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Gender in transnational migration: re-thinking the human rights framework

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Gender in transnational migration: re-thinking the human rights framework

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A spate of gender research in transnational migration at interdisciplinary interfaces has revealed powerful insights on how migration systems have co-evolved with geo-political dynamics of globalisation, revealing emerging forms of intersecting inequality and the need to clarifying the different epistemological positions in the debates about gender inequality. The international classification system used in the definition of rights and entitlements is now in conflict with the rapidly changing realities of migration in which local/global dynamics that have de-stabilised its established categories. Interpreting ‘gender’ in transnational migration today in defence of the human rights of migrants must go beyond ‘gender’ as a pre-given heuristic device handed down from previous theories. Aspirations for a gender equal world cannot avoid employing epistemic vigilance to discern where and which thinking about ‘gender’ is valid, and how unjustifiable biases may be corrected to ensure satisfactory treatments of the relationship between gender, belonging, rights and entitlements.

Keywords: gender; transnational migration; human rights; legal liminality; epistemic vigilance

All particulars become meaningless if we lose sight of the pattern they jointly constitute.


1. Introduction

We are living now in a period of profound social re-ordering for which the term ‘global society’ best reflects the multi-scale and multi-level interdependence and connectedness between nations and communities. It is no longer possible to continue to view ‘society’ through only the perspective of the nation state as a self-contained unit. Public reasoning on migration policy and the ideological justifications of choices today, however, appear to be based on short-term ‘interests’, reacting to prevailing domestic political forces and often contradicting the complex realities of a globalised world driven by trade and financial capital. The absence of an international governance framework for migration acceptable from a human rights standpoint and politically viable from the standpoint of a nation’s politics reflects the persisting tensions between an economically cosmopolitan position and a position of enclosure (national or regional), based on the principle of sovereignty.

After the fall of the Berlin Wall and the disintegration of the Soviet Union the neoliberal discourses on globalisation have pushed to prominence the vision of a world without borders and emphasised the unlimited potential of free movement of factors of production and ideas.

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In an opposite direction, limits of entry have been placed on cross-order migration using legal classification as a mechanism of ‘triage’ prior to entry\(^1\) (Truong, 2011). Ten years down the line and subsequent to ‘9/11’, this countermovement has gone further. Security measures against migrants now consist of the setting up multiple layers of protection.\(^2\)

A paradox of ‘efficiency’ is looming: how cost-effective is the policy of deterrence and detention aiming at decreasing unwanted migration flows relative to the liberalisation of trade as the main driver of migration? What are the political, economic and social costs of a policy of keeping migrants, who are already in a territory, as ‘perpetual strangers’;\(^3\) confined to a zone of ‘legal liminality’ and being politically, socially and economically marginalised (Park, 2004)? Cross-border movements of men, women and young people have co-evolved with changes in the workings of local, regional, national and global economies, along with the reconfiguration of the state and its functions (Truong & Gasper, 2011). These changes have produced a proliferation of forms of market-based services to facilitate movements, often making legal and illegal categories indistinguishable from one another in the migration process. This situation implies that accountability involves more than two states but also the many private actors in the transnational migration chains. Düvell (2003) points out that unresolved tension in migration policy can undermine the coherence of a society and/or breed social pathologies in the long run.\(^4\)

To trace gender issues in transnational migration and to ground practices of abuse of women migrants – as equal rights holders – is challenging for several reasons. Experiences of human rights abuse in migration have been found embedded at the intersections between different structures of power and identities (membership of a political community, gender, ethnicity, age and economic status) that are historically formed. These structures remain relatively stable and can be re-enforced or altered under specific circumstances; yet the framework of universal rights does not necessarily correlate with this picture. Both legally and institutionally, the international human rights regime is built on treaties allowing for a single cause of discrimination to which other causes can be added.\(^5\) These treaties cannot deal with multiple inequalities and multi-causal discrimination occurring simultaneously or sequentially (Makkonen, 2002; Squires, 2008), particularly in the process of migration. In the current shift towards nationalism, hostility to ‘strangers’ is outweighing the political possibilities for ‘hospitality’ and empathy with those who have made decisions under duress, and are now in a foreign land. This renders the intersectional approach to human rights claims ever more difficult to apply, as it demands cooperation across different types of institutions, both governmental and societal.

