

4. Permanent liminality, legal community, and migration law. By Ketan Jha

Liminal entities are neither here nor there; they are betwixt and between the positions assigned and arrayed by law, custom, convention, and ceremonial (Turner, 2011, p.95). This volume situates home as a constructed, multiscalar phenomenon. This chapter concerns itself with the concept of 'Home' in relation to migration law. Inherent in this linkage are notions of community, nation-states, movement, and time. Home might serve to invoke affirmative attachments of belonging over various spatio-temporal scales, but viewing the concept through this narrow lens ignores its function as a microcosm of society. A more fully illuminated vision of home must understand it equally as the site of coercion, detention, and domestic harms.

The juridical formation of 'home' is necessarily multiscalar. The law's place in demarcating geographical boundaries and enforcing the same through state police power cannot be understated. This chapter examines Home Office practice in administering and managing immigration detention centres, finding that the current regime is unstable, unfit for purpose, and serves to delegitimise vulnerable populations.

The practice of limitless detention in the United Kingdom relegates migrant populations and asylum seekers to a liminal space with no clear terminus – a paradoxical condition of permanent liminality. Liminality is here used in the same manner as Van Gennep's theory of rites of passage in anthropological literature. In essence, rites of passage govern moments of transition, whether from season to season, childhood to adulthood, or life to death. In any transition of social status, a pattern occurs in three stages: the [i] rites of separation from a previous world, preliminary rites, those executed during the [ii] transitional stage liminal (or threshold) rites, and the [iii] ceremonies of incorporation into the new world post-liminal rites. Gennep was concerned chiefly with the liminal or 'in-between' stage. When Gennep was translated into English by Victor Turner, liminality described a space where moments of passage foster 'humankindness' or community beyond tribal or national boundaries (Turner, 2011, p. 116). 'Humankindness' evokes Walzer's minimal definition of community, which consists of people 'with some special commitment to one another and some special sense of their common life'. This vision of community is arguably both romantic and myopic, redolent of Benedict Anderson's 'imagined community' where fellow members – who will never meet – are bound by 'a shared image of their communion.' Zygmunt Bauman sought to deconstruct this 'cosy and comfortable' vision of community. Bauman maintains that communities can constrict individuality and command loyalty. Like 'home', community is constituted as much by the imperative of internal security as freedom and belonging.

While liminal spaces are transitory and uncertain, legal scholarship often employs the metaphor of 'regulatory space' (Vibert, 2014) to describe the metaphysical environment bounded by law (Laurie, 2017). In this case, that transition sits between two putatively stable legal spaces: the space of the alien without citizenship rights and that of the full citizen. The liminality occurs where migrants are stuck in between (Bhabha, 1994, p.137), condemned to a legal limbo. However, before examining detention centres some discussion of the frames of citizenship is necessary.

A significant body of literature on citizenship and immigration is rooted in Georg Simmel's identification of the migrant as a stranger, physically present in a state but excluded from political community. This framework underpins an academic corpus rooted in a dichotomy between citizen-insider and immigrant-outsider. Much of the legal scholarship on citizenship and belonging builds on T.H. Marshall's iconic essay wherein citizenship's development into contemporary capitalist societies is divided into civil, political, and social instantiations, mapped onto the 18th, 19th, and 20th centuries respectively. While Marshall's concern was chiefly with the connection of citizenship to a wider political economy, the nascent rights he describes are given life by the law. Thus citizenship is described as being 'internally inclusive' but 'externally exclusive' giving rise to 'a conceptually clear, legally consequential, and ideologically charged distinction between citizens and foreigners' (Brubaker, 1992, p.21). This dichotomy is problematised by the ebb and flow of legal rights for non-citizens. Peter Schuck argues that the entrenchment of universal human rights crystallised in American law through due process jurisprudence serves to emancipate migrants from legal alienation. However, the realities of detention and deportation without trial enabled by legal instruments such as the PATRIOT Act and the restriction of non-citizen access to public benefits in 1996 cast significant doubts on the efficacy of this thesis. In the UK, the administrative detention regime criticised in this chapter was founded in the first instance to offer due process protections. Instead of Brubaker's dichotomy, contemporary Anglo-American immigration law supports the idea of a 'membership continuum' of 'citizens, denizens, and helots' to model the varying rights of full citizens, legal residents, and migrants (Cohen, 1989). This chapter explores the idea of the migrant as a permanent 'liminal personae' for whom unstable and uncertain legal rights are complemented by unstable and uncertain physical existences.

