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ARTICLE

Progress in Migration and Asylum Law scholarship – International, Intersectional, and Interdisciplinary

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Abstract

Migration and asylum are global phenomena. Yet they lack a universally accepted and applicable legal regulatory framework, which leads to fragmentation across different levels and fields of analysis. In this contribution, we focus on migration and asylum law (MAL) which we understand to be made up of national, regional and international laws as well as their implementation in practice. The aim of this article is to identify developments in the area of MAL and the scholarly voices that have contributed to ground-breaking legal scholarship. We approach the question of progress in MAL scholarship based on our combined expertise in human rights, refugee law and migration law and bring forward how, in these often-separate legal fields, similar progress has been made. We focus our discussion on three interactions that we consider to have changed the way in which legal scholarship addresses migration and asylum: interactions between national and other sources of law; interactions between different fields of law, crossing into human rights law, family law or labour law; and interactions with various empirical scholarships (section 3). Learning from sociology and anthropology scholarships, the intersection of social stratifications such as gender, race and ethnicity, and class is now firmly grounded in MAL scholarship, inspiring the methodological shift from black letter law to empirical legal studies.

Keywords: migration and asylum law, legal scholarship, multilevel governance intersectionality.

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1. Introduction

Migration and asylum are global phenomena. Yet they lack a universally accepted and applicable legal regulatory framework, which leads to fragmentation across different levels and fields of analysis. In this contribution, we focus on migration and asylum law (MAL) which we understand to be made up of national, regional and international laws as well as their implementation in practice. MAL scholarship is concerned with issues such as non-nationals' right of entry and residence in a foreign country, which can be granted for multiple reasons ranging from seeking asylum to family-, work- and study-related reasons and more. It can also touch on long-term residence rights and the right to obtain citizenship. The rights and obligations while remaining as a migrant also fall within the scope of MAL scholarship, such as the right to work for refugees or family members, the right to social benefits, the right to reunite with (other) family members, the right not to be detained or returned in certain circumstances and much more. These rights and obligations can be designed in international, regional, national or even at municipal-level laws; they are found in a variety of public (e.g. migration, social security) and private (e.g. labour, family) laws. Taken together, they form the regulatory infrastructure of MAL. Consequently, we understand MAL to be multilevel involving different jurisdictional levels, fragmented across different legal disciplines, and complex in light of the different types of actors involved, ranging from migrants and refugees to institutional actors and civil society organizations.

From a positivist understanding of law, legal scholarship on migration and asylum has a role in shaping and making MAL. Article 38 of the Statute of the International Court of Justice, drafted in 1945, mentions the teachings of the most highly qualified scholars as one of the sources of international law. Today, legal scholarship is no longer considered an independent source of international law, but reputable scholarly voices are still considered influential for the progressive development of international law, most notably by the International Law Commission. Similar mechanisms of scholarly immersion in law-making and its interpretation exist at the national level: for example, the UK, Germany, and the Netherlands have an Advisory Body of scholars, including legal scholars, to advise their governments on law and policy in the field.

The aim of this article is to identify developments in the area of MAL and the scholarly voices that have contributed to ground-breaking legal scholarship. We approach the question of progress in MAL scholarship based on our combined expertise in human rights, refugee law and migration law and bring forward how, in these often-separate legal fields, similar progress has been made. We discuss both migration law and asylum law, although they are considered different fields of law. In our view, migration and asylum are interlinked since they both concern the entry and treatment of outsiders and how law regulates people moving and their entitlements. We acknowledge that most scholars are specialized on some specific angle, but we discuss them in an integrated manner.

Our approach has limitations linked to our positionality as researchers based in European research institutions working on MAL in Europe. Discussing progress

Law and Method 2023
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in legal scholarship globally would require selecting contributions from influential authors in the field in five continents (Africa, Australia, Asia, Europe and the Americas). Although we try to include authors from different regions, our discussion is by and large based on the English language academic literatures accessible to us. We note that the field and the volume of academic literature addressing migration and asylum-related issues have grown exponentially in the past decades. There is an abundance of specialized legal and migration journals and legal scholarship published in non-legal journals, an increase in English publications by legal scholars previously publishing in their native tongue, *and* increased open access publishing across the globe. Yet it must be noted that it is difficult to access non-English literature, for reasons of its limited availability in Western legal and social science data bases, as well as language barriers. Therefore, this is not a systematic literature review describing progress in MAL scholarship from a global perspective. Ours is a partial, somewhat Eurocentric approach, acknowledging the limitations of researchers based in a European institution.

