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International Journal for Crime, Justice and Social Democracy



Guest Editorial

Special Issue: Transforming Borders and the Discretionary Politics of Migration Control

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The first idea for this special issue arose during a seminar that was organized in Leiden, March 14–15, 2018.¹ Against the background of the so-called European migration crisis and the ongoing “War on Migration” in the United States (US), contributors were asked to reflect upon the dynamics of “the local” in relation to “the national” and “the global.” The need to shine a light on the diversification, dispersal, and effects of bordering practices by providing “real” stories from the local level instead of getting too caught up in (supra)national political discourses was a recurring matter of discussion. Over the years, contributors continued to meet during conferences to further flesh out their contributions, which also led to a more critical reflection on the diversity of our contributions. As rightfully flagged by Brandariz (2021) in this journal, the emerging body of scholarship on crimmigration and border criminology has predominantly addressed the Global North, therefore, painting only part of the picture on matters of managing migration and borders. To break out of this methodological nationalism, several contributors whose work focuses on the Global South were added to the issue, presenting similarities and differences from the articles addressing the Global North and forcing scholars to question the dominant “academic gaze” and default scalar setting of the nation-state in the field of border criminology (also see Moffette and Pratt 2020).

Setting the Stage: Globalization, Movement, and the State

Intensified global flows of information, images, goods, people, finances, and capital have led to what has been termed a world in motion. As Gundhus and Franko noted, because of globalization, “states are faced with recurring forms of state ‘blindness’ due to the intensification of movement to their territories” (Gundhus and Franko 2016: 497). Flows of people who move around the world and cross national borders, a central feature to globalization (Appadurai 1990), are increasingly problematized, criminalized, and de-normalized (Aliverti 2013), as immigration violations have become subject to

¹ For more information on the seminar see: <http://europeanbordercommunities.eu/events/bordering-practices-and-the-politics-of-mobility>

criminal law and criminal penalties rather than administration law (Stumpf 2006). Therefore, it is safe to say that the process of globalization has transformed, and continues to transform, the relationship between states, non-state actors and the nature and meaning of territorial and temporal borders. Caught in the crosscurrents of globalization that it helped to create, the state faces structural challenges from above and below, challenges to its sovereignty, moral authority, and to its very purpose (Fraser 2008). From above, it faces challenges from supranational entities, particularly influential economic organizations that try to impose global capitalist principles, markets, trade, and finance onto domestic economies, which has concentrated wealth and increased inequality (Piketty 2013; Sassen 2014). From below, it faces challenges from grassroots movements who justify their claims with references to international law and human rights principles (Darian-Smith 2013). States are also confronted with irregular migrants within their territories whose sheer presence continuously questions the legal and social institutional settings in the domains of labor, education, and health, as well as human rights. As globalization and global mobility continue to accelerate, there has been a concomitant growth in border control practices that are separate to, yet increasingly integrated within, systems of punishment. (Aas 2014; Aas and Bosworth 2013; Barker 2013, 2017; Bosworth 2017). This increased criminalization of human mobility is also highly selective and racialized, as it especially targets those who seek refuge from conflict areas or developing countries and who lack easy access to travel documents. Irregular migration and the mere notion of mobility have become highly politicized issues over recent years and have been central to the formation of migration policies and border controls across many regions and countries of the Global North.

Traditionally, the state is regarded as the holder of exclusive authority over the legal entry of nonnationals. Controls at physical borders carried out by state agents are, therefore, (still) an important remedy at hand for the management of the mobility of persons and goods across the national border. This rests on the (fictional) assumption that borders are a good barrier against crime and irregular migration. While controls have often been located at traditionally defined border regions, there has been an increasing proliferation of sites where such controls are enacted; immigration and border checks have been extended beyond territorial borders, a development that has been particularly prominent in the context of the European Union (EU), and controls have proliferated through the intensification of surveillance practices (Salter 2006). Bordering has also been practiced through apprehensions, alien detention, and deportation regimes. As a result of these different “bordering practices,” the notion of control has become more and more “diffuse,” both across and beyond state territories (Cote-Boucher 2002). Borders are very much alive, and border controls seem to be “everywhere” (Staring and Van Swaaningen 2021). Given this omnipresence of borders and border control, the starting point of this special issue is the notion that borders and border control are everywhere in different forms and, more importantly, come with increasingly complex and differentiated forms of exclusion. The latter can be more systematically unraveled by applying a multiscale perspective that acknowledges the continuous interplay between the various local, national, and (supra)national regulatory layers and (f)actors in the management of migration and mobility. In this issue, we explicitly call attention to this multiscale nature of migration and bordering practices and, as part of this, the role of discretion.