Biopolitics and the State of Exception

Literature on detention centres and refugee camps often invokes Giorgio Agamben's concept of *homo sacer* or 'bare life'. Agamben draws on Carl Schmitt's conception of sovereignty as a function of exercising control over a 'state of exception', wherein the quotidian protections of law (e.g. human rights) are suspended in order to preserve the sovereign's exercise of control (Agamben, 1998, p.11). This state of exception is located in the penumbra of the legal status quo, a shadow that is distinct from, but necessarily contingent on, the existing juridical order. This inclusion creates a 'paradox of sovereignty' wherein the sovereign is 'at the same time, outside and inside the juridical order' (Agamben, 1998, p.15). In this conception of the state, human rights are mechanisms of state power rather than protections against them. As part of the state apparatus, human rights law reproduces 'the contradiction between undocumented migrant's physical and social presence and their official negation as "illegals"' (De Genova, 2002, p. 427). As Hannah Arendt states in the 5th chapter of *Origins of Totalitarianism*, 'it seems easier to deprive a completely innocent person of legality than someone that has committed a crime.' The general concept of the immigrant prison, particularly because it only interfaces with courts of law at the post-detainment stage, might be situated outside the normal territorial juridical order (Cornelisse, 2010, p.244). Only migrants, who are outside of the national political community, are subject to exceptional detention in these administrative prisons. In this way – instead of a citizen-insider and immigrant-outsider dichotomy – migrants are subject to what Agamben calls 'exclusionary inclusion.' (Agamben, 1998). Once in the carceral cradle of the state, these immigrant-outsiders are entirely subject to sovereign power despite being excluded from citizenship. Insofar as human rights regulate and produce the subjects of the state, they are bound up with Foucault's notion of biopolitics. For Foucault, one of sovereignty's classical functions is 'the right to take life and let live', has a corollary in the power to 'make live and let die' (Foucault, 2004). The discipline of individual bodies, facilitated by technologies of surveillance, constitutes 'governmentality.' The genesis of biopower

is located in the transition from the disciplining of individuals to the disciplining of the human race. 'Biopower is constituted by an array of supervisory and regulatory mechanisms that seek to manage and order life itself: it is the investment of natural, biological life with politics' (Hall, 2010). Metrics on population dynamics seen through political and economic lenses facilitate regulatory mechanisms that govern and regularise our species. The primary function of this power is putatively the preservation of life. It is at this point that one must ask which lives the state chooses to preserve – who is 'let to die?'

One of Agamben's premises is that the nation-state's existence relies on the nexus between birth and bounded geographies. The asylum-seeker, suspended perpetually between arrival and departure in different states, 'radically calls into question the fundamental categories of the nation-state' (Agamben, 1998, p.138). The sovereign decision here is of course not to be found in the monarchic diktats of old so much as modern bureaucratic decision-making (Butler, 2006). In the context of migration, that decision-making takes the form of executive action in the form of decisions to detain or deport individuals. When the Home Office sends non-citizens 'home' to their countries of origin, the territorial order of the nation-state is reproduced (Cornelisse 2010, p.246). The next section will examine executive actions in the context of immigration detention decisions for asylum-seekers and irregular migrants.

The 2014 immigration statistics indicate that about 3500 individuals are held in nine Immigration Removal Centres (IRCs) across the UK. These centres are operated both by HM Prison Service and private companies. Demographically, detained individuals tend to be adult men from former colonies such as India, Pakistan, Jamaica, and Nigeria. More than half of the IRC detainees in 2014 'sought asylum during their immigration processes'. Notably, the statutory basis for detention centres makes little mention of their real purpose. The 2001 Detention Centre Rules provide that:

'The purpose of detention centres shall be to provide for the secure but humane accommodation of detained persons in a relaxed regime with as much freedom of movement and association as possible, consistent with maintaining a safe and secure environment, and to encourage and assist detained persons to make the most productive use of their time, whilst respecting in particular their dignity and the right to individual expression.'

