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Conceptualizing semi-legality in migration research

Agnieszka Kubal

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- analyse migration as part of broader global change
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Abstract

What is semi-legality, and why does it offer a viable alternative to the legality-illegality binary divide? The paper discusses theoretical limits to illegality with reference to migrants – especially those deemed to stand outside the state’s legal system – demonstrating that the division between legal/ illegal is never black or white but woven with different shades of grey: the ‘in-between’ statuses of semi-legality. I argue that semi-legality could be viewed as a multi-dimensional space where migrants’ formal relationship with the state interacts with their various forms of agency towards the law.

This paper utilizes data stemming from 360 qualitative interviews with international migrants in four European countries. Delineating the conditions of semi-legality I discuss its various empirical contexts: (1) ‘incomplete’ responses to regularisation programmes - de facto fulfilling the legalisation conditions, yet facing barriers to formally (de iure) corroborate this; (2) balancing between the temporality of residence in various EU countries: understaying in some and overstaying in others; and (3) the nexus with employment – where migrants’ residence in a country is lawful, but their work exceeds the restrictions permitted by their visas. I juxtapose those against the subjective experiences of semi-legality and migrants’ own interpretations of their position vis-à-vis state legal frameworks.

Non-technical summary

What makes a migrant legal or illegal? This paper suggests that rather than a black and white distinction between legal and illegal, there is an ‘in-between’ category of ‘semi-legal’. Many migrants are trapped in legal ambiguity. The paper attempts to define this idea by looking at migrants’ formal relationship with the state and the various ways in which they can act with regards to the law. The paper includes migrants’ own interpretations of where they stand regarding state legal frameworks.

This paper uses data from 360 interviews with international migrants in the Netherlands, Norway, Portugal and the United Kingdom. The author discusses three main conditions of ‘semi-legality’ in which migrants 1) meet the conditions of legalisation, but are unable formally to corroborate this; 2) move between various EU countries, understaying in some and overstaying in others; and 3) reside legally in a country, but work beyond the restrictions permitted by their visas.

Keywords: semi-legality, illegality, migration, European Union, Morocco, Ukraine, Brazil

Authors: Agnieszka Kubal, Research Officer, International Migration Institute, University of Oxford; email: agnieszka.kubal@geh.ox.ac.uk

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[P]articular categories and assumptions, generally taken for granted in the law, may limit the possibilities of those whose lives are shaped by the law. Progressive struggle for social change...comes in part through resistance and transformation of seemingly taken-for-granted categories and terms. Bryant G. Garth & Austin Sarat (1998)

1 Introduction¹

The most common way to define ‘illegal’ or irregular migration would be against the benchmark of migration law. A person who contravenes the law is ascribed an ‘illegal’ or irregular status. This ‘method’ seems dubious for at least two reasons. First, according to classical jurisprudence a person cannot be illegal. Acts are illegal. For example, driving in contravention of the Highway Code does not produce illegal drivers but rather counts as illegal driving (cf. Clayton 2010; Triandafyllidou 2010: 2–3). Second, the category of ‘illegality’, as used analytically with reference to migrants, has recently become dangerously broad. Unauthorised, clandestine entry or overstaying one’s leave to remain (Baldwin-Edwards 2008) are put under the same umbrella as much more legally ambiguous situations.