Considering the aforementioned, we focus our discussion on three interactions that we consider to have changed the way in which legal scholarship addresses migration and asylum. First, we discuss interactions between national and other sources of law on migration and asylum that derive from the local, regional and international levels (section 2). Learning from political science and institutionalism, MAL scholarship pays increasing attention to multilevel governance as an explanatory framework for the rights of migrants and refugees. Second, we discuss interactions between different fields of law (section 3). MAL scholars engage legal scholarship beyond their specialist training, crossing into human rights law, family law, labour law or social security law. Finally, scholarship has experienced important disciplinary interactions with various empirical scholarships (section 4). These interactions raised increased awareness among legal scholars about various other factors besides legal regulation that shape the rights of migrants and refugees and their daily lives. Learning from sociology and anthropology scholarships, the intersection of social stratifications such as gender, race and ethnicity, and class is now firmly grounded in MAL scholarship. Methodologically, we notice a shift from pure black letter law to empirical studies. We conclude with some suggestions as to how MAL scholarship can be further developed (Section 5).

2. Intersecting Legal Levels: The Multilevel Approach to MAL

There is a growing recognition and acceptance that migration and asylum are no longer only national matters that can be successfully regulated by states alone. In the European context, this process is rooted in the 1950s when the free movement of persons was declared by the original European Union (EU) states to be a fundamental freedom that was going to be regulated via EU law. Since 1999, the EU has gained competences to regulate also migration from third countries and develop a common asylum acquis. These legal competences have translated into the development of EU free movement, migration and asylum laws, respectively. Legal

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scholarship has followed suit and we can speak of EU MAL as a standalone discipline and not simply a branch of EU law.

This development is also linked to several scholars who have taken an early interest in this field. Legal scholars Kees Groenedijk and Elspeth Guild have played an important role by nurturing a European-wide community of scholars working on EU migration and asylum law. Their main message has been that EU law has to be taken seriously by national administrations, lawyers and courts since it functions as a source of individual rights for migrants. The emphasis in their scholarship is on migration law escaping its traditionally national confines and its transformation because of EU law. This makes Groenendijk and Guild pioneers of EU migration law scholarship (see, e.g., Groenendijk, 2004; Guild, 2004). Furthermore, both have paid attention to the interaction between EU law and the legal instruments adopted by regional human rights bodies, such as the European Convention on Human Rights (Groenendijk, 1999; Guild & Lesieur, 1998) and instruments adopted by the UN (Guild, 2018b).

Escaping the national or regional gaze in MAL scholarship has been greatly aided by the work of two UN Special Rapporteurs. François Crépeau, the UN Special Rapporteur on the Human Rights of Migrants from 2011 to 2017, had a productive and instrumental tenure for the development of the field through his numerous thematic reports on external borders, detention, extraterritorial asylum processing among other topics. Tendayi Achiume, the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, from 2017 till presently, symbolically issued her first thematic report to the subject of racial discrimination in the context of citizenship, nationality and immigration status (Achiume, 2018a). She has continued leading the field with mandate and scholarly interventions on citizenship and counterterrorism (Achiume, 2018b), racial discrimination and digital technologies (Achiume, 2020), and migration as decolonization (Achiume, 2019).

We note a distinct turn towards the products of UN Human Rights bodies, including those of less well-known bodies, such as the UN Committee on Enforced Disappearances, which published comments on pushbacks and the externalization as well as the criminalization of search and rescue (UN Committee on Enforced Disappearances, 2022). Although UN treaty bodies' recommendations are not legally binding as such, they point to protection gaps and exert pressure for action. As such, they can promote progressive legal developments. Moreover, a number of the universal treaties have optional communications mechanisms that allow anyone, including migrants, to make individual complaints to the relevant UN treaty body (Menéndez, 2015).

