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Research Access and Adaptation in the Securitised Field of Australian Refugee and Asylum Law

Regina Jefferies¹

Each day, a vast network of low- and mid-level government officials at a variety of different agencies go about the business of implementing the international legal obligation of non-refoulement in Australia – one of the central tenets of international refugee law, which prevents states from returning an individual to a place where they fear persecution.² Whether in a formal refugee status determination or in deciding whether to provide legal services information to asylum seekers in detention, officials routinely make decisions based upon organisational, legal, practical and other considerations that factor into how legal obligations are implemented. These determinations are not limited to formal legal processes or reviewable administrative decisions, nor are they limited to the decisions of public-facing officials. Yet, as refugee and asylum policy become increasingly subordinated to (and deemed incompatible with) state sovereignty and national security,³ gaining access to government officials and legal processes for the purpose of academic research faces serious challenges.

I begin with a brief overview of the intersection between international legal compliance scholarship and socio-legal studies, in order to situate a methodological discussion within a broader theoretical frame. I then turn to the challenges I faced in researching Australia's compliance with the norm of non-refoulement, which required an exploration of how front-line state actors internalise, implement and influence the norm. I describe my attempts to gain access to agencies and actors to test one international legal compliance theory using multi-sited ethnography, doctrinal analysis and participant interviews in a grounded theory approach. I then recount my shift towards identifying and mapping the pathways and actors of internalisation using doctrinal and qualitative network analysis, resulting from geographical limitations and legal barriers that, among other things, prescribe imprisonment for officials who disclose broadly defined 'Immigration and Border Protection information.'⁴

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² 1951 Convention Relating to the Status of Refugees (1951 Convention), 189 U.N.T.S. 150, 28 Jul. 1951 (entry into force: 22 Apr. 1954).

³ Jennifer Hyndman and Alison Mountz, 'Another Brick in the Wall? Neo-"Refoulement" and the Externalization of Asylum by Australia and Europe' (2008) 43 *Government and Opposition* 249.

⁴ Australian Border Force Act 2015, s 42.

I. International Legal Compliance and Socio-Legal Studies

In 2017, I moved to Australia to undertake a research programme exploring how international human rights standards flow ‘through layers of national and sub-national institutions’⁵ in their eventual application to individuals through formal and informal discretionary determinations. International legal compliance scholarship emerged in the 1990s as a subfield of international law grappling with the debate between theorists who argued that international law constrains and shapes state behaviour and those who argued that international law is epiphenomenal.⁶ Though many studies have since sought to explain whether states obey international law, scholars generally conclude that states’ rule acceptance equals ‘faithful rule observance.’⁷ While some empirical work has challenged this view, few international law scholars have tested theoretical frameworks beyond traditional legal case studies.⁸

My project ventures to fill that gap by employing social-science research methods to examine, critique, and lay the groundwork for continued empirical testing of one such theory—transnational legal process (‘TLP’). Harold Koh introduced TLP in 1996, arguing that states obey international law through a process of internalisation borne of ‘repeated interaction with other governmental and non-governmental actors in the international system.’⁹ Though the theory acknowledges the multiplicity of actors involved in the domestic internalisation of international legal norms, it describes an iterative process that takes little notice of the role of low-level state officials, or street-level bureaucrats, in questions of internalisation or law production.

Socio-legal scholarship, however, has devoted significant time and attention to these types of ‘bottom-up’ actors and questions. In their theory of ‘legality,’ Patricia Ewick and Susan Silbey present a view of law as fundamental to social interaction and thus representative of ‘the diversity of the situations out of which it emerges and that it helps structure.’¹⁰ They argue that the pervasiveness of law shapes, and is shaped by, social life.¹¹ While legal scholarship often characterises ‘discretionary’ decisions of street-level bureaucrats such as prosecutors and police officers as ‘other-than-law’, requiring legal structure and confinement, legality theory suggests a more nuanced understanding of law that emerges just as readily from routine, discretionary encounters as from ‘groups of powerful law “makers.”’¹²

⁵ Simon Halliday and Patrick Schmidt (eds), *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in the National Context* (Hart Publishing, 2004) 4.