There is, perhaps unsurprisingly, a profound disjunction between this description and the lived experience of detainees. In theory, those detained are served with a 'warrant of detention' or IS91 form by an immigration officer. The warrant is to be issued in cases of imminent deportation and where the individual in question is a flight risk.

One important characteristic of the UK's approach to immigration detention is that this species of imprisonment is not legally punitive and thus does not carry the colour of the criminal law (hence the use of 'administrative detention' in this chapter). In the absence of formal 'criminality' interfacing with the top-down institutional realities of national immigration policy, the spaces where people are detained are replete with razor wire fences, guard dogs, marking imminent threat of state application of force (Bosworth and Guild, 2008). The optics of immigration removal centres highlight the inherent ambiguity and volatility of immigration policy in action: the ambiguity of an illusory and distant state on an institutional level (Abrams, 1988, 82) is concretised by micro-level enforcement actions against individuals (Foucault, 1991). In this way, the precarious legal and physical space where immigration detention occurs can be described as quasi-penal. These are permanently liminal spaces in several regards. Firstly, IRCs are ostensibly meant to temporarily house foreign nationals facing imminent deportation back to their home countries. In practice, migrants can reside in IRCs for months at a time. Equally, detention and deportation are fundamentally practices of administrative law, but deportation orders

are often attached to criminal sentences. As Bosworth recounts in her lengthy study of IRCs, 'the precise or desired relationship between immigration law and the criminal justice system remains enigmatic (Bosworth, 2014, p.16). Another dimension of liminality persists in terms of physical space: detainees can be transferred to prison facilities (Bosworth, 2014, p.13). IRCs are thus situated in an unstable enforcement apparatus and feature several layers of liminality.

UK policy regarding detention centres and immigration removal policy has served to trap exiles in a grey area. The legal authorities for policing borders and regulating entry are voluminous. Article 5(1)(f) of the European Convention on Human Rights (ECHR), which allows for the detention of foreign nationals to prevent unlawful entry and for their removal in cases of unlawful presence. This authority is mediated by protections against torture in Article 3, the 1951 Refugee Convention, the Dublin Conventions, the Schengen Treaty, and swathes of domestic legislation passed under the head of asylum, immigration, or criminal law (fn: On such legislation and its implementation around the world, see Thomas 2011). The Dublin Convention of 1990 (Dublin I) attempted to lay down procedures for processing asylum seekers at their first point of entry in order to ensure accountability for member state governments as well as efficiency in processing incoming migrants. In 2008, the EU passed the Returns Directive, setting a maximum period for pre-deportation detention at 6 months, extendable to 18 months. The Directive sets out that the practice of administrative detention should be reserved for removing illegal immigrants. The United Kingdom, while playing a large part in advocating for minimum standards of care through an independent body tasked with monitoring protections for people in detention, has not signed up to the directive. As a result, there is no statutory upper time limit on detention in the UK. Expectedly, this has caused considerable opprobrium in national organisations campaigning for migrant's rights. Detention Action, for example, has repeatedly called for a one month upper limit, with which the Chief Inspector of Prisons agreed in 2015. The same year saw MPs in the All Party Parliamentary Group on Refugees & The All Party Parliamentary Group on Migration (APPG) convene a public hearing and publish a report recognising current enforcement issues. The report identifies substantial non-compliance with enforcement guidance from the Home Office. That guidance enumerates the principle that 'detention should be used sparingly and for the shortest possible time.' Both case law and the lived experience of detainees indicate that this principle is mere puffery.

An analysis of UK and ECtHR case law

Case law of the past two decades governing the reasonableness of lengthy administrative detention in both domestic courts and the European Court of Human Rights tends to reaffirm Agamben's apprehension of human rights law as legitimising state use of force rather than an emancipatory safeguard on migrant's rights. Two characteristics unify these disparate strands of jurisprudence: (i) general state adherence to administrative law procedures typically defeats claims based on the length of detention, and (ii) the reasonableness of detention (and the attendant duration) is almost always linked to the prospect of the claimant being 'returned home' or deported. This section will examine important samples from that case law and contrast them with enforcement realities. Finally, I assert that populations vulnerable to administrative detention are a partial instantiation of Agamben's *homo sacer* – their permanently liminal and rightless status means that virtually "no act committed against them could appear any longer as a crime' (Agamben, 1998, p.174.)

