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By Tess Hellgren

Introduction

‘Migration is not a crime.’ This mantra, articulated on graffiti images and advocacy posters, has been repeated by migrant rights supporters around the globe. Yet the distinction between ‘legal’ and ‘illegal’ movement continues to exert itself as a powerful categorisation in the realm of international migration. The reality of populations of illegal, or undocumented¹, immigrants worldwide – in 2006, an estimated 12 million in the United States alone (Passel 2006) – demonstrates that legal barriers to migration are not insurmountable. Migrants seeking humanitarian relief or greater economic opportunities regularly cross territorial borders illegally, their will undeterred by legal structures. Concomitantly, however, legality is by no means a neutral classification; instead, it remains a powerful distinction that is applied across the spectrum of ‘forced’ and ‘voluntary’ migration.²

In his seminal research on the ambiguities of ‘refugee’ classifications, Zetter (2007: 173) writes that a ‘label’ ‘recognizes both a process of identification and a mark of identity; implies something independently applied, but also something which can be chosen and amended; has a tangible and real world meaning, but is also metaphorical and symbolic’. In this article, I argue that legal status is one such ‘label’, functioning as a strong structural force that acts practically and symbolically upon migrants’ livelihoods. Given the scope of attitudes and consequences linked to migrant legal status, how then should the nature and significance of migrant legality be understood? I argue that legality must be considered as a spectrum rather than a dichotomy, reflecting the range of interactions between migrants’ structural realities and their agentic responses.

This paper begins by situating migrant legality at the intersection of the structure-agency relationship, underscoring the ways in which legal constructions both shape and react to migrants’ active decision-making. I then address the definition and relevance of legal status, considering how legal status poses implicit as well as explicit barriers to migrants’ independent livelihoods and societal incorporation. Subsequently, I explore the range of migrants’ legal statuses, drawing predominantly on examples from the U.S. and Denmark to demonstrate how the divide between legal and illegal is not a strict dichotomy but rather a tiered relationship. Having acknowledged the fluidity and gradations of this structural boundary, I show how ‘legality’, in its multiple experiences and forms, has varying consequences for migrants’ family life and individual agency.

¹ Even the discourse utilised in migrant classification reflects the potency of this legal distinction: Given the criminal connotations of ‘illegality’, many scholars and advocates promote the terms ‘undocumented’ or ‘irregular’ to avoid the negative implications attached to ‘illegal’ migrants (Duvell 2011; Gonzales 2011). As this paper aims to unpack the tangible implications and gradations of migrant status, I employ the terms legal/illegal to illustrate how this dichotomisation problematically oversimplifies migrants’ legal positions.

² Given the inherent difficulty of separating categories of ‘forced’ and ‘voluntary’ migration and the strong relevance of legal status in both domains, my use of the term ‘migrant’ in this paper references internationally mobile individuals in both categories, encompassing so-called economic migrants and asylum seekers alike.

Situating Migrant Legality at the Intersection of Structure and Agency

Before investigating definitions and manifestations of migrant legality, I will first place the notion of 'legal status' within the 'structure and agency' debate (see e.g. Emirbayer and Mische 1998; Giddens 1984; Sewell 1992). While 'structure' refers to the foundational societal frameworks that direct, organise and influence social relations (Scott and Marshall 2009), agency is understood as the element of 'free will' exerted by individuals within these parameters. Otherwise stated, agency is 'the capacity for social actors to reflect on their position, devise strategies and take action to achieve their desires' (Bakewell 2010: 1694). Although traditional structuration theory places individual agency within the constraints of structural social practices (Giddens 1984), the intertwined nature of structure and agency is often stressed in modern migration scholarship (Bakewell 2010).

The significance of legal status on migrants' lived experiences exemplifies the complicated relationship between these two spheres. Legal restrictions produce tangible structural forces that interact with agentive responses as migrants negotiate the boundary between legality and illegality, asserting life choices within a framework of legal classification that holds empowering as well as obstructive potential. While the role of legal structures in shaping migrants' opportunities is undeniable, it is nevertheless important to note that 'structure is dynamic, not static; it is the continually evolving outcome and matrix of a process of social interaction' (Sewell 1992: 26). Recognition of this interdependence is necessary for a holistic understanding of the state formation of, as well as migrant operationalisation of, legality.

