

DATA SUBJECTIVITY IN WHAT STATE?

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This Post is the first in a new Frontiers series that critically explores the connection between international law and emerging technology, featuring the writing of scholars from a variety of disciplines affiliated with the Institute for Global Law and Policy (IGLP) at Harvard Law School.

The sprawling refugee camp system in Cox's Bazar, Bangladesh, is the world's largest. It is home to over one million Rohingya, the minority group who have been driven from their homeland in Myanmar in successive waves of expulsion over the past 40 years. Life in these camps is dirty, dangerous, and dreary, but above all else, it is defined by the search for resources of both the material and informational variety. Refugees must maneuver to secure food packets or cash-for-work opportunities disbursed by humanitarian agencies while also trying to maintain connections across both the camps and with networks further afield (including with relatives who may remit much-needed cash).

It is against this backdrop that two procedural changes instituted in the last year changed the fabric of the Rohingya community's life. The first change was administered by the United Nations High Commissioner for Refugees ("UNHCR"), the UN agency responsible for disbursing aid. UNHCR rolled out a "Smart Card," a digitally scannable ID card that encodes a holder's biometric data. In an ostensible attempt to prevent fraud, UNHCR now requires refugees to present the card when receiving rations. The second change was implemented by the Bangladeshi government when it banned all use of mobile phones in response to a rally led by camp-based

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Rohingya civil society groups marking the two-year anniversary of their displacement from Myanmar. Since then, SIM card confiscations have proceeded along with new laws that prohibit Rohingya from holding a mobile phone. Any Rohingya caught in violation of this policy will face six months imprisonment and a 50,000 BDT (~\$600 USD) fine.

Through these illustrations of the ways in which the Rohingya's lives have been altered by technology, or the lack thereof, I introduce a number of points. First, *pace* recent rhetoric heralding how techno-governance solutions will transform refugee and stateless lives, the reality is that the few efficiency benefits enjoyed by refugees due to new tech are offset by the increased control over refugees' lives. As Mirca Madianou argues, such "digital systems of migration management" end up constraining "refugee mobility by constituting new types of traceable, 'digital bodies' which are open to additional forms of intervention and surveillance."¹ This fact is apparent to refugees themselves. In my anthropological fieldwork in the camps, I tracked resistance to the aforementioned Smart Card by a stunning cross-section of Rohingya, ranging from youths to widows, and political liberals to militant Islamists. They either articulated concerns over data insecurity (collusion between the UN and the Myanmar state), or highlighted how biometric systems would facilitate oppressive Bangladeshi state control. They also complained that the card, by not referring to them as Rohingya, effaced their identity (particularly painful against the backdrop of the genocidal campaign against them in Myanmar).

Second, these descriptions of Smart Card projects harvesting and controlling Rohingya data and of Rohingya being

¹ Mirca Madianou, *The Biometric Assemblage: Surveillance, Experimentation, Profit and the Measuring of Refugee Bodies*. 20 TELEVISION & NEW MEDIA 581, 596 (2019); see also Btihaj Ajana, *Asylum, Identity Management and Biometric Control*, 26 J. REFUGEE STUD. 576 (2013); Kirsten McConnachie, *Camps of Containment: A Genealogy of the Refugee Camp*, 7 HUMAN. 397 (2016).

barred from accessing their online “selves” also demonstrate how the “data subject” that is constructed by the refugee/stateless person deviates significantly from the imagined “standard” data subject: the unmarked Northern bourgeois one. This bourgeois subject is invested with revolutionary promise even as it becomes the object of anxiety and regulatory response. For instance, in a recent piece, legal anthropologist Kamari Clarke argues that “average citizens engaged in justice-capture projects are now deploying new surveillance technologies that were once under the control of states.”² The “hash-tag publics” that materialize as these citizens circulate signs (photos, documents, memes) should be understood, Clarke insists, as heralding nothing less than a transformation in sovereignty itself. This is because “technology enables the body to ‘produce an image that is larger than itself,’” magnifying resistance and thereby destabilizing classic modes of domination.³