The idea that migrants have rights, be they human rights or regional law-derived rights, and are not simply left at the goodwill of the national immigration authority, is something MAL scholars have continuously emphasized in their work. Thus, national migration law must not only take into account regional (EU) provisions on free movement, migration or asylum, but also the provisions of the ECHR, of the EU Charter in the EU context and of all the other relevant UN Human Rights conventions (Guild, Grant and Groenendijk, 2018). We can thus say that legal scholarship on migration and asylum has been affected by two interrelated

Law and Method 2023
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processes: regionalization (Europeanization)/internationalization, and judicialization both of which are closely linked to the idea that migrants have enforceable rights in their host states, the source of which may be national, regional, international or a combination thereof. European legal scholars have paid attention to how judicial Europeanization results from the European Court of Justice interpreting EU migration and asylum laws and thereby reframing the limits of national migration law (e.g. Wray, Agoston & Hutton, 2014). For legal scholarship, the biggest shift comes from the fact that it needs to assess how national migration law is applied and interpreted by various parts of the state (including the local level) while constantly looking for guidance to the supranational level.

3. Intersections within Law

The very definition of the refugee is perhaps the most contested and debated topic in refugee law. The reason for this is that its carefully selected criteria can afford or deprive individuals of the highest level of international protection. This, combined with the securitarian and exclusionary priorities of states, can create sharp distinctions between voluntary and forced migrants or 'deserving' refugees and 'undeserving' economic or labour migrants, leading us to speak not of 'refugee protection' but of 'migration control' (Feller, 2005, pp. 27, 28).

Pioneering a human rights approach to refugee law, James Hathaway and Michelle Foster published in 1991 The Law of Refugee Status, which paved the way for further work that brings human rights law and refugee law closer (Hathaway & Forster, 1991). Authors have brought forward the study of regional more inclusive systems than that of the Refugee Convention, such as the Latin American or the African systems (Arboleda, 1991; Sharpe, 2018), while others have contested the false distinction from an empirical point of view showing that the reasons for migrating are often mixed (e.g. fear of persecution and search for better financial circumstances) (De Genova, Mezzadra & Pickles, 2015, pp. 55, 72; Sajjad, 2018, p. 40). The negation of this dichotomy (Chetail, 2014a, p. 26; Kukathas, 2016, p. 26; Shacknove, 1985, pp. 274, 275-6; Atak & Crépeau, 2021) led scholars to apply a more unified legal framework introducing human rights law in refugee and immigration law scholarship (Chetail, 2014b; Gorlick, 1999, p. 479; Lambert, 1999, p. 515; Moussalli, 1984; Weis, 1971).

This human rights approach is more inclusive and affords protection to persons falling outside the strict refugee definition in the Refugee Convention. Equally, it translates into broader protection to Convention refugees besides the limited rights and benefits agreed upon by the signatory states (Goodwin-Gill, 2014, p. 44; Goodwin-Gill, 1989, pp. 526, 536). One of the most important examples of broader protection concerns the protection from refoulement, which is absolute under the International Covenant on Civil and Political Rights, the Convention against Torture, and the European Convention for Human Rights and Fundamental Freedoms, but subject to a security exception under the Refugee Convention. Moreover, under the human rights regime, refugees may profit from effective judicial protection, especially before the Inter-American Commission on Human

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Rights, the Inter-American Court of Human Rights, the European Court of Human Rights, or the Court of Justice of the European Union, protection which is not available in the Refugee Convention system.

The international human rights approach to regular migration is less developed. In December 2018, the UN General Assembly endorsed the Global Compact for Safe, Orderly and Regular Migration. Albeit nonbinding, it is a 'milestone in global governance of migration' (Guild, 2018a). The compact sits apart from the Global Compact on Refugees, which reinforces the dichotomy between migration law and asylum law scholarship. The Global Compact on Migration builds on an existing but not overly popular set of ILO conventions such as the one on Migration for Employment (Revised, 1949, No. 97; 1975, No. 143), on Equality of Treatment (Social Security, 1962, No. 118), and on Domestic Workers (2011, No. 189), receiving scant attention in migration law literature (but see e.g. Herzfeld Olsson, 2020; Roos & Zaun, 2014) with the exception of domestic workers, whose (lack of) rights is covered in an extensive body of literature on predominantly irregularly staying migrant domestic workers (Murphy, 2013; Triandafyllidou, 2013). Methodologically novel in this field is Berg's study of regional human rights courts' jurisprudence and their relevance for advancing the standards of treatment of unauthorized migrants. In doing so, she brings forward how international human rights law fails migrant workers, as it takes a chequered approach to the protection of migrants living or working in a foreign state without authorization (Berg, 2015). Guild also pioneered the scholarship on mobility under the scope of EU association agreements (Guild, 1998) and international trade-related mobility under the WTO General Agreement on Trade in Services (Barth & Guild, 1999, and recently, on trade in services in the African context Simo, 2020). Guild's work brings together international trade in services, which is a niche in international law, with refugee law (Goodwin-Gill, 1978, 1983; Hathaway, 1991) and human rights law and challenges us to see the interactions between these separate fields of law.