Construction(s) and Consequences of Legality

In my discussion of legality, I define the term 'illegal' as referring to those migrants whose presence and livelihood in a country of residence fails to align with nationally determined parameters of lawful residence – in short, individuals who are not lawfully permitted, under their current conditions, to live within the territory of a specific state.

For the relevant state and migrants, however, the full implications of a legal status are much more complex. The dictionary definition of the term 'legal' makes reference to the multiple meanings nested within a migrant's lawful status. Among its various definitions, legal may mean 'deriving authority from or founded on law', 'conforming to or permitted by law or established rules', 'recognised or made effective by a court of law', or 'created by the constructions of the law' (Merriam-Webster). The terms employed in these descriptions are significant to note. Legality implies compliance and acceptance according to authoritative norms; it is not an inherent characteristic, but rather actively delineated and selectively bestowed by relevant authorities.

Reflecting its constructed nature, immigrant (il)legality also rests on inconsistent classifications. Decisions about who is deemed 'illegal' vary greatly from country to country. As Duvell (2011: 293) explains, 'in the field of migration, the different cultures and policies offer different conditions, constraints and opportunities to immigrants and contribute to varying degrees to the emergence of irregular immigration'. In the U.S., for example, De Genova (2004: 173) argues that that 'illegality' has been 'produced' through the historical construction of immigration law that 'has entailed an active process of inclusion through illegalization', delineating a specific – and restricted – sphere for illegal migrants to exist in American labor markets. Accordingly, within such specific national power dynamics, illegality is significant not for the actuality but rather the *possibility* of deportation that renders migrant labourers at the mercy of their

employers' authority (2004: 179). This economic vulnerability is only one example of the ways in which unequal power relations resulting from uncertain legal status exert a tangible impact upon the experience of undocumented migrants, constraining their individual agency through the threat of expulsion.

Shades of Grey: Variation in the Experiences and Nature of Legality

It is also crucial to recognise the variation(s) in classifications of migrant legality. As Bloch *et al.* (2011: 1294) note, 'people move in and out of different statuses', by overstaying or violating visa terms, a legal migrant one day may be illegal the next. This is especially true for asylum seekers, whose sustained presence in a country of refuge may quickly change from legal to illegal dependent on the state's judgment about the extent and authenticity of their refugee claims (Zetter 2007). Changing policy agendas of successive governments, sweeping asylum drives, and bureaucratic reforms can also produce inconsistent legal thresholds that cause migrants' legality to fluctuate significantly through no action of their own. In the case of the aforementioned Danish legislation limiting marriage migration, Rytter explains that administrators 'are constantly changing the legal landscape – in fact, the rules often change from one day to the next' (Rytter 2011: 12). This type of inconsistency means that legal structures may be perpetually shifting, regularly re-drawing the boundaries of legal and illegal with direct implications for migrants' livelihoods.

Legal status also comes in a multiplicity of 'in-between' forms that fall between full lawfulness and total exclusion. Menjivar (2006: 1000-1008) identifies such realities as 'the grey area between these legal categories', writing that 'this "liminal legality" is characterised by its ambiguity, as it is neither an undocumented status nor a documented one, but may have the characteristics of both'. This potential range of migrant statuses, along with its shades of uncertainty that can leave migrants in various types of legal 'limbo', is important to recognise when analysing the relative importance of legality or illegality to a given individual.

Within the dichotomised legal-illegal debate, there is thus room for a wide range of (il)legal statuses. The experience of legal status – and access to it – can vary greatly within a given immigrant group. Gonzales' (2011) work with undocumented youth in the United States shows how the intensity and visibility of illegal status is strongly mediated by factors of age and generation. Specific skills, educational assets or economic resources may also determine migrants' navigation of legal processes. Gender can play a significant role here as well: Hagan's (2008) fieldwork with Guatemalan migrants in Houston displays how undocumented female migrants' integration in local social networks was limited by their employment as live-in domestics, which considerably precluded community involvement. Compared to their male counterparts, women's knowledge of legalisation was hindered by the unregulated domestic industry as well as their lack of social networks (Hagan 2008). Individual migrant characteristics can, therefore, either act as assets or obstacles to attaining legal status, revealing the highly hierarchical and arbitrary nature of legal prescriptions that create discriminatory tiers of migrants' access to societal belonging.