Ministerial pronouncements have acknowledged that detention practices must adhere to the ECHR, a

source of law which British politicians have often framed as a 'backstop' on English courts. However, in the context of immigration detention decisions, the European Court of Human Rights has not taken a radically activist role. Instead, landmark cases tend to feature procedural inadequacies as the justification for findings of unlawful detention.

Amuur v France concerned Somali asylum seekers who arrived at Paris-Orly Airport via Damascus. The applicants alleged that the overthrow of Siyad Barre's regime resulted in imminent danger to life on the grounds that a number of their family members had been murdered. French border officials determined their passports were falsified, refused admission, and subsequently detained the applicants in part of a converted hotel. The applicants were detained for three weeks. Article 5(1) protects individuals from the deprivation of liberty. 5(1)(f) contains a derogation from this standard in case of 'lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.' The court found a breach of Article 5(1) on the grounds that the French legal guidance relied on was imprecise in regards to the provision of 'legal, humanitarian, and social assistance' and lacked sufficient procedural granularity, rendering the detention unlawfully arbitrary. However, the court also distinguished between deprivation of liberty, most often identified with detainment in closed quarters, with restricted freedom of movement. As the applicants were staying in a converted hotel, they could not successfully allege deprivation of liberty.

Chahal v UK (1996) concerned a Sikh family. The primary applicant was an Indian citizen who was active in the Sikh separatist movement in the UK, organising protests against the Indian government. He had been detained for a non-continuous period of 6 years. In relation to his unlawful detention claim under Article 5, the court determined that the applicant's detainment was permissible in light of national security concerns since the relevant procedures had been followed 'with due diligence.'

In the English courts, judicial treatment of unlawful detention has been mixed in terms of outcome, but follows the same general trend of the ECtHR jurisprudence. In Detention Action's submission to the UN special rapporteur for human rights, the NGO found that 'the High Court ruled on 15 occasions that a detainee held for over a year with little prospect of removal was detained unlawfully' (Detention Action, p.7). However, domestic determinations of unlawfulness typically resulted from judicial findings that deportation was unlikely rather than from excessive duration.

Detained migrants can contest their confinement by bringing a claim under the common law tort of false imprisonment. In essence, the tort consists of the fact of imprisonment and the absence of lawful authority to justify the same. In any case of administrative detention, unlike streetside disputes, the fact of imprisonment is a premise, situating the focus of judicial examination on whether the Secretary of State can demonstrate authority for the imprisonment. The widest statutory authority for this detention is located in the Immigration Act 1971. Section 3(5) renders non-citizens liable to deportation if ministerial determination serves the public good or if an immediate family member has been or will imminently be deported. Paragraph 2 of Schedule 3 to the act provides in pertinent part that:

(2) Where notice has been given to a person in accordance with regulations under section 105 of the Nationality, Immigration, and Asylum Act 2002 (notice of decision) of a decision to make a deportation order against him, and he is not detained in pursuance of the sentence or order of a court, he may be detained under the authority of the Secretary of State pending the making of the deportation order.

(3) Where a deportation order is in force against any person, he may be detained under the authority of

the Secretary of State pending his removal or departure from the United Kingdom (and if already detained by virtue of sub-paragraph ... (2) above when the order is made, shall continue to be detained unless he is released on bail or the Secretary of State directs otherwise).

The Supreme Court's judgment in *Lumba v. Secretary of State for the Home Department* (2011) UKSC 12 reaffirms a set of substantive limitations on detention under Schedule 3 of the 1971 act. The so-called *Hardial Singh Principles* provide that

- i) the Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
- (ii) the individual may only be detained for a period that is reasonable in all the circumstances;
- (iii) if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention; and
- (iv) the Secretary of State should act with reasonable diligence and expedition to effect removal.

