries and Thomas Spijkerboer, 'Race and the Regulation of International Migration. The Ongoing Impact of Colonialism in the Case Law of The European Court of Human Rights', *Netherlands Quarterly of Human Rights* 39, no. 4 (December 2021): 291–307; Thomas Spijkerboer, 'Coloniality and Recent European Migration Case Law', in *Migrants' Rights, Populism and Legal Resilience in Europe*, ed. Vladislava Stoyanova and Stijn Smet, 1st ed. (Cambridge: Cambridge University Press, 2022), 117–138; Thomas Spijkerboer, 'The Geopolitics of Knowledge Production in International Migration Law', in *Research Handbook on the Law and Politics of Migration*, by Catherine Dauvergne (Cheltenham, UK: Edward Elgar Publishing, 2021): 172–188.
24 See also Ranabir Samaddar, *The Postcolonial Age of Migration* (Abingdon, Oxon; New York: Routledge, 2020), 53.

instability also rises questions of a possibility of resistance towards such domi-
nant structures organising human movement in the global North. I shifted my
focus therefore towards the gap between the legal measures as codified in law
and their implementation in concrete cases conceptualizing this gap as a space
of resistance. Following Michel Foucault, I defined resistance as an inherent and
necessary element of every power relation[25] focusing in particular on resistive
tension embedded in the differential international mobility.[26] I argued that in
order to understand the potential of mobility as resistance, mobility needs to
become a central focus of the power relation between law and the people on the
move.[27] Therefore, in Chapter 4 I discussed the relationship between law and
resistance in the context of *orderly* and *disorderly* mobility, focusing on tradi-
tional ways of mobilizing law within the limits of the nation-state and its bor-
ders but also shifting focus towards mobility itself as resistance to law on the
one hand and mobile law as a possible form of resistance towards the national
order of things on the other. I argued that protection in a form of human rights
can be effectively claimed only by those who move in an orderly fashion and
are, therefore, already included into the global mobility infrastructure where
refusal of entry or expulsion is an exception. In such cases, migrants can call on
human rights for their defence. In the context of the disorderly movement,
rights are often linked with migrants' own conduct and are only available on a
minimal level often in a form of humanitarian protection,[28] and mostly to those
particularly vulnerable.[29] For those whose mobility is characterized as dis-
orderly and whose rights have not been protected sufficiently, mobility itself has
been a form of resistance against the exclusionary law of the global North. This
has been particularly visible when analysing the role of the *Sans-Papiers* move-
ment, the strength of which lay in the refusal of legal categorizations imposed
upon the members by the French law but also in challenging the premise that
they must use existing legal means to support their individual right to stay in
France.[30] In particular *Sans-Papiers* have challenged the existing legal system
through re-establishing themselves as active subjects and rejecting the sub-
jectivities imposed on them by the law. The refusal to engage with law, as well

---

25 Michel Foucault, *The History of Sexuality: The Will to Knowledge: The Will to
   Knowledge v. 1*, trans. Robert Hurley, New Ed edition (Harmondsworth: Penguin,
   1998), 95.
26 Simon Thorpe, 'In Defence of Foucault: The Incessancy of Resistance', *Critical
   Legal Thinking* (blog), 2 July 2012, https://criticallegalthinking.com/2012/02/07/in-de
   fence-of-foucault-the-incessancy-of-resistance/.
27 Samaddar, *The Postcolonial Age of Migration*, 233.
28 Deanna Dadusc and Pierpaolo Mudu, 'Care without Control: The Humanitarian
   Industrial Complex and the Criminalization of Solidarity', *Geopolitics*, 17 April
   2020, 1–26.
29 Fabio Macioce, 'Undocumented Migrants, Vulnerability and Strategies of Inclusion.
   A Philosophical Perspective', *Constellations* 25 (2018).
30 Simon Behrman, *Law and Asylum: Space, Subject, Resistance* (Abingdon, Oxon;
   New York, NY: Routledge, 2018), 4.

as the refusal of the pressure to accept legal categories as a basis of their differential exclusion, paradoxically restored legal protection for many of the *Sans-Papiers*.

Also, other strategies adopted to challenge the nation-state machine through mobility reveal new ways of thinking about law and mobility, challenging the national order of things. This can happen for instance through rethinking the role of sovereignty and strengthening law's universality within the contemporary system of nation-states but also by building on mobility as an emancipatory force in itself in the context of the right to have rights[31] and the right not to have rights,[32] concepts such as illegal,[33] or transgressive citizenship,[34] as well as, the right to social membership,[35] and redistributive function of migration.[36] To be sure, focus on mobility of law opened up possibilities to challenge perceived stability of law as related to law's territoriality as well as stability of legal concepts and emphasizes law's relationality. For instance, non-orderly mobility is not only a product, but also in itself a resistance to the national order of things having its origins in modernity/coloniality milieu. At the same time, law, carried by people, moves across the globe and this can affect law in the place of arrival but also in the place of departure. In addition, mobile subjects bring with them the knowledges gained through mobility that not only can be included in the process of law-making but also contribute to the construction of new forms of belonging. Increased attention to knowledges and epistemologies from the global South can problematize the one-sided understanding of law as supporting the interests of the global North. Borders as perceived from the mobility perspective stop being only spaces and processes of distinction-making but meeting places where relationality can be inscribed into law, bridging the gap between different laws, different legal categories, and legal positionalities. This may happen for instance, through emphasising shared rather than differing features of various subjects such as shared precarity. In turn, movement as a quality of law implies constant negotiation between openness and closeness that can expand our understanding of social reality and provide us with emancipatory possibilities but can sometimes narrow down our worlds and limit our rights. Differential repetition of law can create a space in between the openness and closeness of law shifting attention to the potentiality of the tension between the actual and the possible. Centring mobility as primary in human mobility–law relationship opens up possibilities for reinterpretation of this

---

31 Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law*; Gündoğdu, *Rightlessness in an Age of Rights*.
32 Oudejans, 'The Right Not to Have Rights'.
33 Rigo, 'Citizens despite Borders: Challenges to the Territorial Order of Europe'.
34 Rygiel, 'Dying to Live: Migrant Deaths and Citizenship Politics along European Borders: Transgressions, Disruptions, and Mobilizations'.
35 Carens, *The Ethics of Immigration*.
36 E. Tendayi Achiume, 'Migration as Decolonization', *Stanford Law Review* 71 (2019): 1509–1574.

relationship. At the same time, it is important to understand that law's mobility, does not in itself guarantee emancipation and there is nothing inherently emancipatory in law's movement. The law moves, but the directions and implications of this movement depend on many elements that are rooted in societal organization, desires, and sentiments.[37] These sentiments can however be affected by greater understanding of experiences of law and inclusion of legal knowledges based on mobility in law and policymaking. In Chapter 5 I argue that in order to understand and benefit from the full potential of mobile knowledges rooted in experiences of movement and displacement, one needs to put attention on the historical, ontological, and practical aspects of mobile knowledges. Bringing historicized knowledges produced by and for people known as refugees show yet again that dominant and stable concepts and narratives are not self-evident. Foregrounding minoritized ways of knowing can, when given enough attention, be the basis of new forms of political action.[38] Rethinking legal concepts that are used in the context of mobility such as the nation-state, citizen, or foreigner allows for rethinking the legal position of people that are categorized according to these concepts. Finally, individual, and communal knowledges and experiences of these concepts could be translated into legal and political language.[39] This can mean, for instance, that migrants and refugees take part in the legislative or consultative processes, but it can also include such academic projects grounded in the figure of the migrant,[40] as rewriting existing jurisprudence from the perspective of migrants and refugees,[41] that can foreground alternative imaginaries of legal systems.

Ultimately however, this book does not and cannot propose any comprehensive solution to the modernity/coloniality paradigm and it's structuring of the field of migration law in the global North. To be sure, there is no emancipation in the legal system that is rooted in colonialism. As Achille Mbembe argues, emancipation cannot happen from the Western perspective that is based on the idea of the bordered world.[42] However, proposing the conceptual shift from static to mobile, coupled with the understanding of liberal subjectivity as

37 Alexandre Lefebvre, *The Image of Law: Deleuze, Bergson, Spinoza*, Cultural Memory in the Present (Stanford, Calif: Stanford University Press, 2009), 101.
38 Prem Kuman Rajaram, 'Refugee and Migrant Knowledge as Historical Narratives', in *Refugees and Knowledge Production: Europe's Past and Present*, ed. Magdalena Kmak and Heta Björklund (Abingdon, Oxon: Routledge, 2022), 41.
39 Ukri Soirila, *The Law of Humanity Project: A Story of International Law Reform and State-Making*, Studies in International Law, volume 82 (Oxford, UK; New York, NY: Hart Publishing, an imprint of Bloomsbury Publishing, 2021), 151.
40 Thomas Nail, *The Figure of the Migrant*, 1 edition (Stanford, California: Stanford University Press, 2015).
41 'Rewriting Jurisprudence: Centring Refugee and Migrant Lived Experience', n.d., https://law.anu.edu.au/rewriting-jurisprudence-centring-refugee-and-migrant-lived-experience.
42 Achille Mbembe, 'The Idea of a Borderless World', *Africa Is a Country*, 2018, https://africasacountry.com/2018/11/the-idea-of-a-borderless-world, accessed 26 April 2023

orderly mobility, opens up some possibilities for change. First, recognition that the nation-state is only a temporary stability as is the system of migration rooted in it, allows for a better diagnosis of the phenomenon of migration management through law. Such management can never result in complete control. Shifting attention to the gap between law and the practice of migration control opens up a fuzzy space of movement of law where law has a potential to become closest to the existing embodied realities. Importantly, the lack of full control does not pose any danger to law, which can apply by no longer applying.[43] Secondly, a shift towards knowledges of persons who have experienced law, and inclusion of these knowledges into law and policymaking can be used to further emancipatory developments. It allows one to imagine different forms of societal organization and different forms of belonging, based on an expanded concept of the own state, on solidarity or common precarity. Importantly the analysed examples show that belonging cannot be negotiated and acquired based on law itself. Thirdly, mobile knowledges create potential for a change also of majoritarian selves. They open up the possibility of becoming ethical[44] in the face of mobile knowledges. In the case of law, this requires a recognition of the injustices embedded in the contemporary system of the nation-states rooted in modernity/coloniality and undertaking activities aiming towards addressing these injustices through law. Understanding the deep colonial structure of law and injustices caused by it allows for its critique but can also orient future jurisprudence by affecting the outcomes of formal interpretation of law.[45]

43 Nanda Oudejans, 'The Right Not to Have Rights: A New Perspective on Irregular Immigration', *Political Theory* 47, no. 4 (August 2019): 447–474.
44 Rosi Braidotti, 'The New Activism: A Plea for Affirmative Ethics', in *Art and Activism in the Age of Globalization*, ed. Lieven De Cauter, R. De Roo, and Karel Arnaut (Rotterdam: nai010 uitgevers/publishers, 2012), 264–270.
45 Thomas Spijkerboer, 'Coloniality and Recent European Migration Case Law', in *Migrants' Rights, Populism and Legal Resilience in Europe*, ed. Vladislava Stoyanova and Stijn Smet, 1st ed. (Cambrindge: Cambridge University Press, 2022), 117–38, 137.

