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Emotions are omnipresent in criminal law for it deals with realistic cases of perpetrator having criminal behavior causing harm to the aggrieved victim either physically or mentally. Criminal law is based upon “right in rem” wherein State is the party functions to normalize the basic power that outlines the gender relations and hierarchies through law. Of the offences stated under criminal law, the outbursts of emotions are perceived in its highest degree, when such acts come under the purview of sexual offences. The levels of - honor, injury, impairment, resentment, aversion, embarrassment, misery - could be perceived amongst victim/s, perpetrators, alleged offenders and witnesses. These are evolved also because of social morality, social dishonor, media attention, sensitivity and the tag of physical and sexual abuse where the victim being a woman carries a “baggage of stigma”. This paper would deal with the cases of sexual offences which impact violence - both physical and psychological – where the victim is adjudged on what she is and what sort of character she possess. When the law is well established that “a perpetrator could not be convicted of sexual offences merely on the testimony of the woman” unless there exist “some concurrent circumstances corroborating her evidence”, this paper questions the nature of evidences and existing discourteous manners in collecting evidences in adversarial system that damages the mental stability of victim. Taking the illustrations from case judgments rendered in India, this paper would do a comparative analysis of all adversarial systems that disregarded emotions for the sake of collecting proofs. Ranging from infants to old aged victims, court process on sexual offences do bring challenging experiences to not just victim but everyone who are surrounded by her. The upsetting emotional rollercoaster and the engendered pressure to hide the impaired self from others could lead to victim pressing for plea bargaining too. There are also instances where the court asks victim or she at times gets compelled to marry the perpetrator for the sake of preserving honour. This paper also endeavors to examine the cases of rape and gang rape where the character of women was questioned or rather taken as defense for perpetrators to commit the crime. In a nut shell, the emotion of victim throughout the process of criminal justice system
in adversarial system is the centrality of this paper with an objective to examine the current justice system critically.
Integration has long been a central tenet of disability rights law. However, disability laws and policies have generally operated in one direction only: integrating disabled people into mainstream settings. This paper examines another model of integration, inverse integration—that is, including nondisabled people in contexts, frameworks, or activities typically populated by disabled individuals. While generally not required by law, inverse integration is becoming increasingly popular across the United States. For example, in contemporary America, nondisabled students often participate in programs taking place in “special education” settings; hearing actors perform in Deaf theatres; politicians and celebrities shave their heads to express solidarity with cancer patients; and nondisabled athletes play wheelchair sports.

This paper documents the emergence of inverse integration and analyzes the opportunities and threats posed by this new model. It shows how traditional integration practices and legal mechanisms provided the foundation for and helped give rise to inverse integration. It further argues that inverse integration operates as a double-edged sword. Although some inverse integration practices hold the promise of counteracting the stigma of disability and advancing productive intergroup interactions, inverse integration may also have negative implications. For example, some practices may exacerbate misconceptions about disability, involve cultural appropriation, perpetuate notions of pity and charity, and divert scarce resources. This duality poses significant challenges for lawmakers, policymakers, and activists.

This paper proposes a number of recommendations and best practices to help stakeholders as they grapple with this new model. For example, to prevent nondisabled people from imposing “mainstream norms” on disability-led organizations, this paper suggests that the governing boards of such organizations contain a majority of disabled people. All of these recommendations incorporate the underlying principles of the disability rights movement, most notably “nothing about us without us.”
The Temporality of Parental Determination: Bridging the Gap Between the Self and Legal Identification of Same-Sex Couples (A Case Study of Israel) - Noy Naaman (University of Toronto)

Legal contemporaries have ventured into the territory of time in various areas of the law. Despite growing conversation about time and the law, little has been done to unpack the role of time in relation to parental identity. To address that gap, this paper extends a glance toward queer scholarship on temporality. Queer studies offer a more complex understanding of identification, exploring the many ways in which the self is governed and oriented by external temporal structures. Informed by that understanding, this paper introduces the analytic framework of Temporal Discrepancy to legal literature. Temporal Discrepancy refers to the incongruence between the construction of the self and legal identifications.

In the context of parental determination in cases of assisted reproductive technologies, Temporal Discrepancy occurs when the genetic parent’s partner, the intended social parent, perceives himself as a parent at the child’s birth; however, until a parental or adoption order is granted—usually at a distance in time after the child’s birth—the law configures him as a stranger to the child. This paper examines the various ramifications of this temporal structure. In doing so, it aims to illustrate how time is deployed as a disciplinary and constitutive device, operating against, and conflicts with, same-sex couple’s experience of becoming a family. Rather than merely offering a blueprint for legal reform in the particular case of same-sex couples, this paper aims to nourish a broader conversation on how time informs the regulation of parental determination.
"State of betrayal: Individuals, identities and the constitutional vision under the South African Constitution - Jonathan Hunter-Parsonage (University of Bristol)

The introduction of the Interim and 1996 South African Constitutions fundamentally rebased the foundations of South African society. This change not only impacted the values of the State, but had significant repercussions for individuals, impacting identities, relationships with the State, and, as a result of the horizontality of the Constitution, relationships between individuals. These changes engaged the trust of the South African population, shaping (and reshaping) fundamental elements of how individuals and communities understood themselves.

Reflecting on twenty-five years of development, it is fair to question whether the Constitution (or, perhaps, more specifically, the manner in which it has been imparted to the population by the State, rather than in terms of jurisprudential advances), has proven worthy of the trust that the South African population placed in it. Recent research indicates a virtually complete absence of the Constitution from the lives of the population, or resentment about some elements of the constitutional state. What might the ramifications be for individuals and communities that might be dealing with the consequences of this betrayal? The investigations conducted within the bounds of this PhD project indicate that there may be some sections of the population that exhibit similar characteristics to those found in people experiencing betrayal in their personal relationships – anger, rejection, wishful thinking, and denial.

This project explores the relationship that three South African communities have with the Constitution, exploring its presence (or absence) from the lives of the individuals within these communities, and the ramifications of this on the relationships that each community has with the State. At the heart of this project lies the concept of legal alienation, a conceptualization of legal consciousness that explores the manner through which law loses salience in the minds of the populace.
KEYNOTE SPEECH / CONFÉRENCE D’HONNEUR:

The No-State ‘Solution’: Palestine and the Question of Queer Theory – Jasbir K. Puar (Rutgers University)

This lecture is an overview of nation-state based queer theory from the last 3 decades and an articulation of what queer theories of anti-nationalism, non-nationalism, and no-state solutions could entail, converging with Black and indigenous studies and movements in Palestine.

About the speaker: Jasbir K. Puar is Professor of Women’s and Gender Studies at Rutgers University. She is the author of the award-winning books The Right to Maim: Debility, Capacity, Disability (2017); and Terrorist Assemblages: Homonationalism in Queer Times (2007), which has been translated into Spanish and French and re-issued in an expanded version for its 10th anniversary (2017). In 2019 she was awarded the Kessler from the Center for Gay and Lesbian Studies (CLAGS), given yearly to scholars and activists whose work has significantly impacted scholarship and organizing.
Am I worthy? The case of a white male law student who wants to research into minority rights - Luca Galli (McGill University)

Being a white male law student who wants to research into the protection of refugees’ rights, several questions populate my mind every time I start reflecting on this topic. Is it fair (or possible), for me, to study refugees’ condition even if I am not part of this minority? Will I be able to correctly represent their needs? Will I be able to find a rational solution, practical and helpful for the refugees in their daily life necessities? Am I doing this because I really care about refugees’ well-being or because it will be useful for my career?

In a field where the need for decolonizing the academic research is extremely clear (e.g. while 80% of the world’s refugees remain in their regions of origin in the global South, over 85% of the dominant, published academic research on refugees originates from scholars and research centers in the global North) and in a time where leaving the representation of minorities’ issues to “majority academics” is less and less accepted, answering those questions becomes an essential step to define the meaning, the usefulness and the dignity of my research.

Starting from the existing reflections of “minority academics” (above all, Bell, Dalton, Delgado, Williams) criticizing the approach of their “majority” colleagues, this work intends to unearth the intimate relation – made of ideals, hopes and fears – binding a legal student with the area of law she/he decided to investigate, reflecting on how this relationship plays a key role in defining her/him not only as a lawyer but also as an individual who belongs to a community and who wants to contribute to its positive development.
**Queerness and Harm Reduction ‘Underground’: Transgression and Creation of Legal Space in Queer Friendly Social Spaces - Bradley Por (McGill University)**

This is a proposal for a project that considers how harmful socio-legal constructions of sexuality and substance use are subverted in queer friendly social spaces, and how personal experiences may be used to challenge criminalization of substance use and restrictive/punitive regulation of marginal social spaces such as ‘underground’ raves.

In the conservative suburb where I grew up I was isolated because of my sexuality. I found myself in a secretive relationship with someone who had a serious addiction to opioids that dramatically impacted my life. Fear of being open about my sexuality dovetailed with fear of being open about involvement with ‘illicit’ drug use so I hid the situation and did not seek help. Eventually we became estranged. Three years-ago he died of a fentanyl related overdose at the age of 29.

After coming to terms with my sexuality and moving to Montreal I began going out to queer friendly social spaces that have become places of healing and community. In these spaces a culture of harm reduction prevails. I propose to conduct interviews in these spaces, with focus on ‘underground’ raves where stigmatization of substance use is subverted through a culture of harm reduction. These spaces are threatened by gentrification, policing, and increasing sanitization of urban space. Interviews would record experiences of sexuality and substance use to gather information on the relative safety of these spaces. To supplement interviews, I intend to gather data on location of substance use and overdoses.

While the ultimate objective is decriminalization of all substance use, this project is intended to protect queer friendly social spaces I believe are essential for reducing harm. Their present need is acute as Canada is in the midst of an overdose crisis that has claimed thousands of lives. Queer people use substances at higher than average rates and are more likely to experience substance related harms. I expect the results of my research to demonstrate that social spaces with cultures of harm reduction decrease isolation and increase safety for queer people.
The Intimacy of Autobiographical Legal Methodology - Gabriella Jamieson
(McGill University)

Legal research methodologies are notoriously varied. Methodological approach is impacted by the researcher’s ‘home’ legal system, their academic institution, or their purpose for pursuing a line of research in the first place. Is the work intended for judicial consideration, swaying governmental policy decisions, or for planting a seed of change in the reader’s mind? These different projects might require more or less engagement with the researcher’s personal life experience to be effective; to balance the constant desire for ‘objectivity’ in legal research, with the reality that as legal researchers we always imbue our work with personal experience even if we can present it as impartial. For instance, many Indigenous scholars researching Indigenous law explain how this work requires a methodology that is “intimate and personal, with individuals themselves holding the responsibilities for finding and generating meaning within their own lives” (Leanne Betasamosake Simpson). An autobiographical methodology allows a researcher to be sensitive, reflexive, accept that one’s own life is often intertwined with one’s research, and in the Indigenous legal context acknowledge that to compartmentalize knowledge from the relationships in which it lives would obstruct one’s ability to do that kind of research. What can we learn from engaging with the intimacy created from an autobiographical method in legal scholarship, particularly in scholarship relating to the effects of colonialism? When the ‘objectivity’ of doctrinal research generally reflects the colonial state’s perspective of law, what does it mean for legal scholars (Indigenous and non-Indigenous) to become more comfortable engaging with personal experience, narrative structure, and vulnerability? Can we trust the unknown future reader with our thoughts? As a non-Indigenous jurist engaging in a mixture of auto-biographical and ‘traditional’ legal methodology, I will discuss the process, benefits, and risks of making one’s legal research a personal story when it relates to colonialism.
A Family Affair: Regulating the Intimate, a Critical Look at Hungary’s New Family Protection Action Plan - Edit Frenyo (McGill University)

The paper will apply a gendered, distributive and interdisciplinary analysis to regulatory measures in the field of family governance, using Hungary’s new “Family Protection Action Plan” (2019, FPAP). The Plan is designed to promote “marriage, childbirth and families” in order to counter Europe’s pro-immigration “solution” to the demographic decline in the region. The paper will use the Hungarian case to highlight the limits and potentials of law’s ability to order intimate relationships and to model how various areas of law and policy (such as tax, employment/labor and property) regulate the family, commodify human relations and act as de-facto “family law”. In return, it highlights the power of the intimate and private sphere – against the incursions of the public, especially in matters of childbirth, or love and union between adults.

Normally discussed in the context of ethno-nationalism and anti-immigrant sentiment, the endurance, or trend-setting nature of the FPAP in the region remains to be seen. Yet the policy moves reveal much about the “ideal Hungarian family”. The paper will demonstrate that the FPAP package is designed to reinforce Hungary’s commitment to preserving national identity and ethnic composition, heteronormative marriage-and parenting. It will critically examine the Plan’s claim of “empowering women”, described as the prime decision makers in matters of childbearing and parenting. Family benefits for (some) straight married couples will now include: interest-free, all-purpose loans; family home ownership subsidy program; significant mortgage deductions and women who have at least three children will be granted life-long exemption from personal income tax liability related to formal employment. In addition, the Hungarian state recently captured the majority of IVF fertility clinics, all-but eliminating private actors, and will centrally govern and fund numerous rounds of IVF fertility treatments as part of a large-scale public intervention.

What forms of families, whose children and what ways of becoming a parent are valued and prioritized under these policies against the backdrop of Hungarian laws and the social realities of family life in the country. How in-tune are these priorities with our obligations under EU law, international and regional human rights instruments related to non-discrimination and gender mainstreaming? The paper will answer some of these questions and propose new ones.
that should be taken into consideration regarding various distributive consequences, through the lens ethnicity, gender and family studies.
Inheritance Law is a legal field in which reforms generally arise in a particularly slow pace. Dealing with succession matters, both legislators and courts have traditionally repeated the past instead of focusing on the future. Thus, most Western jurisdictions still adopt a 19th-century structured inheritance system, which is conservative regarding family issues. Using Critical Legal Studies as a methodology, I argue that “family values” conservatism in Inheritance Law is particularly problematic in 2020, for societal changes and new family structures demand succession rules focused on new social values. In most Western jurisdictions there is only one intestate succession model, which has been historically structured specifically based on two pillars: the heterosexual marriage and biology. That intestate inheritance model is both inflexible and abstract, even in liberal, progressive jurisdictions. Having been developed based on a specific family model, these intestate succession rules are potentially insufficient to appropriately address the needs of different family forms; in addition, non-heteronormative relationships are almost always ignored by Inheritance Law. Those traditional inheritance rules may benefit family structures which are analogous both to the heterosexual marriage (such as same-sex partners or cohabiting couples) and to biology (such as adopted children). Nonetheless, they generally still fall short of properly addressing modern family structures, such as polyamorous partners or multiparenting. Furthermore, usually the Law of Succession completely ignores non-sexual, non-biological forms of intimacy, such as those based on caregiving or financial dependence. In my research, I recommend pervasive, deep reforms in the Law of Succession, especially the attribution of more discretionary power to probate courts, which would allow them to recognize non-traditional, hereditarily relevant relationships. In addition, I argue that each intimacy model requires a specific – in a non-discriminatory way – inheritance treatment, based on its particularities; therefore, simply applying traditional succession rules by analogy to them is not be the adequate legislative solution.
La fragilisation du lien de confiance au sein de l’intervention sociale en protection de la jeunesse: Peut-on blâmer le droit ? - **Marilyn Coupienne**
(Université du Québec à Montréal)

Dans le cadre du droit de la protection de la jeunesse, Loi sur la protection de la jeunesse (ci-après « LPJ ») édicté les pouvoirs et responsabilités des travailleuses sociales du Directeur de la protection de la jeunesse (ci-après « DPJ ») et encadre la relation entre celles-ci et les familles. Selon la littérature relative aux pratiques sociales dans ce domaine, les familles suivies par le DPJ peuvent se sentir observées, traquées, dénuées d’intimité et trouvent difficile de laisser entrer une étrangère dans leur vie privée. De plus, la judiciarisation des dossiers à la Chambre de la jeunesse semble davantage opposer les parties, renforcer le rapport de force en faveur des travailleuses sociales et consolider la méfiance des familles à l’égard des institutions judiciaires et sociales. De ce qui précède, je me poserai la question suivante : Comment le droit participe à fragiliser le lien de confiance entre les travailleuses sociales et les familles suivi par le DPJ ? J’analyserai comment les règles de droit édictées dans la LPJ créent un cadre juridique où il est difficile d’établir un réel lien de confiance entre les familles et les travailleuses sociales du DPJ puisqu’elles ne peuvent sortir de leur intervention en contexte autorité. Le double rôle octroyé aux travailleuses sociales par la loi, celui de l’aide et celui du contrôle et de la surveillance, crée des tensions avec les familles et nuit au lien de confiance nécessaire au travail thérapeutique et à la fin de la compromission de la sécurité et du développement de l’enfant.
India's People-Public-Private Partnership Model: Taking The Trust Leap and Beyond - Malcolm Katrak (Jindal Global Law School)