The conundrum of gender in migration and human rights is not just about structural and political visibility and invisibility of different forms of abuse. It is also about how the interpretation of migrants’ realities (by migrants as subjects, and scholars/advocates as interpreters), and how the subject and object of ‘abuse’ are experienced, defined and validated. In this respect epistemic vigilance is particularly necessary because ‘... in the social sciences ... the separation between everyday opinion and scientific discourse is more blurred than elsewhere ... [and] for the sociologist, familiarity with his (sic) social universe is an obstacle, par excellence’ (Bourdieu, Chamboredon, Passeron, & Krais, 1991, p. 13). Researchers and advocates cannot simply take the categories delivered to them by the world of social practice as given. These given categories are actually pre-constructed within a particular perspective that has achieved a hegemonic position through a long-term process of sedimentation and maintenance of the power of representation in law, policy and public opinion. All have their historical and contextual contingencies. Interpreting accountability and rights of the actors involved requires a critical gaze to discern the vantage point from which a given model of interpretation is created.

This essay attempts to clarify different epistemological positions in the debates about the movements of people across borders, the gendered dimensions and the political implications...
of such movements. The international classification system of migration is in conflict with the rapidly changing realities in which local/global dynamics have de-stabilised established categories that are considered fixed. Defining those who cross borders as subjects of justice has become more difficult as the conditions under which some people move across border can redefine their status, sometimes at the expense of access protection. Interpreting ‘gender’ in cross-border migration today, both from the perspective of regional and international political economies, as well as, from the socially constructed perspective of the migrant as a subject of rights needs to go beyond ‘gender’ as a pre-given heuristic device, or handed down from previous theories, and locate its validity as well as unjustifiable biases.

2. Contrasting the meanings of ‘International’ and ‘Transnational’ in migration study

Emerging from the post-Second World War environment, international migration policy had the primary aim of ensuring an orderly management of different types and purposes of migration in a relatively stable bi-polar world order. The central focus of migration studies has since been the monitoring of stocks and flows of migrants, their patterns of remittances, capabilities of assimilation and social integration in host societies. Refugees have been handled as a separate category, through different procedures of status determination and classification, producing the field of refugee studies as a distinct entity.

Initially informed by legal and economic theory in the positivist tradition, international migration study has taken both the nation state and the individual migrant as units of analysis. Positivist sociology has also been applied in studies on migrants’ integration into the labour market and social life of host societies. It has been extended to ethnographic studies, which document the experience of migration and assimilation from the perspective of the human person, showing a fuller picture of the complexity of separation and belonging. Frameworks of analysis in international migration now vary between an emphasis on macro social dynamics between states as entities and one that give more credence to the interaction between middle range institutions and micro perspective of migrants as strategic actors, their rationalities and notions of membership of a community.

Macro-economic historians use aggregate data of population mobility to discern the economic and demographic fundamentals underlying world migration and to project future trends (Hatton & Williamson, 2005). They treat cross-border migration as a (mobile) factor along with others such as goods and capital, the determinants of which include a complex mixture of demographic forces, wage differentials, fixed costs of migration and returns to skill. Their aim is to assess macro and temporal forces of supply and demand and the consequences for policy. This ‘push-and-pull’ approach generally shows that legislation and regulation affects migration flows marginally in some cases, much more in others.

Historians informed by the discipline of political economy focus more on the social and political world of migration as being constituted by structural inequality in the relation between capital and labour present on a global and regional scale. Cohen’s work (1987) suggests that historically migrant labour has fuelled the engine of growth in many regions of the world and growth was generated by the ability of firms and farms to find successive cohorts of quasi-free workers, whose livelihoods hinged on the social periphery of farms, mines and factories. His approach places the connection between migration and marginalisation within the equation between capital and labour to shed light on how, at a particular historical conjuncture, different social, political, economic and ideological contradictions come together to give migration policy a distinctive shape. The operational characteristics of a ‘migration chain’ today are such that it is to be considered as a chain of accumulation built on ‘un-free labour’ (Cohen, 2006).
Samers’ (1999) survey of debates on zero migration policy in the European Union (EU) prior to its enlargement shows a shift from the previously dominant concept of immigrants as an advantageous industrial reserve army to one which views them as a source of potential disorder and unrest. Immigrants were previously conceptualised as a segment of the working-class performing jobs native workers had abandoned. Immigrants were also considered a factor weakening working-class organisations and driving down wages. Within the EU changing economic opportunities as well as internal and social constraints led to the waning of the concept of a ‘reserve army.’ Samers notes (2003, p. 557):

the export of capital became more profitable than the import of labour or, put somewhat differently, an internal racial division of labour could be replaced by a [reconfigured] international division of labour.