The category ‘illegal’ or ‘irregular’ is often stretched to include those who intend to make an asylum claim but have not yet done so. Dauvergne (2008) argues convincingly that although refugees are not to be punished for extra-legal entry, if their asylum claim gets rejected and an appeal is launched they find themselves in a legal limbo. Another example of the stretching of the ‘illegal’ label is that in the majority of legal regimes it is acceptable to have legal permission to remain (‘leave to remain’) but restrictions on work rights; this becomes particularly common with some types of temporary residence permits such as student or tourist visas. Those working outside their visa restrictions therefore form another rather ambiguous category – like students working beyond the permitted 20 hours a week, or tourists engaging in paid employment (Ruhs and Anderson 2010a): ‘thus for 20 hours a day [*sic*] they are perfectly legal immigrants but for the remaining 3 hours they are clandestine immigrant workers’ (Düvell 2008: 488). Those Eastern Europeans whose countries joined the European Union in 2004 and 2007, who migrated to one of the ‘old’ EU member states, shared the rather ambiguous legal status for several years during the transition period. They were EU citizens with the right to enter and reside in another member state but without (full) access to the labour market. This legal incoherence extended to over 73 million EU citizens in 2004, and by 2007 covered an additional 29 million.² For lack of a better term, legal scholars using the classic binary categories saw those migrants as legal residents but illegal workers (Currie 2009; Triandafyllidou 2010: 4). Suffice to say many of those ‘illegal’ workers received contracts, paid taxes and duly cleared their national insurance contributions.

The academic literature throws up many more such categories: in-betweens (Schuck 1998); mixed status households (Chavez 1998; Ngai 2004); liminal migrants (Menjívar 2006);

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² Data according to EuroStat, http://epp.eurostat.ec.europa.eu/portal/page/portal/statistics/search_database accessed on 24 January 2012. The restrictions for countries which joined the European Union in 2004 expired on 1 May 2011. For Bulgarian and Romanian citizens they are still in place. The final date for lifting the restrictions is 1 January 2014.

learning to be illegal (Gonzales 2011); semi-compliant (Ruhs and Anderson 2010a); legally illegal (Rigo 2011); civically stratified (Morris 2002); quasi-legal (Düvell 2008); a-legal (Lindahl 2010) or semi-legal (He 2005; Kubal 2009, 2012; Rytter 2012). The employment of these categories was however fragmented and they were developed largely in isolation from one another, somewhere on the outskirts of the mainstream migration-illegality theoretical literature (Portes 1978; Espenshade 1995; de Genova 2002, 2004; Dauvergne 2008; Baldwin-Edwards 2008; Beacon 2008; Donato and Armenta 2011; Cvajner and Sciortino 2010; Willen 2007; Bloch et al. 2011).

The pursuit and conceptualisation of semi-legality as a viable alternative to the highly unsatisfactory binary opposition between legality/illegality is still missing. This paper attempts to make a first step towards filling this gap. I begin by discussing the theoretical limits to illegality with reference to migrants – especially those who are deemed to stand outside the state’s legal system – demonstrating that the question of legality/illegality is never black and white but woven with different shades of grey: this is the ‘in-between’ statuses of semi-legality. In the second part of the paper I focus on semi-legality to explain the complex and nuanced situation of many migrants trapped in legal ambiguity. In line with the tradition of socio-legal empirical research I give voice to those whose ‘lives are shaped by law’ (Garth and Sarat 1998), utilising the data stemming from over 360 qualitative interviews with international migrants in four European countries. Delineating the conditions of semi-legality I discuss its various empirical contexts: 1) ‘incomplete’ responses to regularisation programmes (cf. Hagan 1994, 1998); 2) balancing between the temporality of residence in various EU countries: understaying in some and over-staying in others (cf. Chavez 1998; Rytter 2012); and 3) the nexus of residence and employment (Kubal 2009, 2012; Gonzales 2011; Ruhs and Anderson 2010a) – in which the resistance to the binary dichotomy legal/illegal was particularly helpful to account analytically for these legally complex situations. I juxtapose those against the subjective experiences of semi-legality and migrants’ own interpretations of their position *vis-à-vis* state legal frameworks, marked by ambivalence, open challenge to categories that define them, but also practical acceptance of them.

2 Methodology

This paper is based on fieldwork among Ukrainian, Moroccan and Brazilian migrants in one or more locations across four European destination countries. The Netherlands and the United Kingdom were selected as representative of those receiving countries in Europe with established immigration histories and (recently) rather exclusionary migration regimes (Apap 2002; Engbersen et al. 2011; Tom 2006; Ruhs and Anderson 2010a,b). Norway and Portugal, on the other hand, have only recently started attracting relatively stable migration flows and were generally thought of as more open: Portugal for example had five migration regularisation programmes between 1992 and 2004 (Fonseca 2000, 2001, 2004; Horst et al. 2010).