⁶ William C. Bradford, ‘International Legal Compliance: An Annotated Bibliography’ (2004) 30 *North Carolina J Intl L Commercial Regulation* 379.

⁷ Roda Mushkat, ‘Dissecting International Legal Compliance: An Unfinished Odyssey’ (2009) 38 *Denver J Intl L Policy* 161, 162.

⁸ Gregory Schaffer and Tom Ginsburg, ‘The Empirical Turn in International Legal Scholarship’ (2012) 106 *AJIL* 1.

⁹ Harold Hongju Koh, ‘Transnational Legal Process’ (1996) 75 *Nebraska L Rev* 181.

¹⁰ Patricia Ewick and Susan S. Silbey, *The Common Place of Law* (University of Chicago 1998) 17.

¹¹ *Ibid.*

¹² *Ibid.*, 18. See Anna C. Pratt, ‘Dunking the Doughnut: Discretionary Power, Law and the Administration of the Canadian Immigration Act’ (1999) 8 *Social & Legal Studies* 199.

II. Negotiating Access in the Australian Context

I embarked on this research programme with the aim of observing and interviewing front-line government officials working at the border, processing refugee status determination and visa cancellation cases and overseeing the detention of refugees and asylum seekers. These are the types of spaces where the actual practices of individuals implementing Australia's *non-refoulement* obligation are carried out – a variety of agencies, geographic locations, and professional settings. Yet, because Australia's geography dictates that people arrive by water, or by air, the government exercises an extraordinary degree of control over the physical spaces where officials process asylum-seekers. This left one practical option for multi-sited ethnography – formally requesting access to observational sites accommodating low- and mid-level officials.

Gaining access for ethnographic observation would not be unprecedented, as scholars had observed and interviewed border officials in two Australian airports¹³ before 2014 and the Department of Home Affairs ('DHA') continued to broadcast front-line border operations through television shows such as 'Border Security: Australia's Front Line'.¹⁴ I therefore began by reaching out to scholars who had conducted research in the field. However, this tactic proved minimally successful due to guarded and non-responses, as well as the fact that in 2017 the federal government transitioned most migration-related agencies into DHA, rendering even recent past experience less useful.

No clear procedure exists for requesting permission to engage with DHA or similar agencies for the purposes of academic study, which raised questions regarding the methods by which agency participation in research is evaluated. Though DHA maintains a 'Irregular Migration and Border Research Programme' and has partnered with research organisations, their website contains no contacts or reference to the process of obtaining permission to conduct a study.¹⁵ This lack of formal procedure is apparently not uncommon, as I found while searching for similar procedures in the United States. A subsequent meeting with an academic and employee of DHA suggested I contact the main switchboard where, after several redirections, I was eventually routed to the media inquiry department. A request to that department resulted in no response. A separate enquiry to a mid-level contact at the Australian Border Force also resulted in no final response.

As I attempted to untangle these leads, I met another academic who had previously worked in several roles within and outside of government and who had maintained strong connections to mid- and high-level officials in the field. By reaching

¹³ Sharon Pickering and Julie Ham, 'Hot Pants at the Border: Sorting Sex Work from Trafficking' (2014) 54 *BJ Criminology* 2.

¹⁴ Paul Farrell, 'Border force and immigration officials have final say on reality TV show' *The Guardian* (Sydney, 22 September 2015) <www.theguardian.com/australia-news/2015/sep/22/border-force-and-immigration-officials-have-final-say-on-reality-tv-show> accessed 5 January 2019.

¹⁵ Australian Department of Home Affairs, *Irregular migration and border research* <<https://www.homeaffairs.gov.au/about/reports-publications/research-statistics/research/irregular-migration>> accessed 20 November 2018.

out to old colleagues and friends in various departments, I received invaluable introductions and an implicit endorsement that facilitated access to officials with the power to consider and grant approval for participation. I thus corresponded with officials at the Assistant Secretary level within DHA, the Attorney-General's Department, and the Department of Foreign Affairs and Trade ('DFAT').