‘Post-Fordism’ introduced organisational and technical innovations, while shifting labour-intensive activities from the ‘cores’ to peripheries. These annulled the ‘need’ for migrant workers in core economies and thereby their demands for rights. The decades of structural adjustments saw corporations benefitting from more favourable political and economic conditions furthering their goals of globalization through the export of capital and know how. Two parallel phenomena have arisen: (1) the decentralisation of production (agribusiness, manufacturing and services) to take advantage of the opportunities of ‘zones’ (‘time zones’, ‘climate zones’, ‘labour zones’ and ‘cultural zones’) and (2) the emergence of corresponding labour markets operating transnationally, not only within regions but also across the globe. A third related phenomenon is the internal population displacements due largely to the ‘development’ interventions that create the facilitating infrastructure for production. Intensified interactions at different levels have connected the local and global, often blurring economic and political causes of migration and giving rise to new socio-cultural and legal aspects to migration.

Arango (2000) and Faist (2000) pointed to the limits of the use of the nation-state as a unit of analysis and the treatment of the migrant as merely a statistical unit. This approach is often disconnected from the social world, obscuring significant structural aspects of migration formed by a convergence of contextual social forces. The term ‘international’ in migration now finds its significance restricted to the domain of regulation and inter-state relations. As an alternative the ‘transnational’ perspective on migration is built on the sociological turn in international relations theory, which views the rise of non-state actors as a force able to curtail the power of states and assume an increasing role in shaping society (Smith and Guarnizo, 1998). From this view transnational research on migration gives more emphasis to migrants’ agency, and resists an a priori connection between migration and marginalisation. Migration is defined as a social field of power connecting sending and receiving countries.

Portes and Sensenbrenner (1993) stress the ‘social embeddedness’ of migration chains, directing us to explore how migration is mediated through local structures of power at both sending and receiving ends. These form distinctive chains having a certain degree of dependency on the path laid down by earlier migrants. Massey and colleagues (2005) emphasise ‘circular and cumulative’ characteristics of these chains stressing the role of information shared within networks and its influence on decision-making at household levels, which in turn fashion broader patterns of mobility. Basch, Glick Schiller, and Szanton-Blanc (1994) emphasise the significance of the migrants’ life-world in which transnational identity is seen as constituting a plurality of intertwined life-worlds.

This sociological turn in migration studies has opened a new space for the analysis of gender in migration, centred on the relationships between gender, worlds of work, family and
culture. Studies have revealed the emotional and social, as well as economic, values of female niches of migration for work, such as: domestic and care work, commercial sex work or transnational and cross-cultural family formation (Ehrenreicb & Hochschild, 2003; Kojima, 2001; Palriwala & Uberoi, 2008). In particular the focus on the care sector has exposed the chains of negative externalities by which an enhancement of care provision through labour import, in some countries, can lead to the denial of the entitlement to care of others who stayed behind (Parreñas, 2005).

The cultural representation of ‘women’ and ‘gender’ in many different contexts of migration-related controversies is a site for articulation of competing values regarding particular societal ‘problems’. Cultural analysis reveals competing ethico-political rationalities which establish the ‘objects’ of protection in opposing ways. The protection of public morality and societal well-being is often pitted against specific categories of women migrants.8

Care, agriculture and construction are three sectors known for the presence of migrant workers with low range skills. They share one common feature regarding the relationship between mobility and immobility. While it is possible to dismantle a manufacturing process and have the production and assembly of parts to take place in different locations, the same cannot be said for the care (private and social), agriculture and construction sectors. Care requires ‘emotional labour’9 as the management of human relations and affiliated emotions Hochschild (1983). Achieving human well-being must also be mediated by an understanding of local cultural meanings and appropriate inter-cultural communications. Similar to agriculture, construction deals with land as a physically immobile asset. Agriculture and construction must bring workers to the land and cannot bring the land to the workers. While features of immobility in these three sectors may be different, they share a commonality in that the option for replacement of labour shortage, arising from demographic changes, is limited to importing; outsourcing is not an option.

Truong (1996, 2003) posits that the emergence of women’s migration across borders as domestic helpers and sexual service providers historically constitutes a transfer of reproductive and sexual labour from one social group and nation to another. Parreñas (2005) has extended this idea and formulate the concept of the ‘international division of reproductive labour’ to cover the transfer of care duties between three groups of women: the female employers in the receiving countries, the migrant workers, and the women in the country of origins who care for the stay-behinds. This was made possible by a legal hegemony that disregards the reproductive side of societies and economies. These findings point to the significance of migration chains in the reproductive sector, and how relations of gender, class and ethnicities help sustains this legal hegemony. With few exceptions, the prevailing classification of occupations in many countries excludes domestic work and commercial sexual service as categories.10 Explanations of women’s migration in these sectors are often reduced to issues of individual preference, choice and life chance, rather than as an integral aspect of broader transformations in societies.