The data collection was conducted under the auspices of the THEMIS project (*Theorizing the Evolution of European Migration Systems*). THEMIS, focusing on migration to Europe from three origin countries – Ukraine, Morocco and Brazil – aims to explain the divergent migration dynamics and contribute to bridging the theories on initiation and continuation of migration (Bakewell et al. 2012). The focus on Ukrainians, Moroccans and

Brazilians, with whom the material presented in this paper has been gathered, was therefore dictated by the rationale of the project's research questions. However, this random selection of migrant groups also enabled me to respond to Coutin's (2000) and others (De Genova 2002; Ngai 2004; Willen 2007; Gonzales 2011) call to focus the research on migrants' relationship with the law (qua socio-political condition), without predetermining the specific groups in focus (as in research on undocumented migrants qua 'illegal aliens', de Genova 2002). This allowed me to engage with the ethnography of the legal process rather than of a particular group (Coutin 2000: 23). In doing so I turned away from studying unauthorised migrants to a more focused examination of (and ultimately a challenge to) the mechanisms that produce and sustain what many scholars term 'migrant illegality' – as part of the politics of law, which involves controls over definitions and categories. My conceptualisation of semi-legality is therefore a resistance against, alternative to, and transformation of seemingly taken-for-granted categories and terms (Garth and Sarat 1998).

I analyse material resulting from eight months of data collection, and stemming from over 360 in-depth interviews with migrants, representatives of migrant organisations and key stakeholders, as well as a literature study. Each interview lasted between 1 and 2.5 hours. They were conducted in origin-country languages (Portuguese, Arabic Moroccan dialect, Russian and Ukrainian), and then transcribed and translated into English. The material was anonymised, coded and managed using NVivo software. In the empirical part of the paper I particularly draw on the section of the interviews relating to migrants' relationship with the legal system of the host country, their reflections on their legal status, its changes, knowledge of and responses toward legalisation programmes, and the role of migrant networks in their socio-legal integration (cf. Kubal2012).

3 Theoretical limitations to illegality

Applying the most common method of defining irregular, illegal migration – with reference to migration law – all the examples of the rather ambiguous statuses presented in the introduction could at face value be termed as 'illegal'. There is however something highly unsatisfactory and disturbing about such crude division. I discuss two sources of such uneasiness: one conceptual (referring to illegality as a socio-legal construct) and one analytical (referring to illegality as an investigative category).

3.1 Nuancing the concept of illegality

Illegality has been conceptualised in many different ways by various migration scholars (de Genova 2002; Baldwin-Edwards 2008; Düvell 2008; Cvajner and Sciortino 2010; Espenshade 1995; Donato and Armenta 2011; Guild 2004; Portes 1978; Triandafyllidou 2010): this was often to its advantage – expanding the semantic borders of the term – but quite often also at the cost of its conceptual clarity.

The legal paragraphs usually delineate who is 'legal', leaving 'the rest' as *potentially* illegal (Guild 2004: 3, my emphasis, cf. Couper, Santamaria 1984). As a result, the definitions of illegality, as they often appear in use, border on tautology. For example, Düvell (2008) – substituting illegal migration with his preferred term 'clandestine migration' – then defines it in self-referential fashion by 'clandestine exit, journey and entry, clandestine residence and clandestine employment' (Düvell 2008: 486). Other conceptualisations, in a more rigid

manner, see formal illegality as ‘the product of immigration laws’ (de Genova 2002: 439). However, illegality is not static: with or without formal changes in the law people may move between different statuses with varying degrees of agency and expedience (Jordan and Düvell 2002; Anderson and Rogaly 2005). Cvajner and Sciortino observe that ‘irregularity is a status that may be both attained and left behind in different ways’ (2010: 214) and as such, they argue, undocumented migration can take a number of different paths. Because it is a fluid and flexible status, and its assertion quite often pertains to the discretion of a law enforcement or immigration officer (cf. Guild 2004), it begs the following question: how exactly does the law articulate the categories of differentiation that constitute individuals?