On family migration, the Declaration on the Rights of the Child, adopted by the League of Nations in 1924, defines rights relevant to child migrants, including the promotion of family unity (Bhabha & Smith, 2007), followed by the Convention on the Rights of the Child, adopted in 1989 by the UN General Assembly. The ECtHR incorporated the rights of the child in its case law, yet while Article 24(2) of the Charter of Fundamental Rights of the European Union encompasses the best interests of the child, and it is mentioned in European Directive 2003/86/EC on the right to family reunification, scholarship found the CJEU case law in family reunification cases not systematically applying it (Klaassen & Rodrigues, 2017). Moreover, the intersection between ECHR and EU migration law is present in the debate over family reunion with care-needing elderly parents (Askola, 2016). Yet the majority of the literature is on spousal family reunification. At the heart of this scholarship is the right to family life enshrined in Article 8 ECHR and its intersection with EU and national, often restrictive, migration laws. De Hart (2009) has rightly articulated how Article 8 ECHR is very much about the protection of insiders' rights, of nationals wanting foreign spouses to join them (De Hart, 2009). On the intersection with international law and the intersection with European policy, Wray et al. (2014) and Bonjour and Block (2013), respectively, show how

Law and Method 2023
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international, regional and national norms on family migration diffuse through indirect, multiple and unpredictable ways. Moreover, this scholarship sees international norms on family reunification in MAL merge as (minor unaccompanied) refugees claim rights to reunite with their family members left behind.

MAL scholarship, moreover, met with security and border studies (Guild, 2009), international humanitarian law (Chetail, 2014b; Ziegler, 2021), the law of the sea (Moreno-Lax & Papastavridis, 2016), international and transnational criminal law (Mann, 2021), and also seen from the perspective of criminalization of migrants and their helpers, that is, crimmigration (Stumpf, 2006; Van der Woude, Barker & Van der Leun, 2017). Finally, the discipline is also 'heavily influenced by international organisations and networks of practitioners that actively take part in and promote particular kinds of scholarly production' (Byrne & Gammeltoft-Hansen, 2020, p. 185).

Undeniably, race and nationality can play a significant role in upholding the distinction between migrants and refugees, which is translated into the legal framework, for instance, with respect to visa policies, or other regular entry schemes, including family reunification. Such distinctions can create highly politicized fragmentation of the protection framework with detrimental effects for migrants. In other words, this distinction, which we perceive as a false dichotomy, implies that non-refugee migrants[1] do not need protection, which leaves them vulnerable to a range of violations. Acknowledging this, migration scholars have ventured the leap towards the unification of the protection framework looking at the combined identities of all migrants, not only as refugees, sponsors of family reunification, unaccompanied minors or labour migrants but also as humans. In doing so, scholarship contributes to a blurring between migration and asylum in narratives on mixed migration flows and challenges the narrative of 'bogus' of 'fortune seeking' asylum seekers (e.g. Zimmermann, 2011).

4. Intersections Outside Law

Legal scholars tend to fit their conceptual analysis into narrow and strictly legal boxes. Methodology sections of books and journal articles refer to the infamous 'elephant path', as the route that everyone else before us has taken, to describe the, until recently, unchallenged 'traditional legal methodology' or 'black letter law'. Certain pioneers, however, dared to diverge from the 'elephant path' and the conventions of the legal discipline. They submerged traditional legal methodology into the social sciences, adopted their insights and connected legal and empirical methodologies, developing the interdisciplinary approach of socio-legal studies.

1 According to the International Organisation for Migration, migrant is 'an umbrella term, not defined under international law, reflecting the common lay understanding of a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons'; International Organisation for Migration (2019).