In 2014, Narendra Modi, the Prime Minister of India, proposed the idea of a People Public Private Partnership (P4), which is a modified concept of the traditional Public-Private Partnership. The aim of P4 is to use a bottom-up participative strategy to understand the nature of public engagement in policy making. His idea was to create policy initiatives as a ‘Jan Andolan’ (People’s movement) with total ‘Jan Bhagidari’ (People’s participation). To be an inclusive partnership, the initiatives should allow financial, social and economic inclusion of the people. Thus, it is necessary to understand what the systematic mechanism of the strategy of inclusion can be and what the viability of a shared power network is in People-Public-Private Partnership. This helps in resolving the issues of hold-ups and unforeseen oppositions in policy formulation. The aim of this paper is to understand the role played by all the actors, in the P4 initiative, in policy formulation. For this reason, the paper will analyse the risks and incentives involved in taking a trust leap for the actors. Whilst the paper’s focus would be the ex-ante approach, it will also consider the ex post impact of the policy. By using the focal point approach, the paper examines the effects the policies have on individual behaviour and collective outcomes. For this study, the paper investigates examples of policies which have been passed by the legislature after the initiation of the P4 strategy. Though the focus of this article would be to examine how the P4 initiative has affected policy formulation, the implications of the analysis will also help in understanding how people’s behaviour is affected by law and public policy.
The Fiduciary Principle in Indian Data Protection Law: Setting Context for an Emerging Data Protection Framework in India - Sameer Avasarala

India, having a legal system with common law roots, is not unfamiliar with the idea of a fiduciary relationship between parties, ranging from contractual arrangements or in the context of other legal relationships. This relationship has also entered the dominion of the emerging data protection framework in India, with the introduction of the Personal Data Protection Bill, 2019 in the Lok Sabha (lower house of the Indian Parliament). While this Bill borrows in large parts from the General Data Protection Regulation in the European Union (GDPR) and the Personal Data Protection Act of Singapore (PDPA), it introduces some novel requirements such as data localization, an irreversible anonymization standard, statutory recognition to consent managers to name a few. The most notable among these is the concept of a data fiduciary, including, significant and guardian data fiduciaries. While the GDPR and the PDPA contemplate a principal-agent relationship between the data controller and data subject, the PDP Bill envisages a fiduciary relationship, rooted in trust between the parties. As detailed in the Report of the Committee of Experts on Data Protection, this relationship is one that is premised on a fundamental expectation of trust and such expectation of fairness in processing is the hallmark of a fiduciary relationship. This is further evident form the scheme of the Bill directing substantial obligations at data fiduciaries which would attain a balance between exploitation of economic benefits of data and individual autonomy. Indications around a fiduciary relationship are also further seen in the context of a forthcoming nonpersonal data regime proposed by a Committee of Experts, as a data custodian. This paper deals with the interplay between data fiduciary and principal in the context of personal and nonpersonal data protection regime and makes a comparative inquiry into the evolving and current regimes in Canada, Japan and the European Union to evolve a consensus on the contribution of fiduciary relationship between the parties towards drawing a balance between monetization of data economy (in the context of nonpersonal data) and individual autonomy (in the context of personal data).
When Intimacy with Employers Becomes an Obstacle in the Emergence of Labor Complaints: Focus on Foreign Household Worker in Taiwan - Tseng, Chien-Hao (National Taipei University)

This study evaluates whether intimacy between labor and employers can be an obstacle to the emergence of complaints when the rights of labor are infringed by employers. In other words, does intimacy makes workers unable to, or tend not to file a complaint against their employers?

The research selected foreign household workers in Taiwan as the research subject, since their work requires them to live with their employers, and a large part of their social network is composed of employers and their families, thus more likely for them to have a "family-like" intimacy with their employer. The author focuses on the framework “Naming, Blaming, Claiming” from socio-legal studies, and analyzes whether intimacy has played a role in these three stages through literature review and depth interview.

This article finds that intimacy is an important factor in whether or not workers emergence a complaint, especially in the “Naming” and “Claiming” stages. That is, it is difficult for workers to identify the fact that their rights have been infringed, and even after correctly identified the injury and blamed it on their employer, they will tend not to file a complaint against their employer, all because of intimacy.

Based on the above findings, the author believes that the impact of intimacy in labor relations should be taken seriously, to prevent legal effectiveness from being affected by intimacy, causing the law unable to protect labor rights.
Theories of associative obligation hold that the membership of a community gives rise to the political obligation to a particular sovereign. They argue that people would have a general obligation to the laws of a particular polity when one acknowledges the membership of a political society. The public social lives of political obligation are explained and justified from a private dimension. The sense of identity with a community or a polity, the feelings of belongings and connectedness, all of which are the private dimensions of social life, make people share the same understandings of a community and become a member of it.

Community is a combination of private and public life, while global issues bring great challenges to its aspect of private life, and in turn influence the feasibility of associative obligation. In the beginning, being a member of a political community means that we stand in a close and intimate relationship with each other within a particular community. However, global issues require a collaboration of people across borders and have penetrated the boundaries of communities. A globalized concerns have altered the private dimensions of social life and the public lives of a polity conflate with other communities.

A reflection on the notion of community has to be made, or the associative obligation theory would be failed. There are two crucial features in understanding a new version of community in face of global issues: first, the community should be an open system and have private and public connections with all others; second, the membership of a community depends on the understanding of our place in the world.
Are Happy Families All Alike? A Turkish Perspective On Corporate Governance
In Family Firms - Seda Palanduz (MEF University / Université Galatasaray)

Corporate law aims to mitigate conflicts of interest among corporate constituencies. Both legal scholars and lawmakers tend to assume that these are rational actors solely motivated by wealth maximization. Family firms, however, add more personal and less rational layers to the inquiry: On the one hand, family ties may enable a relationship of trust that reduces transaction and agency costs; on the other hand, the same intimacy and sentimentality may eventually create conflicts of interest among family members, make the firm vulnerable to changes in the family dynamic, or cause tensions between family and non-family shareholders. Successful family businesses have to integrate family and business governance—a job that, in many jurisdictions, is being unnecessarily complicated due to absence of proper corporate governance regimes supporting family businesses.

From a Turkish perspective, this paper aims to discuss ways through which lawmakers may adopt family firm-friendly corporate governance regimes. The choice of jurisdiction is not incidental. In Turkey, where family firms play a crucial role in the national economy, there are no codes of governance or soft law measures specific to them. On the contrary, Turkish Commercial Code includes the principle of statute stringency that prohibits all deviations from legal provisions unless expressly permitted. Turkey serves as a good example to demonstrate the consequences of overlooking particularities of family firms.

This paper has two central claims: First, it seeks to establish that lawmakers should prioritize default rules over mandatory ones so that family firms can tailor their articles of association to their unique circumstances through legal devices such as exit rights and share transfer restrictions. Second, it argues that in case of reluctance to negotiate legally binding instruments due to fear of impairing ties of trust and intimacy, non-binding family constitutions should be encouraged as an alternative.
The broad philosophy underlying this research echoes the introductory statement of lawyers Samuel Warren and Louis Brandeis in their pioneering article entitled “The Right to Privacy” stating that ‘Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the new demands of society’. ¹

The protection of privacy has almost always been legally treated as an individual matter concerning natural persons. This has been subject to a different approach and treatment by the law when it comes to dealing with the question of a right to privacy to be extended to legal persons such as corporations. The question of the development and ultimately the recognition of a right to privacy *per se* for corporations and the ambit of that right remain insufficiently scholarly examined and unclearly legally treated.

The reality is that there is a substantial and an increasing business context to privacy law. The issues surrounding how increasingly global corporations manage information — in its broadest sense — is of critical importance: the internal governance (internal decision-making process) and management of corporations, and the way in which corporations may either defend themselves from regulatory or civil liability and / or be investigated or held to account whether through the courts or the media. It is argued that privacy, confidentiality and issues of legal privilege are part of an overlapping spectrum of rights that need to be analyzed and understood in parallel with the laws of discovery / search and seizure of evidence and admissibility of evidence in the civil and criminal courts of different jurisdictions. Therefore, the research explores the concept of privacy through what is meant by “privacy” — definition of privacy, privacy interests, rationales of privacy, legal purpose of privacy, to get to propose a concept of privacy for corporations. Then, the research analyzes the question of the recognition of a legal right to privacy *per se* for corporations as right holders through an analysis of what in reality corporations are and what in reality corporations legitimately need in terms of legal support not only to sustain profitability but also to benefit the society, and an analysis of who or what may have legal rights of their own. Those analysis aim to contemplate in practice what a right to privacy would mean for corporations in terms of legal protection with regard to information privacy and intrusion privacy matters, and to what extent that would add to or clarify the extent

of the legal protection of privacy for corporations in this day and age and / or to what extent a right to privacy for corporations ought to be curtailed given an overriding public interest in openness and transparency. A comparative law analysis between the United Kingdom and the United States is also dedicated to this research — it ultimately reflects upon the question of how the courts, within those jurisdictions, would allow privacy law to develop, in a balanced way, in the wider context of corporations, thus providing corporations with sufficient and adequate safeguards in this day and age to effectively carry on their activities.
Information transparency is always an important issue in financial regulation. To better combat the problems revealed by the Global Financial Crisis in 2008, regulators across the world have chosen to adopt more rigorous information disclosure requirements. In the European Union (EU), Markets in Financial Instruments Directives (MiFID II) came into effect on 3 January, 2018. In MiFID II, information disclosure is required ranging from market infrastructure, product governance and transaction reporting to investor protection. Although MiFID II has given detailed and strict requirements towards information disclosure, in practice information transparency can still be an issue. Information may be disclosed not in time, partially or selectively disclosed. Therefore, it is argued here that blockchain technology can be used for information disclosure in regulation.

In essence, blockchain is a decentralized distributed database. It is not controlled by any single party. All parties in the blockchain network are connected to each other, and have a full copy of data and execution records. With databases of financial institutions directly connected to blockchain network, information can be streamlined to clients and regulators without delay and inaccuracy. In addition, since all parties have a complete copy of the data, any party on the network cannot simply modify the data artificially. Information transparency can be guaranteed via blockchain.

Furthermore, blockchain helps increase the control of regulators and clients to financial services by receiving timely and accurate information from financial institutions. This sense of control helps boost clients’ trust in financial institutions and even the whole financial system.
The Supreme Court of Canada in 2019: Dynamics of a Collegial Court - Sandrine Ampleman-Tremblay & Camille Nadeau (McGill University)

One tends to see or perceive the law as objective and impersonal. This perception extends to our judicial system and to the judges in charge of interpreting and applying the law. If courts are impersonal, why are the judgments of the highest collegial courts of many countries not rendered anonymously? If courts are objective, why do attitudinal researches show that judges’ personal features, such as gender, ethnicity or religion, can influence the outcome?

In light of the above, we wish to present the results of our paper focusing on judicial relationships at the Supreme Court of Canada in 2019. With the intent of understanding Justices’ relationships with their peers and the law for that same year, we computed the majority authorship rates, the agreement rates between duos of Justices as well as the vote distribution (i.e., majority, dissent or concurrence). We then contrasted our data with the literature on judicial decision-making as a way to assess whether Justices’ personal features (more specifically gender) may have had an influence on agreement, vote distribution and authorship. Please note that this paper does not contain substantive analyses of the Supreme Court’s decisions and rather focuses on Justices’ decision-making practices. A special attention is given to Justice Côté who has exhibited a high rate of dissensus in the past, a phenomenon reminiscent of the Court’s female Great Dissenters.
Imagine one wishes to undertake a study on the work conditions of bicycle couriers found in major urban centres. The researcher assesses the risks and evaluates the dangers. Taking into account that the same day parcel industry is time-sensitive and that couriers often violate municipal traffic bylaws to meet client deadlines, must the researcher break the law and follow the courier through the red lights in the intersections? There is no simple answer to this question. This scofflaw behaviour permeates into other dimensions of the bicycle courier subculture. Couriers demonstrate a liberal adherence to traffic bylaws and regularly organize urban street races. These marginal and judiciarised couriers have a tenuous level of trust in institutions such as universities wishing to study them in order to improve their work conditions. Indeed, the researcher must establish a relationship of trust with the couriers prior to writing their treatise. Experience shows that in many cases the authors of academic publications on bicycle couriers previously worked as couriers themselves. In light of the worldwide pandemic, couriers in many jurisdictions have been categorized as essential workers. They represent a critical link in the global logistics chain and cannot be overlooked. This paper explores how the nature of the study of bicycle couriers could jeopardize the trust between a researcher and the participant. It relies on academic literature, legislation, internal policy and recent newspaper articles to outline the ethical dilemmas a researcher may face in this type of study. One of the paper’s conclusions is that although couriers often flirt with lawlessness there are many reasons why the presence of a robust courier community is often the sign of a vibrant city.
Why you shouldn't trust your Landlord? Scottish Horror Stories - Shona Warwick (University of Edinburgh)

In Scottish lease law, what parties believe the law to be and what the law actually is, are often two very different things. As this paper illustrates, this discrepancy exists even in the very fundamentals of lease law: parties do not even fully understand what makes a lease a lease. The incongruity between the presumed and actual law in this area can lead to unfortunate results for the parties involved.

One example is the recent immigration case of Ali v Serco 2019 CSIH 54. In that case, refugees were evicted without warning because it was (successfully) argued by the landlords that the refugees did not have a lease and so did not benefit from the implied protections given by a lease. This paper illustrates, however, that the definition of a lease relied on was unduly narrow in scope. It argues that had the true extent of the concept of a “lease” in Scots law been understood, the refugees may have avoided being evicted without notice.

Similar problems arise in the commercial context. In Brador Properties Ltd v British Telecom Plc 1992 SC 12, the landlord made clear that the agreement created was not a lease. Nonetheless, the court found a lease had been formed, the parties having misunderstood both the irrelevancy of intention and the meaning of key terms such as exclusive possession. The consequence here was breach of a pre-existing contract prohibiting leases, meaning extensive damages were payable.

The significance of this paper lies in the degree to which it will illustrate that the understanding of the law forwarded by (powerful) landlords is often inaccurate, and that to avoid unfortunate results like those illustrated in this paper, it is imperative that tenants do not automatically trust what landlords say. Instead, they must ask themselves, what is the law, actually?
Building Public Trust in Tax Administration: The Silent Role of Policy-Based Legitimate Expectation in Nigeria - Okanga Ogbu Okanga (Dalhousie University)

The interaction between tax administration, discretion and legitimate expectation has been widely explored. However, the subject has traditionally been approached from the perspective of legality and deeply focused on how courts adjudicate cases bordering on the frustration of legitimate expectation by tax authorities. This is unsurprising, given that legitimate expectation evolved as a judicial remedy to check administrative unfairness and to provide certainty and trust in public administration. Cases show that this remedy is rarely accorded by the courts, which makes its efficiency questionable. Using Nigeria as a case study, this doctrinal paper explores the prospects of an alternative approach; one that focuses on what tax authorities, rather than the court, can and, perhaps, should do when confronted with claims of legitimate expectation and how what they do potentially impacts public trust in the tax system. The concept of “trust” has played a useful role in shaping the jurisprudence of legitimate expectation. Some authors, likewise, advocate trust as the core underlying principle or justification for the protection of legitimate expectation. It is, however, the view of this author that, regarding taxation especially, adjudication is not a plausible way to engender trust between taxpayer and tax authority. Rather, only an approach that sees the tax authority leading positively on claims of legitimate expectation can engender trust. This approach can better make the tax paying public trust the tax authority, since trust is more likely to derive from a symbiotic interaction between interested parties than through the actions of an intervener.
Governments across Canada engage private contractors in the provision of many public services: from waste collection and road construction to welfare administration and social services. Critics of governments’ privatization projects\textsuperscript{1} note that the participation of private contractors in the provision of public services leads to poor quality of services, procedural irregularities, and lack of accountability. In these troubling circumstances, public law seeks to constrain the exercise of private discretion. To achieve this goal, it employs accountability mechanisms embedded in legislation, regulation, and contracts.

Yet, public law’s attempts to constrain private activity are often unsuccessful. There are several reasons for this: government lacks resources to enforce its own rules; laws and regulations trail development of science and technology; some types of private activity defy familiar forms of regulation, etc. Given the limited success of conventional constraints, this paper advocates for a more pragmatic approach to public/private interconnectedness. The cornerstone of the proposed approach is partnership relationships between private and public realms. In this context, the word “partnership” does not refer to a form of business organization; it is used in a broader sense, to denote the relationships characterized by trust and cooperation.

This paper demonstrates that, in the context of competitive government procurement, partnerships can be formed through flexible procurement formats. These formats allow government to negotiate the conditions of service delivery with a pool of interested bidders, instead of imposing a pro forma service agreement on successful bidders. Flexible procurement formats have two advantages: (1) they give government an opportunity to capitalize on private ingenuity; and (2) they reduce the likelihood of disputes over contract performance and over implied, common law duties of government purchasers.

\textsuperscript{1} Privatization may take many forms; here, the word “privatization” refers exclusively to the assumption by private actors of public services through a competitive procurement process.
Towards a Constructivist Approach to Resolving Trade Disputes in Africa -

Oluwaseyi Sanni (Dalhousie University)

From a third world perspective, the rules undergirding international law, and by extension, international trade law are essentially Eurocentric. Therefore, they lack the trust of developing States, particularly considering their colonial history. The case to Africanize trade agreements, particularly at the regional level has been made. This Africanization agenda must draw from the peculiar context of the African region as defined by their historical experiences in order to derive rules that are familiar to them and which they can trust. This is, in part, what constructivism is about.