While I will not examine in detail Clarke’s claims regarding sovereignty, her argument is worth considering from the perspective of the refugee/stateless body, the one marked as non-standard. Indeed, taking into consideration its ability to “produce an image” of itself, the refugee body seems to be much *smaller* than itself, so small in fact that sometimes it is incapable of signifying at all. Rather than creating “hashtag publics,” the stateless person’s actions in the world fall mostly on deaf eyes and ears globally. Yet, when analysts discuss “the” data subject and its transformative potential, they often presume a citizen of a nation, one who has access to the legal affordances and symbolic capital associated with citizenship.

Relatedly, even as the Northern bourgeois body signifies potential, it is also exposed in a way which creates risk, a risk

² Kamari Clarke, *Rethinking Sovereignty Through Hashtag Publics: The New Body Politics*, 32 *CULTURAL ANTHROPOLOGY* 359, 362 (2017).

³ *Id.* at 362

which must be mitigated and circumscribed. Concerns for this standard Internet user increasingly manifest over concerns about privacy – iconically represented in the European Court of Justice’s recognition of the “right to be forgotten” in *Google Spain SL v. Costeja*,⁴ and the EU’s ensuing General Data Privacy Regulation (“GDPR”)⁵ – as the standard subject’s putative autonomy is infested and invested by unseen data machinations. The “persistence, visibility, spreadability, searchability”⁶ that constitute this subject as an object of data accumulation, micro-targeted advertisements, and general algorithmic governance⁷ seem to reflect the relatively light touch of Gilles Deleuze’s control society.⁸ In contrast, as the case of phone confiscation in Bangladesh illuminates, the insidious data control regime’s gentle touch is not able to be felt by the Rohingya; it is instead inaccessible due to the iron fist of the coercive state. To riff on the old joke about the *lumpen-proletariat*, the only thing worse than being exploited by data capitalism is *not* being exploited by data capitalism. Hence for the stateless person the “right” they demand is to *not* be forgotten.

Of course, it would be fatuous to suggest that these two options – refugee or bourgeois – represent all of the possibilities for data subjectivity. However, by focusing on refugee/stateless subjects, I aim to explore what insights their uses and navigations of technology might provide.

⁴ Case C-131/12, *Google Spain SL v. Costeja*, 2014 E.C.R. 317.

⁵ Regulation 2016/679 of Apr. 27, 2016, on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1 (EU); *see also* Jannice Käll, *A Posthuman Data Subject? The Right to Be Forgotten and Beyond*, 18 GERMAN L. J. 1145 (2017).

⁶ *See* DANAH BOYD, *IT’S COMPLICATED: THE SOCIAL LIVES OF NETWORKED TEENS* 11 (2014).

⁷ *See* LIFE BY ALGORITHMS: HOW ROBOPROCESSES ARE REMAKING OUR WORLD (Catherine Besteman & Hugh Gusterson eds., 2019).

⁸ *See* Gilles Deleuze, *Postscript on the Societies of Control*, 59 OCTOBER 3 (1992).

In late October 2019, the Rohingya Project (“RP”), a Rohingya-led non-profit social enterprise delivering services to some of the 200,000 stateless Rohingya living in Malaysia, launched its “R-Coin,” a crypto-token “used to reward refugees performing certain volunteer tasks, such as teaching, counseling, soup kitchens, group cleanups, and tree planting.”⁹ Yet according to Mohammed Noor, founder and Director of RP, the goal of the R-Coin goes beyond simple remuneration for community work. Instead, it seeks “to recognize and create a digital record of the service of refugees in the informal sector.”¹⁰ Essentially, R-Coin’s ultimate objective is to use the affordances of digital technology (blockchain and biometrics) to circumvent state-based exclusions (whether in Myanmar or in recipient countries), creating not just a digital identity for refugees but opportunities for greater financial inclusion, among other things.