The question remains unanswered. In fact many scholars contribute to increasing the conceptual heterogeneity of the term, observing that:

bogus asylum-seekers (Black 2003), economic refugees or transit migration, became codes for illegal migration [...] the concept often overlaps with other controversial forms and practices of migration such as human smuggling, human trafficking, but also with the flow of refugees (Düvell 2008: 484).

Further complications arise from identifying within the concept of illegality a real plethora of conditions such as ‘illegally entering but residing legally’, ‘illegally entering, illegally residing but in legal employment’, ‘legally entering, legally residing but in illegal employment’ (Düvell 2008: 488; cf. Triandafyllidou 2010) – to name just a few. By adding new variables depending on accustomed discursive practices, political opportunity structures, or a researcher’s definition of the subject, the concept ‘illegal migration’ is in danger of becoming a sponge that soaks up every, even mildly aberrant aspect of the migration and law nexus relevant to the development of ‘unwanted’ migratory movements, paying little or no attention to the legal ambiguities and nuances. Its usefulness becomes particularly challenged when confronted with the borderline, liminal (Turner 1974) cases, as I demonstrate in the second part of the paper.

It does not mean, however, that the conceptual problems around ‘illegality’ have been left unattended or have not inspired a deeper reflection (cf. Guild 2004). De Genova in his theoretical exposition on illegality and deportability in the everyday life of migrants (2002) explains how:

the term undocumented will be consistently deployed in place of the category ‘illegal’ as well as other, less obnoxious but not less problematic proxies for it, such as ‘extra-legal’, ‘unauthorized’, ‘irregular’, or ‘clandestine’. Throughout the ensuing text, I deploy quotes in order to denaturalize the reification of this distinction wherever the term ‘illegality’ appears, as well as wherever the terms ‘legal’ or ‘illegal’ modify migration or migrants (De Genova 2002: 420).

This however offers a half-baked solution, which does not solve the conceptual problems of plurality of meanings. Surely, the debate should not be down to legal taxonomies, labels or nomenclatures pertaining to illegality, as much as closer scrutiny of the concept itself. The choice between calling migrants ‘illegal’ or ‘undocumented’ is of secondary importance and will not resolve – on the contrary is in danger of clouding – the actual trouble with this category. Namely that ‘illegality’ in migration (and its derivative, ‘less-obnoxious’ categories) is used far too often, without proper questioning; they are applied far too easily while in fact they denote many different legal statuses.

Reliance on such a heterogeneous and internally conflicting conceptualisation of illegality in migration demonstrates its inherent problem: it promises to explain too much while it actually explains too little. Binary, black and white oppositions have little reference to real-life, empirical phenomena. By invoking semi-legality, I argue together with other scholars (Chavez 1992; Gonzales 2011; Menjívar 2006; Ngai 2004; Rico 2011; Ruhs and Anderson 2010a; Rytter 2012; Willen 2007) that migrants are hardly ever just 'undocumented', and one should look at the variety of semi-legal statuses placed on a continuum between two poles 'legal–illegal'. This is not merely a discursive task or a quibble, but a closer reflection of the empirical legal reality. The state's seeming ignorance of the multiplicity of 'in-between' categories and their indiscernibility in scholarly debates reflects that they have been 'blissfully', albeit inappropriately, hidden under the 'illegality' umbrella.