The recent coming into force of the African Continental Free Trade Agreement (AfCFTA), which is a major attempt of the region at fostering cooperation among African States, is notable. With the inevitable nature of conflicts, the need to develop an adequate dispute resolution regime that can salvage such cooperation is vital. Both the idea of cooperation and salvaging same in the event of conflict, require that African States are able to trust the system as well as one another in order to influence, not just cooperation, but intimate cooperation among States.

For constructivists, a transformational approach to studying the any dispute resolution system in order to develop rules that appreciate the intrinsic relationships among the States is required, rather than the idea of exogenously imposing rules on the States. The major question I seek to address in my research is how to promote intimacy and trust through a carefully designed characteristic body of trade dispute resolution rules for African States.
The doctrine of “objective good faith” and the building of trust between governments and taxpayers - Eduardo L. A. Campos (Minas Gerais Federal University)

Transparency and predictability are two of the major challenges in contemporary tax policy formulation. Business is daily creating new models to reach consumers’ ever-increasing need for new technologies. In this context, governments’ tax policies around the globe are challenged to keep pace with the market fast-growing diversity and to avoid the erosion of tax basis and capital flight. In this situation, tension continually increases between governments and corporate taxpayers since both plan their activities based on past experiences, foreseeing short, medium, and long-term mutual impacts.

In this fast-forwarding economic scenario, loyalty to both fair tax competition and fair distribution of tax revenues on a globalized economy is a big challenge. Both corporations and countries engage many times to bad faith practices, i.e., aggressive tax planning and harmful tax competition to benefit from lower tax burdens and attract business to their territory, respectively.

Many unilateral, bilateral and multilateral initiatives have been promoted for at least the last twenty years to address this issue and scholars have their role to play. This paper aims to explore the benefits of the doctrine of objective good faith in tackling harmful tax practices. By exploring a theoretical approach to the very nature of taxes and its justification as a legal and political obligation, I expect to demonstrate that, while conceiving good faith as a ubiquitous characteristic of tax obligations, trust between governments and taxpayers becomes easier to build and enforce.
Civil disobedience refers to a range of non-violent techniques of expressing disagreement with authority collectively. Some authors contend that it is a moral and practical way to provoke morally justified social changes. For civil disobedience to become a more widely used form of political expression and a tool for social progress, there must be a commonly shared belief that the judicial system recognizes it as a viable means of dialogue. This paper provides a comprehensive review of Canadian case law referring to civil disobedience and addresses the main ways arguments raised by activists are dealt with by courts. Our review of the case law shows a lack of recognition for the moral justifications of civil disobedience. Acts of civil disobedience do not warrant absolution or reduced punishment. Moreover, civil disobedience often impacts sentencing unfavorably. We conclude that the current treatment of civil disobedience by Canadian courts fails to provide a response that would legitimize it.
We are often told, during the course of our legal studies, that one must be clear. Rarely though do we ever question the meaning of such an imperative. It is understood as self-evident. Being “clear” is an effort of the mind to make communication seamless, that is, to pretend that one’s thoughts are rendered transparent to others. Whilst it is acknowledged to be an ever constant and perfectible endeavour, clarity is at least what any lawyer or legal scholar should aim for. I want to argue, contrary to this widely accepted idea, that the pursuit of clarity in legal discourse poses a threat to the appreciation of what could be called law’s beauty. “Clarity” serves as an ideological devise under which law, through discourses about law, is reduced to its mere function. Language itself is only understood as a functional tool: words are nothing but a means of expression. Such a limited approach to our everyday use of semantics masks the complexity inherent to the multiplicity of our world-views. It denies the symbiotic relationship between our minds and language. One might shrug it off, arguing that the purpose of law is not beauty, but practicality. Yet, arguing so is hardly dissimilar to claiming a home needs not beauty as long as it is sturdy. Experience has proven otherwise, as even caves were decorated, one way or another. Drawing from Jun'ichirō Tanizaki’s work on Japanese aesthetics and Rolland Barthes’ research in semiotics, I will try to show to which extent the injunction to clarity in legal discourse is reminiscent of a certain western imperialism. In doing so I will claim that re-introducing beauty in legal discourse, by recognising the value of semantic ambiguity, ultimately serves a heuristic purpose - that is, revitalising the intimacy legal scholars have with their texts.
Life after Liberalism: Central Europe’s new relationship with illiberal democracy – Mirosław M. Sadowski (McGill University)

In one of the best-known quotes from the TV series Sex and the City Carrie Bradshaw, the main protagonist, asks: “If you loved someone and you break up... where does the love go?”

In the case of Central Europe the answer to this question seems to be: move on as soon as possible and throw yourself into a new relationship. The past several years have seen profound changes take place in the region, notably in Poland and Hungary. The two countries have decided it was time to end things with liberalism and begin a new relationship – with illiberal democracy. The purpose of this paper is to find out why this breakup happened by conducting an analysis of the changes taking place in the region, with a special focus on the place of law and collective memories in the process. In the first part of the paper the author provides a brief overview of the reasons behind the illiberal transition – social, political, economic and legal.

The second part of the paper is devoted to the analysis of the eponymous relationship. The author, focusing on Poland and Hungary as model examples of the transition, shows how quickly the liberal state and its legal mechanisms (e.g. Constitutional Tribunals, rules of parliamentary proceedings) were in a way highjacked and reemployed to serve the new illiberal system. The third part of the paper is devoted to the role played by collective memories and social perceptions of the past in the current changes, with the author investigating how the illiberal regime uses a variety of methods, from renaming the streets to implementing memory laws, to foster certain version of memories. In the concluding remarks the author asks whether the changes are there to stay or is Central Europe going to get back together with liberal democracy.
An Evaluation of Socioeconomic rights of the Muslim Yoruba Woman of South-Western Nigeria - Tobiloba Awotoye (Lead City University)

It is trite that the average African, and indeed the Nigerian, lives with a consciousness of his religion. This is influenced not only by the culture and traditions of the people, but also by westernization and also the country’s colonial heritage. This in turn influences other aspects of the country’s polity. Over the years, these religions- Christianity, Islam and Traditionalism- have grown in more ways than one to accommodate the socioeconomic rights of the woman in the society. In Nigeria, the woman is no longer considered or treated as a ‘property’, but can now exercise her right to own properties as a natural human being. The woman can also vote and be voted for. In essence, the rights of the woman in Nigeria is now well cemented in Chapter Four of the 1999 Constitution of the Federal Republic of Nigeria (as altered) and other domestic legislations. Regardless of these statutory provisions, however, the woman is still subjected and confined to the background under Islamic-customary law.

This paper shall focus on Ede Township in Osun State, South Western Nigeria as case study. The choice is inspired by the fact that Ede is a predominantly Muslim community and also the proximity of the town to the author’s location. This study shall make use of qualitative and quantitative research methods- secondary materials from the library and statistics from the Customary Courts in the town will be used in this study. This study is part of a growing research into the rights of the woman in Africa, particularly under customary African law. This will ultimately contribute to subsequent research on this subject.
Identity is an invaluable criterion for conceptualising belonging, and the law facilitates conceptualisation. Discourses on identity reflect on the role of individualism and collectiveness in the formation of personhood. A school of thought marries individualism with distinctiveness in identity formation. Another school views identity and belonging as products of the collective. That the collective determines one’s position and acceptance within social and cultural networks. Other scholars embrace a middle of the road approach. That is a compromise between distinct individualism and collective conceptualisations of personhood. This paper adopts the assumption that cultural values and collectivism are key drivers of identity. It is within this backdrop that this paper discusses the law on marriageable age in Nigeria. The goal of this paper is not to assess the merit or demerit of a collective approach to identity formation. Rather, it is to showcase the interaction of law and culture in the process and is open to further academic debate. Although Nigeria is the case study, some of the arguments put forward are universal. Culture cuts across geographic boundaries, and the marriage institution advertently or inadvertently occupies a place in discourses on law, identity, and belonging.
Femmes en résistance face à l’extractivisme. Approches décoloniales et féministes de la recherche - Mélisande Séguin (Université du Québec à Montréal)

L’extractivisme est un système économique qui a accompagné le projet impérialiste du droit international lors de l’entreprise coloniale européenne. La plupart des populations impliquées dans les conflits avec des entreprises extractivistes vivent sur des territoires non-cédés ou dans des pays ayant subi la colonisation. Conséquemment, de multiples oppressions à l’égard des femmes s’entrecroisent dans l’extractivisme. Ce système cause l’altération de la relation intime entre les femmes, leur territoire et leurs corps. Catherine Larrère nomme ceci « logique de la domination » : dans l’extractivisme, on domine simultanément les corps et la nature. Pour le collectif Miradas feministas, l’extractivisme est une violence dirigée contre les espaces de reproduction de la vie, qu’il s’agisse des corps ou de la nature. Face à cette violence, les femmes - principalement autochtones - se retrouvent souvent au front des luttes contre l’extractivisme et doivent déployer de multiples stratégies de résistance. En tant qu’étudiante blanche privilégiée et vivant sur un territoire non-cédé, le constat de la situation dans laquelle se trouve les femmes luttant contre l’extractivisme m’amène à me questionner sur la façon dont ces enjeux sont étudiés dans la discipline du droit international. Plus précisément, de m’interrogerai sur l’apport des méthodes autochtones et du féminisme décolonial à la recherche portant sur les luttes contre l’extractivisme.
Tricksters, Teachers, and Transformation - Wesakechak’s Law and Justice as Equality - David Gill (University of Victoria)

The prevailing criminal justice paradigm in Canada treats criminals as a deviant group that has nothing to offer civil society. The creation of a criminal outgroup allows dominant social groups to depoliticise inequality as deserved by characterizing oppression as criminal consequence. The omaškêkowak law of Wesakechak (Wasakechak/Wesakecak) recasts criminals as members of the community and requires us to imagine equality as a substantive outcome where criminals’ interests are considered alongside the rest of society. This paper will use omaškêkowak legal principles to propose solutions to the inequalities created by Canadian society’s treatment of moral outsiders—those who create harm by challenging its fundamental social norms.

What this paper will attempt to do is to challenge the utility and justness of characterizing socially disruptive moral outsiders as criminals. It will argue that criminal law is a poor tool for addressing the vast majority of instances of social disruption, clashes of values, and harm that it currently governs. Criminal law enforcement results in massively unequal substantive outcomes for social groups who are associated with normative or political difference, and for individuals who are socially disruptive or challenge the status quo. It also promotes an intergroup dynamic that results in Indigenous people in particular being morally suspect in their entirety. This dynamic results in, amongst other inequities, a criminal justice system that works against Indigenous people, whether as accused, offenders, or victims. Indigenous people are subject to disproportionate mass incarceration, and are disproportionate victims of crime. Sentencing reforms have failed to address either of these problems—perhaps because addressing inequality at the end of a process that categorizes people as criminal is incompatible with their equal treatment.
PAPERS FROM DEAN MAXWELL AND ISLE COHEN

SEMINAR ON INTERNATIONAL LAW
‘Emotions’ in Refugee Status Determination: A case against the strict objectivity of law

Menaka I Lecamwasam (University of Hong Kong)

Introduction

Refugees - involuntary migrants fleeing their own countries in search of safety and protection from violence - can be traced back to centuries ago. Any person seeking asylum for any reason was afforded asylum. However, refugees as we know them today emerged as a distinct group of persons during and in the aftermath of World War II. The international community negotiated the Geneva Convention on the Status of Refugees in 1951 to address the issue of the large influx of refugees in Europe during and after the War. This originally euro-centric instrument and its 1967 additional protocol together form the cornerstone of the modern international refugee protection regime, subsequent to the removal of the temporal and geographic limitations contained in the original instrument. The Convention has, since its inception been acclaimed for containing a set of identifiable objective principles aimed at providing protection for refugees, including the recognition of refugee-status through Refugee Status Determination (RSD) processes. While only signatory states are bound by the content, the silence of the Convention on the precise manner of implementation leaves it to the discretion of individual states “having regard to its particular constitutional and administrative structure”. The Vietnam refugee crisis during the late 1980s led to individual states establishing formal RSD procedures, with no singular identifiable model, to

1 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137
3 The 1951 Convention defined a refugee as an individual with a ‘well-founded fear of persecution’ due to ‘events occurring before 1 January 1951...’ in Europe, with the option for states to keep the geographic constraints or to remove it from their accession document. The 1967 Protocol removed both the temporal and geographic limitations save for declarations made under the 1951 Convention opting for the geographic limitations or not. Even though states which retained the geographic limitations still recognize refugees from other countries, such recognition is not on the basis of the Convention.
assess the claims of individual asylum seekers. It is trite fact that neither international refugee law nor domestic RSD processes create refugees. These processes are said to be declaratory rather than constitutive in nature. However, formal recognition of refugee status remains the only avenue through which refugees can legally access protection. Therefore, the effective functioning of RSD processes is crucial for robust refugee protection.

Who is eligible to claim refugee status? Article 1A(2) of the Convention contains the definition of a refugee. Unlike with historical refugees, as per the requirements of the Convention, asylum seekers claiming asylum in a signatory state must satisfy the authorities (within the RSD process) that they have a ‘well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion’ [Emphasis added]; they are outside their countries of origin; and are ‘unable or unwilling’ to avail themselves of the protection of such countries of origin. The conditions of ‘well-founded fear’ and ‘persecution’, crucial to be fulfilled in an asylum claim, have not been further elaborated or defined within the Convention.

Unlike in other legal claims which could be corroborated through independent evidence, refugee claimants often only have their own personal narrative to advance their claim. Therefore, the asylum-seeker is expected to present a credible narrative to the RSD authority in the state of asylum for her asylum claim to succeed. This credibility assessment of asylum claims is fraught with pitfalls for the asylum-seeker. She has to primarily rely on her account of her lived reality, which is subjective and intimate to her, often even traumatic, in order to convince the decision-maker that she fulfils the criteria set out in the law. Conversely, the decision-maker often relies on objective criteria of assessment insisted on by refugee law-or what is perceived as objective-to assess the credibility of the account put forth by the asylum-seeker.

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7 Mary Crock, Laura Smith-Khan, Ron McCallum, and Ben Saul, The Legal Protection of Refugees with Disabilities: Forgotten and Invisible? (Edward Elgar 2017) 136
8 It is accepted that Convention refugees are not the only category of refugees. However, this discussion is confined to Convention refugees in the interests of confining the scope of the study.
10 ibid
Against the above backdrop, this paper seeks to determine whether RSD processes predicated on international refugee law have succeeded in accommodating the subjective realities of asylum-seekers within their objective approach, or whether those have succumbed to excessive objectivity, removing it from any notion of emotion, thereby subverting the protection needs of asylum-seekers, which arguably are subjective. The paper concludes arguing that the ‘personal’ in RSD processes needs acknowledgement and must be counterbalanced with objective detachment, in order to make RSD processes more robust. It also provides a few practical recommendations on how this could be achieved.

I. Lived realities of asylum-seekers

The first point of departure for the current inquiry is to situate the lives of refugee claimants and their protection concerns appropriately. The consideration in this respect is whether a single objectively identifiable asylum-claimant with a set of readily apparent protection needs exists. Asylum-seekers fleeing persecution are manifold. Even if serious attempts are made, one will be hard-pressed to identify all categories of asylum-seekers. One commonality however, is that they all flee serious harm. They have either faced harm or anticipate harm in the future in their countries of origin which creates ‘fear’ in their minds. Whether this harm amounts to ‘persecution’ or the ‘fear’ is ‘well-founded’ to warrant refugee protection are legal questions asylum-seekers have to contend with to the satisfaction of the decision-making authorities in receiving countries. On the ground however, all asylum-seekers have a real or perceived ‘fear’ of returning to their countries. ‘Fear’ is a strong emotional response to an anticipation or awareness of danger, which pushes people to move from that danger. Asylum-seekers who flee persecution are often dictated by emotion, which affect their preparation, choice of destination, and even their reason for flight. They hardly possess knowledge of legal ramifications of such fleeing. The destination may have been chosen for no better reason than that they have heard of it on the news.

Axiomatic of this fear are traumatic experiences, often of torture, sexual assault, or persecution based on sexual orientation or even disability. Therefore, in presenting a claim, most claimants face the difficulty of speaking about their experiences which led to flight. For instance, sexual orientation claims require extremely private experiences being shared with the decision-maker. “Feelings of shame and self-repression in revealing the kind of information necessary to make a
claim of group membership manifest distinctively in sexual orientation claims”. However, these are generalized depictions. Within these groups there exists a wide spectrum of persons with individualized protection needs. While some sexual orientation claimants may require psychological assistance, others may urgently require housing and food. While some claimants may possess sufficient funds to cover their immediate needs, others may only have the clothes on their back, making the securing of basic necessities paramount for them.

In other instances, claimants may choose to focus on particular aspects of their persecution, based on their priorities. Therefore, one claimant might highlight existential issues, while another will highlight social issues, neither less important than the other nor less credible than the other. As such,

“a devout but politically uninvolved Cambodian woman,...widowed and tortured during the Pol Pot terror and raped by refugee camp guards,...will have one set of concerns, one framework of meaning. A committed, urban Marxist union leader from Chile, tortured by the right wing regime and now employed and active in the ongoing struggle for democracy, will have quite different concerns.”