Returning now to the query about what refugees/stateless subjects can reveal regarding our contemporary societies of control, I ask whether the radically excluded’s attempts to access technology, to evade control, and to create novel non-standard data subjectivities end up constructing alternative ontological positions that might help inform modes of resistance to those control societies.

I. BREAKING CHAINS, BLOCK BY BLOCK?

While a longer paper would be required to adequately describe the Rohingya existence in Malaysia and the R-Coin solution being forged by RP, an overview of R-Coin will help

⁹ Press Release, Rohingya Project, Rohingya Project Launches “R-Coin” Crypto Token to Reward Refugee Volunteers (Oct. 28, 2019) (on file with author); see also Elliott Prasse-Freeman, *R-Coin: Building Social Infrastructure and Identity for Refugees and the Stateless* 1-12 (Rohingya Project, Working Paper, 2020), <https://rohingvaproject.com/r-coin-building-social-infrastructure-and-identity-for-refugees-and-the-stateless-elliott-prasse-freeman/> (reviewing R-Coin project).

¹⁰ *Id.*

outline the unique data subjectivities being imagined here.

First, RP is responding to the perpetual exclusion that defines Rohingya lives in Malaysia. While Malaysia touts its compassion toward the Rohingya, it still formally regulates them as illegal migrants, as it has not signed the 1951 Convention Relating to the Status of Refugees. This results in the Rohingya not being legally permitted to work or send their children to school, despite some having lived in Malaysia for multiple generations. Instead, they toil as menial laborers, and because they lack legal identities, they face difficulties accessing insurance and even establishing paternity over their children. They are also barred from opening bank accounts, as post 9/11 international financial law has insisted that banks confirm the legal identity of clients. The stateless, lacking such identity, are deemed ineligible,¹¹ and thus, any trajectories for improvement beyond a hand-to-mouth existence tend to be non-existent.

The intervention being piloted by RP seeks to break this cycle by generating quasi-legal identities for these refugees through the particular legal and technological affordances of biometrics, blockchain, and international financial law. The law enables identity creation by providing exceptions in cases in which an individual can be confirmed through his or her biometric data.¹² Blockchain allows data owners to “self-confirm” this biometric data, eliminating dependence on a sovereign authorizing that they are who they claim to be. This can be accomplished as follows: a biometric sample (a finger print or iris scan) is taken and encrypted, and the original data is

¹¹ See SARA CURRAN ET AL., IDENTITIES FOR OPPORTUNITIES: A FEASIBILITY STUDY FOR OVERCOMING THE ROHINGYA'S STATELESSNESS CHALLENGES VIA BLOCKCHAIN DIGITAL SOLUTIONS 6 (2018), <https://jsis.washington.edu/wordpress/wp-content/uploads/2018/08/jsis-arp-rohingya-2018.pdf>.

¹² *Id.* at 24.

destroyed.¹³ The encryption is stored on the blockchain ledger, becoming the user's "private key." When a user wants to access her data, she creates a new sample that is also encrypted. These two samples are then matched, and a successful match grants admission to the blockchain.¹⁴

Marking a contrast to the way that daily Rohingya life fails to signify beyond their local communities, the project seeks to get the attention of a world that Rohingya say has forgotten them.¹⁵ By creating a durable trace of actions, the biometric-blockchain assemblage provides durable evidence of existence. R-Coin inscribes Rohingya volunteer activities as data, producing the signs of personhood that will ideally be used to access new opportunities (such as bank accounts and loans), which will in turn potentially transform the trajectories of that existence.

II. DATA SUBJECTIVITY IN WHAT STATE?

Questions of feasibility certainly loom large over the project. Moreover, the dream of "financial inclusion" is itself problematic.¹⁶ But even if the Rohingya participating in the process cannot drastically improve their material conditions, the

¹³ See Larry Dohrs, *It's High Time to Distinguish Between Biometric Systems and Technologies*, GOOD ID (Sept. 10 2019), <https://www.good-id.org/en/articles/its-high-time-to-distinguish-between-biometric-systems-and-technologies/>.

