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SYMPOSIUM ON UNSETTLING THE SOVEREIGN "RIGHT TO EXCLUDE"

COLONIALISM AND THE "RIGHT TO EXCLUDE"

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A discussion of the state's "right to exclude" requires that we have at our disposal unambiguous understandings of what constitutes the state, who constitute its subjects/citizens, and who constitute aliens.[1] This, however, is not the case. In fact, the reverse is more true: particular notions of the state, of subjects/citizens, and of aliens are the *outcome* of (among other things) practices of migration regulation. This essay interrogates two understandings of the state that characterize much scholarship on migration, including legal scholarship. First, the assumption of the salience of state borders, of citizens/subjects, and of aliens understood in *national* terms; second, the assumption—often condensed in invocations of the Westphalian state—that the authority to control migration across these putative borders is a longstanding and non-contentious element of state sovereignty. In such approaches, the state is simply there. It matters little what prefix—national, colonial, imperial, modern, and so forth—we affix to it. Such views are premised on the notion that the practices of governance and the institutions of the state have a fidelity to, can be deduced from, and simply reflect a set of principles. In my view, rather than understand the state as merely translating a set of principles into practice, we are better served by focusing on *practices* to examine how they interpret and remake principles in *particular historical conjunctures*.

To elucidate this proposition, I provide here a synoptic analysis of two debates—one from the early nineteenth century, the other from the early twentieth—in the regulation of colonial Indian migration to demonstrate the radical contingency of not only the right to exclude but, more broadly, of state control of migration. We require this broader perspective since states' right to exclude is constitutively tethered and inversely related to subjects' right to leave. Regardless of any normative assumption or defense of the right to leave, as states' right to exclude has expanded, subjects' right to leave has shrunk. With states now regulating both exit and entry, the right to leave is a theoretical fiction and the right to exclude is a palpable reality. I address here some colonial dimensions of the processes that produced this twinned scenario.

Nineteenth-Century Debates: Slavery, Abolition, and Free Migration

British abolition of plantation slavery in 1834 provided the immediate occasion for the earliest regulations of colonial Indian migration.[2] Abolition caused planters in Mauritius and the Caribbean to develop schemes for migrant Indian labor to replace emancipated slave labor. Though historians now refer to this as "indentured"

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[1] Regrettably, due to stringent space constraints and *AJIL Unbound* conventions, this essay is lightly footnoted and omits references that otherwise would have been cited.

[2] This section distills arguments advanced in Radhika Mongia, Indian Migration and Empire: A Colonial Genealogy of the Modern State 22–55 (2018).

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migration, what preoccupied the state, in the wake of slavery abolition, was how to ensure that it was "free." The demand for freedom provoked trenchant debates that worked in two distinct and contrasting registers: first, were the vociferous objections of abolitionists who saw the planter-organized migration schemes as "a new system of slavery."[3] In their view, Indian migration to the former slave colonies required immediate cessation through state intervention. In the second register, were the equally vociferous objections emanating from the plantocracy that saw *any* state control as an illegitimate exercise of sovereign power, contravening the then-prevalent principle and practice of free movement. In their view, state intervention compromised the fundamental "liberty of the subject," represented a "tyranny not for a moment to be endured," and exceeded the limits of sovereign authority.[4] If cynical and opportunistic, the planters were, in fact, correct. There were no ready-made principles that could be applied to justify state control of migration, with authorities in England noting "that this practice [of regulating migration] has no foundation in any existing law."[5] Lacking recourse to a settled principle, how was such control to be justified? Premised on colonial-racial thinking, the state argued that the (presumed) ignorance and vulnerability of the Indians warranted a *temporary exception* to general principles regarding both free movement and the reach and limits of sovereign authority. Debates that began in 1835 would find their paradoxical resolution in 1842: the state would regulate "free" migration precisely to ensure that it was "free." This paradoxical resolution required emigrants to stage a ritual of consent to a state-authored and state-authorized labor contract *prior* to departure. (Migrant contract labor schemes that utilize this framework have since proliferated.)