Bibliography

Literature and media

Aas, Katja Franko. 'Bordered Penality: Precarious Membership and Abnormal Justice'. *Punishment & Society* 16, no. 5 (December 2014): 520–541. https://doi.org/10.1177/1462474514548807.

Aas, Katja Franko. '"Crimmigrant" Bodies and Bona Fide Travelers: Surveillance, Citizenship and Global Governance'. *Theoretical Criminology* 15, no. 3 (August 2011): 331–346. https://doi.org/10.1177/1362480610396643.

Aas, Katja Franko, and Mary Bosworth, eds. *The Borders of Punishment: Migration, Citizenship, and Social Exclusion*. 1st edition. Oxford, UK: Oxford University Press, 2013.

Abram, Simone, Bela Feldman Bianco, Shahram Khosravi, Noel Salazar, and Nicholas de Genova. 'The Free Movement of People around the World Would Be Utopian: IUAES World Congress 2013: Evolving Humanity, Emerging Worlds, 5–10 August 2013'. *Identities* 24, no. 2 (4 March 2017): 123–155. https://doi.org/10.1080/1070289X.2016.1142879.

Achiume, E. Tendayi. 'Migration as Decolonization'. *Stanford Law Review* 71 (2019): 1509–1574.

Acosta Arcarazo, Diego. *The National versus the Foreigner in South America: 200 Years of Migration and Citizenship Law*. Law in Context. Cambridge, UK; New York, USA: Cambridge University, 2018.

Adey, Peter, David Bissell, Kevin Hannam, Peter Merriman, and Mimi Sheller, eds. *The Routledge Handbook of Mobilities*. Abingdon, Oxon: Routledge, 2014.

Agamben, Giorgio. *Means without End: Notes on Politics*. Translated by Vincenzo Binetti, and Cesare Casarino, Minneapolis: University of Minnesota Press, 2000.

Agence France-Presse in Helsinki. 'Finland Passes Law to Bolster Border Fence with Russia'. *The Guardian*, 7 July 2022. https://www.theguardian.com/world/2022/jul/07/finland-passes-law-to-bolster-border-fence-with-russia.

Albertson Fineman, Martha. 'Equality, Autonomy, and the Vulnerable Subject in Law and Politics'. In *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics*, edited by Martha Albertson Fineman and Anna Grear, 13–28. London: Ashgate, 2013.

Aleinikoff, T. Alexander. 'Toward a Global System of Human Mobility: Three Thoughts'. *AJIL Unbound* 111 (2017): 24–28. https://doi.org/10.1017/aju.2017.8.

Ali, Ali. 'Reframing the Subject. Affective Knowledge in the Urgency of Refuge'. In *Refugees and Knowledge Production: Europe's Past and Present*, edited by Magdalena Kmak and Heta Björklund, 182–198. London; New York: Routledge, 2022.

Aliverti, Anna. 'Making People Criminal: The Role of the Criminal Law in Immigration Enforcement'. *Theoretical Criminology* 16, no. 4 (2012): 417–434. https://doi.org/10.1177/1362480612449779.

Anderson, Bridget, Matthew J. Gibney, and Emanuela Paoletti. 'Citizenship, Deportation and the Boundaries of Belonging'. *Citizenship Studies* 15, no. 5 (2011): 547–563. https://doi.org/10.1080/13621025.2011.583787.

Anderson, David. *Citizenship Removal Resulting in Statelessness: First Report of the Independent Reviewer on the Operation of the Power to Remove Citizenship Obtained by Naturalisation from Persons Who Have No Citizenship*. HM Government, 2016.

Andrade, Vítor Lopes, Carmelo Danisi, Moira Dustin, Nuno Ferreira, and Nina Held. *Queering Asylum in Europe: A Survey Report*. Brighton: University of Sussex, 2020. https://www.researchgate.net/profile/Nuno-Ferreira-27/publication/342961863_Queering_Asylum_in_Europe_A_Survey_Report/links/5f0f6cdb45851512999bd22a/Queering-Asylum-in-Europe-A-Survey-Report.pdf.

Anghie, Antony. *Imperialism, Sovereignty and the Making of International Law*. 1st ed. Cambridge: Cambridge University Press, 2005. https://doi.org/10.1017/CBO9780511614262.

Anthias, Floya. *Translocational Belongings: Intersectional Dilemmas and Social Inequalities*. 1st ed. Routledge Research in Race and Ethnicity. Oxford; New York: Routledge, 2020. https://doi.org/10.4324/9780203730256.

Arendt, Hannah. *The Origins of Totalitarianism*. New York: A Harvest Book, Harcourt Inc., 1985.

Arendt, Hannah. 'We Refugees'. In *The Jewish Writings*, edited by Jerome Kohn and Ron H. Feldman. New York: Schocken Books, 2007.

Armstrong, Ashley Binetti. 'You Shall Not Pass! How the Dublin System Fueled Fortress Europe', *Chicago Journal of International Law* 20, no. 2 (1 January 2020): 332–383.

Armstrong, Chris. 'The Price of Selling Citizenship'. In *Debating Transformations of National Citizenship*, edited by Rainer Bauböck, 25–28. IMISCOE Research Series. Cham: Springer International Publishing, 2018. https://doi.org/10.1007/978-3-319-92719-0.

Ash, Mitchell G., and Alfons Söllner, eds. *Forced Migration and Scientific Change: Émigré German-Speaking Scientists and Scholars after 1933*. Cambridge: Cambridge University Press, 1996.

Ashenden, Samantha, and Andreas Hess, eds. *Between Utopia and Realism: The Political Thought of Judith N. Shklar*. 1st edition. Haney Foundation Series. Philadelphia: University of Pennsylvania Press, 2019.

Atleo, Clifford, and Jonathan Boron. 'Land Is Life: Indigenous Relationships to Territory and Navigating Settler Colonial Property Regimes in Canada'. *Land* 11, no. 5 (21 April 2022): 609. https://doi.org/10.3390/land11050609.

Ayalew Mengiste, Tekalign. 'Refugee Protections from Below: Smuggling in the Eritrea-Ethiopia Context'. *The ANNALS of the American Academy of Political and Social Science* 676, no. 1 (March 2018): 57–76. https://doi.org/10.1177/0002716217743944.

Baar, Huub van. 'Evictability and the Biopolitical Bordering of Europe'. *Antipode* 49, no. 1 (2016): 212–230.

Badshah, Nadeem. 'Protesters across UK Decry "Heinous" Rwanda Deportation Plan'. *The Guardian*, 16 July 2022. https://www.theguardian.com/politics/2022/jul/16/protesters-across-uk-decry-heinous-rwanda-deportation-plan.

Balibar, Étienne. *Equaliberty: Political Essays*. Translated by James Ingram. Durham, NC: Duke University Press, 2014.

Balzacq, Thierry. 'A Theory of Securitization: Origins, Core Assumptions, and Variants'. In *Securitization Theory: How Security Problems Emerge and Dissolve*, edited by Thierry Balzacq, 1–30. Abingdon, Oxon: Routledge, 2011.

Banakar, Reza. *Normativity in Legal Sociology: Methodological Reflections on Law and Regulation in Late Modernity*. New York; Dordrecht; London: Springer, 2015.

Barbulescu, Roxana. 'Global Mobility Corridors for the Ultra-Rich. The Neoliberal Transformation of Citizenship'. In *Debating Transformations of National Citizenship*, edited by Rainer Bauböck, 29–32. IMISCOE Research Series. Cham: Springer International Publishing, 2018. https://doi.org/10.1007/978-3-319-92719-0.

Barr, Olivia. *A Jurisprudence of Movement: Common Law, Walking, Unsettling Place*, 2016. https://search.ebscohost.com/login.aspx?direct=true&scope=site&db=nlebk&db=nlabk&AN=1174758.

Barr, Olivia. *A Jurisprudence of Movement: Common Law, Walking, Unsettling Place*. Abingdon, Oxon; New York, NY: Routledge, 2016.

Barr, Olivia. 'Movement. An Homage to Legal Drips, Wobbles and Perpetual Motion'. In *Routledge Handbook of Law and Theory*, edited by Andreas Philippopoulos-Mihalopoulos, 129–150. Abingdon, Oxon; New York, NY: Routledge, 2019.

Bauböck, Rainer, ed. *Debating Transformations of National Citizenship*. IMISCOE Research Series. Cham: Springer International Publishing, 2018. https://doi.org/10.1007/978-3-319-92719-0.

Bauböck, Rainer. 'Summary: Global, European and National Questions About the Price of Citizenship'. In *Debating Transformations of National Citizenship*, edited by Rainer Bauböck, 3–5. IMISCOE Research Series. Cham: Springer International Publishing, 2018. https://doi.org/10.1007/978-3-319-92719-0.

Behrman, Simon. *Law and Asylum: Space, Subject, Resistance*. Abingdon, Oxon; New York, NY: Routledge, 2018.