¹⁴ See Ann Cavoukian & Alex Stoianov, *Biometric Encryption*, in *ENCYCLOPEDIA OF CRYPTOGRAPHY AND SECURITY* (Henk C. A. van Tilborg & Sushil Jajodia eds., 2011) (describing how the computer science is a bit more complex: given that two samples of biometric data are never exactly the same, algorithms are necessary to assist with matching).

¹⁵ See Michael McGrath, *Two Years On: The Forgotten Side Of The Rohingya Crisis*, EURONEWS (Feb. 2019), <https://www.euronews.com/2019/08/26/two-years-on-the-forgotten-side-of-the-rohingya-crisis-view>.

¹⁶ Financial inclusion can atomize individuals from social networks even as it makes them vulnerable to debt. Further, financial inclusion's chimeric promises of wealth creation undermine collective political struggles. See Elliott Prasse-Freeman, *Petit Bourgeois Fantasies: Microcredit, Small-is-Beautiful Solutions, and Development's New Anti-Politics*, in *SEDUCED AND BETRAYED: EXPOSING THE CONTEMPORARY MICROFINANCE PHENOMENON* 69, 72 (Milford Bateman ed., 2017)

recording of both individual (qua specific histories) and group (qua Rohingya collectivity) identities marks a significant innovation in the way non-standard subjects are making use of data.

It is worth highlighting how the Rohingya in this case seem to enact Michael Mann's observation about the technological dialectic,¹⁷ wherein technologies deployed by states are later appropriated by civil society (or vice versa). Additionally noteworthy is how these historically excluded subjects, based on their position of exclusion, are compelled to improvise the technology's uses and hence modify its effects. Specifically, the Rohingya only access legal personhood by first rendering themselves into data. We tend to think of the person as primary, the stable referent from which data is extracted. However, as Upendra Baxi reminds us, the person (as a legal entity) is an artificial construction assigned by the law.¹⁸ The law in question is typically enacted by states – and so “stateless, diasporic, and nomadic humans may not belong to the category of persons/populaces and may be reduced to status of things and objects.”¹⁹ Roberto Esposito identifies how legal persons were long defined as the bodies able to *own* things – often other bodies, who, when thus owned, were reduced to mere things.²⁰ The Rohingya, originally exiled from the domain of ownership and hence, personhood, finally become persons through the ownership of their data, the material representation of themselves.

This not only inverts the relationship between person-as-

¹⁷ See Michael Mann, *The Autonomous Power of the State: Its Origins, Mechanisms and Results*, 25 EUR. J. SOC. 185, 193 (1994).

¹⁸ See Upendra Baxi, *The Posthuman and Human Rights*, in HUMAN RIGHTS IN A POSTHUMAN WORLD: CRITICAL ESSAYS, 197, 198-200 (2009).

¹⁹ *Id.* at 200.

²⁰ See ROBERTO ESPOSITO, PERSONS AND THINGS: FROM THE BODY'S POINT OF VIEW, 6 (Zakiya Hanafi trans., 2015).

bodily-substrate and person-as-legal-representation, but keeps the legal subject distinguished and separate from the social data subject generated through typical digital use. Note here the contrast with the experience of the bourgeois data subject. Despite putative “rights to be forgotten,” this subject increasingly experiences what social media scholar danah boyd calls “context collapse.”²¹ This describes the reality in which Northern online and offline selves flatten into one single identity - which in turn is linked with a political/legal self which can be identified and exploited. When a person’s social media activity, credit card purchase history, and legal information (e.g. Social Security Number) circulate together on browsers leaving digital traces of actions, that person’s identity can be easily determined. As Mark Zuckerberg has put it, “The days of you having a different image for your work friends or co-workers and for the other people you know are probably coming to an end pretty quickly.”²² What’s more, such users are not only disciplined by technological surveillance that threatens to ban “inauthentic” profiles, but also pressured to capitulate to a *norm* in which the collective social assumption is that one laminates their online and offline selves.²³ Indeed, as Zuckerberg has sententiously scolded us: “having two identities for yourself is an example of a lack of integrity,”²⁴

For non-standard data subjects, by contrast, the terrain is different. While stateless people can have social media lives as active (in terms of time spent) and deep (in terms of

²¹ See BOYD, *supra* note 6, at 30.