The phrase 'a period that is reasonable all the circumstances' in (ii) does not refer to a static list of criteria but includes the diligence of the secretary of state in effecting a deportation and the length of the detention, the effect of the detention on the detained person, and the risk of absconding or engaging in criminal activity upon release. Principle (iii) relates back to the central argument of this section; whether the duration of detention is excessive is largely determined by the likelihood of deportation.

Sino (2011) concerned an Algerian man subject to a deportation order who sought declaratory relief (i.e. that his detainment was unlawful) and damages for false imprisonment and breach of his Article 5 rights. At the commencement of the judicial review proceedings, his detention had lasted for 4 years and 11 months. The Secretary of State unsuccessfully attempted to obtain an emergency travel document from the Algerian government to enable the claimant's deportation. During the course of the proceedings, witness statements from civil servants and the Secretary of State were found to be rife with inaccuracies and contradictions in respect to these attempts to attain an emergency travel document. Inconsistent witness statements in regards to whether or not the claimant could be deported to Algeria resulted in a ruling of unlawful detention. In *A v SSHD*, an asylum seeker who refused to accept voluntary repatriation could not succeed in proving unlawful detainment. Toulson LJ commented 'there is a big difference between administrative detention in circumstances where there is no immediate prospect of the detainee being able to return to his country of origin and detention in circumstances where he could return there at once. In the latter case the loss of liberty involved in the individual's continued detention is a product of his own making.' His lordship's argument ignores the tension between imprisonment through the criminal law and indefinite detention without trial. The possibility of this permanent liminality is crystallised in the speech of Richards LJ in *R(MH) v Home Secretary* at para 65:

'Of course, if a finite time can be identified, it is likely to have an important effect on the balancing exercise: a soundly based expectation that removal can be effected within, say, two weeks will weigh heavily in favour of continued detention pending such removal, whereas an expectation that removal will not occur for, say, a further two years will weigh heavily against continued detention. There can, however, be a realistic prospect of removal without it being possible to specify or predict the date by which, or period within which, removal can reasonably be expected to occur and without any certainty that removal will occur at all. Again, the extent of certainty or uncertainty as to whether and when removal can be effected will affect the balancing exercise. There must be a sufficient prospect of removal to warrant continued detention when account is taken of all other relevant factors.'

A 'realistic' prospect of removal might thus be found in circumstances where both the experience of the detained and the power exerted by the sovereign regulator are no longer temporally bound. To mediate the concern caused by this ambiguity, Richards LJ devises a scale where longer periods of detention impose a more onerous burden on the minister to have certainty of if and when removal will occur:

"As the period of detention gets longer, the greater the degree of certainty and proximity of removal I would expect to be required in order to justify continued detention."

In *R (on the application of) v Secretary of State for the Home Department* [2015] EWCA Civ 168 ultimately affirmed that the length of time spent in detainment could differentiate lawful from unlawful detainment in cases with similar facts. On average, however, long periods of administrative detention in the UK are without remedy. One structural limitation of analysing case law is rooted in lack of sufficient legal aid to help people try their claims.

Experiencing IRCs

While administrative detention intuitively puts a stop to the peripatetic quality of migration, it is notable that a common experience of detainees is enforced mobility (Griffiths, 2013). Once an individual is caught within the remit of the administrative immigration detention regime, inter-center transfers and attendant loss of possessions, late night removals with uncertain destinations, and even potential release can occur without warning. Indeed, many individuals at the Campsfield IRC in Oxfordshire destined for deportation were subject to several removal attempts before actually being sent out of the country (ibid). In parallel to globalisation's ability to contract space and time, asylum seekers and migrants variously encounter space and time in accelerated and decelerated ways (Harvey, 1996). Time, as a social phenomenon in relation to migration, 'is a metaphor by which deportable migrants experience and describe the instability and powerlessness of the immigration system, and that temporal uncertainty and discord mark points of tension within the system' (Griffiths, 2013). Some detainees buckled under the uncertainty of state action. One Sri Lankan woman detained at Yarl's Wood told researchers that she had no home left to return to: 'There is nothing I can do... I can't go back. I have nowhere to go. I can do nothing. My family would never have me back. My mother died and they don't answer my phone calls' (Bosworth & Kellezi, 2016). An African detainee resident in an IRC for several months commented on the contradiction between the aims and realities of detention centres: 'I don't want them to dump me here, this is a removal centre! Not a place you can leave someone. It is for removal, for emergency!' (Griffiths 2013, 2003). This derogation from Detention Centre Rules can be read as a manifestation of Agamben's permanent state of exception. Arguably, even the exercise of sovereign power in the context of IRCs attracts a concomitant resistance at the same site. One asylum-seeker described his time in terms of liminality:

"When I live with the people who were in-between, before they get their permission and thing, they do what they like! Because nobody expect anything of them. They are not British, they are not Algerian, they are no belonging to anywhere, any community. They are in-between. They just do what they want" (Griffiths 2013, p.2003).