Bell, Nathan. '"In the Face, a Right Is There": Arendt, Levinas and the Phenomenology of the Rights of Man'. *Journal of the British Society for Phenomenology* 49, no. 4 (2 October 2018): 291–307. https://doi.org/10.1080/00071773.2018.1451219.

Benhabib, Seyla. *Exile, Statelessness, and Migration: Playing Chess with History from Hannah Arendt to Isaiah Berlin*. Princeton: Princeton University Press, 2018.

Benhabib, Seyla. 'From the "Right to Have Rights" to the "Critique of Humanitarian Reason"'. In *Exile, Statelessness, and Migration: Playing Chess with History from Hannah Arendt to Isaiah Berlin*, 101–124. Princeton: Princeton University Press, 2018.

Benhabib, Seyla. *The Reluctant Modernism of Hannah Arendt*. New ed. Modernity and Political Thought. Lanham, Md: Rowman & Littlefield, 2003.

Benvenisti, Eyal. 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders'. *American Journal of International Law* 107, no. 2 (April 2013): 295–333. https://doi.org/10.5305/amerjintelaw.107.2.0295.

Bergholm, Bea, and Reetta Toivanen. 'Narratives on "Refugee Knowledge" in the Institutions of Europe'. In *Refugees and Knowledge Production: Europe's Past and Present*, edited by Magdalena Kmak and Heta Björklund, 53–69. Abingdon, Oxon; New York, NY: Routledge, 2022.

Bierbrauer, Günter. 'Toward an Understanding of Legal Culture: Variations in Individualism and Collectivism between Kurds, Lebanese, and Germans'. *Law & Society Review* 28, no. 2 (1994): 243–264.

Bigo, Didier. 'Criminalisation of "Migrants": The Side Effect of the Will to Control the Frontiers and the Sovereign Illusion'. In *Irregular Migration and Human Rights:*

Theoretical, European and International Perspectives, edited by Barbara Bogusz, Ryszard Cholewinski, Adam Cygan, and Erika Szyszczak, 61–91. Leiden: Martinus Nijhoff Publishers, 2004.

Bigo, Didier. 'Criminalisation of Security and Immigration: Toward a Critique of the Governmentality of Unease'. *Alternatives: Global, Local, Political* 27, no. 1 suppl (1 February 2002): 63–92. https://doi.org/10.1177/03043754020270S105.

Bigo, Didier, and Elspeth Guild, eds. *Controlling Frontiers: Free Movement into and within Europe*. London: Routledge, 2016.

Boccagni, Paolo, and Loretta Baldassar. 'Emotions on the Move: Mapping the Emergent Field of Emotion and Migration'. *Emotion, Space and Society* 16 (August 2015): 73–80. https://doi.org/10.1016/j.emospa.2015.06.009.

Bohmer, Carol. 'Refugee Scholars Then and Now'. In *Refugees and Knowledge Production: Europe's Past and Present*, edited by Magdalena Kmak and Heta Björklund, 128–145. Abingdon, Oxon: Routledge, 2022. https://doi.org/10.4324/9781003092421-10.

Boochani, Behrouz, Omid Tofighian, and Richard Flanagan. *No Friend but the Mountains: Writing from Manus Prison*. Toronto, Ontario: House of Anansi Press Inc, 2019.

Bosniak, Linda. 'Making Sense of Citizenship'. *Issues in Legal Scholarship* 9, no. 1 (24 January 2011). https://doi.org/10.2202/1539-8323.1132.

Bosniak, Linda. *The Citizen and the Alien: Dilemmas of Contemporary Membership*. 2nd printing, 1st paperback printing. Princeton, NJ: Princeton University Press, 2008.

Bosworth, Mary, and Mhairi Guild. 'Governing Through Migration Control: Security and Citizenship in Britain'. *The British Journal of Criminology* 48, no. 6 (1 November 2008): 703–719. https://doi.org/10.1093/bjc/azn059.

Braidotti, Rosi. *Nomadic Theory: The Portable Rosi Braidotti*. New York: Columbia University Press, 2012.

Braidotti, Rosi. 'The New Activism: A Plea for Affirmative Ethics'. In *Art and Activism in the Age of Globalization*, edited by Lieven De Cauter, Ruben De Roo, and Karel Vanhaesebrouck, 264–270. Rotterdam: nai010 uitgevers/publishers, 2012.

Braidotti, Rosi, Claire Colebrook, and Patrick Hanafin, eds. *Deleuze and Law: Forensic Futures*. Basingstoke, UK: Palgrave Macmillan, 2009.

Brown, Wendy. *Walled States, Waning Sovereignty*. 1st edition. New York; Cambridge, Mass.: Zone Books – MIT, 2010.

Browne, Simone. *Dark Matters: On the Surveillance of Blackness*. Durham: Duke University Press, 2015.

Brubaker, Rogers. *Citizenship and Nationhood in France and Germany*. 6th print. Cambridge, Mass.: Harvard University Press, 2002.

Burke, Peter. *A Social History of Knowledge II: From the Encyclopédie to Wikipedia*. Cambridge, UK: Polity Press, 2012.

Burke, Peter. *Exiles and Expatriates in the History of Knowledge, 1500–2000*. The Menahem Stern Jerusalem Lectures. Waltham, Mass.: Brandeis University Press/Historical Society of Israel, 2017.

Camurri, Renato. 'The Exile Experience Reconsidered: A Comparative Perspective in European Cultural Migration during the Interwar Period'. *Transatlantica. Revue d'études Américaines. American Studies Journal*, no. 1 (9 July 2014). https://transatlantica.revues.org/6920.

Cantat, Céline, Ian M. Cook, and Prem Kumar Rajaram, eds. *Opening up the University: Teaching and Learning with Refugees*. Higher Education in Central Perspective: Practices and Policies, Volume 5. New York: Berghahn Books, 2022.

Carauș, Tamara, and Elena Paris, eds. *Migration, Protest Movements and the Politics of Resistance: A Radical Political Philosophy of Cosmopolitanism*. Abingdon, Oxon; New York: Routledge, 2019.

Carens, Joseph H. *The Ethics of Immigration*. Issued as an Oxford University Press paperback. Oxford; New York; Melbourne; Madrid; Toronto: Oxford University Press, 2015.

Carrera, Sergio. 'The Strasbourg Court Judgement "N.D. and N.T. v Spain": A "Carte Blanche" to Push Backs at EU External Borders?' Working Paper. Migration Policy Centre: European University Institute, 2020.

Casas-Cortés, Maribel. 'A Genealogy of Precarity: A Toolbox for Rearticulating Fragmented Social Realities In and Out of the Workplace'. In *Politics of Precarity: Migrant Conditions, Struggles and Experiences*, edited by Carl-Ulrik Schierup and Martin Bak Jørgensen, 30–51. Leiden; Boston: Brill, 2017.

Castles, Stephen, and Mark J. Miller. *The Age of Migration: International Population Movements in the Modern World*. 4th ed., revised and updated. New York: Guilford Press, 2009.

Cheng, Yi'En, ed. *International Student Mobilities and Voices in the Asia-Pacific: Letters to Coronavirus*. Singapore: Springer Nature Singapore, 2022. https://doi.org/10.1007/978-981-19-3675-3.

Chimni, B.S. 'The Geopolitics of Refugee Studies: A View from the South'. *Journal of Refugee Studies* 11, no. 4 (1 January 1998): 350–374. https://doi.org/10.1093/jrs/11.4.350-a.

Connolly, William E. *A World of Becoming*. Durham, NC: Duke University Press, 2011.

Cooper, Davina. 'Towards an Adventurous Institutional Politics: The Prefigurative "as If" and the Reposing of What's Real'. *The Sociological Review* 68, no. 5 (September 2020): 893–916. https://doi.org/10.1177/0038026120915148.

Coser, Lewis A. *Refugee Scholars in America: Their Impact and Their Experiences*. New Haven, CT; London: Yale University Press, 1984.

Costello, Cathryn. *The Human Rights of Migrants and Refugees in European Law*. Oxford Studies in European Law. Oxford: Oxford University Press, 2016.

Crane, Daniel. 'The Future of Law and Mobility'. *Journal of Law and Mobility* 2018 (2018): 1–9. https://doi.org/10.36635/jlm.2018.future.

Crépeau, François, and Bethany Hastie. 'The Case for "Firewall" Protections for Irregular Migrants: Safeguarding Fundamental Rights'. *European Journal of Migration and Law* 17, no. 2–3 (24 June 2015): 157–183. https://doi.org/10.1163/15718166-12342076.

Criddle, Evan J., and Evan Fox-Decent. *Fiduciaries of Humanity: How International Law Constitutes Authority*. Oxford: Oxford University Press, 2016.

Crisp, Jeff. 'Externalization and the Erosion of Refugee Protection'. *University of Melbourne* (blog), 25 November 2019. https://arts.unimelb.edu.au/school-of-social-and-political-sciences/our-research/comparative-network-on-refugee-externalisation-policies/blog/externalization-and-the-erosion-of-refugee-protection.

Dadusc, Deanna, and Pierpaolo Mudu. 'Care without Control: The Humanitarian Industrial Complex and the Criminalisation of Solidarity'. *Geopolitics* 27, no. 4 (2022): 1205–1230. https://doi.org/10.1080/14650045.2020.1749839.

Dahinden, Janine. 'A Plea for the "de-Migranticization" of Research on Migration and Integration'. *Ethnic and Racial Studies* 39, no. 13 (20 October 2016): 2207–2225. https://doi.org/10.1080/01419870.2015.1124129.

Da Lomba, Sylvie, and Saskia Vermeylen. 'Ethical Vulnerability Analysis and Unconditional Hospitality in Times of COVID-19: Rethinking Social Welfare Provision for Asylum Seekers in Scotland'. *International Journal of Law in Context* 19, no. 2 (2023): 143–160. https://doi.org/10.1017/S1744552322000192.

Danisi, Carmelo, Moira Dustin, Nuno Ferreira, and Nina Held. *Queering Asylum in Europe: Legal and Social Experiences of Seeking International Protection on Grounds of Sexual Orientation and Gender Identity*. IMISCOE Research Series. Cham: Springer Nature, 2021.