Contemporary migration chains in this ‘intimate’ side of the economy operate within a two-tiered system. Tier (1) consists of the care sector in which the chains have formed by a combination of macro and institutional factors. These include the care deficit in major industrialised countries due to ageing populations, structural reforms affecting the quality and coverage of care and the growth of women’s participation in the labour force without a corresponding rise in the range and intensity of men’s ‘domestic’ participation. Tier (2) consists of the commercial sex sector, which has co-evolved with a different set of dynamics. These came about through the growth of tourism driven by foreign exchange earnings combined with the political will to allow commercial sexual services to becomes tourism’s auxiliary (Truong, 1990).11 Additionally, growing militarisation around the world, with the presence of
military bases and peace-keeping forces, contributes to a silent contract between allies around the provision of sexual services (Moon, 1997).

The contemporary migration chains in the care and sex sectors reflect a growing link between different national systems of social reproduction, one which now spans a plurality of countries and regions. Emerging trends point to the possible formation of a new class of women based on their gender identity (female), their work (domestic helper, commercial sexual provider and foreign bride) and their unrecognised status in migration law (Agustin, 2003, 2007; Cheah, 2009; Truong, 1996). The socio-legal space through which these migratory movements take place is ambiguous and therefore, abuse is frequent and often without redress.

Migration chains in the care and commercial sexual services reflect a gender division of labour as an institution vested with power. This power comes from recursive and re-iterative practices of individuals and groups who adhere to the notion of an asymmetrical gender order as ‘natural’ and the bias extends to the reproductive side of the economy. This produces a hegemonic understanding of the law and public morality about care as a moral duty and sex as intimacy, which refuses to recognise that liberalisation of economies and broadening market relations can also ‘free up’ a social and moral space for care and sexual services to become incorporated into (semi-industrial) labour relations.

Analysis of gender dynamics in the socio-cultural contexts of migration decisions further shows how state ideology and policy shape the social environment in which networks operate and form distinctive spatial arrangements and pathways of movements (Oishi, 2005; Tyner, 2000). By integrating macro, meso and micro perspectives new perspectives on how migration systems evolve from interactions between regulation and the actions (with transformative potentials) of all those involved: migrants, employers, social networks, civic organisations and law enforcement agents can help deepen theoretical insights, to cover also the intersecting inequalities which shape security-seeking actions of particular groups of migrants, and the challenges these pose to justice-seeking actions.

In short, feminist scholarship in migration studies has furthered our understanding by bringing to bear the significance of ‘gender’ and distinct epistemological and methodological values, into research and interpretations. Besides gender-differentiated patterns of mobility, identified by Ravenstein more than 100 years ago, this scholarship shows how a given notion of ‘gender’ can structure the thinking, reasoning and understanding of human movements and the identities of those on the move. Now seen as a multifaceted process, transnational migration is analysed as something that profoundly influences overlapping social worlds (sexuality, work, home maintenance and childcare) and re/shapes institution rules. A small body of literature has now emerged on how transnational migration impacts masculine identities, norms and conventions, and how men negotiate and reconstruct their identities as they encounter different gender regimes, rationalise their experience of racial discrimination and find new lines of intergroup differentiations (Datta et al., 2008). In short, the use of ‘gender’ as a heuristic device in several disciplinary interfaces (political economy, law, sociology and anthropology) in migration studies suggests that satisfactory treatments of the relationship between gender and human rights require insights and angles of multiple kinds. Aspirations for a gender equal world cannot avoid employing epistemic vigilance to discern where and which thinking about ‘gender’ is valid and how unjustifiable biases may be corrected.

3. The disorder of global management

The Human Development Report (2009) estimates that there are currently approximately one billion people on the move, both within their own countries and overseas, searching for better opportunities, noting that one of the most complex contemporary issues is governing these
movements. Roughly 740 million are internal migrants, nearly four times the estimated number of international migrants. Fewer than 30% of the latter move from developing to developed countries. In actual terms, the ‘management’ of global migration deals with some 200 million migrants (50% of whom are female). Rather than a focus on numbers, a deepened understanding of the lack of coherence in management frameworks (in terms of the underlying assumptions) can help counter the perceived ‘immigration threat’ to ‘social cohesion’ in high-income countries.

The oldest piece of international legislation governing peoples’ movement across borders is the UN Refugee Convention (1951), a post-Second World War product which lost significance in the post-cold war decade and continues to do so in the era of the war against terror. Today, this convention provides limited legal avenues for those seeking asylum. Signatory states have introduced more stringent rules and, by default, these rules can and have diverted those seeking asylum to smugglers. The demise of the Refugee Convention reveals a shift of the ‘object of protection’ from the rights of those being politically persecuted, or who flee from the violence of war, to the right of a state to maintain sovereignty of territorial borders and to control crime, thus creating what Webber (2006) calls ‘the crime of arrival’.