²² Elisabetta Costa, *Social Media as Practices: An Ethnographic Critique of “Affordances” and “Context Collapse”*, 6 (EASA Media Anthropology Network’s 60th e-Seminar, Working Paper, 2017).

²³ See BOYD, *supra* note 6, at 38; see also Alison Cool, *Impossible, Unknowable, Accountable: Dramas and Dilemmas of Data Law*, 49 SOC. STUD. SCI. 503, 521 (2019) (describing how data researchers “developed ethical relationships with what they imagined as the ‘real people behind the data’”).

²⁴ BOYD, *supra* note 6, at 50.

intensity of affect) as standard data subjects, those online “lives” cannot be integrated into coherent and unitary personhoods. This is because the affordances of the legal milieu and the cultures of interaction with technology militate against harmonization of the online and offline domains. In regards to online cultures, not only do non-standard subjects often have multiple online versions of themselves for different functions,²⁵ but they retain a critical distance between these online avatars and the other iterations of themselves. While such maneuvers technically violate the terms of service of the platforms, in de facto terms, this does not affect these users for the very reason that they do not fear sanction. This is because, in Myanmar for instance, Facebook users initiate and abandon profiles with remarkable frequency.²⁶ In regards to legal structures, while burgeoning legal personhood is stored on blockchain, it does not emerge out of a pre-existing legal subject who also operates on the Internet. Instead, legal personhood, made up of such things as financial transactions, birth certificates, and educational diplomas, is immured on blockchain, firewalled from the social personhood on Facebook. Taken together, this allows these subjects to perhaps resist inscription in the “societies of control” that Deleuze warned about.

Deleuze and Felix Guattari theorized the self as at worst a dangerous reterritorialization, and at best “only a threshold, a door, a becoming between two multiplicities.”²⁷ Such a critical stance toward the deployment of “the self” seems increasingly necessary as the techno-ecology for standard Northern data subjects increasingly exposes them to “surveillance capitalism,”²⁸ in which the micro-choices (clicks, mouse-

²⁵ See Costa, *supra* note 22, at 1.

²⁶ See *Exploring Digital & Mobile Cultures in Myanmar*, PHANDEEYAR (May 2019), <https://www.digitalculturesmm.com/>.

²⁷ GILLES DELEUZE & FELIX GUATTARI, *A THOUSAND PLATEAUS: CAPITALISM AND SCHIZOPHRENIA* 249 (Brian Massumi trans., 1987).

²⁸ See *generally* SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM* (2019).

overs, purchases) made by data subjects in digital domains are amassed into aggregate populations of those sharing certain critical likenesses (age, gender average salary in zip code, gender, etc.). This is done so that products can be sold back to them and their behaviors modified. That extractive project becomes more difficult when the self is multiple – when fragmentation and diffusion is engaged as a matter of course. More importantly, having multiple identities, and an ironic distance maintained from all of those data subjectivities, seems a necessary mode of resistance to societies of control – ones that non-standard data subjects enact daily.

As for the Rohingya, their collective situation – whether remaining in Myanmar, encamped in Bangladesh, or surviving in Malaysia or beyond – is bleak. The focus on data improvisations here is not meant to elide the reality of these enduring conditions. It is only to highlight how, within a context of radically constrained options, some Rohingya are improvising with technologies not originally designed with them in mind, repurposing them for potentially transformative ends, and challenging from below states' monopoly over legal/economic subjectivity creation and management.