Dastyari, Azadeh, and Maria O'Sullivan. 'Not for Export: The Failure of Australia's Extraterritorial Processing Regime in Papua New Guinea and the Decision of the PNG Supreme Court in Namah (2016)'. *Monash University Law Review* 42, no. 2 (2016): 308–338.

Dauvergne, Catherine. *Making People Illegal: What Globalization Means for Migration and Law*. Cambridge, UK: Cambridge University Press, 2008.

De Genova, Nicholas, ed. *The Borders of 'Europe': Autonomy of Migration, Tactics of Bordering*. Durham, NC.: Duke University Press, 2017.

De Genova, Nicholas, and Martina Tazzioli, co-ordinators and eds. Co-Authored by: Brenna Bhandar, Manuela Bojadzijev, Josue David Cisneros, Nicholas De Genova, et al. 'Minor Keywords of Political Theory: Migration as a Critical Standpoint. A Collaborative Project of Collective Writing'. *Environment and Planning C: Politics and Space 40*, no. 4 (9 March 2021): 781–875. https://doi.org/10.1177/2399654420988563.

DeLanda, Manuel. *Assemblage Theory*. Speculative Realism. Edinburgh: Edinburgh University Press, 2016.

Deleuze, Gilles, and Felix Guattari. *A Thousand Plateaus: Capitalism and Schizophrenia*. Translated by Brian Massumi. 1st ed. Minneapolis, MN: University of Minnesota Press, 1987.

Deleuze, Gilles, and Felix Guattari. *Anti-Oedipus: Capitalism and Schizophrenia*. Translated by Robert Hurley, Mark Seem, and Helen Lane. 6th printing. London: The Athlone Press, 2003.

Den Boer, Monica. 'Moving between Bogus and Bona Fide: The Policing of Inclusion and Exclusion in Europe'. In *Migration and European Integration: The Dynamics of Inclusion and Exclusion*, edited by Robert Miles, and Dietrich Thränhardt, 92–111. London: Associated University Press, 1995.

'Denmark Asylum: Law Passed to Allow Offshore Asylum Centres'. *BBC News*, 6 March 2021. https://www.bbc.com/news/world-europe-57343572.

'Denmark Had a Goal of Zero Asylum Seekers Until Ukraine Was Invaded by Russia' *Schengen Visa News*, 31 March 2022. https://www.schengenvisainfo.com/news/denmark-had-a-goal-of-zero-asylum-seekers-until-ukraine-was-invaded-by-russia/.

'Denmark: National Court Rules against Human Rights Judgement in Migrant Begging Case', *European Website on Integration*, 31 August 2022. https://ec.europa.eu/migrant-integration/news/denmark-national-court-rules-against-human-rights-judgement-migrant-begging-case_en.

'Designing and Supporting Inclusive Practices in Higher Education'. Accessed 16 November 2022. https://inclusivehe.eu/en/.

'Dismantling Antiblackness in Finnish Higher Education (Call to Action)'. Call for Action, 22 November 2021. https://raster.fi/2021/11/22/dismantling-antiblackness-in-finnish-universities-call-to-action/.

Dzankic, Jelena. 'Citizenship by Investment: Can Money Buy Citizenship?' *European Union Democracy Observatory on Citizenship* (blog), 15 February 2012. https://globalcit.eu/citizenship-by-investment-can-money-buy-citizenship/.

Dzankic, Jelena. 'Investor Programs: Attempting to Cure the Struggling European Economies? I'. *Citizenship in Southeast Europe* (blog), 14 December 2012. http://www.citsee.eu/blog/investor-programs-attempting-cure-struggling-european-economies.

Dzankic, Jelena. 'The Pros and Cons of Ius Pecuniae: Investor Citizenship in Comparative Perspective'. Florence: European University Institute, Robert Schuman Centre for Advanced Studies, EUDO Citizenship Observatory, 2012.

Edwards, Alice. 'Tampering with Refugee Protection: The Case of Australia'. *International Journal of Refugee Law* 15, no. 2 (1 April 2003): 192–211. https://doi.org/10.1093/ijrl/15.2.192.

El-Enany, Nadine. *(B)Ordering Britain: Law, Race and Empire*, Manchester: Manchester University Press, 2020.

Engelbert, Jiska, Isabel Awad, and Jacco Van Sterkenburg, 'Everyday Practices and the (Un)Making of "Fortress Europe": Introduction to the Special Issue', *European Journal of Cultural Studies* 22, no. 2 (April 2019): 133–143.

'EU Border Agency Frontex "Covered up" Greek Pushbacks: Reports'. *Euractive.com*, 29 July 2022. https://www.euractiv.com/section/justice-home-affairs/news/eu-border-agency-frontex-covered-up-greek-pushbacks-reports/.

European Court for Human Rights. 'Guide on Article 8 of the European Convention on Human Rights: Right to Respect for Private and Family Life', 31 August 2022. https://echr.coe.int/Documents/Guide_Art_8_ENG.pdf.

European Union Agency for Fundamental Rights. 'Criminalization of Migrants in an Irregular Situation and of Persons Engaging with Them', 2014. https://fra.europa.eu/sites/default/files/fra-2014-criminalisation-of-migrants_en.pdf.

Faist, Thomas. 'Local and Transnational Citizenship'. *Europa Ethnica* 76, no. 1–2 (2019): 12–15.

Farzamfar, Mehrnoosh. 'The Implications of the Securitisation of Immigration upon the Right to Seek Asylum in the European Union: An Interdisciplinary Legal Analysis'. PhD diss., University of Helsinki, 2021. https://helda.helsinki.fi/bitstream/handle/10138/334434/farzamfar_mehrnoosh_dissertation_2021.pdf?sequence=1&isAllowed=y.

Fermi, Laura. *Illustrious Immigrants: The Intellectual Migration From Europe 1930–1941.* Chicago; London: The University of Chicago Press, 1968.

Fiddian-Qasmiyeh, Elena. *Refuge in a Moving World: Tracing Refugee and Migrant Journeys across Disciplines.* London: UCL Press, 2020.

FitzGerald, David Scott. *Refuge beyond Reach: How Rich Democracies Repel Asylum Seekers.* New York, NY: Oxford University Press, 2019.

Fitzpatrick, Peter. *Law as Resistance: Modernism, Imperialism, Legalism.* Abingdon, Oxon; New York, NY: Routledge, 2008.

Foblets, Marie-Claire. 'Mobility versus Law, Mobility in the Law? Judges in Europe Are Confronted with the Thorny Question "Which Law Applies to Litigants of Migrant Origin?"' In *Mobile People, Mobile Law: Expanding Legal Relations in a Contracting World*, edited by Franz von Benda-Beckmann, Keebet von Benda-Beckmann, and Anne Griffiths, 297–315. Abingdon, Oxon; New York, NY: Routledge, 2016.

Fortier, Anne-Marie. 'Migration Studies'. In *The Routledge Handbook of Mobilities*, edited by Peter Adey, David Bissel, Kevin Hannam, Peter Merriman, and Mimi Sheller, 64–73. Abingdon, Oxon; New York, NY: Routledge, 2014.

Fortuna, Gerardo. 'EU Relaxes Entry Paperwork for Pets Travelling with Ukrainian Refu-
    gees'. *Euractive.Com*, 27 February 2022. https://www.euractiv.com/section/health-con
    sumers/news/eu-relaxes-entry-paperwork-for-pets-travelling-with-ukrainian-refugees/.
Foucault, Michel. *The History of Sexuality: The Will to Knowledge v. 1*. Translated by
    Robert Hurley. New edition. Harmondsworth: Penguin, 1998.
Foucault, Michel. 'The Subject and Power'. *Critical Inquiry* 8, no. 4 (1982): 777–795.
Franko, Katja. *The Crimmigrant Other: Migration and Penal Power*. Key Ideas in
    Criminology. Abingdon, Oxon; New York, NY: Routledge, 2020.
Franko Aas, Katja. 'The Ordered and the Bordered Society: Migration Control, Citi-
    zenship, and the Northern Penal State'. In *The Borders of Punishment: Migration,
    Citizenship, and Social Exclusion*, edited by Katja Franko Aas and Mary Bosworth,
    20–39. Oxford: Oxford University Press, 2013.
Frontex. '5.3 Million Ukrainians Have Entered EU since the Beginning of the Invasion', 6
    February 2022. https://frontex.europa.eu/media-centre/news/news-release/5-3-millio
    n-ukrainians-have-entered-eu-since-the-beginning-of-invasion-HbXkUz.
Gammeltoft-Hansen, Thomas. *Access to Asylum International Refugee Law and the
    Globalisation of Migration Control*. Cambridge: Cambridge University Press, 2013.
Gammeltoft-Hansen, Thomas, and Nikolas F. Tan. 'The End of the Deterrence Paradigm?
    Future Directions for Global Refugee Policy'. *Journal on Migration and Human Security*
    5, no. 1 (March 2017): 28–56. https://doi.org/10.1177/233150241700500103.
Gammeltoft-Hansen, Thomas, and Jens Vedsted-Hansen, eds. *Human Rights and the
    Dark Side of Globalisation: Transnational Law Enforcement and Migration Control*.
    Routledge Studies in Human Rights. Abingdon, Oxon; New York, NY: Routledge,
    2017.
Geoghegan, Tom. 'The British Illegal Immigrants'. *BBC News*, 2 February 2005. http://
    news.bbc.co.uk/2/hi/uk_news/magazine/4226949.stm.
Gera, Vanessa, Monika Scislowska, and Geir Moulson, 'EU Accuses Belarus of "Traf-
    ficking" Migrants toward Border', *APNews*, 11 November 2021, https://apnews.com/a
    rticle/european-union-belarus-europe-poland-migration-ee8912d6998a
    95f421c97b7c99e06f55 (accessed 19. 04. 2023).
Ghezelbash, Daniel. *Refuge Lost: Asylum Law in an Interdependent World*. 1st ed.
    Cambridge: Cambridge University Press, 2018. https://doi.org/10.1017/9781108349031.
Ghezelbash, Daniel, and Nikolas Feith Tan. 'The End of the Right to Seek Asylum?
    COVID-19 and the Future of Refugee Protection'. *International Journal of Refugee
    Law* 32, no. 4 (31 December 2020): 668–679. https://doi.org/10.1093/ijrl/eeab002.
Golder, Ben, and Peter Fitzpatrick. *Foucault's Law*. Abingdon, Oxon: Routledge-
    Cavendish, 2009.
Gozdecka, Dorota A. '"Barbarians" and "Radicals" against the Legitimate Community? -
    Cultural Othering through Discourses on Legitimacy of Human Rights'. *No Founda-
    tions Journal* 15 (2018): 101–126.
Gozdecka, Dorota A., Selen A. Ercan, and Magdalena Kmak. 'From Multiculturalism to
    Post-Multiculturalism: Trends and Paradoxes'. *Journal of Sociology* 50, no. 1 (1
    March 2014): 51–64. https://doi.org/10.1177/1440783314522191.
Gozdecka, Dorota A., and Magdalena Kmak, eds. 'Law and the Other'. *No Foundations
    : An Interdisciplinary Journal of Law and Justice* 15 (2018).
Groot, Gerard-René de, and Maarten Peter Vink. 'Loss of Citizenship: Trends and
    Regulations in Europe'. Comparative Report. European University Institute, Robert
    Schuman Centre for Advanced Studies: EUDO Citizenship Observatory, 2010.