Multiscale Bordering

When it comes to issues of border control and the management of (cross-border) mobilities, we see influences of both globalization and glocalization. The “voice” and agenda of the (supra)national government is strong and influential. Conversely, in implementing the state perspective, the dynamics of the local context where the measures should be implemented and felt most directly, local state and non-state actors seem to play an important role as well. This multilayered legal and governance structure, in which a broad variety of actors operate, is especially, but not exclusively strong in the context of the EU. It renders explicit how the national level of legislation, policies, or institutions, or *scale*, is an important yet hardly exclusive jurisdiction in bordering. While taking a critical criminological approach, Wonders (2008, 2017) reflects on the implications of globalization on the role of the state and the distribution of state power. She observes how, as a result of globalization, the scalar hierarchy centered in the national

state is fundamentally destabilized, leading to the creation of transnational spaces of governance. By drawing on Chambliss's "'dialectical approach to lawmaking' which considers the nation-state to be a crucial site for mediating class struggle, responding to the impacts of structural contradictions, and ensuring the long-run success of capitalism as a system," (Wonders 2016: 204), Wonders argues that globalization has made state power become flexible, fluid, and global, "freed from the fetters of time and place" (2016: 204). The development of this "just-in-time justice" is characterized by the flexibilization of the architecture of nation-states and the flexible application of the law. All actors can actively "use" the transnational spaces of governance to avoid submitting their activities to the state's jurisdiction. On the other hand, national courts and public international law remain in place to be used selectively, as needed. In this way, nation-states and the (enforcement) agencies that represent these states can use the law flexibly, just-in-time—or they can choose to make it utterly irrelevant (Sweet 2004: 144). Moffette and Pratt (2020) also call attention to the importance of acknowledging the different scales that can be in play when it comes to matters of bordering and migration control. To do justice to the "heterogeneity, contingency, and multiplicity of ordering and bordering practices," (2020: 16), the authors call attention to the importance of addressing different "jurisdictions"—legal and quasi-legal regimes that can be in place and in effect within one geographical area. While using illustrations from their own work on the US-Canadian maritime border and on street vending in Barcelona, Moffette and Pratt show the limitations of state-centered approach, as such an approach "hides from view the ways that sovereignties are always plural, partial, contested and incomplete" (2020: 17). As argued by Valverde (2009, 2010), it is important to understand jurisdictions in a broader sense than merely legal technical—which, in fact, is largely spatial (federal, provincial, municipal)—to also acknowledge the "meaning making" of many state and non-state agents. It is through their performative acts that involve summoning or enforcing the law that claims are made about the "where," "who," "what," "when," and "how" of law. Jurisdictional thinking can help make sense of the multiscalar, multi-actor, and multijurisdictional sociolegal regulation of mobility and people on the move. It is here where the notion of discretion enters or should enter the scope of analysis. While describing and analyzing territorial jurisdiction, Ford (1999) likens jurisdiction to the tango, a type of dance with a set of rules that define the role of each partner to negotiate, with a certain level of creativity and *discretion*, when to step forward and when to let their partner make a move.

Discretion and Multiscalar Bordering

The multiscalar perspective that is adopted in this issue also allows for closer scrutiny on the role of discretionary acts and non-acts in the context of migration and border control. Discretion, through the existence of open norms, plays a crucial role in understanding the local decisions by state agents as well as the experiences of those on the receiving end of these decisions. As argued in the previous section, the (perceived) flexibility of the law as a result of the increased multiscalar dimension of legal governance is, at least partly, the result of the increased use of open norms creating discretionary space to decide when to use which (legal) norm or jurisdiction (for an analysis on the European Schengen Area see: Van der Woude 2019). Discretion, thus, allows for the development of "just-in-time justice," driven by highly politicized motives. Discretion has long been of interest to those studying borders, as it is the discretionary power of state officials that, in practice, is vital in deciding whether a border can be crossed or not or whether you are (partially) included or excluded from belonging. For a long time, border control was merely confined to land borders. It was centered on immigration control and the identification of travelers through the review of passports and other documents. The entirety of that static territorial control work was devolved to immigration and customs officers who enjoyed a high degree of statutory discretion. In many countries, the use of this discretion is intertwined with extended search and seizure powers as well as the capacity for border officials to arrest without warrants. Pride in these extended powers has, thus, long characterized the occupational cultures of border personnel (Gilboy 1991; Pratt 2005). These prerogatives were granted in part because their use was confined to the limits of the state and seen to be necessary to protect its sovereignty. Of course, abuse of power, xenophobia, and lack of accountability plagued bordering then as it does now, yet the extended legal discretion of border authorities remained restricted to areas close to territorial borders. However, current border control clearly brings discretion beyond these limits as the emphasis has moved to the global tracking and tracing

of mobilities (Gundhus and Franko 2016). The latter has become increasingly and painfully visible in the EU. The perceived refugee crisis of 2015, or rather “the intractable crisis of migration in Europe” (De Genova 2017: 17), seems to have shifted the focus away from one of the guiding principles of the EU, the principle of free movement, toward a focus on the restriction and monitoring of movement (van der Woude and Van Berlo 2015). As also illustrated by the North American and Australian cases, border landscapes have been overhauled, and with them, the social and political conditions that forge discretion and decision-making in border spaces. Borders and border areas are now key policing spaces where countless decisions about risk, belonging, and citizenship are made daily. These decisions are invested in surveillance regimes that intersect with discretion in new ways. Confronted with the policing of mobilities of goods, data, and persons through borders that extend outside and inside their territorial limits, and with the dispersed “surveillant assemblages” of actors, technologies, policies, and legal regimes that make such policing possible (Haggerty and Ericson 2000), the shifting terrain of border control prompts us to refocus our attention to and revisit what we thought we knew about discretion in the context of the management of migration and border mobility.