Before I turn to events in the twentieth century and the nationalization of migration, let me flag three additional facets of the debates and ensuing resolutions surrounding Indian indenture: first, the orienting frame, spatial scale, and economic imperatives of these debates—that included state, quasi-state, and non-state participants in England, India, Mauritius, and the Caribbean—were imperial and not (proto-)national. With "freedom" as the chief axis of control, the debates unfolded across a complex field of variegated state and sovereign forms that characterized imperial space.[6] Second, these exceptional state regulations—that specified the terms of exit, entry, residence, and potential return—monitored *only* the movement of Indian indentured labor to specific destinations; they did not control the *far larger* migration of Indians not participating in the indenture system.[7] Third, the regulations were directed at meeting the labor demands of the plantocracy and at *facilitating*, not *prohibiting*, movement, while guarding against charges that indenture was but slavery by another name.

Twentieth-Century Debates: Citizens, Aliens, and the Nationalization of Migration

State control of migration that draws on an explicit logic of prohibition has a different history. Primarily concerned to restrict Asian migration to various white-settler colonies (such as Argentina, Australia, Canada, South Africa, and the United States) in the late nineteenth and early twentieth centuries,[8] justificatory rationales to curtail entry were configured in terms more familiar to us today—as embodying the inherent rights of states and

[3] Russell, Secretary of State for the Colonies, to Light, Governor of British Guiana, Feb. 15, 1840, No. 56, UK Parliamentary Papers, 1840, xxxiv (151), at 43.

[4] Minute by Mr. Dowson, Oct. 16, 1840, UK Parliamentary Papers, 1841, xvi (45), at 13.

[5] Secretary to the Colonial Office, London, to Law Commissioners, India, May 25, 1836, *quoted in* Edward Lawford, Solicitor to the East India Company, to David Hill, June 12, 1838, Papers Respecting the East India Labourers' Bill 2 (1838).

[6] On such variegated forms, see Philip Sterne, The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India (2011); Lauren Benton, Law and Colonial Cultures: Legal Regimes in World History (2002).

[7] On the scale of Indian and other Asian migrations, see Adam McKeown, Melancholy Order: Asian Migration and the Globalization of Borders 43–65 (2008).

[8] *See, e.g.*, *id.*

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concerned with issues of state sovereignty and security. It is worth examining how they took shape and produced now-dominant understandings of the state, the citizen, and the alien. To this end, I briefly recount some aspects of a protracted ten-year debate, between 1905 and 1914, occasioned by the migration of Indians to Canada. Unfolding across Canada (a self-governing British dominion), Britain (the seat of imperial power), and India (a non-self-governing or dependent colony), the debate centered on the definition and rights of British subjects within the British empire-state. The resolution of the debate and the practices it authorized embodied new notions of the state, the citizen, and the alien, with each now conceived in specifically *national*—not imperial—terms.

In 1905, animated by racial anxieties, the Canadian government sought to discourage Indian migration by claiming that Indian migrants were ill-suited to the climate and that Canada lacked employment opportunities.[9] These efforts had little effect; a continued stream of Indian migrants arrived in Canada and found gainful employment. Thus, in 1907, Canada asked the government of India to implement a system of restrictively issued passports to limit Indian emigration to Canada to a pre-agreed number. The viceroy of India rejected the passport system on grounds that India regulated *only* indentured migration and, thus, had no authority to intervene.[10] Between 1842 (when the indenture system was (re)instituted after a cessation) and the early twentieth century (when these debates intensified) a huge bureaucracy to manage indentured migration had emerged; however, the legal premise of the system had remained unaltered: namely, that the regulation of indenture was the *only exception* to the principle of "the complete freedom for all British subjects to transfer themselves from one part of His Majesty's dominions to another."[11] For this reason, Canada too was severely constrained—often by explicit instructions from London—in enacting legislation targeted at Indians, fellow British subjects.[12] Notably absent from these early discussions was a discourse of nationality—an imperial worldview shaped the political and legal horizon.