The Influence of (Il)legality on Family Life

As previously established, legal status has serious impacts on multiple spheres of migrant livelihoods, encompassing the areas of personal, societal, and family life. Legal uncertainty can seriously impact the construction and dynamics of migrant families. Without a guaranteed right to re-entry, migrants separated from their families may be unable to return for even temporary visits without risking permanent exclusion from their new countries of residence (Menjivar 2006:

1018-1019). This can cause great emotional strain, as Menjivar (2006) shows in the traumatic alienation of Central American migrants from their children left behind out of legal and economic necessity. The restrictive terms of legal migration channels may also influence major decisions about family formation, particularly vis-à-vis marriage. As Rytter (2011: 2) explains, ‘marriage migration has become one of the last legal ways in which non-European immigrants can gain access [sic – to] “Fortress Europe”’. Such parameters of legalisation may influence migrants’ marital timing as well as partner choice (Beck-Gernsheim 2011; Timmerman and Wets 2011), imposing an additional structural factor upon personal family decisions.

In addition to shaping familial choices through practical legal considerations, legal structures may also exert normative expectations on migrants’ family decisions. Denmark’s recent ‘24-year rule’ is a prime example (Danish Ministry of Refugee, Immigration and Integration Affairs 2002; 2006). This legislation severely limits the ability of Danish residents to legally bring foreign, non-EU spouses into the country without proving adequate levels of shared ‘national attachment’ to Denmark (Fair 2011). As Rytter explains, these legal restrictions on family migration do not only establish significant tangible impediments to legal entry but also create deeply symbolic parameters for national identity. ‘The current Danish immigration regime,’ he explains, ‘is turning the *territorial border* of the nation-state (bureaucratic decisions about who can and cannot enter the country) into a *moral boundary* that stipulates how to contract marriages and organize family life’ (Rytter 2011: 14, emphasis in original). In its targeting of the transnational marriage practices of specific ethnic minorities, the ‘24-year rule’ is stringent enough that it ‘resembles “social engineering”’ (Rytter 2011: 7).

Similarly, the case of undocumented Central American migrants in the U.S. vividly shows how legal status may be dependent on normative expectations of ‘ideal’ family structures: In court cases for suspensions of deportation, Coutin (2003) argues that migrants’ likelihood of gaining legal status was largely dependent on their perceived ‘deservingness’, determined substantially by their quality of family life as defined by ‘traditional’, hetero-normative standards. This type of legal boundary-drawing demonstrates how the explicit terms of legal migration status are often accompanied by substantial normative implications that exert equally powerful restrictions upon migrants’ agency.

Acknowledging Agency: The Navigation of Legal Structures

Despite such structural impediments, it is important to recognise the potential for migrant agency in the face of legal restrictions. Obstacles of illegality, or ‘liminal legality’, may restrain migrants’ decisions and even day-to-day life, but (il)legal status does not impede migrant livelihoods *in toto*. As Menjivar (2006: 1032) writes, alongside an appreciation of legality’s serious structural effects, understanding the impact of legal status requires recognition of ‘how in turn [migrants] adjust and attempt to conform to the law, possibly redefining structures in the process’. Her work on undocumented Central American migrants in the United States displays ample examples of individuals ‘contributing meaningfully and in diverse forms to their communities, schools, and families’, from artistic outlets to political activism (Menjivar 2006:027-1031). As previously noted, (il)legality is variously experienced by migrants; migrants’ agency is determined not only by their specific legal classification but, *inter alia*, by their support networks and individual attitudes regarding legal status.