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The interaction of law with other disciplines has not only offered law new methods, such as qualitative interviewing, but also familiarization with an intersectional analytical framework, which originates from critical race and feminist theory (Crenshaw, 1989). Intersectionality acknowledges a person's different overlapping social and political identities as producing new and different forms of oppression and privilege. MAL scholars were among the first in the legal field to recognize these intersecting and overlapping social identities. They saw the migrant also as a woman, an LGBTQ+ person, a person of colour, and as a worker, highly educated or performing low-waged labour. They recognized that, as a result of the changed social position of the person as a migrant, the legal analysis towards them should adapt accordingly in order to achieve an egalitarian understanding, development and impact of the law. In the following, we discuss several intersections that have changed the way in which scholars understand the scope and reach of MAL scholarship.

4.1 MAL and Gender Scholarship

The branching out of the legal scholarship of migration and asylum into gender studies has mainly resulted in four analytical angles: feminist theory and displacement (Rimmer & Ogg, 2019), gender and human rights (Bunch, 1990), sexual orientation and gender identity (SOGI) of refugees (LaViolette, 2010), and the reproduction of gendered labour markets (Fudge & Owens, 2006; Kofman, 2000) and gender-stereotyped family relations (Van Walsum, 2004) in migration policy.

As the starting point for any asylum law scholar, the Refugee Convention omits references to sex and gender, as it was drafted 'with male refugees in mind' (Firth & Mauthe, 2013).[2] It was initially read as excluding sex or gender from the refugee definition, based on the assumption that gender-based persecution (e.g. rape, domestic violence, female genital mutilation) takes place in the private sphere (Greatbatch, 1989, pp. 518, 520). The already more progressed human rights field, which had moved towards recognizing women's rights as human rights fed into the interpretation of the Refugee Convention and migration law analyses more generally (Edwards, 2003, pp. 46, 49-50; Macklin, 1995)

Today, MAL scholarship has achieved a normative shift from these gender-blind origins and now reflects gender concerns focusing on a feminist critique of biases in the legal framework. This has created a normative movement of gendering of international law and of refugee and migration law in particular, which is today densely and adeptly represented in the literature by seminal Global North authors, such as Deborah Anker (Anker, 2001, 2002) and Charlesworth, also a judge at the International Court of Justice, and Chinkin and Wright (Charlesworth, Chinkin & Wright, 1991), influencing a considerable body of recent work (Anderson & Foster, 2021; Rimmer & Ogg, 2019).

The literature points out how nonconformity to stereotypical gender roles results in additional risks of persecution and violations faced by women and LGBTQ+ migrants in the country of origin, during the journey, and in the countries

2 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (19 November 1951).

Law and Method 2023
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of destination. It focuses on the refugee definition (Article 1 of the Refugee Convention) in relation to gender-based persecution (Arbel, Dauvergne & Millbank, 2014). Authors find fault with judges who ignore circumstances not involving gender-specific forms of harm, lacking, thus, a broader gender-sensitive approach (Dauvergne, 2021; Querton, 2019). While much ground has been covered, undoubtedly also due to the 'notable feminization of this field of study' (Costello, Foster & McAdam, 2021), scholars call for migration and refugee law to continue to 'interrogate and update its understanding on gender' (Anderson & Foster, 2021). Substantial gaps still remain with regard to the complete implementation of gender gains and theoretical gaps and misconceptions about gender, which affect jurisprudence and policymaking. These concern, for instance, access to refugee status determination procedures, with women receiving derivative status, as the principal applicant is often the male head of the household (Freedman, 2015, pp. 86, 87). Further gaps are found regarding the evaluation of state protection where persecution is conducted by non-state actors (e.g. family in the case of domestic violence) (Firth & Mauthe, 2013, p. 473), the evaluation of the credibility of the applicant (Singer, 2014, p. 98), or the use of queer theory (McNeilly, 2019).