Three other pieces of current legislation are: (1) GATS-Mode 4 in Trade and Services (1995); (2) The UN Migration Workers Convention (2003) and (3) The UN Convention on Transnational Crime and its Protocols on Human Trafficking and Smuggling (2003). Each legal sphere is formed and informed by a particular definition of ‘movement’ and ‘object’ of protection.

In an apex structure of regulations GATS-Mode 4, which came into effect with the establishment of the World Trade Organization (WTO) in 1995, has the most privileged status of movement: the free movement of ‘natural persons’ affiliated with the corporate world (intra-firm personnel transfer; business consultants and knowledge workers), and the firm is given the status of a ‘natural person’ sharing the same constitutional protections granted to individual citizens who take part in this mode. In this framework the movement of people as ‘natural persons’ is to be differentiated from migration. It is seen exclusively through the perspective of service delivery trade. The object of protection is ‘freedom’, freedom of trade flows and the corporate gains to be made.

Forms of labour movements perceived to be unconnected with the corporate world are deferred to the UN Migration Workers Convention. In other words, if a person crosses a border to deliver a service for a corporation, s/he enjoys full protection. Meanwhile, a person crossing a border to deliver a service for entities indirectly connected with the corporate world is protected by a Convention that major labour-importing states have not shown willingness to ratify, or sign, primarily due to the clauses on social and cultural rights. Service, work and skill are defined in such a way as to separate the movements of people in the same global world of work and link them with distinct spheres of state administration, trade and finance vs. social welfare, showing a distinct hierarchy between skills and social entitlements.

The UN Convention on Transnational Crime and the two Protocols on Human Trafficking and Smuggling, ratified by a majority of states, entered into force in 2003. The Protocol on Human Trafficking ensures the protection of those persons victimised when crossing borders in search of work. However, many national governments have since introduced a limiting clause on resident status, intended for the purpose of protection, investigation and litigation. There has been persistent concern about possible negative effect on immigration, whereby making resident status for victims mandatory, the protocol may inadvertently provide an incentive for moving illegal migration through trafficking channels (Fredette, 2009, p. 131). By contrast, the Protocol on Human Smuggling penalises not only those who organise illicit cross-border movements but also those migrants who pay for these services. Practices
of human trafficking and smuggling are now recognised as practically indistinguishable (Coluccello & Massey, 2007; Touzenis, 2010).

It can be said at this point that the regime of power/knowledge inherent in practices of migration management at the global level is built on a political rationality which is coherent neither with the concept of natural rights in the Universal Declaration of Human Rights nor with the transnational view on globalisation as a movement towards free trade, unobstructed capital flows, open borders for immigration and interdependency among nations.

Present day practices of control in most countries are born out of shifting modes of power, the declining commitment to welfare provision and the ascendancy of a new logic where public fiscal concerns lead to debt-financed migration for the sake of private household survival and growth. New forms of debt-driven migration manifest a complex web of inequalities co-constituted by neoliberal practices and pre-existing hierarchical relations between knowledge forms and between societies.

4. Legal liminality as an outcome of fragmented regulation

Migration arrangements are socially embedded and thus take on features of gender, class, ethnicity and age. These features also interact with market dynamics and institutions, which in turn emulated each other. Thus practices of trafficking applicable in the 1980s and 1990s to the trafficking of women for sexual exploitation now are also prevalent among male migrants destined for agricultural and construction work, such as seizure of passports and tying the workers to their employers. The privatisation of labour recruiting and the absence of both ethical standards and effective monitoring by states have allowed for the emergence of new types of transnational actors called the ‘merchants of labour’ (Kuptsch, 2006). A large number of persons who cross borders through dubious channels are defined as ‘irregular’. They occupy a zone characterised by legal ‘liminality’, an intermediate, indecisive and ambiguous legal position, which makes them vulnerable. The legitimacy of their presence is always open to question and their rights are frequently violated. Ambiguity in social status and position also instils distrust by states due to the strict nature of the legal process of identification. In this respect, the emergence of markets of ‘migration as services’ has fostered new types of allegiances and loyalty to groups and networks providing protection.