Asylum-seekers also fear refoulement by the receiving state. The Refugee Convention explicitly prohibits refoulement of asylum-seekers to situations of danger. This prohibition is relevant if receiving states resort to the safe third country option. For example, Canada permits the designation of countries that respect human rights and offer a high degree of protection to asylum seekers as safe third countries. However, individual claimants, probably based on their country of origin, may risk detention and violation of due process rights in this third country.

Another situation which brings the subjectivity into stark relief is the Internal Protection Alternative (IPA), the availability of which vitiates the need for international protection. While the

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11 Laurie Berg and Jenni Millbank, “Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants” (2009) JRS, 195
13 ibid
14 Article 33
15 Section 102 of the Immigration and Refugee Protection Act. Only the USA was designated a safe third country under this provision, the agreement of which was struck down by the Federal Court of Canada in July 2020.
IPA may be objectively viable, due to intrinsic factors in the life of an individual claimant, it may be subjectively unavailable to her, which no amount of objective information will reveal. Thus, it is cogently evident that no single objectively identifiable asylum-claimant or objective protection needs of such claimants exist. Claims of asylum-seekers, saturated with their lived realities, and their protection needs are inarguably subjective and individualized which needs to be taken cognizance of, within refugee law as well as RSD processes.

II. Objective refugee law?

As stated previously, RSD processes make serious attempts to be objective in their assessment of asylum claims, which are inherently subjective as illustrated in the preceding section. This raises the interesting question of whether refugee law, which generally informs RSD processes, is inherently objective? Or does it accommodate subjective considerations, or ‘emotions’ within its folds? If it does, then the insistence on objectivity within RSD processes is misplaced, allowing for greater acceptance of the subjective realities of asylum-seekers. The 1951 Refugee Convention is the point of departure to delve into this issue. The discussion is confined to Article 1A(2) of the Convention as that is the provision which necessitated establishing RSD processes.

The Cambridge English Dictionary defines ‘objectivity’ as ‘the fact of being based on facts and not influenced by personal beliefs or feelings’ and ‘the quality of being able to make a decision or judgment in a fair way that is not influenced by personal feelings or beliefs’. This is contrasted with ‘Subjectivity’, which is defined as ‘influenced by or based on personal beliefs or feelings, rather than based on facts’. Subjectivity is tied to ‘emotions’ while objectivity is a state devoid of ‘emotion’. Objectivity in law thus relates to the substantive requirements of a law and to the grounds for decision-making. Patterson quoting Williams argues that the broad application of rules (meaning laws) "seems to imply a standard of correctness that is independent of applications" and that objectivists explain this phenomenon through the assertion of the “existence of a standard independent of the rule which enables rule application in a variety of contexts.”

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16 ‘Emotions’ are defined simply as subjective feelings
18 ibid <https://dictionary.cambridge.org/us/dictionary/english/subjective>
19 Dennis Patterson, “Normativity and Objectivity in Law” (2001) 43 WMLR 325
20 ibid 331
21 ibid
contexts”\(^\text{22}\). He rejects the proposition of the legal subjectivists that laws become meaningful through interpretation based on individual politics\(^\text{23}\) because:

“*We want law to be more than opinion, collective or otherwise. The question whether a legal standard has or has not been violated should turn on more than the caprice of who is asked to decide the matter.*”\(^\text{24}\)

Dworkin’s assertion that "even the debate about the nature of law, which has dominated legal philosophy for some decades, is, at bottom, a debate within the philosophy of language and metaphysics”\(^\text{25}\) highlights the dissonance within philosophy as to the nature of law. While it is not within the scope of this paper to expound at length on the actual nature of law, it is indisputable that even subjectivists agree that law requires a certain amount of certainty, a confidence that it will not change from one moment to the other, or from one person to another. This general standard of the nature of objective law is used to evaluate whether refugee law is as objective, as ‘emotionless’, as it is claimed to be.

Unlike in times gone by, the Refugee Convention does not protect all involuntary migrants. As stated in the introduction above, asylum-seekers must satisfy the two main legal tests contained in the Convention to succeed in their claim: (1) to demonstrate a well-founded fear of persecution; and (2) that the persecution is on account of their race, religion, nationality, political opinion, or membership in a particular social group. Asylum-seekers must also show that their home country is “unwilling or unable to offer protection”\(^\text{26}\)

As mentioned earlier, the Convention itself does not elaborate on the content of the test of ‘well-founded fear of persecution’. Hathaway and Foster however elaborates the requirement of “well-founded fear”, which generally comprise two requirements: (1) “the person seeking recognition of refugee status perceive herself to stand in ‘terror of persecution’; her very personal response to the prospect of return to her home country must be an extreme form of anxiety that neither feigned nor overstated.”; and (2) “this subjective perception of risk must be consistent with available information on the conditions in the state of origin, as only those persons whose fear is reasonable

\(^{22}\) ibid  
\(^{23}\) ibid 335  
\(^{24}\) ibid 340  
\(^{25}\) ibid 326  
can be said to stand in need of international protection.”27 This explanation is testament to the fact that the Convention provisions contain more than objective conditions.

The UNHCR Handbook on Refugee Status28 recognizes that the emotion of ‘fear’ is subjective, which therefore “…primarily require an evaluation of the applicant’s statements rather than a judgement on the situation prevailing in his country of origin”.29 On the requirement of “well-founded”, the handbook states:

“...the qualification ‘well-founded’... implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term “well-founded fear” therefore contains a subjective and an objective element, and..., both elements must be taken into consideration.”30

Accordingly, the establishment of a “well-founded fear” will consist of the subjective credibility assessment and the objective country of origin information,31 as also suggested by case law.32

Further, the expansive notion of ‘persecution’ too seems to have been left undefined intentionally. While it is beyond the scope of this paper to delve into an extensive exploration of the reasons or different understandings of this concept,33 the general consensus is that the drafters intentionally declined to define the term because the purpose was to introduce a flexible concept to accommodate all forms of past and future harm of a particular severity which will legitimately entitle persons for protection.34 However, the implementation of this flexible approach, which may leave it vulnerable to the vagaries of individual decision-makers, has been tempered by the insistence of the necessity for the decisions of the examiners, which otherwise could be subjective, to be grounded in an objective principle which could be identified as a legitimate source of law.35

28 ibid, 5
29 ibid, 19
30 ibid
33 See n 27, 182ff for a detailed and in-depth discussion on what constitutes persecution
34 n 27, 182
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The second important aspect of relevance in the Convention definition is the grounds of persecution or as Hathaway and Foster states “nexus to civil or political status”\textsuperscript{36} Claimants must establish that the persecution is on account of their race, religion, nationality, political opinion, or membership in a particular social group. Even when persecution is established, if this nexus cannot be established, the claim fails. The requirement at first glance is straight forward and has been introduced in recognition of the insufficient capacity of states to accept all asylum claims based only on persecution. However, due to the understanding that these categories are insufficient to include all instances of social or political alienation at present,\textsuperscript{37} judicial bodies have adopted a liberal interpretation of this requirement. For example, it is not necessary for the asylum-seeker to correctly identify the ground on which she was persecuted. It is the responsibility of the authorities to determine this.\textsuperscript{38} Neither is it justified to reject a claim on the basis that the claimant shares a common characteristic with the persecutor\textsuperscript{39} or that not all members within the group are at risk.\textsuperscript{40} Hence, this Convention requirement allows, either wittingly or unwittingly, for subjective circumstances of individual asylum claimants to be taken into consideration when assessing asylum claims.

In light of the foregoing, the obvious conclusion is that international refugee law contains both objective and subjective elements. This means ‘emotions’ or subjective realities of asylum seekers are accommodated within the legal framework. A further consideration may tip the scales in favour of a less objective refugee law, which will be discussed below.

What drives states to accept international law? Are states objective in their approach to international law, both in negotiations and implementation. The argument being that, if international law is essentially shaped by emotions of states, it is implausible to expect it to remain devoid of emotion. In turn, this acceptance of emotion will shake the perception of the objectivity of the law (or international refugee law, specifically) thereby paving way for the acceptance and accommodation of the subjective within RSD processes.

\textsuperscript{36} N 27, 362
\textsuperscript{37} ibid, 363
\textsuperscript{38} ibid, 364
\textsuperscript{39} ibid, 365
\textsuperscript{40} ibid, 366
Brent E. Sasley’s argument based on the Intergroup Emotions Theory that emotions are inherently part of life in the international system, is useful for this purpose. States display emotional reactions to events and other phenomena as groups - the collective of individuals within states.\(^{41}\) Political leaders of states negotiate within the international legal order and accept international law propelled by these emotions. In other words, often states negotiate and accept/reject international law based on their own self-interest. It has also been argued that “states may well have a moral obligation to obey public international law grounded in the principle of fairness”.\(^{42}\) However, Posner argues that morality is too indeterminate to imbue states with moral obligations in the international sphere. He posits that “each state makes a cost-benefit analysis, albeit a sophisticated one that takes account of the reputational consequences of that decision...”\(^{43}\) Therefore, the acceptance or non-compliance of international law by states is not predicated on a desire to ‘create a culture of international legality’.\(^{44}\) It is always for self-interest. All international treaties are the result of negotiations and consensus. States engage in negotiations to ensure the outcome document does not have negative implications for them and if it does, states tend to disassociate themselves from such treaties. States are motivated by political expediencies such as the dominant public opinion on a subject within the country at any given point, or the reputational cost of either signing the particular treaty or otherwise.

Taking for example the 1951 Refugee Convention, it is clear that some states are not party to the Convention due to the insufficient domestic capacities to provide all protection needs of refugees\(^{45}\), while in some other instances, this is due to historical reasons of non-accommodation, such as is the basis for India’s continued repudiation of the Convention.\(^{46}\) On the other hand, while most OECD states have signed the Convention, they have effective border enforcement mechanisms which are successful in keeping refugees out. Interestingly, even countries such as Afghanistan and Somalia have signed the Convention, when they are far from preferred safe countries for

\(^{41}\) Brent E. Sasley, “Theorizing States’ Emotions” (2011) 13 ISR 452–476
\(^{42}\) David Lefkowitz, “The Principle of Fairness and States’ Duty to Obey International Law” (2011) Philosophy Faculty Publications, 33
\(^{44}\) ibid, 1915
\(^{45}\) Such as is the case with Indonesia and Malaysia which attract many refugees due to their geographic proximity to refugee generating countries
\(^{46}\) See P. Oberoi, ‘South Asia and the Creation of the International Refugee Regime’ (2001) 19(5) Refuge 37
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refugees, thus effectively repelling asylum-seekers. The findings of Hafner-Burton et al. are also relevant to explain this phenomenon. They found:

“That the deepening international human rights regime creates opportunities for rights-violating governments to display low-cost legitimating commitments to world norms, leading them to ratify human rights treaties without the capacity or willingness to comply with the provisions...”.

These findings also reveal clear displays of self-interest by states. Popovski argues that emotions are necessary for international law and play a major role in law-making. The very essence of ‘law-making’ is to accommodate emotions of states and their citizens. He however goes on to argue that the role of emotions must and should be lesser in ‘law-practicing’. i.e. the adjudication process must be de-emotionalized such as the requirement for judges to be objective and not base their judgments on emotions but fact.

While the above exposition makes a strong case for the proposition that states do have emotions and are driven by these emotions in the sphere of international law, it is pertinent to point out that the aim of this paper is to make a case against the very objectivity in the practice of law-refugee law specifically- Popovski insists on.

Proceeding from the above, it is necessary for RSD processes to take cognizance of the inclusion and accommodation of the ‘subjective’ within refugee law, in approaching claims of asylum-seekers. How RSD processes approach asylum claims and whether the subjective is obscured by the adherence to objectivity will be discussed below.

III. Refugee Status Determination (RSD) processes in practice

RSD processes are an integral part of domestic asylum protection regimes which decide the fate of asylum-seekers. RSD officers are saddled with the unenviable task of assessing the desirability of claimants to the state. The processes are established by law and decision-makers are expected to make their findings on the veracity of asylum claims based on objective criteria, often set out in laws, regulations, and administrative guidelines. Objective criteria are for purposes of

48 ibid
50 ibid
transparency, accountability, and certainty of the process. Within the RSD processes a considerable onus is placed on asylum-seekers, due mostly to pre-conceived notions. The genuine asylum-seeker is “assumed to know what they need to do to satisfy the asylum process, to know how to present themselves and any documentary evidence appropriately and to express emotion in a recognisable fashion.”\textsuperscript{51} which is certainly not true for all bona-fide asylum-seekers.

With regards to the substance of the claim, as stated earlier, most often asylum-seekers only have their personal narrative to advance their claim of a “well-founded fear of persecution” owing to one of the Convention grounds, with nothing to corroborate these narratives. Due to this scarcity of supporting evidence, decisions regarding claims are often based on whether the personal narrative of the claimant is credible. For these credibility assessments, decision makers focus on “consistency, standard disclosure, and demeanor”\textsuperscript{52} as important factors. The UNHCR, typical of early approaches, advised refugee credibility assessment to "be a matter of personal judgment."\textsuperscript{53} UNHCR in recent years advocate “a structured analysis in which adjudicators should specifically note positive and negative factors, isolate areas of testimony where credibility problems appear to exist, and clearly articulate their reasoning”\textsuperscript{54} moving towards recommending an objective approach to credibility assessments. Beyond credibility, decision-makers must also assess the risk of persecution if returned home, and the alternatives to international protection such as the IPA.

Despite the law requiring an objective approach, decision-makers are accused of arriving at their findings based on assumptions about the information presented by asylum-seekers due to a dearth of objective evidence. As such, behaviour that conforms to preconceived norms is more likely to be accepted as credible.\textsuperscript{55} These assumptions are considered problematic because they “draw on subjective understandings of human interaction and behaviour”\textsuperscript{56}. However, it is argued that these assumptions on which decision-makers base their findings are not purely subjective in many cases. Due to the insistence on objectivity, Decision-makers attempt to base their findings on documentary information such as screening interviews, statements made to the authorities before making a claim, Country of Origin Information (COI), which is considered objective and reliable.

\textsuperscript{51} n 9, 359
\textsuperscript{52} n 6, 107
\textsuperscript{54} ibid, 128
\textsuperscript{55} n 9, 354
\textsuperscript{56} ibid, 364
Established practice in this instance means the approach of generations of decision-makers. Therefore, decisions based on such understandings are strictly speaking, not subjective or personal to the decision-maker. They can find legitimacy in precedent, in a standard beyond their personal beliefs:

“Adjudicators deciding refugee claims often assume that people in danger will take prompt and effective steps to save themselves and will never willingly put themselves at risk. They rely on three articles of faith handed down by generations of judges…”57

It is argued that findings of implausibility are commonplace in credibility assessments, resulting in low rates of refugee status recognition, due to the over-reliance of decision-makers on independent evidence and practice to make reasoned decisions. Ironically, this decision-making process is saturated with an intimacy beyond the detachment of law it seeks to achieve, as bureaucrats and even adjudicators may allow dimensions of ‘trust’ to seep into their decisions, colouring the outcome of these processes. ‘Trust’ in this context refers to both trust in the process established by the State, in the sense of a perception that the state could do no wrong, as well as often, a lack of ‘trust’ in the narrative of the asylum-seeker, which they explain by reference to objective reasoning. The following observations are made to illustrate that the insistence on objective detachment may be counter-productive to a robust refugee protection regime:

**Approach to COI information:**

COI is crucial to credibility assessments. Typically, this evidence is drawn from independent human rights reports released by governmental, non-governmental, and media organizations. The practice of looking to COI information however, is not uniform. While in some cases, COI is given considerable weight, in others, the information is disregarded.58 COI information must provide “transparent, objective, impartial, and balanced factual”59 information on the situation of a particular country. While in practice, reliance is predominantly placed on English language sources, potentially impacting the extensiveness of the information,60 COI will only provide ‘a

58 n 9, 358
59 Common EU Guidelines for Processing Country of Origin Information (COI)
general impression, more or less detailed, of what is going on”61 in a particular country “rather than materials providing independent evidence of specific events involving the claimant”62. The general information requires to be interpreted and analysed when deciding the plausibility of the asylum claim.63 At the same time, the COI may contradict the narrative on material facts which could easily be explained by reference to contextual socio-political knowledge. Unfortunately, the decision-makers do not possess this knowledge, for which they ironically rely on the COI, and intermediaries such as interpreters are not encouraged to correct these errors, even when they may possess accurate information.