In the 1980s, social science scholars exposed a reality of female labour migrants so far overlooked: female migrant workers did not only arrive as 'just' accompanying spouses but were also labour migrants in their own right (Ackers, 1996; Morokvasic, 1984). This attention has since transitioned into legal scholarship on (low-waged) female migrant workers, largely dominated by labour law scholars (e.g. Fudge & Owens, 2006; Herzfeld Olsson, 2020; Pavlou, 2021) and less so by migration scholars (but see Mantu, 2021, 2022; Van Walsum & Alpes, 2014). The main method used here is one of interdisciplinary legal scholarship, intersecting migration and labour law developed towards investigating how migration law and (lack of) legal status vulnerabilizes female migrants as workers in traditional female sectors such as domestic work (Pavlou, 2021) and, as shown more recently, also as (highly) skilled workers (Kofman, 2000). According to the literature, the precarious immigration status of many migrant domestic workers renders employment protections 'largely illusory in practice' (Berg, 2015). This translates into little case law on (low-waged as well as high-waged) migrant workers' legal predicaments, lack of lobby actors on their behalf, and little legislative action towards their protection.

4.2 MAL and Race and Ethnicity Scholarship

The MAL scholarship engages with race as a concrete analytical lens, pointing out, for instance, the discriminatory nature of the refugee definition (Glynn, 2012; Oberoi, 2001), or as a distinct additional analytical variable, which may even add a level of vulnerability (e.g. unaccompanied minors). Critical studies treat race as an inherent 'embedded structure of oppression in which the racialized refugee regime is generated and reproduced' (Kyriakides, Taha, Handy Charles & Torres, 2019, p. 5).

Seminal in this regard is the work of Tendayi Achiume, who has educated the field on the social construction of race, also shaped by law itself, as a structure of power and an embedded system of oppression, according to which privilege and

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oppression are distributed (Achiume, 2019, 2021, p. 43). 'International legal scholarship on refugees has a race problem', writes Achiume, diagnosing the field with 'racial aphasia', a collective inability to conceptualize and talk about race and that 'This aphasia entails effacement, amnesia and neglect of racism's histories and structures' (Achiume, 2021, pp. 43, 44).

Along the same lines Al-Qasem challenges the totality of the 'inalianable' human rights (Al-Qasem, 1984, p. 6), while several authors have argued that migration law is inherently racialized and selectively exclusionary. Racist and xenophobic elements find their place in legal and policy of non-entrée regimes (Hathaway, 1990), in visa policies (Cholewinski, 2002; Den Heijer, 2018) and admission priorities via resettlement programmes (Pittaway & Bartolome, 2001, p. 28), racialized border controls (Gkliati, 2022), the determination of asylum claims (Emeriau, 2023), or even integration in the host country (Kendzior, 2017).

More broadly, the gaps regarding race and ethnicity in the field can be explained from a historical perspective, as both the Refugee Convention and the United Nations Human Rights system were the result of the horrors of World War II, which mainly affected white Europeans. Earlier even, League of Nations' instruments on refugees explicitly covered Armenian, Assyrian, Austrian, German and Russian refugees fleeing quisling and authoritarian communist regimes (Costello et al., 2021, p. 3). The International Refugee Organisation continued basing the refugee definition on specific nationalities and ethnicities, which were, however, no longer exclusive (Constitution of the IRO, 1946). Article 1(A)(2) of the 1951 Refugee Convention on the definition of the refugee lists well-founded fear of persecution on the grounds of race or nationality as bases for refugee status, while race- and nationality-based persecution triggers state duties of non-refoulement (Article 33, Refugee Convention).

The Refugee Convention itself, however, includes a geographical and temporal limitation, which limits its application only to those fleeing as a consequence of events occurring in Europe before 1 January 1951 (Article 1(A)(2) of Refugee Convention). This limitation was only lifted with the New York Protocol of 1965 to the Refugee Convention, which has also not been ratified by all parties to the Convention (e.g. Turkey). Today, however, the demographic of the refugee and broader migrant population has significantly changed and has brought with it the arrival of a race-based perspective, looking at challenging racial and xenophobic discrimination and exclusion.

The ideology of race and white supremacy are persisting remnants of the European colonial project, forming a neocolonial dynamic in migration and refugee law (Quijano, 2000, pp. 533, 535). It is such racist and xenophobic premises that have resulted in policies of deterrence and securitarian migration control in Europe (FRA, 2016). Therefore, using race and colonial critique as analytical bases are essential for the further development of the field (De Vries & Spijkerboer, 2021; Spijkerboer, 2022).