This Issue

These two notions, the multilevel nature of bordering practices and the role of discretion in relation to the actions of both state and non-state public and private actors and individuals, need to be taken into account when trying to make sense of how borders and bordering practices have both transformed over time and contribute to transformations of lives, experiences, practices, policies, and notions of justice. As borders can be seen as important regulatory devices, regulating not only who belongs and who does not, but also as instruments that interrupt, delay, and speed up human mobilities (Mezzadra and Neilson 2013), borders and bordering practices also potentially have a transformative influence on those involved in or subjected to these practices. In this issue, while taking into consideration the gaps and understudied concepts in the current literature, the authors reflect upon several related issues the temporal, spatial, and sociopolitical transformation of borders as well as the transformative effects of borders on public and private social-control agents, migrants, and localities (linking border areas with localities of origin). In doing so, the authors also reflect and possibly elaborate upon the irreconcilability of current bordering practices, whether happening *at* the physical border or *beyond* it, with the high humanitarian standards many Western Liberal Democracies claim to uphold, especially in the light of the increased racialization and ethnicization of migration and border control. To what extent are the responses to the international mobility of people and the threats of radicalism and terrorism balanced with respect to security demands and social justice? What kind of complex alliances between migration control efforts and social justice can be distinguished (Andersson 2014)? Further, can social justice be seriously met if the majority of these bordering practices make little effort in dealing with the root causes of this international mobility and only superficially seem to comply with the universal declaration of human rights?

The eight articles in this issue promise us a global journey around transformed borders, multiscalar bordering, and discretionary practices within these migration controls. In doing so, the authors guide us through the Global North and Global South with countries as varied as the US, Mexico, Mali, Poland, Norway, the Netherlands, the United Kingdom (UK), Spain, Italy, Germany, Greece, and Turkey. We also gain insights through these specific research settings from additional Asian and African countries of origin for the migrants involved. By situating their analyses in a specific locus, the authors provide us with a grounded, localized narrative, which they insightfully theorize on and interact with at the global level. Through these glocalised analyses, we not only learn about the importance of multiscalar forms of migration control and the discretion of these actors within these bordering practices, but also gain insights into the immediate and long-term effects of these control efforts on the divergent actors that transform our borders and give meaning to the multiscalar bordering practices.

Given these similarities across the different articles, the authors focus on many different main “actors,” such as the city, local governments, police, criminal judges, civil society organizations, and grassroots organizations. Wonders and Fernandez-Bessa consciously ignored the classic analytical level of the nation-state and instead opted for an analysis of sanctuary cities in the US and welcoming cities in Spain. They conclude that these initiatives, from below, not only contest and resist national migration control policies but also have implications on the global level. The research team of Oomen chose the local governments of cities, which can facilitate or simply shun migrant resettlement, as their level of analysis. Their rich paper, situated in several cities across Europe and beyond, unfolds how, within multi-actor (local state actors, civil society organizations, social enterprises) and multiscalar contexts, bordering practices are being shaped or contested. Campos Delgado takes her main focus to the level of the (transit) state in Mexico and explains how Mexico, within the context of the Transit Control Regime, instrumentalizes exemption as a bordering practice in which they assume, react, and utilize their role as a “transit” country. Others, such as Parmar and Gundhus, put the police at the center of their analysis of migration control and bordering practices. Parmar further calls attention to the abuse of discretionary practices by highlighting the racialized decisions and practices of UK police officers in the context of Operation Nexus in the UK. As these injustices tend to be ignored when they affect migrant communities, Parmar argues for the need to pay attention more explicitly to racialized discretion. Gundhus, also focusing on the police but in Norway, convincingly shows how risk categories within the police “Operation Migrant” are distributed and translated into a multilayered institutional arrangement where migration is policed and through which the view on migrants as risky and criminal is being reinforced. Szulecka and Klaus, in their analysis of the sanctioning facilitation of unauthorized stay in Poland, also concentrate on law enforcement agents next to low-level (criminal) judges, who both, in their own way, facilitate internal migration control practices. Other contributors, such as Kox and Staring, as well as Schultz, focus primarily on the “targets” of migration control: those labeled as deportees, crimmigrants, failed asylum seekers, bonus migrants, or fortune seekers. While Schultz writes about the social suffering of the deportees in Mali as a consequence of the North African and European deportation regimes, Kox and Staring situate their study in the Netherlands and reflect upon the consequences of the multilayered character of internal migration control mechanisms for migrants staying undocumented in the Netherlands and for their daily lives long after their return to their home countries.

The focus in this special issue on multiscalar bordering and on discretion within different and partially overlapping migration control practices is, in our vision, just a first step. The next step would be to engage in comparative and cross-national comparisons, as it is only through comparative and cross-national analysis that scholars can truly reflect on what is happening in their dominant case study by placing its familiar structures and routines against those of other systems.

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