Grupa Granica. 'Humanitarian Crisis at the Polish-Belarusian Border', 21 December 2021.

Guia, Maria Joao, Maartje van der Woude, and Joanne van der Leun, eds. *Social Control and Justice: Crimmigration in the Age of Fear*. The Hague; Portland, OR: Eleven International Publishing, 2013.

Güdük, Ayse, and Ellen Desmet. 'Legal Consciousness and Migration: Towards a Research Agenda'. *International Journal of Law in Context* 18, no. 2 (June 2022): 213–228. https://doi.org/10.1017/S1744552322000118.

Guild, Elspeth. '*Criminalisation* of Migration in Europe: Human Rights Implications'. Office of the Commissioner for Human Rights, Council of Europe, *CommDH/ IssuePaper* (2010)1.

Gündoğdu, Ayten. *Rightlessness in an Age of Rights*. Oxford; New York: Oxford University Press, 2015. https://doi.org/10.1093/acprof:oso/9780199370412.001.0001.

Gunneflo, Marcus, and Niklas Selberg. 'Discourse or Merely Noise? Regarding the Disagreement on Undocumented Migrants'. *European Journal of Migration and Law* 12 (2010): 173–191.

Hassouneh, Nadine, and Elisa Pascucci. 'Nursing Trauma, Harvesting Data: Refugee Knowledge and Refugee Labour in the International Humanitarian Regime'. In *Refugees and Knowledge Production: Europe's Past and Present*, edited by Magdalena Kmak and Heta Björklund, 199–214. Abingdon, Oxon; New York: Routledge, 2022.

Holborn, Louise W. 'Letter to Ruth Woodman Russell'. Archival document, 12 September 1945. *Schlesinger Library on the History of Women in America*, Harvard Radcliffe Institute.

Holborn, Louise W. 'Letter to Ruth Woodman Russell'. Archival document, 12 September 1945. *Refugees: A Problem of Our Time. The Work of the United Nations High Commissioner for Refugees, 1951–1972*. Metuchen, NJ: The Scarecrow Press, Inc., 1975.

Holborn, Louise W. 'Letter to Ruth Woodman Russell'. Archival document, 12 September 1945 'The League of Nations and the Refugee Problem'. *The Annals of the American Academy of Political and Social Science* 203 (1939): 124–135.

Holborn, Louise W. 'Letter to Ruth Woodman Russell'. Archival document, 12 September 'The Legal Status of Political Refugees, 1920–1938'. *The American Journal of International Law* 23, no. 4 (1938): 680–703.

Home Office in the Media. 'Factsheet: Migration and Economic Development Partnership', 14 April 2022. https://homeofficemedia.blog.gov.uk/2022/04/14/factsheet-migration-and-economic-development-partnership/.

Hooks, Bell. 'Essentialism and Experience'. *American Literary History* 3, no. 1 (1991): 172–183. https://doi.org/10.1093/alh/3.1.172.

Horst, Cindy, and Odin Lysaker. 'Miracles in Dark Times: Hannah Arendt and Refugees as "Vanguard"'. *Journal of Refugee Studies*, 13 July 2019. https://doi.org/10.1093/jrs/fez057.

Horsti, Karina. 'Hope and Despair: Representations of Europe and Africa in Finnish News Coverage of "Migration Crisis"'. *Communication Studies*, (2008): 3–25.

Howard, Marc Morjé. *The Politics of Citizenship in Europe*. Cambridge: Cambridge University Press, 2009. https://doi.org/10.1017/CBO9780511819124.

Huysmans, Jef. *The Politics of Insecurity: Fear, Migration and Asylum in the EU*. New edition. Abingdon, Oxon; New York, NY: Routledge, 2006.

Ineli-Ciger, Meltem, and Carrera, Sergio, eds. *EU Responses to the Large-Scale Refugee Displacement from Ukraine: An Analysis on the Temporary Protection Directive and*

Its Implications for the Future EU Asylum Policy. Florence: European University Institute, 2023.

Isin, Engin F. *Being Political: Genealogies of Citizenship*. Minneapolis: University of Minnesota Press, 2002.

Isin, Engin F., and Greg Marc Nielsen, eds. *Acts of Citizenship*. London; New York: Zed Books Ltd.; Distributed in the USA by Palgrave Macmillan, 2008.

Jacobsen, Malene H. 'Practical Engagements in Legal Geography: Collaborative Feminist Approaches to Immigration Advocacy in Denmark'. *Area* 53, no. 4 (December 2021): 595–602. https://doi.org/10.1111/area.12654.

Joppke, Christian. 'The Inevitable Lightening of Citizenship'. *European Journal of Sociology / Archives Européennes de Sociologie* 51, no. 01 (2010): 9–32. https://doi.org/10.1017/S0003975610000019.

Kesby, Alison. *The Right to Have Rights: Citizenship, Humanity, and International Law*. Oxford: Oxford University Press, 2012.

Khosravi, Shahram. *'Illegal' Traveller: An Auto-Ethnography of Borders*. Basingstoke, UK: Palgrave Macmillan, 2011.

Kirchheimer, Otto. 'Asylum'. *American Political Science Review* 53, no. 4 (December 1959): 985–1016. https://doi.org/10.2307/1952071.

Kirchheimer, Otto. 'Asylum'. *Political Justice: The Use of Legal Procedure for Political Ends*. Westport: Greenwood Press, 1980.

Klabbers, Jan. *International Law*. 1st ed. Cambridge: Cambridge University Press, 2013. https://doi.org/10.1017/CBO9781139022569.

Klaus, Witold. 'The Porous Border Woven with Prejudices and Economic Interests. Polish Border Admission Practices in the Time of COVID-19'. *Social Sciences* 10, no. 11 (13 November 2021): 435. https://doi.org/10.3390/socsci10110435.

Kmak, Magdalena. 'Between Citizens and Bogus Asylum Seekers: Management of Migration in the EU through the Technology of Morality'. *Social Identities* 21, no. 4 (2015): 395–409.

Kmak, Magdalena. 'Crimmigration and Othering in the Finnish Law and Practice of Immigration Detention'. *No Foundations: An Interdisciplinary Journal of Law and Justice* 15 (2018): 1–22.

Kmak, Magdalena. 'From Law's Discourse on Refugees to Refugees' Discourse on Law'. *Redescriptions: Political Thought, Conceptual History and Feminist Theory* 24, no. 2 (16 December 2021): 110–128. https://doi.org/10.33134/rds.346.

Kmak, Magdalena. 'Limits of Sovereignty?: Rethinking the Conflict between Human Rights and Immigration in the European Union'. *Finnish Yearbook of International Law* 20, no. 2009 (2011): 53–81.

Kmak, Magdalena. 'Migration Law as a State (Re)Producing Mechanism'. In *Migration, Identity, and Belonging: Defining Borders and Boundaries of the Homeland*, edited by Margaret Franz and Kumarini Silva, 31–38. Abingdon, Oxon; New York, NY: Routledge, 2020.

Kmak, Magdalena. 'Mnogość Obywatelstw: Studium Nad Dominującymi i Mniejszościowymi Dyskursami Prawnymi'. In *O Prawach Człowieka. Księga Jubileuszowa Profesora Romana Wieruszewskiego*, 395–408. Warszawa: Wolters Kluwer, 2017.

Kmak, Magdalena. 'The Impact of Exile on Law and Legal Science 1934–1964'. In *Roman Law and The Idea of Europe*, edited by Kaius Tori, and Hetta Björklund, 15–34. London; New York: Bloomsbury Academic, 2019.

Kmak, Magdalena. 'The Right to Have Rights of Undocumented Migrants: Inadequacy and Rigidity of Legal Categories of Migrants and Minorities in International Law of Human Rights'. *International Journal of Human Rights* 24, no. 8 (2020): 1201–1217.

Kmak, Magdalena. '"The Ugly" of EU Migration Policy: The Role of the Recast Reception Directive in Fragmentation of the Refugee Subject'. In *Europe at the Edge of Pluralism*, edited by Dorota Gozdecka, and Magdalena Kmak, 87–100. Cambridge: Intersentia Ltd., 2015.

Kmak, Magdalena, and Heta Björklund, eds. *Refugees and Knowledge Production: Europe's Past and Present*. Abingdon, Oxon; New York: Routledge, 2022.

Kmak, Magdalena, and Mehrnoosh Farzamfar. 'Personal and Academic Narratives of Exiled and Displaced Scholars'. In *Refugees and Knowledge Production: Europe's Past and Present*, edited by Magdalena Kmak, and Heta Björklund, 109–127. Abingdon, Oxon; New York: Routledge, 2022.

Kmak, Magdalena, and Elisa Pascucci. 'Eurooppalaisen Elämäntavan Suojeleminen'. *Politiikasta.Fi* (blog), 11 July 2019. https://politiikasta.fi/eurooppalaisen-elamantavan-suojeleminen/.