In the additional intersection of gender with race, authors challenge essentialist constructions of especially women from the Global South as passive victims of persecution and innately vulnerable, having to 'conform to a particular narrative of submissiveness in order to be successful' in their applications for international

Law and Method 2023
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protection (Anderson & Foster, 2021, p. 67; Razack, 1995). Such orientalist or patriarchal narratives result in undercutting the refugee claims of Muslim women in the United States (Akram, 2000), and in the prioritization of protection from 'exotic' forms of harm, such as female genital mutilation, over broader global gender issues, such as domestic violence (Macklin, 1995).

4.3 MAL and Class or Socioeconomic Status

While legal categorization of foreigners in law and policy according to their nationality, gender and socioeconomic or cultural background is often acknowledged, legal categorization based on class, for example, merit, wealth, access to funding, has for long been understudied (De Lange et al., 2021). Harpaz (2021) introduces the idea of a 'hierarchy of passports' where travellers from rich countries enjoy extensive travel freedom, while others are subject to stringent visa controls, creating a status competition of international travel. Shachar (2021), like Harpaz, speaks of a 'cocktail of laws and regulations that combine economic barriers for long-term residents with fast-tracks for a wealthy transnational elite' which contributes to 'processes of global and domestic sorting'. With her book *Birth Right Lottery* (2009), Shachar brought attention to the persistence of wealth in creating, or replicating, unequal migration, asylum and citizenship policies. In the European context, her critique on the citizenship-for-sale schemes has resonated well in the policy debate resulting in a resolution of the European Parliament to reduce golden passport schemes (popular among wealthy Russians)[3] and a proposal from the European Commission for the categorical exclusion of foreign investors in the EU from its long-term resident status.[4]

Recently, interdisciplinary volumes have given more substance to problematizing socioeconomic status in migration law (e.g. De Lange, Maas & Schrauwen, 2021) with studies on income levels or lack of access to financial services (De Lange & Guild, 2021) as examples of 'money matters' in migration law and policy. Methodologically novel here is the juxtaposing of 'wanted' migrants, such as the superrich and highly educated with the 'unwanted' in restrictive labour and family migration policies. Sociologists of migration have been much more interested in this topic. Singh (2016), for example, describes how the different socioeconomic characteristics of migrants are partly a response to changes in Australian migration policy. International students and highly skilled migrant workers, for instance, (have to) bring more money to Australia (Singh, 2016, pp. 92-93). She rightly comments that the data on the consequences of such policies do not easily permeate policymaking, or, we would add, critical legal migration scholarship on merit or money-based entry conditions, also at the heart of many restrictive family reunification policies. Finally, there is a body of literature on the intersection of class and race, investigating racialized migration policies in the United States (Johnson, 2009), on, for instance, restrictive policies based on ethnic origin (e.g. Asia). Besides racialist entry conditions, migrant and refugee 'whiteness' is also a facilitating factor in labour market integration (Colic-Peisker &

3 European Parliament (9 March 2022).

4 Recast Proposal Long Term Residence Directive, Directive (EC) 2003/109/EC.

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Tilbury, 2007). Finally, refugee law has been criticized from the perspective of (neocolonial and neoliberal) economic and power relations, and Chimni's (1998) and Falola and Yacob-Haliso's (2023) (both referencing the seminal work of Harrell-Bond) critique is, in our reading, befitting MAL more generally.

5. Concluding Remarks

While the field has already taken its first steps in recognizing the racialized characteristics of migration and refugee law, the next step would be moving to a further intersectional understanding of foreignness and otherness, which goes beyond race and is also connected to nationality, origin, religion, colour, class, ethnicity and other markers of oppression (Taylor Saito, 1997, pp. 261, 332). Critical approaches include Critical Race Theory (CRT) and Third World Approaches to International Law (TWAIL) which explore the oppressive aspects of international law, through the historical and lived experiences of the Third World and the examination of the colonial foundations of international law (Anghie & Chimni, 2003, pp. 77, 78). TWAIL, originating from African and Asian perspectives (Baxi & Mendelsohn, 1994; Bedjaoui, 1995; Chimni, 2006, pp. 3-27, p. 4), aims at developing an understanding over the facilitation and perpetuation by international law of the exploitation of the Global South and the subordination of Third World peoples to the Global North, and proposing functional alternatives which can address underdevelopment in the Third World. It further aims at engaging with and creating the circumstances for the participation of Third World scholars in the theoretical analysis and the progressive development of international law (Gathii, 2011, pp. 26-48, pp. 8-9; Mutua, 2000, pp. 31-40, p. 31), a goal which is hindered by the systemic geopolitical hegemonies of knowledge production in international migration law (Spijkerboer, 2021, pp. 172-188, p. 17).