Though the viceroy rejected the passport proposal and was unwilling to aid Canadian goals through regulation in India, he suggested that Canada devise facially neutral immigration policies with their racist motivations suitably disguised—a suggestion that Canada, in the absence of other means, would doggedly pursue. Most importantly, in 1908, the province of British Columbia passed an ingenious Order-in-Council that disallowed entry to immigrants "unless they come from [their] country of birth or citizenship by continuous journey, and on through tickets purchased before starting."[13] The Continuous Journey Regulation effectively prevented both re-immigrant Indians and immigrants coming directly from India to enter Canada: the former since they did not come from what was deemed their "country of birth or citizenship;" the latter due to the pressure exerted by the Canadian government on shipping companies to cease direct passage from India.[14] The Regulation met with success: between 1909 and 1913, only twenty-seven Indians managed to enter Canada by establishing they were returning immigrants with Canadian domicile.[15] Despite this success, the Canadian government feared the reintroduction of a direct passage

[9] This section draws on Mongia, *supra* note 2, at 112–40 and Radhika Mongia, *The Komagata Maru as Event: Legal Transformations in Migration Regimes, in* Unmooring the Komagata maru: Charting Colonial Trajectories 95 (Rita Dhamoon, Davina Bhandar, Renisa Mawani & Satwinder Kaur Bains eds., 2019).

[10] For details on the different resolutions to the passport question, see Mongia, *supra* note 2 and Radhika Singha, *The Great War and a "Proper" Passport for the Colony: Border Crossing in British India, c 1882–1922*, 50 Indian Econ. Soc. Hist. R. 289 (2013).

[11] Comments, Slater, Sept. 19, 1913, Department of Commerce and Industry, *Emigration Proceedings A*, Oct. 1913, Nos. 29–30 (confidential, original consultation), National Archives of India [hereinafter *Proceedings A*].

[12] Audrey Macklin, *Historicizing Narratives of Arrival: The Other Indian Other*, *in* Storied Communities: Narratives of Contact and Arrival in Constituting Political Community 40, 44, 48 (Hester Lessard, Rebecca Johnson & Jeremy Webber eds., 2011).

[13] Governor General, Canada, to Secretary of State for the Colonies, London, Telegram Received Jan. 15, 1908, *Proceedings A*, May 1908, No. 6.

[14] Macklin, *supra* note 12, at 49.

[15] Hugh Tinker, Separate and Unequal: India and Indians in the British Commonwealth, 1920–1950, at 29 (1976).

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from India and that the Regulation might not survive a robust court challenge, particularly since Indians argued that "as long as we are British subjects any British territory is the land of our citizenship" (thus making it possible to embark on "continuous" journeys at any of the many outposts of empire).[16] This was not an idiosyncratic or tendentious claim. Rather, it pushed to the logical limit the legal equality of British subjects—for, though the British empire was hierarchically organized, equality was its much-vaunted premise and promise.

Canadian fears would come to pass in 1914, when Gurdit Singh, an Indian merchant, hired the *Komagata Maru* to make a voyage from Hong Kong (then a British colony) to Vancouver. The *Komagata Maru* arrived on Canadian shores on May 23, 1914, with 376 Indian passengers and was refused permission to dock in the Vancouver Harbor. The Indian passengers (except a few who could demonstrate Canadian domicile) were prohibited from reaching shore, as an extraordinary series of legal and extralegal machinations unfolded that would have an enduring impact on migration regimes—within, and beyond, empire. I provide here only a thumbnail sketch of two of the transformations provoked by the *Komagata Maru*. First, the event catalyzed a profound revision in the very premise of migration regulation, particularly within empire. For almost a decade, the overarching principle of free movement had prevented both Canada and India from enacting legislation to curtail Indian migration. In the wake of the *Komagata Maru*, there emerged new rationales, that decisively broke with close to a century of law on free migration and embraced the principle of restrictive and prohibitive measures. In India, officials who, just months earlier, had defended the free movement of British subjects, would write: "circumstances are now compelling a stricter definition of such phrases as . . . 'membership of the British Empire.' It is now conceded that such membership does not carry with it the right of free entry to all parts of the Empire."[17]

While this official granted that it was the "circumstances" that "compelled" a redefinition, Viceroy Hardinge declared that "thoughtful people will agree that states and countries have an inherent right to decide whom they will or will not admit within their borders."[18] Why, one might ask, had such "inherent rights" not been evident to officials earlier? Answering this question brings us to the second transformation provoked by the *Komagata Maru*. Though cast in the language of "inherent rights," these changes represented a radically new conception of empire that fissured the legal category of the British subject, exposing the myth of the legal equality of imperial subjects. To contain the dangers this exposure posed to empire—encapsulated in the risks of instituting race-based restrictions on migration in a world where (militant and reformist) anti-colonial nationalisms were ascendent—officials searched for a mechanism that would "secure some kind of reciprocity"[19] and "which above all things . . . [would] have the *appearance* of giving equal treatment to British subjects residing in all parts of the Empire."[20] Nationality, operating as an alibi for race, would prove to be this mechanism. Officials in India proposed a conception of the world as composed not of a *hierarchy* of races, but of different, *formally equivalent* "nationalities." This new thinking, part of what Mrinalini Sinha has called the "imperial-nationalizing" conjuncture, sought to reconfigure and remake empire as comprised of different nationalities.[21] (The incorporation of seemingly nonracial "national" quotas in the migration regimes of diverse states is a direct legacy of this racial thinking.)