Kochenov, Dimitry. *Citizenship*. The MIT Press Essential Knowledge Series. Cambridge, Massachusetts; London, England: The MIT Press, 2019.

Könönen, Jukka. 'Borders in the Future: Policing Unwanted Mobility through Entry Bans in the Schengen Area'. *Journal of Ethnic and Migration Studies*, 31 January 2022, 1–18. https://doi.org/10.1080/1369183X.2022.2029375.

Könönen, Jukka. 'Legal Geographies of Irregular Migration: An Outlook on Immigration Detention'. *Population, Space and Place* 26, no. 5 (July 2020). https://doi.org/10.1002/psp.2340.

Konuk, Kader. 'Jewish-German Philologists in Turkish Exile: Leo Spitzer and Erich Auerbach'. In *Exile and Otherness: New Approaches to the Experience of the Nazi Refugees*, edited by Alexander Stephan, 31–48. Oxford: Peter Lang, 2005.

Kotef, Hagar. *Movement and the Ordering of Freedom: On Liberal Governances of Mobility*. Perverse Modernities. Durham, NC; London: Duke University Press, 2015.

Krivonos, Daria. 'Migrations on the Edge of Whiteness: Young Russian-Speaking Migrants in Helsinki, Finland'. PhD diss., University of Helsinki, 2019. https://helda.helsinki.fi/bitstream/handle/10138/304004/Migratio.pdf?sequence=1.

Krivonos, Daria. 'Ukrainian Farm Workers and Finland's Regular Army of Labour', 30 April 2020. https://raster.fi/2020/04/30/ukrainian-farm-workers-and-finlands-regular-army-of-labour/.

Krivonos, Daria, and Lena Näre. 'Imagining the "West" in the Context of Global Coloniality: The Case of Post-Soviet Youth Migration to Finland'. *Sociology* 53, no. 6 (December 2019): 1177–1193. https://doi.org/10.1177/0038038519853111.

Krohn, Claus-Dieter. *Intellectuals in Exile, Refugee Scholars and the New School for Social Research*. Translated by Rita Kimber and Robert Kimber. Amherst: University of Massachusetts Press, 1993.

Kuschminder, Katie. 'Before Disembarkation: Eritrean and Nigerian Migrants Journeys within Africa'. *Journal of Ethnic and Migration Studies* 47, no. 14 (26 October 2021): 3260–3275. https://doi.org/10.1080/1369183X.2020.1804192.

Kysel, Ian M., and Chantal Thomas. 'The Contested Boundaries of Emerging International Migration Law in the Post-Pandemic'. *AJIL Unbound* 114 (2020): 349–353. https://doi.org/10.1017/aju.2020.67.

Marcus, George E., and Erkan Saka. 'Assemblage'. *Theory, Culture & Society* 23, no. 2–3 (May 2006): 101–106. https://doi.org/10.1177/0263276406062573.

Martire, Jacopo. *A Foucauldian Interpretation of Modern Law: From Sovereignty to Normalisation and Beyond*. Edinburgh: Edinburgh University Press, 2019.

Mataix Ferrándiz, Emilia. *Shipwrecks, Legal Landscapes and Mediterranean Paradigms: Gone under Sea*. Mnemosyne Supplements History and Archaeology of Classical Antiquity, volume 456. Leiden, The Netherlands; Boston: Brill, 2022.

May, Todd. *The Political Thought of Jacques Rancière: Creating Equality*. Edinburgh: Edinburgh University Press, 2008.

Mayblin, Lucy. *Asylum after Empire: Colonial Legacies in the Politics of Asylum Seeking*. Kilombo: International Relations and Colonial Questions. London; New York: Rowman & Littlefield International, 2017.

Mayblin, Lucy, and Joe Turner. *Migration Studies and Colonialism*. Cambridge: Polity Press, 2020.

Mbembe, Achille. 'The Idea of a Borderless World'. *Africa Is a Country*, 2018. https://africasacountry.com/2018/11/the-idea-of-a-borderless-world.

Mbembe, Achille, and Steve Corcoran. *Necropolitics*. Theory in Forms. Durham, NC: Duke University Press, 2019.

McNevin, Anne. *Contesting Citizenship: Irregular Migrants and New Frontiers of the Political*. New York; Chichester, West Sussex: Columbia University Press, 2011.

Mezzadra, Sandro, and Brett Neilson. *Border as Method, or, the Multiplication of Labor*, Durham, NC: Duke University Press, 2013.

Migration and Home Affairs. 'Entry/Exit System (EES)'. Accessed 16 September 2022. https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/smart-borders/entry-exit-system_en.

Mirga-Wójtowicz, Elżbieta, Joanna Talewicz, and Małgorzata Kołaczek. 'Prawa Człowieka, Potrzeby i Dyskryminacja - Sytuacja Romskich Uchodźców z Ukrainy w Polsce: Sprawozdanie z Działalności Badawczej i Interwencyjnej'. Zentralrat Deutscher Sinti und Roma / Centralna Rada Niemieckich Sinti i Romów, 2022.

Mitchell, Christopher. 'U.S. Policy toward Haitian Boat People, 1972–93'. *The ANNALS of the American Academy of Political and Social Science* 534, no. 1 (July 1994): 69–80. https://doi.org/10.1177/0002716294534001006.

Mitsilegas, Valsamis. *The Criminalisation of Migration in Europe: Challenges for Human Rights and the Rule of Law*. SpringerBriefs in Law. Cham Heidelberg: Springer, 2015. https://doi.org/10.1007/978-3-319-12658-6.

Mohanty, Chandra Talpade, Ann Russo, and Lourdes Torres, eds. *Third World Women and the Politics of Feminism*. Bloomington: Indiana University Press, 1991.

Munshi, Sherally. 'Unsettling the Border'. *UCLA Law Review* 67, no. 6 (2021): 1720–1767.

Mustasaari, Sanna. 'Affective Constructions of Justice: ISIS-Families and the Law in the Finnish Public Debate'. *Oñati Socio-Legal Series* 11, no. 4 (2021): 1036–1065.

Nail, Thomas. *Being and Motion*. New York, NY: Oxford University Press, U.S.A., 2019.

Nail, Thomas. 'Figures of the Migrant: Structure and Resistance'. *Cultural Dynamics* 30, no. 3 (2018): 225–230.

Nail, Thomas. *The Figure of the Migrant*. 1st edition. Stanford, California: Stanford University Press, 2015.

Nail, Thomas. *Theory of the Border*. Oxford; New York: Oxford University Press, 2016.

Noll, Gregor. 'Why Human Rights Fail to Protect Undocumented Migrants'. *European Journal of Migration and Law* 12 (2010): 241–272.

Nord News. 'Tesfaye Gives Greece Pat on the Back for Low Asylum Rates', 23 August 2021. https://nord.news/2021/09/23/tesfaye-gives-greece-pat-on-the-back-for-low-asylum-rates/.

'Open Learning Initiative'. Accessed 16 November 2022. https://olive.ceu.edu.

'Operation Sovereign Borders'. Australian Government. Accessed 15 September 2022. https://osb.homeaffairs.gov.au.

Oudejans, Nanda. 'The Right Not to Have Rights: A New Perspective on Irregular Immigration'. *Political Theory* 47, no. 4 (August 2019): 447–474. https://doi.org/10.1177/0090591718824071.

Oudejans, Nanda. 'The Right to Have Rights as the Right to Asylum'. *Netherlands Journal of Legal Philosophy* 43, no. 1 (March 2014): 7–26. https://doi.org/10.5553/NJLP/221307132014043001002.

Oudejans, Nanda. 'What Is Asylum? More than Protection, Less than Citizenship'. *Constellations* 27, no. 3 (September 2020): 524–539. https://doi.org/10.1111/1467-8675.12521.

Pallister-Wilkins, Polly. 'Hotspots and the Geographies of Humanitarianism'. *Environment and Planning D: Society and Space* 38, no. 6 (December 2020): 991–1008. https://doi.org/10.1177/0263775818754884.

Pallister-Wilkins, Polly. 'Hotspots and the Geographies of Humanitarianism'. *Humanitarian Borders: Unequal Mobility and Saving Lives*. London: Verso Books, 2022.

Patton, Paul. *Deleuze and the Political*. 1st edition. London; New York: Routledge, 2000.

Patton, Paul. 'Immanence, Transcendence, and the Creation of Rights'. In *Deleuze and Law*, edited by Laurent de Sutter, and Kyle McGee, 15–31. Edinburgh: Edinburgh University Press, 2012.

Peers, Steve. 'Giving Back Control: British Travel to the EU after Brexit'. *EU Law Analysis* (blog), 24 July 2022. http://eulawanalysis.blogspot.com/2022/07/giving-back-control-british-travel-to.html.

Perruchoud, Richard. 'State Sovereignty and Freedom of Movement'. In *Foundations of International Migration Law*, edited by Brian Opeskin, Richard Perruchoud, and Jillyanne Redpath-Cross, 123–151. Cambridge: Cambridge University Press, 2012. https://doi.org/10.1017/CBO9781139084598.

Philippopoulos-Mihalopoulos, Andreas. *Spatial Justice: Body, Lawscape, Atmosphere*. Abingdon, Oxon: Routledge, 2015.

Phillips, Stephen. 'Nordic Exceptionalism or a Well-Trodden Path? Asylum Policy Lessons From the US and Australia', *Retfaerd: Nordisk Juridisk Tidsskrift* 1 (2023): 55–68.

'Press Statement on Denmark's Alien Act Provision to Externalize Asylum Procedures to Third Countries'. African Union, 8 February 2021. https://au.int/en/pressreleases/20210802/press-statement-denmarks-alien-act-provision-externalize-asylum-procedures.

'Programs of Residence Permit and Citizenship by Investment in the European Union Are Suspended for Russians'. *Immigrant Invest*, 28 February 2022. https://immigrantinvest.com/insider/sanctions-statement-en/.

Pruchnic, Jeff. 'Postcritical Theory? Demanding the Possible'. *Criticism* 54, no. 4 (2012): 637–657.