A superficial approach to COI may result in, for example, undue dependence on alternatives to international protection such as IPA. The Asylum and Immigration Tribunal of the UK decided that it was ‘reasonable’ to return a young woman who had fled Sierra Leone to escape forced marriage and female genital mutilation, to another part of the country, even if it means a life of begging or forced prostitution due to destitution.64 The Tribunal accepted that her fear is justifiably persecutory, but that she has failed to establish that she is “at risk of being forced through destitution into begging, crime or prostitution”65 in another part of the country, and COI information did not reveal such a risk to the claimant personally. The decision-makers also overlook the reality that a dearth of information on persecution may very well be due to severe repression rather than an indicator of the absence of persecution.66

**Stereotyping:**

Even though generally, stereotyping is considered subjective in nature, objective stereotyping could be identified within RSD processes. This is especially true in the expectations of rationality and reasonableness in asylum narratives stemming from preconceptions and assumptions based on broad-based lay understandings of reactions to danger and memory. As a result, if a claimant had continued to experience persecution without deciding to flee she was alleged undermining her

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63 Douglas McDonald, ‘Simply impossible- Plausibility assessment in refugee status determination’ (2014) 39(4) AltLJ, 241, 244
64 *FB Sierra Leone* [2008] UKAIT 00090
65 ibid, Paragraph 94
66 Nicholas Hersh, ‘Refugee Claims and Criminalization of Same-Sex Intimacy: The Case of Sebastiao’ (2017) 29(2) CJW&L 227, 248
claim or a person who acts in a particular way in a situation of danger is expected to acts identically in a similarly fearful situation at another time.\textsuperscript{67}

Further, a finding of truth in personal narratives is considerably higher when the account is sufficiently detailed because according to “empirical knowledge about autobiographical memory, a rich account is assumed to be more likely to be an account of events that actually happened”\textsuperscript{68} while at other times, vivid detail was sought of traumatic events based on a popular assumption that “traumatic material is always clearly remembered.”\textsuperscript{69}

Stereotyping identity such as that of religious converts and claimants based on sexual orientation and gender is also familiar. Theological questioning of the inner belief system of an individual is considered a more objective way of determining faith to prevent the personal prejudices of the decision-makers getting in the way. However, this objective approach is based on the assumption that all persons belonging to a faith ought necessarily to be familiar with theology. How many persons belonging to a faith can actually claim a theological understanding of the faith for this objective test to be fair? The reasoning goes “A convert has made a conscious and deliberate decision to not only choose a religion but also to reject another religion”\textsuperscript{70} which therefore raises the bar for the faith of the converted. Asylum judges have perpetuated these stereotypes to an alarming extent when they found contradictions in a claim of gay sexual orientation of a person belonging to the catholic faith and in a claim of an Iranian who had converted from Islam to Christianity since he continued to eat pork-free meals in prison.\textsuperscript{71}

In relation to sexual identity, decision-makers do not appreciate that development of sexual identity is not universal. LaViolette argues that ‘there is no uniform way in which lesbians and gay men recognize and act on their sexual orientation’.\textsuperscript{72} Despite this, Bisexual applicants in a heterosexual relationship at the time of the claim have fared poorly in credibility assessments due to this reason.\textsuperscript{73} Some European governments have also been accused of phallological testing for

\textsuperscript{67} n 9, 358

\textsuperscript{68} ibid, 361

\textsuperscript{69} ibid

\textsuperscript{70} Le Udsholt, ‘The Objective Refugee Status Determination’ Aalborg University student thesis for Development and International Relations – Global Refugee Studies 45

\textsuperscript{71} n 53, 126

\textsuperscript{72} Nicole LaViolette, ‘Coming Out to Canada: The Immigration of Same-Sex Couples under the Immigration and Refugee Protection Act ’ (2004) 49 McGillLJ 969, 996

\textsuperscript{73} n 11, 213
the truthfulness of homosexual asylum-seekers by forcing them to watch pornography in order to monitor their sexual arousal. \(^{74}\) In Canada, a lesbian Ukrainian’s account of declaring her feelings to another woman in the 1980s was discredited on the basis that she could not have done this given the ‘intense homophobic society of Ukraine at the time’. \(^{75}\) Therefore, holding sexual identities to stereotypical standards has proven inimical to a fair credibility assessment.

**Inconsistencies:**

RSD decision-makers continue to flag inconsistencies in the narratives of asylum-seekers, given during different stages of the asylum process as evidence of fabrication despite the existence of empirical evidence to the contrary. \(^{76}\) Asylum Tribunals too view truth as “objective and discoverable by a decision-maker who is a ‘fact-finder’”. \(^{77}\) Needless to say, the very fact of flight from the country of origin is traumatic in itself not to mention the persecution she is fleeing from. Such mental shock ‘disrupts the lingering processing necessary for full storage of information in memory’. \(^{78}\) Therefore, many factors affect the memory of an asylum-seeker ultimately having a bearing on the consistency of narratives. Fabrication is the least conceivable explanation for many of the inconsistencies detected in asylum claims. For example, the “severity of posttraumatic stress symptoms is associated with reduced specificity of autobiographical memories in refugees” \(^{79}\) while “events involving sexual violence have also been found to be associated with limited disclosure of sensitive information as a result of interpersonal, cultural, and psychological factors” \(^{80}\). Additionally, “traumatic history is routinely narrated with the omission of important details and/or with a flat affect as a result of the symptoms of numbing and avoidance” and “hyperamnesia . . . the observation that people remember more details with repeated recalls” \(^{81}\) may also account for later details in the narratives which were absent in the initial accounts. Ignoring the psychological aspects of individuals and viewing their narratives through the prism of objectivity may adversely affect their claims.

\(^{74}\) n 53, 126
\(^{77}\) n 75, 5
\(^{78}\) Hilary Evans Cameron, ‘Refugee Status Determinations and the Limits of Memory’ (2010) OJRL 469, 486
\(^{79}\) n 6, 107
\(^{80}\) ibid
\(^{81}\) n 26, 259 quoting Cohen (2001)
Apart from memory related reasons, inconsistencies could arise due to cultural factors that play an important role in the narration of traumatic events. Further, the mistrust of authority could also lead to inconsistencies as it is “both unrealistic and unreasonable to expect asylum seekers to provide information before they have had an opportunity to satisfy themselves that the receiving State's authorities can be trusted”. For example, homosexual applicants from contexts which officially sanction homophobia may leave this vital information out of their narratives in the first instance due to a perception of hostility from the authorities based on their previous personal experiences.

**Restrictive cross-cultural understandings and language barriers:**

RSD decision-makers often erroneously assume that “the way they think is also the way the asylum-seeker thinks”. This erroneous assumption without due regard to the political, cultural, and historical context of individuals, “including the role of the RSD officer’s own culture in determining their construction of what is ‘plausible’” has led to purely speculative findings of implausibility. These misunderstandings have a significant negative impact on demeanor assessments. For example, the homosexual Iranian claimant who became visibly shaken and said that he cannot answer that question when required to describe his homosexual activities was found to display a “distaste at the prospect of describing that which was foreign to him” instead of what could simply be shame and inhibition stemming from cultural mores of a deeply religious and homophobic society.

Even interpreters may have a significant impact on the credibility of a narrative. While they are a procedural safeguard for the claimant, understandably, even with a good interpreter, certain parts may get lost in translation. An incompetent interpreter may misinterpret, while a hostile interpreter may jeopardize the claim through distortion. A lack of trust in the interpreter on the part of the claimant could also hinder a successful claim.

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82 n 6, 107  
83 n 62, 65  
85 n 63, 242  
86 n 75, 10  
87 ibid
IV. Acknowledging the ‘personal’ in RSD processes

Therefore, it is argued that the ‘personal’ in RSD processes needs acknowledgement and must be counterbalanced with objective detachment, in order to foster mutual respect and trust between the bureaucrats and asylum seekers, to ultimately make RSD processes more robust. The ‘personal’ element relates both to the subjectivity of individual narratives and the entrenched systemic biases which influence decision-makers. This acknowledgement is the first step in strengthening the RSD processes.

Comprehensive and continuous training at all levels of decision-making must supplement this acknowledgement for further strengthening of RSD processes. The following points are noted in relation to training:

- Given the incidence of mental health issues among asylum-seekers and empirical evidence of the potential impact of such issues on their personal narratives it is imperative for decision-makers to be given continuous specialist training in refugee mental health at all levels. Decision-makers must be encouraged not only to consider psychological evidence but also to analyse the content thereof through a positive lens as explaining certain inconsistencies in the narratives or demeanor related negative observations. These trainings must also include approaches to assessing personal risk-tolerance and management as reactions of individuals to similar situations of risk differ based on their orientation towards risk. Likewise, mental health professionals providing psychological evidence must be trained on the general principles and specific decision-making frameworks in each context, and the concerns of decision-makers in relation to psychological evidence in order to address those concerns in their reports.

- Extensive training on cross-cultural communication including appropriate interview techniques is also necessary. Such training will equip decision-makers with the skills necessary to evaluate whether the negative impressions including inconsistencies in evidence and demeanor of claimants affecting credibility can be explained on the basis of a lack of cross-cultural competence on both sides. Training on interview techniques will ensure examiners

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88 n 57, 573
89 n 6, 113
90 n 62, 73
customize their approach to each claimant based on the background of the claimant, taking into consideration the nature of persecution faced by the claimant in her home country, the alleged psychological impact of it, and the cultural mores of the claimant.

- Training must also include in-depth understanding of issues faced by claimants in their home countries, going well beyond that which is documented in COI reports. These trainings must encompass techniques which encourage decision-makers to adopt a nuanced, critical, and analytical approach to COI and other supporting evidence without merely relying on a superficial acceptance or denial or such information.\(^9\) Consideration may be given to develop in-house expertise on issues such as gender, sexuality, and religion with country specialization to assist decision-makers.\(^2\)

An overarching concern in facilitating the foregoing is resource constraints. Therefore, due consideration must be given to channel adequate budgetary resources into RSD processes which will not only enhance the service but will also ensure the dignity of asylum-seekers are preserved.

Finally, it is worth reviewing RSD procedures, relevant laws, and guidelines in order to ensure RSD processes are effectively implementing the spirit of the refugee protection regime. This effort could be assisted by multiple stakeholders including RSD officers, adjudicators, interpreters, and protection service providers. Each will bring unique insights to the table based on their expertise and experience, which will be contribute to robust, humane, and effective RSD processes.

\(^9\) n 11
\(^2\) n 75, 28
The “Distinctive” Climate Law: Why, What, and How to Teach It

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Abstract

This article investigates climate law teaching and learning at Canadian law schools in the context that climate law is arguably evolving as a new field for legal practice and research. While some law schools have introduced stand-alone courses or integrated climate law modules into more conventional courses, most of them have not done so in any systematic way. I argue that Canadian law schools must do their part in the fight against climate change by educating future climate lawyers and scholars and producing climate-related legal knowledge.

I start with a detailed analysis of climate law’s internal cohesive operation, its distinctiveness, and its relationships with other areas of law and disciplines. Carefully considering the complex and dynamic nature of climate change and the fact that international climate law has motivated climate law developments in various modes and at different levels, I examine how and to what extent these unique features shape the objectives, structures, and pedagogies relating to climate law education. I also identify the opportunities and challenges facing law schools to have climate law as an independent curriculum subject, by first emphasizing its intimacy and distancing with other subjects and then offering practical considerations. Having selectively reviewed the curricula and teaching materials and methods of Canadian law schools, I showcase how these schools have engaged with climate change and explain the pathways through which climate law courses can be introduced. Before the conclusion, I provide a set of normative questions about what law schools should do with interdisciplinary or even transdisciplinary teaching and the good practices and challenges.

My research contributes to the ongoing dialogue on why, what, and how to teach climate law as well as deriving some key lessons to inform and inspire future development and reform.

¹ As this paper is a work in progress that will be submitted to a law journal, the author preferred to share the abstract only.
L’émergence des intérêts étatiques en Arctique : d’un point de vue constructiviste de droit

Monim Benaissa (Université d’Ottawa)²

Si la perception commune est que les théories rationalistes des relations internationales ne font que de la description, pourtant ces théories exercent également une fonction prédictive. Les principales perspectives théoriques dans les relations internationales diffèrent dans l’analyse de la nature du système international. À la lumière de l’émergence des intérêts étatiques en Arctique la perspective constructiviste apparaît comme une théorie instruite.

L’utilisation à la fois de rationalité et de matérialisme n’a laissé que peu de place aux dimensions sociales dans la vie politique internationale, le matérialisme ayant réjecté le rôle des idées, des valeurs et des normes, tandis que la rationalité a ignoré le rôle de l’identité et de la société dans la formation des intérêts et donc du comportement des États. La sociologie en tant que déterminant central du comportement au sein de la communauté internationale, a donc incité les constructivistes à se concentrer sur le rôle de la culture, de l’identité, des intérêts et des idées dans la formation de politiques internationales, et à créer une sorte d’États communautaires. Ceci a encouragé le discours constructiviste à relire l’histoire sociologique des relations internationales dans le but de redéfinir le droit international selon de nouveaux concepts.

Les événements de la guerre froide et de la chute du bloc de l’Est ont poussé la théorie constructiviste d’aller au-delà de la force matérielle : le concept de légitimité a commencé à faire partie de la force non physique, ce qui a amené certains pionniers de cette théorie à œuvrer sur des sujets liés à l’éthique et au droit international. Subséquemment, ce courant a beaucoup apporter à l’analyse théorique, et pourrait davantage réussir à faire sortir les principaux éléments critiques.

Depuis ces deux dernières décennies, la doctrine en droit international s’est attardée aux récentes écoles de pensées pour mieux saisir l’impact normatif du droit. Dans ce contexte, le constructivisme entreprend une étude sociale de l’analyse des relations internationales, en considérant les acteurs et les événements internationaux comme socialement construits. Plus

² En raison de la soumission de l’article à une revue pour publication, on ne partage que le résumé de l’article.
précisément, le constructivisme explique les limites et les possibilités offertes par le droit international pour résoudre les conflits.

De toute certitude, les États à travers une politique vêtue du constructivisme, ont démontré comment avec le choix d’une nouvelle réalité géopolitique en Arctique, ils participent au processus d’internalisation des normes qui les conduit à repenser leur identité et leurs intérêts. En effet, ces États sont amenés selon la théorie constructiviste à redéfinir progressivement leurs intérêts nationaux parce qu’ils acquièrent une identité en participant à ce type de représentation collective.

Dans ce sens, les cinq États Arctiques et pour des raisons géostratégiques se réservent l’accès à cet océan par les États tiers. Toutefois, ces derniers affirment que le réchauffement planétaire est un enjeu difficile à relever par les seuls États Arctiques. Les constructivistes diraient que la plupart des États se réunissent pour développer les politiques d'atténuation du changement climatique. Il s’agit de la bonne voie à suivre pour la survie de l'humanité. Au cours des années de diplomatie ceci devient un engagement que la majorité des citoyens attendent de leur dirigeant à tenir.

En effet, on peut dire que, le constructivisme est une théorie bien placée pour développer la dimension de l’émergence des intérêts étatiques en Arctique, car les constructivistes offrent des explications et des idées alternatives pour les événements qui se produisent dans le monde. D’après eux, le comportement d’un État ne s’explique pas seulement par la répartition du pouvoir matériel, mais aussi par le développement des idées, des identités et des normes. De plus, leur concentration sur les facteurs idéationnels montrent que la réalité n’est pas figée, mais sujette au changement.

**Plan de présentation**

Nous allons présenter notre document selon le plan suivant:

1-Explication de la théorie constructiviste du droit international

A-Les principaux éléments et les traits distinctifs de la théorie constructiviste

B-L’analyse du droit international selon la théorie constructiviste

2-Application de la théorie constructiviste sur un cas d’espèce : la gouvernance de l’Arctique

A-La situation géopolitique et juridique en Arctique

B-Le constructivisme et le tour de la pratique en Arctique
Conclusion
Rethinking the Global Governance of Migrant Domestic Workers: The Heterodox Case of Informal Filipina Workers in China

Yiran Zhang (Harvard Law School)

I. Introduction

I met Emma at a birthday party held at a Miami-style outdoor swimming pool in a metropolitan city in China; butlers served fashionable cocktails at the pool and people were flirting and dancing on the side. Around twenty Filipina women occupied one end of the pool. Emma was a woman from the Philippines in her late 30s who had worked for five years as an overseas domestic worker in China, a jurisdiction that prohibits its citizens from hiring foreign domestic workers. Her tourism visa expired one month after her entry, and she lost her passport to an agent who promised to sell her a long-term visa. When I met Emma, she was living with her mother and her toddler daughter born in China, both without a valid visa, in a separate apartment provided by her employer. She was working 8 hours a day five days a week in her employer’s home a few blocks away for a monthly salary of 7.5K RMB (~1070 USD).

On hearing about my research, Emma asked me: “so you are a lawyer, what do you think is the best law for us?” I gave her the standard lawyer’s answer that the government should provide formalization reforms, including special visa programs, to bring foreign domestic workers into legal migration regimes. She, with apparent disappointment, interrupted me: “Really? You think so? You think legal is better for us? But you see, with a legal visa, you are tied to your employer. You cannot change, even if the employer is not good. You cannot fight back when they are not good to you. Now I can change employers if I don’t like them. So all of my employers have been very good to me.”

Emma is one of the estimated 1.4 million Filipina women and more than ten million women worldwide who are working as domestic workers in a foreign country. Meanwhile, her celebration of her illegal status, her presence at this luxurious poolside party, and her migration trajectory through informality not only contradicts our common imagination of an overseas domestic worker

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1 As I will explain later, the work arrangements of Filipina domestic workers in S City were not standardized. Both of Emma’s working hours and salaries were both on the lower end of the community. She was the only informant who gave birth to a baby.
2 Interview transcript with Emma. For confidentiality reasons, I use pseudonyms for my informants. I will refer to the informants by their pseudonyms in the following footnotes.
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as a docile third-country woman tied to somebody else’s home, but also problematizes the prescription for them by international law and labor advocates.