The maintenance of a legal distinction between the different types of migrants, though necessary for policy decisions and administrative purposes, has shown its limits in capturing the complexity of an evolving social world of mobility. Policy guided by unfounded assumptions can inadvertently produce counterproductive outcomes. For example, stringent regulations intended to ‘encourage’ voluntary return can ‘trap’ migrants with an illegal status in a state of transit because they must vacillate between different considerations (Brunovskis & Surtees, 2007). These include the fears of return with uncertainty and debt to be paid at home, and the likely financial difficulties in any attempt to re-migrate from their home country to another country.

A precarious existence, with a constant fear of being identified, arrested and deported, gives rise to practices of seeking protection from third parties and hence has opened new markets for identity documents (Coutin, 2003; Vesta, 2008). The suspension of a legal identity also has fostered trafficking/smuggling practices within receiving, transit and countries of origins, not just out from the countries of origin. Forced repatriation without sensitivity to context has also triggered the ‘revolving door syndrome’: it can expose migrants to human traffickers who wait at the deportation points and offer re-entry at a high charge, often in collusion with immigration officers (Fernandez, 2008). ‘Becoming legal’ once inside a territory is a socio-legal struggle. Migrants’ manoeuvres around immigration administrative procedures
to gain legal recognition can lead to a state changing and adapting its strategies of containment. The gap between legality and illegality can be considered as a field of power, co-constituted by the actions of migrants, employers, supporters and the state.

Menjivar (2006) introduces the concept of ‘liminal legality’ in her study of Salvadoran and Guatemalan immigrants in the USA. She combines Turner’s concept of liminality with Coutin’s (2003) concept of ‘legal non-existence’ to describe a condition characterised by being in a legal limbo. They have no access to basic human needs and restricted livelihood opportunities (Menjivar, 2006, p. 1008). Without using the term ‘liminal legality’ Engbergsen and Broeders (2009) refer to a similar condition in the Netherlands arising from the policy to restrict migrants’ access to social support. An increase of subsistence crime as a means of livelihood appears connected to this condition of legal limbo. Migrants can purposely destroy their genuine identity papers and provide the state with false information in order to frustrate its attempt to arrange orderly return. Being without a legal identity also means the erasing of personhood and rights and can exacerbate vulnerability to direct violence without redress.

Chun’s (2009) concept of ‘legal liminality’, in her analysis of Korea’s ‘irregular employment’ sector, is also instructive from the standpoint of administrative law in the domain of work for those with a legal identity. The concept refers to a system of classification of skills which defines the terms and conditions of ‘irregular’ work below the formal threshold. It creates a zone of legal ambiguity in which workers are neither fully protected by, nor fully denied, (labour) rights so that workers belonging to the same work force can be set apart from one another, with one remaining outside its system of rights. This can block workers’ solidarity and access to unionism. In Chun’s view legal liminality in ‘irregular employment’ has significance beyond Korea, it is to be understood as a political tool to re-enforce corporate interests, and a technical device to keep up with global competition and reduce labour costs.

Garcés-Mascareñas’ (2010) comparative studies of illegal migration in Malaysia and Spain take issue with what she considers mainstream positions: (1) the view that the presence of illegal migration reflects either the ineffectiveness of control policies, or the strength of the macro-structural forces which makes cross-border migration too overwhelming for the adaptive capacity of a social system and (2) the view that migration laws serve the interests of powerful economic and political groups, thereby making migration policies functional to labour exploitation. She suggests that immigration law features individuals within its categories and creates the subjects whom it seeks to allow, or bar from, entry. More effective migration control policies do not necessarily mean less illegal migration but rather an improvement of the state’s ability to constitute differentiated categories and provides a measure for filtering them.

These contributions bring an important message home: immigration control is a product of a historical and political context. The Universal Bill of Rights, a product of the post-Second World War ethos, recognises the right to move freely and to return, but is curtailed by the rights of states to grant the right to stay or to leave. Most of the more powerful states have played an active role in advancing globalisation. Yet, it is they who are resisting an international regime for labour migration. Instead, the emphasis on criminalisation of ‘irregular migration’, justified by the need to protect the dignity of the ‘free person’ and the integrity of the nation-state, has been unable to control a market-led ‘migration industry’. Migration as a trade in services now includes not only those who move from one country to give a service to a firm in another, but also includes those who provide migrants the service of obtaining a legal presence and protection. From this perspective, ‘liminality’ may also be understood in terms of the incompleteness of an ethos of globalisation, allowing transnational businesses to alter the economic landscape but resisting a full acknowledgement of the negative human consequences of this alteration.
Legal liminality remains the main ‘black box’ in the general study of ‘irregular migration’ and intersectional discrimination in particular. It is co-constituted by various actors, including the migrants themselves, the state and the ‘merchants of labour’ or recruiters. There is, perhaps, another category of players in the cast: the ‘merchants of insecurity’ who promise to would-be migrants things such as a secure job and life space, and charge high fees for passage which end up making them more insecure. Merchants of labour and insecurity promote a form of debt-financed migration, which can lead to the mortgaging of a family’s entire future. Caron draws attention to well-documented cases involving recruiters confiscating property titles and procuring false debts from would-be migrants who must comply in order to secure a place on the list for going to the USA (Caron 2007b). Some charge fees equivalent to someone’s life savings and even require contributions from entire communities (Fredette, 2009).