Puglierin, Jana. 'Towards Being a "Traveller between All Worlds"'. *International Relations* 22, no. 4 (2008): 419–426.

Rajaram, Prem Kuman. 'Refugee and Migrant Knowledge as Historical Narratives'. In *Refugees and Knowledge Production: Europe's Past and Present*, edited by Magdalena Kmak and Heta Björklund, 38–52. Abingdon, Oxon; New York, NY: Routledge, 2022.

Ramji-Nogales, Jaya, and Peter J. Spiro. 'Introduction to Symposium on Framing Global Migration Law'. *AJIL Unbound* 111 (2017): 1–2. https://doi.org/10.1017/aju.2017.14.

Rancière, Jacques. 'Who Is the Subject of the Rights of Man?' *The South Atlantic Quarterly* 203, no. 2/3 (2004): 297–310.

Rankin, Jennifer. '"Putin Will Fail and Europe Will Prevail," EU Chief Tells MEPs'. *The Guardian*, 14 September 2022. https://www.theguardian.com/world/2022/sep/14/putin-will-fail-and-europe-will-prevail-eu-chief-tells-meps.

'Rewriting Jurisprudence: Centring Refugee and Migrant Lived Experience', n.d. https://law.anu.edu.au/rewriting-jurisprudence-centring-refugee-and-migrant-lived-experience.

Rigo, Enrica. 'Citizenship at Europe's Borders: Some Reflections on the Post-Colonial Condition of Europe in the Context of EU Enlargement'. *Citizenship Studies* 9, no. 1 (February 2005): 3–22. https://doi.org/10.1080/1362102042000325379.

Rigo, Enrica. 'Citizens despite Borders: Challenges to the Territorial Order of Europe'. In *The Contested Politics of Mobility: Borderzones and Irregularity*, edited by Vicki Squire, 197–215. Abingdon, Oxon; New York: Routledge, 2012.

Rösch, Felix. *Émigré Scholars and the Genesis of International Relations*. Houndmills, Basingstoke: Palgrave Macmillan, 2014.

Rouleau-Dick, Michel. 'Competing Continuities: What Role for the Presumption of Continuity in the Claim to Continued Statehood of Small Island States?' *Melbourne Journal of International Law* 22, no. 2 (December 2021): 357–382.

Rygiel, Kim. 'Dying to Live: Migrant Deaths and Citizenship Politics along European Borders: Transgressions, Disruptions, and Mobilizations'. *Citizenship Studies* 20, no. 5 (2016): 545–560.

Sabbagh, Dan. 'Shamima Begum Loses Fight to Restore UK Citizenship after Supreme Court Ruling'. *The Guardian*, 26 February 2021. https://www.theguardian.com/uk-news/2021/feb/26/shamima-begum-cannot-return-to-uk-to-fight-for-citizenship-court-rules.

Sager, Alex. 'Methodological Nationalism, Migration and Political Studies'. *Political Studies* 64, no. 1 (2016): 42–59. https://doi.org/10.1111/1467-9248.12167.

Sager, Maja. 'Struggles Around Representation and In/Visibility in Everyday Migrant Irregularity in Sweden'. *Nordic Journal of Migration Research* 8, no. 3 (1 September 2018): 175. https://doi.org/10.2478/njmr-2018-0022.

Said, Edward W. *Reflections on Exile and Other Literary and Cultural Essays*. London: Granta, 2001.

Samaddar, Ranabir. *The Postcolonial Age of Migration*. Abingdon, Oxon; New York: Routledge, 2020.

Sassen, Saskia. 'Making Membership'. *Issues in Legal Scholarship* 9, no. 1 (24 January 2011). https://doi.org/10.2202/1539-8323.1122.

Sassen, Saskia. *Territory, Authority, Rights: From Medieval to Global Assemblages*. Updated edition. Princeton, NJ: Princeton University Press, 2008.

Schierup, Carl-Ulrik, and Martin Bak Jorgensen. 'From "Social Exclusion" to "Precarity". The Becoming-Migrant of Labour: An Introduction'. In *Politics of Precarity: Migrant Conditions, Struggles and Experiences*, edited by Carl-Ulrik Schierup, and Martin Bak Jorgensen, 1–29. Leiden: Brill, 2017.

Schierup, Carl-Ulrik, and Martin Bak Jorgensen, eds. *Politics of Precarity: Migrant Conditions, Struggles and Experiences*. Leiden: Brill, 2017.

Schmalz, Dana. *Refugees, Democracy and the Law: A Deficit of Rights*. Law and Migration. Abingdon, Oxon; New York, NY: Routledge, 2020.

Schwenken, Helen. '"The EU Should Talk to Germany" Transnational Legal Consciousness as a Rights Claiming Tool among Undocumented Migrants'. *International Migration* 51, no. 6 (December 2013): 132–145. https://doi.org/10.1111/imig.12118.

Seilonen, Aleksi, and Magdalena Kmak. 'Administrative Detention of Migrants in the District Court of Helsinki'. Helsinki: University of Helsinki, 2015. http://www.helsinki.fi/law-and-other/publications/detention-monitoring-report.pdf.

Shachar, Ayelet. 'Dangerous Liaisons: Money and Citizenship'. In *Debating Transformations of National Citizenship*, edited by Rainer Bauböck, 7–15. IMISCOE Research Series. Cham: Springer International Publishing, 2018. https://doi.org/10.1007/978-3-319-92719-0.

Shachar, Ayelet. 'The Birthright Lottery: Response to Interlocutors'. *Issues in Legal Scholarship* 9, no. 1 (24 January 2011). https://doi.org/10.2202/1539-8323.1133.

Shachar, Ayelet. *The Shifting Border: Legal Cartographies of Migration and Mobility: Ayelet Shachar in Dialogue*. Manchester: Manchester University Press, 2020.

Shearer, Ivan, and Brian Opeskin. 'Nationality and Statelessness'. In *Foundations of International Migration Law*, edited by Brian Opeskin, Richard Perruchoud, and Jillyanne Redpath-Cross, 93–122. Cambridge: Cambridge University Press, 2012. https://doi.org/10.1017/CBO9781139084598.

Sheller, Mimi. *Mobility Justice: The Politics of Movement in the Age of Extremes*. London; Brooklyn, NY: Verso, 2018.

Sheller, Mimi, and John Urry. 'The New Mobilities Paradigm'. *Environment and Planning A: Economy and Space* 38, no. 2 (February 2006): 207–226. https://doi.org/10.1068/a37268.

Simmons, William Paul. *Human Rights Law and the Marginalized Other*. 1st ed. Cambridge: Cambridge University Press, 2011. https://doi.org/10.1017/CBO9780511844539.

Skran, Claudena, and Carla N. Daughtry. 'The Study of Refugees before "Refugee Studies"'. *Refugee Survey Quarterly* 26, no. 3 (2007): 15–35.

Smith, Helen. 'Cyprus to Step up Security Checks in Cash-for Citizenship Scheme'. *The Guardian*, 23 May 2018.

Soirila, Ukri. *The Law of Humanity Project: A Story of International Law Reform and State-Making*. Studies in International Law, volume 82. Oxford, UK; New York, NY: Hart Publishing, an imprint of Bloomsbury Publishing, 2021.

Söllner, Alfons. 'From Public Law to Political Science? The Emigration of German Scholars after 1933 and Their Influence on the Transformation of a Discipline'. In *Forced Migration and Scientific Change: Émigré German-Speaking Scientists and Scholars after 1933*, edited by Mitchell G. Ash, and Alfons Söllner, 246–272. Cambridge: Cambridge University Press, 1996.

Somers, Margaret R. *Genealogies of Citizenship: Markets, Statelessness, and the Right to Have Rights*. Cambridge Cultural Social Studies. Cambridge; New York: Cambridge University Press, 2008.

Spijkerboer, Thomas. 'Coloniality and Recent European Migration Case Law'. In *Migrants' Rights, Populism and Legal Resilience in Europe*, edited by Vladislava Stoyanova and Stijn Smet, 1st ed., 117–138. Cambridge; New York: Cambridge University Press, 2022. https://doi.org/10.1017/9781009040396.008.

Spijkerboer, Thomas. 'Marathon Man and "Our European Way of Life"'. *Open-Democracy* (blog), 27 October 2020. https://www.opendemocracy.net/en/can-europe-make-it/marathon-man-and-our-european-way-life/.

Spijkerboer, Thomas. 'The Geopolitics of Knowledge Production in International Migration Law'. In *Research Handbook on the Law and Politics of Migration*, edited by Catherine Dauvergne, 172–188. Cheltenham, Glos.: Edward Elgar Publishing, 2021. https://doi.org/10.4337/9781789902266.00023.

Spijkerboer, Thomas. 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control'. *European Journal of Migration and Law* 20, no. 4 (29 November 2018): 452–469. https://doi.org/10.1163/15718166-12340038.

Spiro, Peter, J. 'Cash-for-Passports and the End of Citizenship'. In *Debating Transformations of National Citizenship*, edited by Rainer Bauböck, 17–19. IMISCOE Research Series. Cham: Springer International Publishing, 2018. https://doi.org/10.1007/978-3-319-92719-0.

Spiro, Peter, J. 'Citizenship, Nationality, and Statelessness'. In *Research Handbook on International Law and Migration*, edited by Vincent Chetail and Céline Bauloz, 281–302. Research Handbooks in International Law. Cheltenham, UK: Edward Elgar, 2014.

Stewart, Melissa. '"A New Law on Earth" Hannah Arendt and the Vision for a Positive Legal Framework to Guarantee the Right to Have Rights'. SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, 1 February 2021. https://doi.org/10.2139/ssrn.3791785.

Stock, Inka, Ayşen Üstübici, and Susanne U. Schultz. 'Externalization at Work: Responses to Migration Policies from the Global South'. *Comparative Migration Studies* 7, no. 1 (December 2019): 48. https://doi.org/10.1186/s40878-019-0157-z.

Stumpf, Juliet P. 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power'. *American University Law Review* 56 (2006): 367–419.