Massive waves of female labor force flow from low-income countries to take up service jobs for upper-middle-class families in affluent metropolitan cities. As the seminal book edited by Barbara Ehrenreich and Arlie Russell Hochschild *Global Woman: Nannies, Maids, and Sex Workers in the New Economy* observes, the gendered division of labor, once anchored in the household, is now transforming into one between affluent cities and less developed regions. The rich nations are increasingly assuming “a role like that of the old-fashioned male in the family—pampered, entitled, unable to cook, clear or find his socks,” while third-world countries have to take up what is traditionally regarded as “women’s work,” often through deploying their working-class women.³ Rhacel Salazar Parreñas describes the phenomenon as an “international division of reproductive labor.”⁴

Despite their contribution to both societies, migrant domestic workers are often found in over-exploitative working conditions with low compensation, amounting to what many accuse as “modern-day slavery.”⁵ The global governance agenda to enhance their conditions, as advanced by United Nations-affiliated organizations like the International Labor Organization (ILO) and International Organization for Migration (IOM), is divided along the line of formality.⁶ On one side, they adopt a rights-centric approach through the extension of formal labor standard and regulated migration corridor to bring more workers into formality; the critical legal tools are labor contracts and special migration programs. On the other side of the dichotomy is the association of informality solely with risk and harm, and accordingly, an abolitionist agenda for informal and

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irregular labor migration, through more punitive legal instruments, such as the anti-trafficking laws.\(^7\)

However, the story of Emma, and an estimated 200,000 illegal Filipina domestic workers in mainland China\(^8\) struggles to fit in these orthodox narratives. As an overstaying migrant worker working with neither an enforceable labor contract nor a special work visa, Emma has very few legal rights and eligible for almost no formal protection from the law. Meanwhile, though she is undoubtedly suffering from the risks and human costs well-articulated in the literature about informal work,\(^9\) she is also earning an above-1000-USD monthly wage (plus separate housing provided by the employer) with two flexible rest days per week. This is far better than the earnings and working conditions that most Filipina domestic workers can expect in other jurisdictions where they work legally.\(^10\) Instead of the standard move to educate workers about the law, I ask a question in the opposite direction: what can the international lawmakers and advocates learn from Emma and her fellow Filipina workers in this informal migration corridor?\(^11\)

Through studying this heterodox case of informal Filipina domestic workers in China,\(^12\) and the comparison to its real-world alternatives of formal migration programs in other Asian jurisdictions, I propose to resist the dichotomized assumption in international labor law that formality, through labor contract and special immigration program, is universally better than informal migration options. I argue that it is crucial to look into the actual distributional consequences of legal and non-legal mechanisms under both formal and informal regimes from the workers’ perspectives.\(^13\)

By no means do I propose to reverse the formality/informality dichotomy, or claim that the


\(^8\) The estimate came from a talk given by the Philippines' Secretary of labor and employment, Silvestre Bello III. See South China Morning Post, “Manila to ask Beijing to legitimise status of up to 200,000 domestic workers illegally on mainland” (Sep.25, 2016);


\(^10\) For comparison, the average monthly salary for overseas domestic workers in the other major destinations: Singapore 430 USD, Hong Kong 600 USD, and Saudi Arabia 400 USD. See the price quotes from Helper Choice, as a recruiter agency recognized by the ILO for fair practice, helperchoice.com.

\(^11\) Especially, for such a community saturated with the culture of labor emigration to many host jurisdictions, overseas Filipina domestic workers constitute a group of informed comparativists that would enrich our thinking about transnational labor migration. For further discussion about the group, see Section III.A.

\(^12\) For further discussion of the methodology and its limitations, see section IV.A.

informal workers enjoy all-round benefits from informality in this specific case. Instead, through studying the informal workers’ bargaining power, my normative ambition is to identify rules—legal and non-legal—working in workers’ benefits and alternative pro-worker interventions that can enrich the current international pro-labor agenda.

The article proceeds as follows. Section II examines the formalization debate from the perspective of migrant domestic workers. Section III discusses the case study of informal Filipina domestic workers in China. The four sub-sections respectively discuss the research methodology and the primary setting of the local market; the market’s contingent relationship to law and law enforcement; the critical question of bargaining power among workers, employers, and broker in the shadow of informality; and the informal support network among the informal workers. Then it ends with the article’s critical intervention to the formalization debate.

II. Formalization for Migrant Domestic Workers? Disciplinary Formality versus Informality

Formality and informality have long faced bifurcated treatment in the field of international labor law, with the latter occupying a marginal conceptual and normative space. Early studies of the informal economy have conceptualized a persistent informal sector with large volumes of casual and intermittent jobs outside a more advanced capitalist formal sector, a phenomenon disproportionately associated with the under-developed Global South. Thus social and economic modernization is assigned as the cure. This dualism view has defined the ILO’s early interventions towards informality and persists its influence until today. From the legal perspective, the longstanding agenda has been formalization and inclusion of the informal workers, through extending labor standards and other rights.

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14 Some of the disadvantages associated with informal work are very pronounced in this case study, such as social exclusion and political disadvantage. See Kerry Rittich, Formality and Informality in the Law of Work, in THE DAUNTING ENTERPRISE OF LAW: ESSAYS IN HONOUR OF HARRY W ARTHURS, eds. S ARCHER, D DRACHE AND P ZUMBANSEN (MONTREAL AND KINGSTON, McGILL-QUEEN’S UNIVERSITY PRESS, 2017) 109–123 (2017).

15 Rittich, supra note 19, at 110.


17 Id.; for the historical debates around the link between informality and development, see MARTHA ALTER CHEN, The informal economy: Definitions, theories and policies (2012).

18 CHEN, supra note 18.

Meanwhile, empirical studies are constantly disturbing such a dichotomized understanding with alternative narratives. Studies have shown that informal employment is usually closely intertwined with the formal sector. The development of the capitalist economy, especially its globalization, has driven the surging informalization of work in many industries and countries, including those in the Global North. Recent studies also start to recognize some positive values of the informal economy, particularly as a potential safety net in crisis and transitional times. Meanwhile, the consensus in the field remains that informality has negative welfare consequences to individual participants, in terms of poor working conditions, low pay, economic insecurity, and social exclusion.

Despite recent empirical and conceptual reflections, the current normative agenda of the international labor law continuously uses informality as a normative token for bad jobs. Naming the informality already implies the need for intervention, and in some cases, the need for prohibition. The international legal norms also use the formality/informality dichotomy as a marker between justified and unjustified exploitation and to further divide the labor between a decent work agenda to extend protection and an abolitionist one to eliminate extremely bad working condition through more punitive anti-trafficking laws.

The implication of this governance agenda for migrant workers is further complicated by the heterogeneous values around migration in international law. When workers move across national

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25 Id.


27 Chantal Thomas, *Convergences and Divergences in International Legal Norms on Migrant Labor*, 32 *COMP LAB POL J* 405 (2010).
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borders to labor, aside from the disagreement over the individual-welfare-maximizing governance rules, the international norms also reflect the states’ interest in drawing the boundary of its population. The divergence between the primacy of individuals’ rights and the primacy of states’ interest is especially pronounced in the field of anti-trafficking law.

As a result, migrant workers laboring under a formal legal arrangement are often subject to hyper-regulation yet entitled to substandard labor rights in comparison to local workers. The formal rules are employed at least equally to discipline the workers as to protect them. They often find themselves recruited through temporary migrant worker programs, an increasingly popular labor migration scheme across the globe. Such programs often require the migrant worker to commit themselves to labor for particular employers or labor bureaus for a specific term, and formal immigration status is only valid as long as they strictly follow the terms of their labor contract. This legal structure can be traced back to the English law of indentured labor and has spread with the expansion of the British Empire. Contradictory to the expectations, the formal status as constructed by such programs generates legal vulnerability to substandard exploitation and trafficking. When the receiving countries design special labor migration programs for domestic workers, they usually further internalize the society’s entrenching undervaluation of paid domestic work, which is historically associated with women’s unpaid work inside the household and female laborers of ethnicity minorities. Some formal programs even extend intricate disciplinary rules onto workers’ personal and sexual life.

Not unaware of the issue’s multi-dimensionality, the ILO still assigns formalization as the resolution to promote migrant domestic workers’ interest. For example, the Domestic Worker Convention mandates an enforceable pre-departure labor contract together with the right to

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28 Id.
29 Id.
30 NICOLE CONSTABLE, MAID TO ORDER IN HONG KONG: STORIES OF FILIPINA WORKERS (1997).
31 Shamir, supra note 8.
33 For a more historical review of temporary migration regimes, see David Cook-Martin, Temp nations? A research agenda on migration, temporariness, and membership, 63 AM. BEHAV. SCI. 1389–1403 (2019); Halley, supra note 33; Shireen Ally, On Laws, Rights and Conventions A PROVOCATION, 13 INT. FEM. J. POLIT. 457–461 (2011).
34 Id.
36 CONSTABLE, supra note 31.
37 ILO c 189.
repatriation as the ideal form to structure the work.\textsuperscript{38} It takes the longstanding position that informal workers’ poor bargaining power is a result of inadequate legal system and thus a formal contract elevates them into better working conditions.\textsuperscript{39} The convention also falls short of intervention into the work permit laws accompanying the labor contract that often constrains the works’ bargaining power.\textsuperscript{40}

For individual migrant workers straddling between various work arrangements, the strategic choice is less certain. Several sociological studies in the United States, Taiwan, and Israel have all observed that temporary migrant workers intentionally leave their formal status for financial and other benefits in the informal economy. The leap often comes with a reduction of security but a substantial bump in income.\textsuperscript{41} Sociologist Pierrette Hondagneu-Sotelo, comparing the undocumented immigrant domestic workers in California and the hyper-regulated migrant domestic worker industry in Hong Kong, tentatively finds that the former group, though suffering indignities and abuses, still enjoy more agency to exit bad jobs.\textsuperscript{42}

This case provides an in-depth inquiry into a predominantly informal market without a formal program and its distributional consequences for migrant domestic workers. Though without legal rights, the parties incur power and vulnerability, permission and prohibition, and constraint and freedom and are constantly bargaining with them in the shadow of informality.\textsuperscript{43} Normatively, it advances the stance to conceptualize formality and informality as comparable conditions of welfares and risks that can and should be analyzed and compared under the same framework.\textsuperscript{44} And the ultimate marker for evaluation shall be the power individual participant imbues in the setting.

III. “Illegal but Free”: The Case of Filipina Domestic Workers in China

A. Methodology and Introduction to the Field

\textsuperscript{38} Id, article 8.
\textsuperscript{39} Rittich, supra note 15.
\textsuperscript{40} Stuart C. Rosewarne, The ILO’s Domestic Worker Convention (C189): Challenging the gendered disadvantage of Asia’s foreign domestic workers?, 4 Glob. Labour J. 1–25 (2013).
\textsuperscript{41} Gordon, supra note 17, at 449 footnote 14.17 CLAUDIA LIEBELT, CARING FOR THE “HOLY LAND”: FILIPINA DOMESTIC WORKERS IN ISRAEL (2011); Pei-Chia Lan, Legal servitude and free illegality: Migrant ‘guest’workers in Taiwan, in ASIAN DIASPORAS: NEW FORMATIONS, NEW CONCEPTIONS 253–277 (2007).
\textsuperscript{42} HONDAGNEU-SOTEOLO, supra note 7, preface to the 2007 Edition, at xiii-xiv.
\textsuperscript{43} Rittich, supra note 15.
\textsuperscript{44} Kerry Rittich, Formality and Informality in the Law of Work. At 113.
Due to the difficult-to-reach nature of the population and the lack of formal statistics, I developed my sample of informants through the snowballing method, which is often employed to study subjects with similar characteristics.\textsuperscript{45} I entered the social world of Filipina domestic workers through one Filipina nanny friend who had been a highly respected member of the community. Between June and August 2019, I was regularly invited to their group outings in S City, a metropolitan coastal city in mainland China, on weekends and their rest days. I have experienced police checking with them. Overall I conducted semi-structured interviews with 36 workers and multiple group discussions.\textsuperscript{46} Besides, I also interviewed two Chinese broker agents working with Filipina domestic workers.\textsuperscript{47} For the informants’ privacy and safety, I use pseudonyms for both individuals and the location.

Here I also introduce the basics of this informal market. Though not well known to the public, multiple informants estimated that there existed around 100,000 Filipina domestic workers in S City alone, with a few thousand undocumented domestic workers from other countries, such as Myanmar and Indonesia.\textsuperscript{48} The ethnicity, class, and domestic/foreign relations in the locality twists the international presumptions. As an emerging economy, China has gone through rapid economic development in the past few decades and witnessed an emerging upper-middle class. The recently enriched society now has a thirst for the embodiment of globalization, a new wave of incoming foreign workers. Though the employers are much richer in monetary measurement, some of them lack the cultural capital in the globalization, including but not limited to English language ability.\textsuperscript{49}

\begin{footnotes}
\textsuperscript{45} H. RUSSELL BERNARD, RESEARCH METHODS IN ANTHROPOLOGY: QUALITATIVE AND QUANTITATIVE APPROACHES (2017). The limitation is obvious: all of my informants have some connections to the community and my sampling has left out those without access to the community or rest days. Meanwhile, sociological researches of migrant domestic workers often use similar recruitment methods. See CONSTABLE, supra note 31; PARREÑAS, supra note 5; Kayoko Ueno, Strategies of resistance among Filipina and Indonesian domestic workers in Singapore, 18 ASIAN PAC. MIGR. J. 497–517 (2009); Anju Mary Paul, Stepwise international migration: A multistage migration pattern for the aspiring migrant, 116 AM. J. SOCIOL. 1842–86 (2011). Even large-scale quantitative researches about documented domestic workers in other jurisdictions with formal migration programs often use similar sampling methods. See Martin Ruhs, The price of rights: Regulating international labor migration (2013); Anja Wessels, Madeline Ong & Davania Daniel, Bonded to the System: Labour exploitation in the foreign domestic work sector in Singapore Report (2017).

\textsuperscript{46} The sample size is also comparable to sociological studies of Filipina domestic workers in other jurisdictions.

\textsuperscript{47} I have attempted multiple interviews with the employers but they all declined quoting privacy concerns.

\textsuperscript{48} S City is one of the two cities in mainland China with large Filipina domestic worker population. A few Filipina domestic workers work in other regions as well. The Philippines’ government estimated that a total of 200,000 undocumented Filipina domestic workers worked in mainland China. See South China Morning Post, supra note 13.

\textsuperscript{49} Pei-Chia Lan has discussed a similar employer-worker dynamic in Taiwan two decades ago. See Pei-Chia Lan, “They have more money but I speak better English!” Transnational encounters between Filipina domestics and Taiwanese employers, 10 IDENTITIES GLOB. STUD. CULT. POWER 133–161 (2003).
\end{footnotes}
Filipina workers’ language skills earned them two distinct client pools: the foreign expatriate families who often don’t speak the local language and upper-middle-class Chinese families who crave an English education for their young children in addition to everyday care. Thus many Filipina domestic workers are not only substituting the labor of the local women but bringing in some unique skills to the household and the market.

As a result, the average salary for a Filipina nanny is 10-15% higher than a Chinese nanny in the local market. Their income is also high based on other metrical comparisons. The market salary for a live-in Filipina nanny in S City is 8k to 10K RMB (USD 1135-1415 USD). This is significantly higher than the average wage of Filipina domestic workers in other Asian jurisdictions, which is 640 USD in Hong Kong, 560 USD in Taiwan, 500 USD in UAE, and 370 USD in Singapore.50 The only Asian market yielding a higher wage is Israel with above 1270 USD. 51

Between the Filipina workers and the employers stand two types of agents, the “transnational recruiter” and the “local headhunter.” A “transnational recruiter,” usually consisting of two branches, one in the Philippines and the other in China, connects a worker in the Philippines and an employer in China. He also facilitates the immigration of the worker. The mechanism follows the typical “fly now, pay later” practices recruiting Filipina domestic workers into other Asian jurisdictions.52 After online interviews and sometimes a deposit fee, the recruiter arranges for the worker when she is still in the Philippines to sign a two-year-long contract to work for the specific employer. The contract usually stipulates a salary 25% lower than the market wage and shorter weekly rest hours. (The pay is still better than other jurisdictions.) The recruiter also charges a high fee in the term of 50 to 75% deductions from the first six-month salaries, which usually amounts to $2,500-$2,800. The employer directly transfers the deducted wages to the recruiter. In exchange, the recruiter takes care of the visa application, transportation, and initial training and medical examination. In the process, he often controls the workers’ travel documents. The recruiter’s staff escorts the worker during transportation and keeps her travel documents until they arrive in the recruiter’s local office.