The last decades have delivered progressive literature, which offers numerous opportunities for reshaping the discipline and equipping it for contemporary challenges. Still, the vast developments in the design and enforcement of migration law require brave and decisive steps in the exploration of the cutting-edge trends of securitization (Gammeltoft-Hansen & Hathaway, 2015, pp. 235-284; Pallister-Wilkins 2016, pp. 311-314; Waever & Carlton, 1993), externalization (Cantor et al., 2022; Moreno-Lax, 2017; RLI Declaration on Externalisation, 2022), new technologies (Vavoula, 2021), and climate-related migration (Fornalé, 2020; Nasser, 2012; UNHCR, 2020). While such work sets the agenda for the next stages of the research, future trajectories must not fail to take structuralist theories into account, if real paradigm shifts are to be achieved.

In particular, while not rejecting the classic liberal-individualist conception of rights, a Kantian perspective of the law, where the individual is in the centre of the concept of rights (Beck, 2006, pp. 371-401), scholars may revisit structuralist analyses on human rights. Structuralism moves away from individuals and states as the sole actors of interest and the starting points of analysis (rights and obligations). It focuses on the holistic understanding of society, the networks that form among the separate actors in society and the socioeconomic, political or legal

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structures that fundamentally influence social action (Landman, 2006, p. 45). Such legal analyses look at systems, regimes or infrastructures that can fundamentally impact societal organization. They can focus on access to justice for individuals, the impact of systemic deficiencies on the protection and realization of human rights, and structural changes that can bring societal impact broader than remedying the violation for a certain individual.

To strengthen the anti-essentialist critique of race-biased constructions, the continuous engagement of scholarly voices from the Global South is necessary. This is, however, inhibited by global socioeconomic inequalities reflected in the academic publishing industry. To the detriment of normative progress, contributions of Islamic feminist scholars and African feminist decolonizing scholars remain limited and largely inaccessible to a broader academic audience. Internationally published emerging Global South scholars tend to have a rather domestic or regional focus, which has yet to influence a broader spectrum of scholars in adopting a further intersection and decolonial perspective (Sifris & Tanyag, 2019; Yacoub, Errington, Wai Wai Nu & Robinson, 2021). As persuasively noted by Dauvergne, the practice of 'assembling an overview of leading trends in the law' tends not to 'reflect Global South decision-making in any way, as Global South decisions have not attained that odd legal status of "leading"' (Dauvergne, 2021, p. 742).

To conclude, MAL scholarship has progressed in the last decades through major disciplinary – and with it methodological – interactions. Our point of departure for this contribution was that the legal, political and scientific are interlinked. We have illustrated first that the scholarship has experienced important disciplinary interactions with various empirical scholarships. These interactions raised increased awareness among legal scholars of three factors that shape MAL scholarship today. Learning from sociology and anthropology scholarships, the intersection of social stratifications – such as gender, race and ethnicity, and class – is now firmly grounded in MAL scholarship. Methodologically, we notice a shift from pure black letter law to empirical studies. Second, we illustrated how there are growing interactions with political science literature and institutionalism, whereby MAL scholarship pays increasing attention to multilevel governance as an explanatory framework. Third, we see MAL scholars engage legal scholarship beyond their specialist training, crossing into disciplines, such as human rights law, family law, labour law or social security law. The multilevel governance approach and interdisciplinarity shape the 'legal infrastructure' defining the rights and reality of the person labelled in law as migrant or refugees and the scholarship thereof.

We voice a modest critique on the discipline for training and practicing either asylum/refugee law or regular migration law, but seldom make the effort to bring the two together, or to systematically show students the intersection with other legal disciplines, such as international trade law, human rights law, family law or labour law. Similarly, traditional legal training offers students little more than black letter law analysis, not engaging with politics of law. However, we show that the scholarship has made a shift to intersectionality and investigated multiple levels of governance, which we cheer and contribute to.

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The crucial progress in MAL scholarship which we highlight in this article is precisely this decisive passage from the positivist tradition to engagement with politics and the blossoming of integrated approaches. This is also the quintessence of migration and asylum law as a methodological stronghold of scholarship on law and society.

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