I presented my research as an attempt to gain an understanding of the perspectives of front-line officials in the implementation and internalisation of the norm of *non-refoulement*. I explained that interviews would be confidential, appended a participant information sheet, and indicated flexibility regarding observational sites. Each official initially responded with interest and an openness to allowing low-level officials to participate. However, the Attorney-General's Department and DHA ultimately declined to participate on the basis of 'the confidentiality of the advice [they] provide and the trusted relationships [they] have with [...] clients when participating in government decision-making...'¹⁶ DFAT also declined participation, concluding that officials 'would not be well placed to contribute' on the topic of research.¹⁷

The initial interest and subsequent rejection of my request caused me to question whether my status as a 'foreigner' and thus, legal subject of the system I sought to study might have hindered my ability to gain access to sensitive locations. I arrived in Australia amidst a dual citizenship parliamentary eligibility crisis, as well as an unfolding scandal over foreign influence in domestic politics. Against this background, Parliament passed the Foreign Influence Transparency Scheme Bill 2018, instituting new rules aimed at regulating and criminalising 'foreign influence' in Australia. Though I will likely never know whether this contributed to the denial of access, my original research objective and methodology clearly required rethinking.

I therefore revised my research question to focus on the pathways and actors of internalisation of the norm of *non-refoulement*. By shifting focus to the process, I could look to former officials and actors who had participated in that process, including employees of civil society organisations, international organisations, and legal practitioners, while laying groundwork for future research. I recruited study participants through legal and community listservs and snowball sampling to conduct qualitative network analysis using semi-structured interviews. This resulted in thirteen interviewees – more than two-thirds of whom had previously worked as front-line officials in the field. Combining doctrinal review with invaluable insights from interviews allowed me to triangulate methods and sources, producing a more robust account.

In the interviews, former officials also indicated that fear of prosecution and loss of current or future employment weighed heavily on participation considerations. The Australian legal and political framework includes restrictive laws and employment contracts that prevent current and former DHA officials from discussing their

¹⁶ E-mail on file with author.

¹⁷ *Ibid.*

employment without fear of a two year prison sentence¹⁸ and lacks effective whistleblower protections.¹⁹ Government officials have suffered the consequences of even anonymous disclosure.²⁰ The pressure on officials not to speak about government practice thus strongly militated against participation.

III. Conclusion

Several factors encumber deep engagement with the implementation apparatus in the securitised field of refugee and asylum law in Australia. There is general recognition amongst researchers, expressed privately and publicly, that the current political and legal climate present significant roadblocks. Moreover, while it seems plausible that a formal collaboration between my university and the DHA might have facilitated my research methods and aims, framing my research question differently may have had a greater impact. For example, the framing of the ethnographic airport study cited above corresponded to a 'human trafficking' discourse favoured by Australian officials.

Yet, these practical issues reflect more than challenges of framing or institutional relationships. Shielding from view the routine, discretionary actions of officials charged with implementing legal obligations frustrates the participatory, dialogical dimensions of legality. By limiting access to research that furthers agency goals, whether by exercising control over messaging, or by aligning research with perceived agency needs,²¹ agencies enact an undemocratic version of legality. As the daily practices of government officials are core to law internalisation, production and a democratic legal process, additional work is needed to identify and clear pathways to access.

¹⁸ Australian Border Force Act 2015, s 42.

¹⁹ Nicola Bevitt, 'The Australian Border Force Act 2015 (Cth) Secrecy Provisions - Borderline Unconstitutional' (2017) 39 *Sydney L Rev* 257.

²⁰ Doug Dingwall, 'Attorney-General argues limits to public servant free speech justified', *Sydney Morning Herald* (Sydney, 9 November 2018) <www.smh.com.au/politics/federal/attorney-general-argues-limits-to-public-servant-free-speech-justified-20181108-p50esk.html> accessed 5 January 2019.

²¹ Farrell, (n 14).