50 PARREÑAS, supra note 5.
51 17 CLAUDIA LIEBELT, CARING FOR THE ‘HOLY LAND’: FILIPINA DOMESTIC WORKERS IN ISRAEL (2011).
52 PARREÑAS, supra note 5; Lan, supra note 41..
In contrast, a “local headhunter” connects employers and workers who are already in China. A headhunter often posts available jobs on social media and put in connection interested workers and employers. On the formation of an employment relation, usually after a negotiated trial time, the agent charges the employer a commission fee equal to the worker’s one-month salary (8K to 10K RMB, or 1135-1415 USD) while the worker pays 20-30% (~2K RMB or 285 USD). Both pay the fee directly to the headhunter. Some Filipina workers also work as headhunters on the side.

**B. Contingent Illegality: Immigration Law on the Books and in Action**

Formality and informality are by no means two dichotomized forms of work empirically.\(^53\) Instead, it means one or multiple deviations from an employment relationship that is fully complying with all the laws of both sending and receiving states. The departure from formality can be exit and/or exclusion.\(^54\) A Filipina domestic worker in China often deviates from multiple layers of formal laws, as is shown in Table 1. The written laws assign different legal consequences to each deviation, ranging from non-rights in courts, prohibiting the continuation of the practice, to economic/administrative punishments and possible criminal punishments. Yet, each departments’ diverse incentives, capacities, and approaches to enforce each aspect of the law across different periods add contingencies to the actual consequences of informality.\(^55\) It is worth noting here that the loose enforcement, especially of the prohibitive part, can work in favor of parties who are engaged in informal activities.

<table>
<thead>
<tr>
<th>Law</th>
<th>Specific deviation</th>
<th>Law-on-the-books consequences</th>
<th>Law-in-action consequences</th>
</tr>
</thead>
<tbody>
<tr>
<td>Taxation/Social security</td>
<td>None of the interviewed workers or their employers pay for taxation or social insurance contribution for this</td>
<td>Tax enforcement, such as fines;</td>
<td>Tax and social insurance</td>
</tr>
</tbody>
</table>

\(^{53}\) Rittich, supra note 15; CHEN, supra note 18.

\(^{54}\) CHEN, supra note 23, at 10.

\(^{55}\) For an everyday life perspective of law enforcement in China, see Margaret Boittin, “China’s Legal Construction Program at 40 Years – Towards an Autonomous Legal System?”: A View from the Trenches of Law, the State and Society, conference paper.
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<table>
<thead>
<tr>
<th></th>
<th>employment relationship in either country.</th>
<th>No eligibility to social insurances.</th>
<th>enforcement are very rare.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Contract</strong></td>
<td>Though some of the workers have signed an employment contract with the employers/intermediate agencies, none of the informants expect it to be enforceable in the court. Some contracts are abruptly a fake one (stating office work instead of domestic service) for the purpose of immigration law requirements. None of the contract is registered with the state as mandated by Chinese or Filipino labor law.</td>
<td>Non-enforcibility of the employment contract in formal dispute resolution systems (court and labor arbitration).</td>
<td>Parties very spottily use formal systems to enforce contract. Yet some use the contract as bargaining leverage.</td>
</tr>
<tr>
<td><strong>Registration of entities</strong></td>
<td>The recruitment agencies are either not registered enterprises or operate outside the scope of their entity registration in both countries. When workers operate small-scale side businesses, none of them register or abide by the regulation of small enterprises.</td>
<td>Fines and suspension of the license; Prohibition of future practices.</td>
<td>Enforcement on agencies sometimes happens. Enforcement on migrant traders were very rare.</td>
</tr>
<tr>
<td><strong>Zoning/ tenant law</strong></td>
<td>The workers’ leased independent lodgings often violate the maximum occupancy in local zoning regulations. The landlords violate the local</td>
<td>Non-enforceability of the lease in court;</td>
<td>Prohibitions are sometimes enforced.</td>
</tr>
</tbody>
</table>

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56 Only one informant ever reached out to authorities for unpaid wages and she got a reduced wage enforced by the police.
Of course, for an undocumented foreign worker, each deviation of laws is closely intertwined with their informality from the perspective of immigration law that disqualifies them from establishing many formal relationships. In contrast to some unnoticeable informalities, the violation of immigration law is a status that they have to strategize with every day. Yet, the consequence of informality is, again, highly contingent. The prohibitions read as certain in the legal text are enforced through a fragmented immigration law enforcement system on the ground. This contingency enables the Filipina domestic workers to enter, stay, and work in the country for years, and, at the same time, also leaves them vulnerable in their encounters with law enforcement.57

China’s immigration law generally doesn’t extend employment visas to foreign domestic workers. An enactment issued by multiple ministries in 1996 prohibits individuals and individual businesses (a legal category for small businesses) from hiring foreign workers.58 Exceptionally, “long-term elite foreign workers” can sponsor “personal assistant visa” to formally employ foreign domestic workers.59 All but three of the workers I interviewed entered the country on one-month tourist visas, which they applied themselves or with the help of a transnational recruiter. Though most

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57 In this section, I narrate the law as written and as experienced by my informants, whose experience, to be sure, might not be generalizable beyond this specific group. For example, their experience substantially differs from that of undocumented African traders in Southern China, as recorded in The World in Guangzhou, a 2017 ethnography about illegal immigrants in China. According to the authors, Nigerian Igbo traders were disproportionately harassed and pursued by the police and their illegal immigration status caused them substantial everyday inconvenience. GORDON MATHEWS, LINESSA DAN LIN & YANG YANG, THE WORLD IN GUANGZHOU: AFRICANS AND OTHER FOREIGNERS IN SOUTH CHINA’S GLOBAL MARKETPLACE (2017), chapter 5.

58 PRC Ministry of Labor et al, Administration of Foreigners Working in China (1996), clause 33. I shall press here that this is another example of Family Law Exceptionalism.

59 These domestic workers are issued S-1 visa, a category for family companions, which traditionally only covered elite foreign workers’ family members. PRC Exit and Entrance Administration Law (hereinafter as EEAL), Article 6-10. Less than one thousand domestic workers, according to a news report, had obtained a visa under this exception as of 2017. S City Gov, “It’s more convenient for foreign elite workers to hire Filipina helpers!” at http://www.shanghai.gov.cn/nw2/nw2314/nw2315/nw17239/nw23858/t21aw1220470.html
workers simply overstayed their tourist visa, some managed to maintain a misclassified business or work visa, to work quasi-legally in the country.  

Workers working without visas are subject to administrative punishments. According to China’s Exit and Entrance Administration Law (EEAL), overstaying the visa and working without a visa is subject to a fine up to 10,000 RMB (~1,412USD), and detention up to 15 days for the worker. The employer and the agent are subject to penalties up to 100,000 RMB (~14,115 USD). Any foreigners involved “may be repatriated” for violating EEAL. The transnational recruiter might also be criminally liable. Section 6-3 of the Criminal Code criminalizes various acts related to human smuggling, subject them to up to 7 years’ incarceration or life imprisonment in serious offenses.

While the statutes seem non-negotiable, immigration law enforcement is uncoordinated and sporadic, partially attributable to the EEAL’s procedural rules. Only police or immigration bureaus above the county level have the authority to investigate immigration-related activities, including initiating an on-site interrogation. Minimizing the incentives for street-level enforcement officials to go after illegal overstays, the internal division of labor spares the Filipina workers from much of the risk of being caught. Up to the time of my interviews in 2019, the Filipina community finds that illegal overstay per se is not on the top of the law enforcement’s radar. However, their encountering street-level law enforcement for other issues like census checking and striking down of unregistered churches had the potential to escalate into immigration enforcement. With various resistance strategies, such as staying vigilant, bribery, and sympathy invocation, more often than not, workers managed to get off the hook.

Laboring without a formal contract or a work visa violates the Philippines’ regulation on their emigrants. The Philippines Overseas Employment Administration (POEA) regulates overseas

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60 The specific cases of visa miscategorization omitted here.
61 EEAL, art. 62 and art. 80.
62 EEAL, art. 62.
63 I corroborate the legal text with a search of the online adjudication database. (http://www.court.gov.cn/wenshu.html) Under the search terms of “the Philippines” and “domestic workers,” the only case records I found were agents brokering the workers into the country.
64 PRC Criminal code section 6-3.
65 EEAL, article 58.
66 A worker made a brilliant observation that “if you see an officer speaking English (very likely an immigration policeman), you know you are in the system. Before that, you can always escape, tip, or pray to God, and God might give you another chance.” Interview with Sia.
67 A worker’s story with police omitted here.
employment at three stages: first, it licenses private placement agencies in the Philippines; second, it accredits foreign employers and verifies each job order before permitting the worker’s departure; third, it also sets other pre-departure clearance for the workers, including skills testing, medical examination, and compulsory pre-departure seminars.68 Many migrant workers and their recruiters contravene at least the second and third stage of regulations. The legal consequence for the former is to be stopped at the border and the latter, administrative fines, and removal of licenses.69

The Philippines’s Consulate in S City also plays a discretionary role in support of the workers. The Consulate readily issues a travel document when a worker reports a lost passport. It also renews expired passports without checking the visa pages. Moreover, it also organizes community events, including national elections, that are open to all Filipina workers. Workers on overstay status find these practices empowering in maintaining their independence and legal identity. At the same time, the Consulate refrains from actively intervening in the repatriation process, striking a subtle balance with the border control officials.

The legal rules—especially the ones they are violating—shape the workers’ bargaining power in the following ways. First, immigration law creates and distributes costs and risks. As complete compliance is nearly impossible, how much to comply with the law is a strategic choice calculated between the cost of compliance and the risk of violation. Second, the legal punishment for deviations distributes risks and bargaining strategies among the workers, the employer, and the brokers. Third, the prohibitions deter the workers from turning to state authorities for any public service, which cultivates their reliance on other informal networks, especially the migrant community.

C. Bargaining in the Shadow of Informality

Now I turn towards the vital question of workplace bargaining power. This section follows the literature on bargaining power and background rules. 70 It also draws lessons from contract

68 POEA Rules and Regulations, Part II, Rule VI.

69 Only one of my informants had been actually stopped by the Filipino emigration officer at the border due to lack of an employment certificate. But the Filipino restriction does enter some workers’ calculations for migration strategies. Even when the worker has mis-categorized Chinese visas to travel across borders, they’re more deterred to return to the Philippines. See interview with Danny.

70 For a summary of the literature and its applications, see Hale, supra note 13; Duncan Kennedy, The stakes of law, or Hale and Foucault, 15 LEG. STUD F 327 (1991); Robert H. Mnookin & Lewis Kornhauser, Bargaining in the shadow of the law: The case of divorce, 88 YALE LJ 950 (1978); HALLEY ET AL., supra note 13 at 256-66; LIBBY ADLER, GAY PRIORI: A QUEER CRITICAL LEGAL STUDIES APPROACH TO LAW REFORM (2018).
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theorists about the non-legal enforcement mechanisms of contract.\textsuperscript{71} Under this framework, the players are not so much governed by law as conditioned by it. The stakeholders' bargain with each other in the predictive range of their individual and collective guesses about the legal consequences of their action or non-action and accordingly speculate their bargaining power vis-à-vis each other.\textsuperscript{72} Though the stakeholders are not always antagonistic, the bargaining framework emphasizes the role of reciprocal threats of coercion as strategies to bargain and to enforce the bargain, as enabled or disabled by layers of legal and non-legal rules.\textsuperscript{73} A prerequisite to this model is the players’ bargaining consciousness.\textsuperscript{74} In Filipina domestic workers’ case, the weekend community gatherings serve as a crucial site where the workers define the value of their labor, explore the background rules, and discover, discuss, and to some extent, enforce their bargaining strategies in this informal market.\textsuperscript{75} In this section, I first identify the major background rules of bargaining as perceived by the community. Then I discuss what the workers are bargaining for and the repertoire of workers’ bargaining strategies.

One key message that saturated in workers’ discussions is that, with contract and immigration enforcement afar in the background and with every player reluctant to involve the formal authorities, she can exit the employment relationship without severe legal consequences if she finds it unsatisfactory. Working against the immigration law means working without their immigration status attached to a specific employment contract. Consequently, they can move between employers and between different types of employment, away from the law’s explicit disciplinary role. The workers have identified that this specific leverage to change their jobs substantially enhances their bargaining power. The workers have again and again identified this leverage as empowerment in the workplace: “no visa means free. It’s free for the employers and free for us too. They can choose us and we can choose them. If I don’t like them, I will change.


\textsuperscript{73} Hale, \textit{supra} note 70.

\textsuperscript{74} Mnookin and Kornhauser, \textit{supra} note 72.

\textsuperscript{75} This is true in other East Asian jurisdictions where Filipina workers are allowed to congregate on Sundays. See \textit{Constable}, \textit{supra} note 31; Margaret Fenerty Schumann & Anju Mary Paul, \textit{The Giving Up of Weekly Rest-Days by Migrant Domestic Workers in Singapore: When Submission Is Both Resistance and Victimhood}, \textit{1 Soc. Forces} 24 (2019).
(Job change) is normal here.”

“A community norm that enables many job changes is the information gathering and sharing in the group. The job opportunities outside their current employment are commonly discussed at group gatherings and sometimes persuaded onto the fellow worker who has a bad employer according to the group. Sometimes the women start blaming and pushing interviews onto the worker if she sticks to her bad employer. The group dynamic makes the switch from a less-than-average employment relationship a possibility as well as a norm. Since employment also means a home for many live-in domestic workers, the independent lodging and informal support network to be discussed in the next section enhances the possibility of job changing.

Now I introduce the surplus that the workers are bargaining for. The most obvious surplus metrics are the salary and rest hours. The baseline in the S City is 8,000 RMB and 24 consecutive hours per week outside the employer’s home. If the employment renders salaries or rest hours falling short of the baseline, the workers need some extra-standard treatment to stay and also to justify it to her peers, such as free separate housing and extra short working hours. Aside from the two basic metrics, workers’ satisfaction with their work also illustrates in relational aspects with their employers’ family, or as a common saying in the community, whether “they treat me like a family.”

“Being treated like a family” is both a subjective feeling and a collective evaluation by her group. One standard dimension is the level of respect the worker receives from the employer, whether she is treated as an equal family member enjoying similar freedom. Workers enlist specific details in everyday life as signs of (dis)respect, such as whether she is dining together with the family, whether she can watch videos on the phone in front of the employer, whether she can go out during working hours, and so on. Sometimes the relational aspect contravenes the metric ones. For example, bringing the employer’s child to the Filipinas’ weekend social events prolongs the

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76 Nancy.
77 Eugene.
78 Group discussion with Erica and friend.
79 Emma.
80 Shelly.
81 This is also well recorded in other ethnographies about Filipina domestic workers, see PARREÑAS, supra note 5. At 9
worker’s working hours yet is widely celebrated in the community as a sign of the employer’s familial trust.\textsuperscript{82}

The background rule over job changes enables the worker to leave an unsatisfying employment relationship, not just extremely abusive ones. One worker said she quit her previous employer because her employer failed to deliver the promise of a coherent schedule.\textsuperscript{83} Another worker kept a record to herself the incidents of disrespect and left the employer after “four strikes.”\textsuperscript{84} Aside from the employer’s treatment, the worker also takes into account her preferences about the household that she prefers to live in among the possible options she might have. In this way, their autonomy in changing employers is also a freedom of family formation. Some common preference markers include the employer’s ethnicity and language ability, the size of the household, the (non-)existence of a grandma, the age of the kid, level of privacy, etc. While some workers prefer culturally traditional Asian families that don’t perpetuate the stereotype of a sexually available Filipina woman and respect her relationship with her husband,\textsuperscript{85} others embrace Western families with more amicable employers and more independent children.\textsuperscript{86}

Now I move on to the bargaining power structures and the community’s repertoire of bargaining strategies. In terms of their bargaining positions, workers can be broadly divided into two categories, those who are under the transnational recruiters’ first contracts (“first-comers”) and those who come without transnational recruiters or who are not under the first contract (“freelancers”).

Since the first contract cannot be enforced by the law yet the employers and recruiters have already paid for the workers’ immigration cost. They have to privately enforce the contract to collect their investment in the form of lower wages and debt, with contractual and extra-contractual means.\textsuperscript{87} Thus, the first-comers’ salaries is a quarter less than the freelancers’ wage, or the “market wage,” as an exchange to the employer’s commission fee. The recruiter collects the workers’ half of the commission fee through the structure of wage deduction. The existence of the contract, even unenforceable in the court, deters workers from changing to fairer contract terms, especially when

\textsuperscript{82} Maria.
\textsuperscript{83} Coco.
\textsuperscript{84} Meghan.
\textsuperscript{85} E.g. Frida and Meghan.
\textsuperscript{86} E.g. Adele and Marian.
\textsuperscript{87} Charny, supra note 71.
they are unfamiliar with the local environment. During this period, the worker often faces excessive strategies by the employer and the recruiter to keep them in the contract, and has limited access to the community and thus the bargaining strategy repertoire. The contract often contains strict clauses, such as “no use of cell phones in the first three months” or “two off days in one month” (the norm in the local market was 24 hours off per week.) Extra-contractual coercions are also invoked, such as passport confiscation, arranging the worker’s off hours on Saturday instead of Sundays, controlling the Wi-Fi in the house, putting the Filipina in the same room with another Chinese nanny, and so forth. Fourteen workers out of seventeen who had come through transnational recruiters mentioned that the first employer was the worst, or even “the only bad family” they had in China.