Within the diversity of national legal constructions, migrants may also find possibilities for strategic negotiation within immigration law. Bloch *et al.*’s (2011) work with young irregular migrants in the United Kingdom reveals how migrants employ a variety of ‘strategies’ for navigating the constraints and requirements of legal status, using forged documents, overstaying

tourist visas, or buying time with asylum claims. While developed out of necessity, these tactics allow migrants to – with varying success – establish lives in Britain that may not correspond to legal parameters. The case of recent Danish migrants to southern Sweden also exemplifies this creative potential at the intersection of structure and agency. In response to Denmark’s highly restrictive ‘24-year rule’, thousands of first- and second-generation Danish migrants are relocating to southern Sweden in order to exercise their right to spousal choice and legally bring a ‘third-country-national’ partner to reside with them in the EU (Rytter 2011). By invoking their rights to family unification under EU law, migrants are able to set up a livelihood with non-EU spouses who are legally excluded from Danish residence under current legislation (Rytter 2011). Such migration to Sweden may be neither desirable nor advantageous to migrants’ overall livelihoods; for many Pakistani marriage migrants, relocation has taken place due to the absence of other viable or acceptable legal options, even as the move necessitated that migrants ‘redirect their trajectories and future prospects’ (Rytter 2011: 6). While occurring within and in response to legal structures, this negotiation of legal status nevertheless demonstrates, as Schmidt (2011: 85-86) explains, ‘how people can use – or are forced to use – space strategically to uphold aspects of their identity as transnationals’.

By invoking their EU rights to family unification based on their freedom of movement,³ the thousands of Pakistani and Turkish couples who have moved to southern Sweden are also creating new forms of liminal legality through their day-to-day mobility. Rytter’s work with Pakistani couples in southern Sweden shows the emergence of what he calls ‘semi-legal’ status: by residing in Sweden while working and socially engaging across the border in Denmark, migrants are lawfully under-staying in Sweden and over-staying in Denmark in their attempt to balance personal ties, economic opportunities, and legal requirements out of structural legislative necessity (Rytter 2011: 7-8). This type of creative navigation of legal structures demonstrates both the challenges and agentive opportunities presented by immigration laws, underscoring the importance of legality for migrants’ lived experiences and complicating the perceived binary between ‘legality’ and ‘illegality.’

Conclusion

This article has demonstrated the importance of ‘legality’ in shaping migrants’ experiences and opportunities. After situating legal status at the cross-section of structural forces and agentive possibilities, I explored the technical, practical, and symbolic elements of the concept and consequences of legality. From a consideration of the varying importance and form of legal status, I focused on the ways in which legality interacts significantly with migrants’ family life. Finally, I explicitly acknowledged the potential for agency within legal frameworks, showing how migrants are actively and creatively reacting to the challenges of immigration constraints. As this paper shows, ‘being legal’ is an important concern for international migrants and their families. Legality significantly impacts migrants’ daily and long-term livelihoods, shaping decision and opportunity structures, limiting but not precluding the power of migrant agency. This range of legal statuses deserves greater attention from academics and legal authorities alike. In the formation and application of migration law, misleading simplifications of the legal/illegal divide

³ While the right to family life is guaranteed by Article 8 of the European Convention on Human Rights (ECHR), by invoking the fundamental EU right to free movement of labour (Council Directive 2004/38/EC OJ L 158, 30 April 2004), these transnational migrants are able to access family unification rights at the EU level that are stronger than those guaranteed to them as sedentary residents within Denmark’s sovereign borders. For relevant cases addressing the special extension of EU rights to mobile individuals, see *Akerich* (Case C-109/01 *Secretary of State for the Home Department v. Hacene Akerich* [2003] ECR I-9607), *Surinder Singh* (Case C-370/90 *The Queen v. Immigration Appeal Tribunal et Surinder Singh, ex parte Secretary of State for Home Department* [1992] ECR I-4265), and *Metock* (Case C-127/08 *Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform* OJ C 236 of 13 September 2008).

need to be examined with greater complexity; at the same time, opposition to this problematic dichotomisation should not discourage scholars from reclaiming legal discourses to more accurately reflect migrants' realities. The nuanced relationship between migrants' agency and the legal structures under which they are classified is much more than a question of labeling: Legal status shapes national boundaries of belonging and prescribes normative family expectations. The true impact of migrant (il)legality thus extends beyond debates of lawfulness to encompass the full spectrum of migrants' realities within and beyond the legal realm.

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