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Introduction - The Laws of Undocumented Migration

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Introduction

The Laws of Undocumented Migration

Sheer economics suggest that we have reason to think, write and speak about undocumented migrants to a much greater extent. I shall not recap the old tales of income disparities, pull factors and bell curves here, however relevant they remain. Let me instead consider the example of China, being more than just an example, and only slightly less than a new paradigm for a large-scale merger of migration with labour. This merger lives off the disposability and disenfranchisement of migrant workers, and China's role as the world's workshop hinges on it.¹

By the force of competition alone, the systemic exploitation of migrant labour will proliferate further. Any country wishing to learn from China's successful rise into a major player of the world economy is invariably going to consider its exploitation of migrant workers amongst the success factors. Central to it is the absence of a right to association. This absence also defines the undocumented migrant worker, as noted by three contributions to this special issue. This, in turn, raises the question what role the law can and does play, when the law is determined without the participation of this group.

China is an oligarchy; its territory and population is huge, and its government has actively partitioned the country since the development of coastal export zones. In China's case, these are the reasons why internal migration is perfectly sufficient for upholding its low-end labour market. Other countries copying the Chinese model will resort to migrant labourers who cross international borders. Yet, one may object, undocumented migrant labour has proliferated globally long before China rose to power. That is obviously correct. The case of China allows us, however, to ask questions on the disenfranchisement of undocumented migrants. With no right to association and the concomitant inability to influence politics, the undocumented migrant also dwells in an oligarchic power

¹ Ching Kwan Lee, *Against the Law: Labour Protests in China's Rustbelt and Sunbelt* (Berkeley: UCP, 2007), is an ethnographic study addressing two major changes in China's labour policy. One is the dismantling of the old industrial areas in the Northeast (the rustbelt) and the other the emergence of the coastal export zones (the sunbelt), with the latter relying heavily on migrant workers originating from the Chinese countryside. Lee shows that these migrant workers do not view themselves as a group with shared interests, but rather as individual, and, to a degree, apolitical subalterns. They do, however, attempt to employ the court system to counter grievances that scholars of undocumented migration are all too familiar with: unpaid wages, physical violence as a disciplinary tool and the withholding of compensation for work-related injuries.

structure. How much compensatory power do discourses of rights, be it human rights or labour rights, possess? Will the courts side with the migrant, or with the *raison d'état*?

This special issue of the *European Journal of Migration and Law* is seized with undocumented migrants at large. From the authors' perspective, the problem is not that the law has withdrawn from this category, subjecting its members to the free interplay of forces, to a form of lawlessness. Rather, as the following contributions show, the law is very much present, for better and worse. It expresses how our ideas on equality before, by and through the law awkwardly produce this disenfranchised group. Yet, in doing so, it opens opportunities for critique and activism, for attempts to address the law with the law. As contributors to this special issue, we have employed two strategies. One is to resurrect equality by arguing human rights or labour rights, or both (Alexander and Inghammar). The other is a return to the political in an attempt to question its premises (Tjernberg, Gunneflo/Selberg and Noll). We are conscious of the fact that these two approaches embody two different ways of thinking the problem, two potentially opposed epistemologies, and that readers will experience the tension between them. Yet this tension is intended. Faced with the predicament of undocumented migrants, legal scholarship cannot maintain its calm and carry on. We see this issue as a laboratory for a number of scholarly responses – whether they are adequate or not, is quite another matter.

The contributions to this special issue touch on tax law, labour law, health law and human rights law in international, European and domestic law contexts, emphasising the plurality of legal norms conditioning the status of undocumented migrants. Many, but not all of them are extensively drawing on empirical material drawn from Swedish law and practice. Sweden offers a fruitful case study, as its advanced welfare system and its high unionisation of the workforce put differences between the protected and the unprotected in a particularly sharp light. Yet, as will emerge in the following articles, Swedish empiry is regularly complemented and contrasted with findings from other jurisdictions.

First out is Mats Tjernberg, who looks at undocumented migration from the vantage point of tax law. In his article on “The Economy of Undocumented Migration: Taxation and Access to Welfare”, Tjernberg inquires into the nexus between contribution and benefit as a central issue in the construction of the welfare state. First, he asks whether undocumented migrants deliver a net contribution to the economy of host states. After a painstaking survey of relevant literature across disciplines, he concludes that this is the case. Second, considering that undocumented migrants are *de jure* taxable in certain economies, while being *de jure* or *de facto* unable to benefit from tax-based welfare benefits, Tjernberg argues that this runs counter to demands of coherence in law. He argues that European states basing their social policy on a Beveridge model should integrate undocumented migrants in their social benefit system.