Despite all the coercion from the employers and brokers, running away was a widespread strategy among first-comers. Indeed, it was so common that a recruiter informant told me that she would warn the employers of this risk ex ante if they insisted on hiring a newly arrived worker. An informal industry consisting of local headhunters, drivers, and fellow Filipinas are out there ready to assist runaways. As a Filipina nanny expects to earn a considerable salary after running away, the helpers are happy to help her with transportation in exchange for 50% of her one-month salary (4K RMB, ~570USD). Almost every informant I knew had the contact number of at least one “Filipina’s friend” and were usually happy to introduce them. As a result, for a newly arrived worker, acquainting one fellow Filipina is usually enough for runaways. Better informed workers were prepared for the runaway scheme even before signing the contract; the fastest runaway happened just two weeks after arrival. More than one worker mentioned that it was not the particular individual that made their first employment the worst, but the sub-market power structure embodied in the form of sub-market salary and wage deduction. “They (the employer family) were actually good persons and did nothing wrong as an employer. But I had to run away because the wage gap was so large.”

88 Regina.
89 Elsa; Pearl.
90 Pearl.
91 Rosemary.
92 Recruiter 1.
93 Eugenia.
94 Pearl.
Their illegal status, paradoxically, made their runaway easier. The non-existence of a prospective long-lasting legal visa, a potential surplus, reduces their incentives to stay longer in the contract and to repay the debt. More importantly, the lack of an immigration law system in support of the financially onerous contract disempowers the employer and the agent to enforce the contract against the migrant domestic workers with the state’s power. It, of course, doesn’t eliminate the possibility of extralegal strategies to self-enforcement, such as holding the travel documents. There are particular socio-legal conditions, such as the Filipino consulate’s travel document policies, that make running away less costly.

As for freelancers and workers more embedded in the Filipina community, job mobility is a more smooth and mundane part of workplace choice. They have developed a wide variety of bargaining strategies leveraging both her role as an indispensable caregiver in the employer’s family and against her alternative opportunities in the market.

Some bargaining strategies come from within the household. It’s worth noticing that many workers are more than a passive service-provider inside the household; instead, they have some authority in reshaping other household members’ behaviors, which is often established through their close relationship with the highly valued child. Authority in the household per se is a surplus that the worker values, and it simultaneously constitutes the worker’s power to establish a better working environment for herself. One worker pushed back against quibbling employers through the mouth of the boy who she was caring for and genuinely cared for her welfare. Another worker mentioned, leveraging her work as an early-age language tutor, proposed to the female employer to operate “Chinese-free days” to foster an English language environment for the child, efficiently silencing an antagonistic granny.

A more market-oriented strategy is to keep their options open by maximizing their information about job opportunities through keeping in connection with local headhunters and receiving job interviews without leaving the current job. Some more opportunistic workers even colluded with

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95 This bargaining strategy within the family is not unique to the Filipina domestic workers in this informal market. Ethnographies about Filipina domestic workers in Singapore also document similar strategies. See Nirmala.
96 Erika.
97 Maria.
98 Cecilia, Kate.
one local headhunter to “job hop” every few months so that they can earn additional commission fees from the employers.  

Indeed, some workers explicitly exerted her power as an active participant of an informal labor market on one end and a member of an inter-dependent household on the other, in order to extract more surplus from the employer, improving the quantitative as well as the relational aspect of her working condition. For example, Alex had left and returned to the same employer three times to get the conditions she wanted: “For the first two years, I didn’t have off days. The madam only allowed me to get out for a few hours every week. After another fight, I left them to work for another family. Madam begged for me back. She sent me videos of the two boys (I was caring for), crying and asking for me. ‘Please come back. The boys cannot live without you. We cannot live without you.’ She begged on the phone. I was too attached to the two boys, so that I went back. She also gave me a salary raise from 4k to 6.5k and now 8k. She also agreed to give me 24 hours off per week and flexible hours during the work. Now we are good. We are finally like families.” (emphasis by the author) It’s through exerting this power not to be part of the family that she was able to make the employer into a responsible family member that treats her with respect and an employer that pays her a better wage: “like families.” It is also worth noticing that the employer, in reverse, leveraged the worker’s attachment to the child to keep her within the family.

The freedom to change employers also enables quick exit as a compromising way to reduce abuse. However, the limited incidences in my sample cannot survey its effectiveness on a large scale. For example, after narrowly escaping a sexual assault by the male employer when the female employer was on a business trip, Anita contacted several agents. She took online interviews for jobs in other cities. When the female employer returned home a week later, Anita politely told her employers that she needed to pack everything and fly back to the Philippines and took the train to start a new job in another city.

The informality also enables some workers to develop alternative work arrangements and to have a household of their own in the city. Three of my informants worked live-out while eight did part-times with multiple households. Part-time jobs are paid for a higher hourly rate and enable more

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99 Jane.
100 Alex.
101 Anita.
flexibility and privacy time for the workers. Part-time is also a typical arrangement among lesbian Filipina couples, enabling them to live with their partners in their own households. Free from the occupational restraints set by formal rules, some workers even managed to take jobs outside the domestic worker sector. Three of the informants were teaching English in private kindergartens, and one became a salesperson at a trading company.

Aside from the market norms in cooperative settings, the illegality of the employment also introduces another weapon into the bargaining—the threat to report to authorities. In other words, Filipina workers and their employers are not only bargainings in the shadow of illegality, but they are also bargaining with it. The threat to report comes into the power dynamics in contradictory ways—it’s a weapon ready to be used by all stakeholders, as the others always involve in different illegal acts; at the same time, the threatening party also doesn’t want the threat to be realized ultimately because it might backfire. In the law, the consequence of such revelation is 10-to-15-day detention and repatriation for the worker, fines for the employers and local headhunters, and potential criminal charges for the transnational recruiter. An additional drawback for the employer in practice is that their residence will enter the radar of the immigration officials, which might induce future inspection. The inspection, or even just the fear for such a possibility shared by the workers, may constitute a de facto blacklisting of hiring foreign domestic workers.

Judging from the limited number of incidents emerging from my interviews, workers are no less active in invoking this weapon than other parties. And they found it sometimes useful. For example, when Meghan quit her first employer after less than one month, both resorted to this weapon of threat, the employers to coerce her to stay in the contract, and her to annul it. “The boss wanted to threaten me: ‘there are many immigration officials around. If you just quit, we might report you.’ ‘You think I am afraid? I know your name, your home address, and your company’s name, and your company’s address. If you report me, I would report you and your agent. It’s not

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103 Almost no formal programs allow domestic workers to switch sectors without leaving the jurisdiction. See Shamir, supra note 8.
104 EEAL and criminal code as in previous section.
legal for you to hire me in the first place. It’s a big company and you don’t want troubles.’ So he asked me whether I need extra money for the taxi.”

Workers also deploy this weapon to get their documents back from the transnational recruiters and, in some cases, fellow Filipinas. In these cases, the threats can go beyond immigration law violations in the receiving country. For example, Denise got her documents back with a threat to sue in the Philippines’ court for the recruiters’ participation in illegal job introduction and potential human trafficking. Janice employed a similar threat in a similar scenario yet failed to get the document back from the agency. As the threat derives the coercive power from its ambiguity as much as its punitive legal consequences, it’s even hard for the parties to predict when such a threat would work and why.

The strategy— and ethics— of bargaining is being developed and reproduced during community gatherings. In the first gathering I attended, an experienced worker taught a newly arrived worker the techniques of quitting and threatening to report. In the end, she added: “But don’t leave your employers in the middle of the week. They both work and have children to care for. We shall be considerate of them too. Pack your stuff and leave them next weekend.”

Of course, the workers’ bargaining power and strategy are severely restrained by the involvement of informality. Only one of my informants reported to the police for help in the scenario of wage underpayment, and another reported the recruiter’s document confiscation practice to the immigration law enforcement. Labor organizations and support from the civil society organizations, who have significantly empowered the workers elsewhere, are absent in this case study. The worker’s bargaining position is also restrained by the broader structure in the political economy, such as income inequality between countries so that she has to work in a foreign family to support her family at home. It also doesn’t mean that the perils of the immigration law are non-existent.

What the informality has done here is to untie the connection between the workers’ market behavior and the risk of deportation and thus to enable some bargaining strategies that are

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105 Meghan.  
106 Denise.  
107 Janice.  
108 Group gathering with Janice and friends.  
110 Global care chain, in EHRENREICH AND HOCHSCHILD, supra note 4.  
111 As explained in the previous section.
not available when immigration law is more strictly enforced. As a worker has already become deportable upon overstaying her visa, the immigration law system can no longer directly discipline her other decisions around her work and family life like finishing her current employment or moving out of the employer’s household.

<table>
<thead>
<tr>
<th>Table 2: Bargaining strategy repertoires</th>
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<tbody>
<tr>
<td><strong>Worker</strong></td>
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<td><strong>Agency</strong></td>
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<tr>
<td><strong>Before departure</strong></td>
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<tr>
<td><strong>Go through the immigration process on herself;</strong></td>
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<tr>
<td><strong>Connect with the employer through friends and relatives to bypass charges.</strong></td>
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<tr>
<td><strong>Within the household</strong></td>
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<tr>
<td><strong>Everyday resistance;</strong></td>
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<tr>
<td><strong>Family-like bond with the employer;</strong></td>
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<tr>
<td><strong>Meddling with family members;</strong></td>
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<tr>
<td><strong>Leveraging English.</strong></td>
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<tr>
<td><strong>Taking new job interviews to compare conditions;</strong></td>
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</table>
Maintaining the connection with multiple headhunters; The threat to leave.

<table>
<thead>
<tr>
<th><strong>Changing the employment</strong></th>
<th>Runaway with help (if the first contract); Changing employers; Taking part-times and side jobs (see below).</th>
<th>Taking new workers; Taking part-time workers.</th>
<th>Enabling free job changes to keep the worker (if the first contract); Colluding with opportunistic job-hopping workers.</th>
</tr>
</thead>
</table>

**Invoking the state.**

<table>
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<tr>
<th></th>
<th>The threat to report a violation of immigration law; Report other violations, such as wage theft.</th>
<th>A threat to report a violation of immigration law; Report other violations, such as theft.</th>
<th>A threat to report.</th>
</tr>
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</table>

**D. Surviving and Thriving in the Informal Economy**

In this section, I turn towards the informal economic network that enables the workers’ livelihood outside their workplaces and, ultimately, strengthens their bargaining power at the workplace. In the formal law in China, many essential public services are provided based on residency status, so that overstaying a visa means exclusion from these provisions, or legal disability. Meanwhile, a lively informal market, where the Filipina workers both provide and consume services in place of public service, supports the everyday life of the community, ranging from housing, leisure traveling, to sending remittances to her family members in the Philippines. Again, staying away from the formality unties the restraints from participating in other trades as a part-time worker or sometimes as an entrepreneur, which Filipina domestic workers in formal labor migration programs often face.112

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112 Shamir, supra note 8.
Such an informal support network outside her workplace empowers certain bargaining strategies for the Filipina women in their role as domestic workers: 1) it enables her to live a more independent life, less or not reliant on the employer household’s provision of everyday goods, including housing; 2) it provides an alternative income source to domestic service and a cushion to fall back on between jobs; 3) it also enriches the reproduction of the Filipina workers as a community in the city. It is also worth noting, however, that the informal network fails to find a solution for some legal disabilities, like the ability to travel outside the country reliably.

<table>
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<tr>
<th>Legal disability in the formal system</th>
<th>Provision from informal supporting network</th>
<th>Alternative: reliance on employer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Enter legal lease</td>
<td>“Boarding house.”</td>
<td>Live-in</td>
</tr>
<tr>
<td>Access to financial service, especially transnational transfer</td>
<td>Remittance service and mobile payment app</td>
<td>A bank account under the employer’s name</td>
</tr>
<tr>
<td>Register a telephone number and recharge it</td>
<td>A sim card under a friend’s name, often free.</td>
<td>A sim card under the employer’s name</td>
</tr>
<tr>
<td>Online shopping platform with registered online bank</td>
<td>Social media-based private traders</td>
<td>An online account under the employer’s name</td>
</tr>
<tr>
<td>Public inter-city transportation in the country</td>
<td>Private drivers for Filipina workers</td>
<td>Tagging on an employer’s trip.</td>
</tr>
<tr>
<td>Travel outside the country and re-entry</td>
<td>No provision.</td>
<td>No provision.</td>
</tr>
</tbody>
</table>
Here I use the example of remittance to illustrate how the workers balance between the informal market and the employer’s household to fulfill their everyday needs and to generate income from the process.

Remittance is a shared goal of overseas Filipina workers around the world. Remittance supports the worker’s family members to live a decent life, their children to receive education, and for the workers themselves to accumulate wealth to purchase property or start new businesses. Moreover, the Filipino state has named remittances as part of overseas workers’ “civic duty” and invested heavily in making it a legal duty to send remittance through official financial institutions.\textsuperscript{113} Formal financial institutions, however, are hardly accessible for undocumented workers in China as the banks require identification documents to open a bank account. Living off the record also scrap them off the radar in the Philippines. The lack of public financial infrastructure is circumvented through an informal network.

The most common channel is the private remittance service operated by Filipino traders in China with the help of some Filipina domestic workers. For example, Alex was a live-in domestic worker who also participated in an informal private remittance network on the side. Alex’s boss owned multiple trading companies and thus had multiple bank accounts in both countries. He hired around 20 moonlighting nannies to advertise the service to fellow Filipinas through social media platforms. Lack of a formal system to underwrite the monetary transactions, the existent bonds from the close-knit community plays a crucial role in instantly establishing trust in the network. The solicited worker deposits RMBs to a Chinese bank account held by the trading company or hands over the cash to the moonlighter, in exchange for a receipt, usually an online message. The next day, the boss’s helpers in the Philippines, sometimes the moonlighters’ family members, collect PHPs from the company’s bank account in the Philippines and then send the money to the bank account as designated by the sender. The exchange rate is the bank’s daily rate, often updated on the moonlighters’ social media every day. For each remittance up to 5K or 8K RMB, the business charge 50 RMB (a minimum of 1% rate). Of that sum, 20 RMB goes to the moonlighter who’s recruited the transfer, and 30 goes to the boss.

\textsuperscript{113} ROBYN MAGALIT RODRIGUEZ, MIGRANTS FOR EXPORT: HOW THE PHILIPPINE STATE BROKERS LABOR TO THE WORLD (2010); Ong, supra note 5.
The informal network can go further informalized, detached from the trading company. Ultimately if a domestic worker has two bank accounts in both countries and some connections, she can fully operate a small-scale remittance business herself. For example, Alex and her girlfriend in the Philippines were starting their own remittance business. The girlfriend used to work as a domestic worker in China under a miscategorized student visa, thus had bank accounts in both countries. By diverting the senders into their own business, they got to keep all of the 50 RMB charges.\textsuperscript{114}

It is not uncommon for the domestic workers to have one or multiple micro-business serving the community, including remittance, trading, and food service. Thus aside from emotional support and job information, the workers also have more direct economic incentives to develop bonds with more fellow Filipina and to maintain a positive reputation. The persons with side businesses are especially active in organizing group outings, operating group chats, and publicizing information. Thus the economic function of the informal support network and the social reinforcement of the community overlap and mutually reinforce each other, enabling the informal workers to survive and to thrive with limited access to the formal system.

V. Conclusion: A Bargaining Power Framework

How can we interpret this heterodox case of informal labor migration in the context of the global governance of migrant domestic workers?

I am by no means arguing that this case study informs the debate as a “good practice” example that can or should be replicated across the jurisdictions. Living undocumented in China can be cruel and precarious. A substantial human cost for working undocumented is long-time family separation. The workers have to make a tradeoff between losing future employment in this jurisdiction and not being able to return to their home country for years. The so-far prosperous market is highly contingent on the Chinese government’s not-so-harsh attitude. As the anthropologist Claudia Liebelt recorded a comparable case in Israel, the lively community of informal Filipina migrants in Tel Aviv shrank dramatically in six months when the Israeli government started a deportation campaign against undocumented immigrants.\textsuperscript{115} The whole industry of migrant labor, informal or formal, has become more unpredictable than ever now in

\textsuperscript{114} Alex.
\textsuperscript{115} 17 LIEBELT, supra note 41.
the middle of a pandemic. The fear for disease drives the host countries to be more xenophobic than usual, which put the migrants’ life under an unprecedented threat. 116

Nevertheless, this case, at least, raises a local exception to the current normative formality/informality dichotomy in international legal norms that tends to use informality as a token for bad jobs. 117 Rather, both informal and formal regimes can produce rules working in favor of or against the workers and thus different compromises of benefits and risks for the workers. A considerable number of workers, with varying levels of knowledge and some options, prefer the compromises in an informal system when the alternative—disciplinary formality works significantly in their disadvantage. Thus, I urge to separate the form and the substance of the arrangement in our analysis and to look beyond the legality question into the concrete distributional consequences for the workers that both legal and non-legal mechanisms enable. I also argue that the bargaining framework—especially the distribution of bargaining strategies in the industry—constitutes a helpful perspective to evaluate the workers’ power and lack of power, and to inform any governance interventions.


117 Rittich, supra note 15.