The merchants of labour and insecurity operate as interlocking networks often defying national and international regulations, where applicable, or conduct their business in the absence of bilateral agreements. Conflicts about rights and obligations during migration can work to strengthen relationships of dominance, leaving those who are voiceless without support and even lead to fatal consequences by default, or design, to destroy evidence.13

Given that most criminal or civil systems for redressing violations are limited to acts perpetrated within a jurisdiction, it is generally assumed that the plaintiff, claimant or victim remains in the country, or jurisdiction, where the violation occurred (Caron, 2007a). Immediate deportation of victims, or lack of support, in what typically can be a protracted process, means that transnational migrants are often denied the litigation process. In her view, transnational labour needs transnational justice, but judiciaries are immobile where borders are concerned; she proposes the concept of ‘portable justice’ as a solution.

Understanding irregular migration from the perspective of legal liminality can open new avenues for research, dialogues and action. Legal liminality offers three interconnected ideas. One is the space of legal non-existence created by being a ‘subject of passage’, or being inside a territory but outside its legal system. Another is the process of transforming a person’s legal status, at the point of origin, into an ascribed status at the point of destination. This can include a temporary form of legal existence or the full status of a non-legality entity, depending on the operational standards of a given broker. Lastly, the process of ‘becoming legal’ in the receiving country takes place across a field of social forces where many agents are involved, be they sympathetic, unsympathetic and/or opportunist.

A ruling system, buttressed by a classification system downgrading certain statuses, creates a stratified structure of agency and choice. Legal liminality in transnational migration, a domain of power through which norms and values of a culture are confirmed and/or re-evaluated, not only confronts the human rights question with a categorical disarray but also offer an intense reflexive potential for governments’ betwixt and between position on their ‘guests’ as ‘subjects’ of rights. The conditions of displacement and forms of legal liminality facilitate violence and make existence for many migrants ever so provisional. Yet ‘migration’, as spatial mobility of the human population that can be expressed in the historically specific displacements of people, is also a state of displacement that befalls humankind generally. To allow the destabilisation of nominal protection of international migrants runs the danger of creating structures that re-enforce the immobility of some people while promoting the mobility of others. It can turn the current war on terror into a war on migrants by conflating crime, terror and migration.

5. Conclusion
In policy domains with cross-border implications, such as transnational migration, states can no longer act independently and must increasingly negotiate with each other, as well as
with other institutions and actors concerned. The different ethical positions adopted by states, interstate institutions and civic organisations will remain a key area for reflexive and mutual learning to avoid a convergence of dominant interests allowing anarchy to destroy human capital, people’s aspirations and values, and to undermine the dignity of a society and its members (Bagchi, 2008). Foucault’s insights on ‘governmentality’ can serve as useful guidelines for further enquiry into the hierarchy extant within the system of global management of migration and the gendered aspects of its legal liminality. Understanding how the neoliberal art of governing can displace the ‘real conflicts’ derived from the transformation of nation-states into market-led entities, it is important to give meanings to the ‘particulars’ in transnational migration in a pattern they jointly constitute.

States have become market-led entities allowing the emergence of the integration of markets but disintegration of production, the integration of concepts of human rights (civil, political, socio economic and cultural) but also the ‘disintegration’ of their application, with the resurgence of the notion of ‘Nation’ to compensate for the weakening of ‘States’. Classical liberalism recognises the impossibility of integrating the multiplicity of interests with the unity of the judicial sovereign, and hence intervenes, through social policy, to provide protection for those considered as weaker subjects and creates a zone of non-intervention to allow markets to function. The neoliberalist line of reasoning, despite its claim to non-intervention, actually intervenes both in state and society with different techniques of power (Foucault, 2007). On the one hand, the neoliberal ‘project’ uses economics as science to justify states changing the rules in order to provide conditions for competitive markets. This includes the conventional areas of state ruling: security, public administration and social policy. State organisations (e.g. utilities, schools, hospitals and prisons) are now under pressure to become corporate entities, or at least to streamline their functioning according to corporate norms. On the other hand, this project intervenes in society through the diffusion of the notion ‘a self entrepreneur’ in competitive markets (Protevi, 2010). For Foucault, neoliberal ‘governmentality conducts our conduct’ by inducing the populace to fashion individuals as entrepreneurs concerned with obtaining a return on human capital. Apart from undermining the more holistic imaginary of the ‘self’ under classical liberalism, this line of reasoning, and its diffusion, also foil the material forces behind the shaping of new ‘subjectivities’.