In a migration law context, this argument appears to be straightforward and outlandish at the same time. Why is that? In the following piece entitled “Discourse or Merely Noise? Regarding the Disagreement on Undocumented Migrants”, authored by Markus Gunneflo with Niklas Selberg, the crafting of undocumented migrants’ political and legal subjectivity is addressed. Drawing on Jacques Rancière’s concept of dissensus, the authors map the drafting of a recent EU directive on employers’ sanctions and track current Swedish legislative debates. They conclude that undocumented migrants “have no place in or do not belong to the question under consideration”, a price to be paid for the performance of a communal, nation-statist identity. In addition, Gunneflo and Selberg problematize demands for regularization made by certain associations for undocumented migrants. They are able to demonstrate that such demands tend to reproduce an exclusionary communal paradigm, leaving it “perfectly intact” for the production of future generations of disposable undocumented migrants.

In the next article, Andreas Inghammar engages specifically with labour law at a domestic, regional and international level (“The Employment Contract Revisited. Undocumented Migrant Workers and the Intersection between International Standards, Immigration Policy and Employment Law”). Inghammar’s analysis suggests that more attention should be devoted to the protective potential of the employment contract. Even though its full validity may be dented by the undocumented presence of the employee, it retains important effects in various areas of labour law. Drawing on the example of major Swedish trade unions, Inghammar is able to show that unions could act as a conduit for legal claims of undocumented migrant workers, but fail to do so for narrow policy reasons. This, he emphasizes, raises issues not at least under human rights law.

Shannon Alexander’s “Humanitarian Bottom League? Sweden and the Right to Health for Undocumented Migrants” follows up on a particular aspect of the human rights, which brings her to a head-on confrontation with the myth of the inclusionary Swedish welfare state. After a detailed analysis, highlighting difficulties of access and exorbitant fees imposed on undocumented migrants, she concludes that “Swedish legislation, practice and policy are generally inconsistent with its international human rights obligations” towards this group. In addition, she demonstrates the averse effects of lacking cultural competence among Swedish caregivers to migrants at large, amongst which those without a residence permit remain the most exposed group. Her article offers a model for studying to which extent other jurisdictions comply with their obligations under the right to health.

Finally, my own article attempts to respond to the question “Why Human Rights Fail to Protect Undocumented Migrants”. It departs from the factual difficulties of undocumented migrants to access human rights protection by the state and relates these to two competing conceptions of territorial jurisdictions. Drawing on the Convention on the Rights of the Child and the Migrant Work-

ers Convention, this piece separates the sphere of the political community (the *polis*) from that of the household (the *oikos*) in developing a politico-legal theory of undocumented migration. It rests two central tenets: one is a tributary transaction between sending state and host state, made with the hope of remittances flowing in return. The second is a quasi-contractual form of submission by the undocumented migrant worker entering the *polis*, which is structurally analogous to the master-slave relationship developed in Hobbes' defense of war slavery. Finally, drawing on Werner Hamacher's work, I analyse how human rights are intrinsically related to a position of privacy and a separation from the social world, which casts the undocumented migrant as what could be termed the anti-man of human rights.

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I do not want to end without reflecting on the meaning of a particular word. As will be clear from this introduction already, we have settled for the term "undocumented migrant", which remains an indecency, yet it is so much more decent than its alternatives. There are, it seems to me, reasons to ask oneself what the term "undocumented" means. To be undocumented obviously implies the lack of an official paper: a paper reflecting the permit to reside where one is.² But apart from that, we might wish to recall that *document* is derived from the Latin verb *docere*, which means to teach. There are two meanings offering itself after this etymological regression. One is that humans, once turned into undocu-

² See Gunneflo with Selberg's contribution to this issue, referring to Derrida's declination of the term *sans-papiers* in footnote 1; Markus Gunneflo with Niklas Selberg, 'Discourse or Merely Noise? Regarding the Disagreement on Undocumented Migrants', *European Journal of Migration and Law* 12(2) (2010) pp. 173–191.

mented migrants, apparently loose so much of that what has been taught to them. Whatever the skills they had before: now they are unskilled. As unskilled workers, it is only the lower end of the labour market that is open to them. But, and this seems to be more decisive, they have not been taught, or perhaps not allowed themselves to be taught, lessons in the *raison d'état*. By sheer being-here-outright, those un-taught point out to us the remaining possibility of unlearning these lessons: the lessons of subjecting oneself to the nation state.

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