Incidence of mental health problems and self-harm is high in IRCs even when compared to the prison population. There are sound reasons underpinning this principle. For one, the detention system jeop-

ardises both the mental and physical health of detained individuals. A study of mental health conditions at one IRC found that four out five respondents meet symptomatic criteria for depression. The strongest indicators for depression in this sample included being female, medicated for health problems, a short duration of stay in the UK, no prior experience of prison, application for asylum, and application for judicial review. Depressed detainees were more likely to refuse food and use an interpreter (Shaw, 2016).

In addition to a variety of mental and physical health issues, there were twenty-four deaths at IRCs between 2004-2014. One incident involved an asylum seeker from Pakistan awaiting deportation. Long-term cardiac problems resulted in a determination that he was 'unfit to be detained.' Officials at Colnbrook, an IRC run by Serco, released him from detention. Here, rather than exercising sovereign power to preserve life, the state left him to die.

While the temporal experience of many migrants is characterised by waiting (Turnbull, 2016), the opposite effect of insufficient time can be observed in detainees who encounter the detention fast track rules. This procedure allows for the asylum process to be completed within about 21 days. Compounded with the possibility of being transferred across IRCs multiple times in a day and the possibility of release without any support mechanisms, the detention regime can devolve into frenzied attempts to contact family members and legal representatives under insurmountable time pressure. The result of this temporal effect is that detained populations are relegated to a depoliticized bare life.

The Fast Track Rules 2014 ("FTR") which previously governed appeals to the first instance tribunal responsible for presiding over refused asylum applications provide a pertinent example of how individual migrant experiences are affected by temporal uncertainties. These rules are secondary legislation promulgated under the authority of Section 22 of the Tribunals, Courts, and Enforcement Act 2007 which provides for the enactment of 'Tribunal Procedure Rules' (TPRs) by the Tribunal Procedure Committee. Subsection 4 of the act sets five objectives for the rules: (1) that justice is done, (2) that the tribunal system is accessible and fair, (3) that proceedings are handled quickly and efficiently, (4) that the rules are simple and simply expressed, and (5) that adjudicators bear the responsibility of (3). Immigration cases in particular are heard in the Immigration and Asylum Chamber. The TPRs for this tribunal are contained in The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, SI No 2604. These specific rules create a bifurcated procedure. Ordinary procedure is constituted by 'the Principal Rules' contained in Rules 1 through 46, while the Schedule to the SI contains the FTR.

Activist group Detention Action challenged the validity of the rules on the basis that the above objectives were not met due to, *inter alia*, the burden placed on legal representation for detainees. Lord Dyson held that the system 'is structurally unfair and unjust...justice and fairness should not be sacrificed at the altar of speed and efficiency,' confirming that the rules did not fulfill the objectives of their enabling legislation. Parallel forms of destitution are perhaps unsurprisingly instituted by ordinary procedure as well. Between the initial rejection and appeal, migrants may have to wait up to 12 months during which they cannot legally be employed. While some access government benefits to the tune of 36 pounds per week, others are forced to seek informal employment opportunities (Allsopp et al, 2014). Even with the piecemeal intervention of the courts forcing procedural reform, detained individuals are faced with exclusionary inclusion – the human rights regime that is supposed to operate as a safeguard is not enough to remedy indefinite detention. As a result, these individuals are liminal personae, indefinitely. In Arendt's terms, 'the only practical substitute for a homeland is [detainment]....

Once they had left their homeland they remained homeless, once they had left their state they became stateless, once they had been deprived of their human rights they were rightless, the scum of the earth' (Arendt, 1985, p.341).

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