Acknowledging the mutation of the liberal imaginary of the ‘self’ under neoliberalism, and its effects on transnational migration, requires that analytical attention be given to the politics and ethics of ‘attentiveness’ to changes. This concerns the power relations exercised over: (1) production and reproduction as an integrated social system, so far governed by a gendered rationale; (2) human bodies and subjective identities formed by ‘transnational migration’ as a state of displacement at this historical juncture of globalisation and (3) the re-configuration of the nation state as a homogeneous entity as a response and its ability to overwrite heterogeneous, hybrid identities and individual desires with respect to the ‘self’, as expressed in cultural forms, not always identifiable with the neoliberal imaginary of risk-taking and evaluating individuals with an expectation of the return to human capital. Exposing the ‘poverty’ of neoliberalism does not mean an uncritical return to classical liberalism or socialism, but is an invitation to make changes in the various epistemological positions to help deepen understanding on migration and its plural linkages with economies and societies. Doing so represents a counter-hegemonic strategy to rectify and rewrite the ‘public’ sphere and its interfaces with the ‘private’ so as to make the workings of power more visible and subjected to accountability in the defence of human rights.
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Notes

1. A selection based on economic expediency rather than moral principles.

2. The first layer of control, now digitalised, is at territorial borders. Within a territory, layers of control consist of social-legal instruments used to classify different groups among the migrant population and separate them by merit and desert. Extra-territorial control measures are also adopted by way of outsourcing border protection to a third party. Administrative detention practices, and their growing affiliated infrastructure across high-income regions, have become a major concern for social justice movements. See http://www.globaldetentionproject.org/

3. A survey conducted by the Economic Intelligence Unit on the behalf of Western Union in 2009 among 501 senior business executives revealed that while they believe migration continues to be good for business and the economy, there is a disconnection between the value business executives place on foreign workers and their efforts to maintain and foster the human capital of this workforce. As Christopher Sabatini puts it: ‘Help Wanted but Don’t Ask Us for Any’. The Huffington Post, 29 March, 2010. See http://www.as-coa.org/article.php?id=2250 (21 July 2010)

4. Düvell refers to how xenophobia may become a greater threat to social coherence than migrants initially experience. Likewise, sexism manifested through the growing circuits of commercial sexual services may deepen internal societal fractures, including cumulating features of race, age and other identities. It can go well beyond the individual experience of discrimination and lead to a racialised, gendered and sexualised consumption culture based on discrimination.


6. For example, using an identity paper purchased from the facilitator can forego a person’s right to protection as a citizen and make the person vulnerable to criminal charge.

7. For example, Freeman (1994) sees immigration policy as being shaped by ‘client politics’, dominated by small and well-organised groups (employers and migrant political groups) intensely interested in shaping policy to their advantage or ideals, who forge partisan politics tending to have some affects on national electoral processes, although with considerable variation across the EU member countries.

8. For example, women who migrate for work as domestic workers have been blamed for the ‘delinquency’ of the children left behind (Perera, 2009), or migrant sex workers have been depicted as ‘contaminating’ the host society (Trimiklinioti, 1999).

9. Hochschild (1983) defines emotional labour as a form of emotional regulation wherein workers are expected to display certain emotions as part of their job, and to promote organisational goals.

10. The ILO (2009) has made some global estimates on the economic cost and gains of migration under coercion.

11. Agustin (2007) and Kampadoe and Doezema (1998) develop the concept of ‘sex work’ further, within the world of services.

12. Ravenstein (1885). Laws of Migration include: (1) Most migration is over a short distance; (2) Migration occurs in steps; (3) Long-range migrants usually move to urban areas; (4) Each migration produces a movement in the opposite direction (although not necessarily of the same volume); (5) Rural dwellers are more migratory than urban dwellers; (6) Within their own country females are more migratory than males, but males are more migratory over long distances; (7) Most migrants are adults; (8) Large towns grow more by migration than by natural increase; (9) Migration increases with economic development and (10) Migration is mostly due to economic causes.

13. Early feminist thoughts in classical liberalism recognise ‘dependency’ at different moments in the life cycle (birth, illness and old age) and therefore does not loathe it, but instead sees mutuality and reciprocity as positive and necessary attributes (Engster, 2007).
Notes on contributor

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