Stumpf, Juliet P. 'The Process Is the Punishment in Crimmigation Law'. In *The Borders of Punishment: Migration, Citizenship and Social Exclusion* edited by Katya Franko Aas, and Mary Bosworth, 58–75. Oxford: Oxford University Press, 2013.

Szulecka, Monika. 'The Undermined Role of (Domestic) Case Law in Shaping the Practice of Admitting Asylum Seekers in Poland'. *European Journal of Legal Studies* 14, SI (11 May 2022): 171–209. https://doi.org/10.2924/EJLS.2022.006.

'The Henley Passport Index'. Accessed 24 August 2022. https://www.henleyglobal.com/passport-index/ranking.

Thorpe, Simon. 'In Defence of Foucault: The Incessancy of Resistance'. *Critical Legal Thinking* (blog), 2 July 2012. https://criticallegalthinking.com/2012/02/07/in-defence-of-foucault-the-incessancy-of-resistance/.

Torpey, John C. *The Invention of the Passport: Surveillance, Citizenship and the State*. Cambridge: Cambridge University Press, 2000.

Trimikliniotis, Nicos. 'Report on Citizenship Law: Cyprus'. EUDO Citizenship Observatory, 2015.

Trimikliniotis, Nicos, Dimitris Parsanoglou, and Vassilis Tsianos. 'Mobile Commons and/in Precarious Spaces: Mapping Migrant Struggles and Social Resistance'. In *Politics of Precarity: Migrant Conditions, Struggles and Experiences*, edited by Carl-Ulrik Schierup, and Martin Bak Jørgensen, 224–244. Leiden: Brill, 2017.

Trimikliniotis, Nicos, Dimitris Parsanoglou, and Vassilis S. Tsianos. *Mobile Commons, Migrant Digitalities and the Right to the City*. Basingstoke: Palgrave Macmillan UK, 2015. https://doi.org/10.1057/9781137406910.

Tuori, Kaius. *Empire of Law: Nazi Germany, Exile Scholars and the Battle for the Future of Europe*. Cambridge: Cambridge University Press, 2020.

Tzouvala, Ntina. 'Invested in Whiteness: Zimbabwe, the von Pezold Arbitration, and the Question of Race in International Law'. *Journal of Law and Political Economy* 2, no. 2 (1 August 2022): 226–251. https://doi.org/10.5070/LP62258226.

UN News. 'UNHCR Chief Condemns "Discrimination, Violence and Racism" against Some Fleeing Ukraine', 21 March 2022. https://news.un.org/en/story/2022/03/1114282.

'Vanuatu Citizenship: How Political Refugees Get Freedom to Travel around the World and Start Their Own Business'. *Immigrant Invest*. Accessed 18 August 2022. https://immigrantinvest.com/cases/vanuatu-passport-for-politician-en/.

Vatansever, Aslı. *At the Margins of Academia: Exile, Precariousness, and Subjectivity*. Leiden: Brill, 2020. https://doi.org/10.1163/9789004431355.

Von Benda-Beckmann, Franz, Keebet von Benda-Beckmann, and Anne Griffiths, eds. *Mobile People, Mobile Law: Expanding Legal Relations in a Contracting World*. Abingdon, Oxon; New York, NY: Routledge, 2005.

Vries, Karin de, and Thomas Spijkerboer. 'Race and the Regulation of International Migration. The Ongoing Impact of Colonialism in the Case Law of The European Court of Human Rights'. *Netherlands Quarterly of Human Rights* 39, no. 4 (December 2021): 291–307. https://doi.org/10.1177/09240519211053932.

Vries, Kim de. 'The EU-Turkey Statement: A Design for Human Rights Violations? An Examination Concerning the Compatibility of the EU – Turkey Statement with Human Rights in EU Law'. MAIR Thesis European Union Studies, Leiden University, 2018. https://openaccess.leidenuniv.nl/bitstream/handle/1887/63629/K.%20de%20Vries.%20The%20EU%20Turkey%20Statement.%20A%20design%20for%20human%20rights%20violations.pdf?sequence=1.

Walia, Harsha, Robin D. G. Kelley, and Nick Estes. *Border and Rule: Global Migration, Capitalism, and the Rise of Racist Nationalism*. Chicago: Haymarket Books, 2021.

Walters, William. 'Deportation, Expulsion, and the International Police of Aliens'. *Citizenship Studies* 6, no. 3 (2002): 265–292. https://doi.org/10.1080/1362102022000011612.

Walters, William. 'Migration, Vehicles, and Politics: Three Theses on Viapolitics'. *European Journal of Social Theory* 18, no. 4 (November 2015): 469–488. https://doi.org/10.1177/1368431014554859.

Weston, Amanda. 'Deprivation of Citizenship – by Stealth'. *Institute of Race Relations* (blog), 9 June 2011. https://irr.org.uk/article/deprivation-of-citizenship-by-stealth/.

Wiber, Melanie G. 'Mobile Law and Globalization: Epistemic Communities versus Community-Based Innovation in the Fisheries Sector'. In *Mobile People, Mobile Law: Expanding Legal Relations in a Contracting World*, edited by Franz von Benda-Beckmann, Keebet von Benda-Beckmann, and Anne Griffiths, 131–152. Abingdon, Oxon; New York, NY: Routledge, 2005.

Wilsher, Kim. 'Hollande Drops Plan to Revoke Citizenship of Dual-National Terrorists'. *The Guardian*, 30 March 2016. https://www.theguardian.com/world/2016/mar/30/francois-hollande-drops-plan-to-revoke-citizenship-of-dual-national-terrorists.

Wimmer, Andreas, and Nina Glick Schiller. 'Methodological Nationalism and beyond: Nation-State Building, Migration and the Social Sciences'. *Global Networks* 2, no. 4 (October 2002): 301–334. https://doi.org/10.1111/1471-0374.00043.

Wonders, Nancy A. 'Sitting on the Fence – Spain's Delicate Balance: Bordering, Multi-scalar Challenges, and Crimmigration'. *European Journal of Criminology* 14, no. 1 (1 January 2017): 7–26. https://doi.org/10.1177/1477370816640140.

Woude, Maartje A. H. van der, Joanne P.van der Leun, and Jo-Anne A.Nijland. 'Crimmigration in the Netherlands'. *Law & Social Inquiry* 39, no. 3 (1 September 2014): 560–579. https://doi.org/10.1111/lsi.12078.

Woude, Maartje van der, Vanessa Barker, and Joanne van der Leun. 'Crimmigration in Europe'. *European Journal of Criminology* 14, no. 1 (1 January 2017): 3–6. https://doi.org/10.1177/1477370816639814.

Yuval-Davis, Nira. *The Politics of Belonging: Intersectional Contestations*. 1st edition. London: SAGE Publications Ltd, 2011.

Zedner, Lucia. 'Citizenship Deprivation, Security and Human Rights'. *European Journal of Migration and Law* 18, no. 2 (17 June 2016): 222–242. https://doi.org/10.1163/15718166-12342100.

Zureik, Elia, and Mark B. Salter, eds. *Global Surveillance and Policing: Borders, Security, Identity*. Abingdon, Oxon: Routledge, 2012.

Legal Documents

Communication from the Commission on a New Pact on Migration and Asylum, Pub. L. No. COM (2020) 609 final (2020).

Council of the EU, 'Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences Thereof', Pub. L. No. 2001/55/EC (2021).

Council of the EU. Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, Pub. L. No. 2001/55/EC (2021).

Council of the European Union. Council Decision on the partial suspension of the application of the Agreement between the European Union and the Republic of Vanuatu on the short-stay visa waiver, Pub. L. No. 6190/22 (2022).

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, p. 77–123.

'EU-Turkey Statement'. European Council, 18 March 2016. https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/.

Human Rights Committee. CCPR General Comment No. 27: Article 12 (Freedom of Movement), CCPR/C/21/Rev.1/Add.9 § (1999).

Treaty of Guadalupe Hidalgo (2 February 1848).

UN General Assembly. Global Compact for Safe, Orderly and Regular Migration, Pub. L. No. A/RES/73/195 (2018).

UN General Assembly, 'Global Compact on Refugees', Pub. L. No. A/RES/73/151 (2018).

Case Law

A.A. and Others v. North Macedonia, No. 55798/16 (European Court of Human Rights 7 May 2022).

Abdulaziz, Cabales, and Balkandali v UK, No. 9214/80; 9473/81; 9474/81 (European Court of Human Rights 28 May 1985).

F.B. et al v. France. (Committee on the Rights of the Child 30 September 2020).

H.F. and Others v. France, No. 24384/19 and 44234/20, (European Court of Human Rights 14 September 2022, Grand Chamber).

Hirsi Jamaa and Others v Italy, No. 27765/09 (European Court of Human Rights 23 August 2012).

Janko Rottman v Freistaat Bayern, No. C-135/08 (Court of Justice of the European Union3 February 2010).

L.H. et al v. France, Nos 79/2019 and 109/2019 and 77/2019 (Committee on the Rights of the Child 30 September 2020).

M.K. and Others v. Poland, No. 40503/17, 42902/17 and 43643/17 (European Court of Human Rights 23 July 2020).

M.S.S. v. Belgium and Greece, No. 30696/09 (European Court of Human Rights 21 January 2011).

Nishimura Eiku v. United States, No. 142 US 651 (Supreme Court of the United States 1891).

N.D. and N.T. v. Spain, No. 8675/15; 8697/15 (European Court of Human Rights 13 February 2020).

N.S.K v. the United Kingdom, No. 28774/22 (European Court of Human Rights 14 June 2022).

Pormes v. the Netherlands, No. 25402/14 (European Court for Human Rights 28 July 2020) (accessed 18.12.2022).

S.N. et al. v. Finland, Nos 100/2019, (Committee on the Rights of the Child 12 September 2022). T.I. v the United Kingdom, No. 43844/98 (European Court of Human Rights 3 July 2000).

No. VII Kp 203/21 (Sąd Rejonowy w Bielsku Podlaskim, VII Zamiejscowy Wydział Karny w Hajnówce 22 March 2022).

No. II SA/Bk 492/22 (Wojewódzki Sąd Administracyjny w Białymstoku, Wydział II, 15 September 2022).

Index