The changes underway in India were mirrored in Canada. Echoing Hardinge, the judgment of the British Columbia Court of Appeals in *Re Munshi Singh*, that decided the fate of the *Komagata Maru* passengers, would summarily dismiss the challenge on whether Canadian immigration law as it related to (Indian) British subjects was *ultra*

[16] British Indian Subjects, Canada to Colonial Office, London, Apr. 24, 1910, *Proceedings A*, Oct. 1910, No. 47.

[17] Slater to Enthoven, May 26, 1914, *Proceedings A*, Sept. 1914, Nos. 18–20 (confidential).

[18] *Id.*, Comments, Viceroy Hardinge, July 8, 1914.

[19] *Id.*, Comments, Gillian, June 23, 1914.

[20] *Id.*, Comments, Enthoven, June 13, 1914 (emphasis added).

[21] Mrinalini Sinha, *Premonitions of the Past*, 74 J. Asian Stud. 821, 825 (2015).

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vires. Chief Justice Macdonald would write: "*The British North America Act* [that established the Dominion of Canada in 1867] vested in the Parliament of Canada sovereign power over immigration into Canada; that that power includes the right to exclude British subjects, not even excepting those born in the United Kingdom."[22] But Macdonald here was grossly overstating the case. According to the Immigration Act of 1910 (at issue in the case), "[a]lien means a person who is not a British subject." Though the Act referred to the "Canadian citizen," the category was, at the time, a fiction. Formal Canadian citizenship "had no autonomous legal existence prior to the 1947 *Citizenship Act*."[23] Audrey Macklin argues that the purpose of this terminology in immigration law was to enable the construal of *some* British subjects as aliens. Thus, in Canada too, we see the legal fissuring of the category of the British subject; its suture to a still-nascent notion of (resolutely white) Canadian nationality; and a critical remaking of definitions of the subject/citizen, the alien, and the norms of state sovereignty regarding migration.

Conclusion

The nineteenth-century regulations I surveyed earlier were instituted as an *exception* to the principle of free movement and claimed to protect the liberty and sovereignty of the (putatively vulnerable) subject. The twentieth-century regulations, on the other hand, were offered as a *general* principle and sought to protect the sovereignty of the state. Neither set of regulations, however, emerged without extensive contention and debate which related to precise historical conjunctures and could not simply utilize notions of sovereignty, be they of the subject or the state, in uncontested terms. Moreover, as we can see from the foregoing, the architecture of expansionist empire-states cannot be apprehended through neat notions of the Westphalian state that inform much migration analysis today. Forms of sovereignty such as "self-governing dominions" (like Canada) or "dependent colonies" (like India) were improvisations that emerged from complex contingencies, not the result of translating pre-given principles into institutional forms.[24] The imperial world was composed of myriad, changing sovereignties and political subjectivities that strain common understandings of the citizen and the alien; of notions of "internal" and "external" sovereignty; and of the territorial basis for authority. To account for such genealogies of the modern state as we contemplate the right to exclude, we must wrench analyses out of the tight grasp of a spatial-territorial closure and avoid abstract meditations that reify the state. Such approaches stymie an understanding of state regulation of migration and, in turn, what this can tell us about the modern state and the modern subject. As importantly, they reinscribe the too-easy demarcation between the colonial state and the modern state, invariably falling prey to diffusionist and/or teleological understandings of state formation which naturalize, rather than historicize, the Westphalian state.

[22] *Re Munshi Singh*, 20 BCR 243, 1350 (B.C. Ct. App. 1914) (Can.).

[23] Macklin, *supra* note 12, at 45.

[24] On the "improvisational" character of sovereignty doctrine, see Antony Anghie, Imperialism, Sovereignty and the Making of International Law (2005).

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