3.2 The spheres of (il)legality

The broad, un-reflexive use of the term 'illegality' to modify migration and migrants (cf. De Genova 2004) provokes my analytical scepticism toward this category. In empirical reality, when conducting fieldwork with migrants in various situations and circumstances, the issues of status or legality very often take a central position only because they are placed there by us, the researchers (cf. van Meeteren et al. 2009). As Coutin (2000) observes: '[o]n a day-to-day basis, their [migrants'] illegality may be irrelevant to most of their activities, only becoming an issue in certain contexts' (Coutin 2000: 40). What follows is an implicit general consensus that the adjective 'illegal' does not belong to the descriptive domain of the whole of migrants' lives, but only to their relationship with states' actions (cf. Cvajner and Sciortino 2010: 395), and – as with citizens – it is a contextual relationship.

However, in the theoretical accounts of 'illegality' with reference to migration one can broadly distinguish two positions assigning different degrees of importance to this interaction: one argues that the relationship with the state is the defining position that has consequences for any other relationships migrants form in the host country (cf. Menjívar 2000, 2006). The second one asserts that illegality, as a partial category denoting one's juridical status, is 'a pre-eminently political identity (...) that entails a social relation to the state' (De Genova 2002: 422), which should not pervade or transpose all forms of social interaction, as this is not its place, nor purpose.

Representing the first position, Menjívar (2006) views society as being comprised of many different, semi-autonomous spheres (cf. Moore 1973; Galligan 2007) including market, family, work, social life, etc. She maintains that one's relationship with the state via immigration law affects one's relationships in all spheres of society, as migrants' interaction with the body of law which governs their immigration status impinges on many vital spheres of their existence, such as their social networks and family, the place of the church in immigrants' lives, and the broader domain of artistic expression (Menjívar 2006: 999–1000).

Therefore, while Menjívar views society as being comprised of different spheres, she identifies that there is a hierarchy of spheres, with immigration law asserting its dominant position, echoing the famous 'law is all over' (Sarat 1990). Illegality or exclusion from the sphere of immigration law has consequences regarding full or partial exclusion from one's membership in society (Menjívar 2006: 1004). This asserts the power of the nation-state in

determining who stands inside, who remains outside and who is stuck 'in-between' (Schuck 1998).

While Menjívar (2006) clearly makes a link between migrants' standing before immigration law and their relationships with the rest of the society, little evidence is provided to explain why and how migrants' exclusion by immigration law would necessarily, and in principle, be transferred to other spheres. Bolderson (2011), when discussing migrants' access to welfare, strongly contests this 'transfer' altogether by making a point against the 'blurring' of the various spheres of social policy realisation and immigration law: 'welfare policies need to be independent of other policies and this is not the case when migrants' welfare entitlements depend on status constructed by immigration policy' (Bolderson 2011: 223). Along similar lines it has been argued that while in certain legal contexts the doctrine of illegality may hinder migrant workers from standing up for their employment rights (for the UK cf. Ryan 2006: 45), this is not the case in other jurisdictions, where employment law takes a more proactive role superseding immigration law limitations (cf. Gleeson 2009, 2010). Finally, drawing on international human rights, the omnipotence of 'illegality' as defining the status of migrants stands in clear contradiction with the spirit and letter of the Universal Declaration of Human Rights which establishes in Article 6 that *every person* has the right to recognition before the law, and in Article 8, that *every person* has the right to due process (LeVoy and Verbruggen 2005).

In contrast to Menjívar, Cvajnar and Sciortino (2010) theorise illegal migration through the lens of differentiation theory. While they also view society as constituted by various interacting and communicating (Luhmann 1995) subsystems, they do not assume that their relationships are hierarchical (Cvajnar and Sciortino 2010: 396).

They agree that migrants' legal status is situated in the subsystem of state law; however, people's irregular immigration status may affect their social interaction in the other subsystems –to the extent that the migrant–state relationship limits one's agency in other spheres (Cvajnar and Sciortino 2010: 397). With reference to an individual migrant: illegality before immigration law does not define the whole 'self' but an aspect of it. Relationship with the state is just one aspect of all social relationships and transactions that migrants experience, therefore a migrant's legal status is significant, or relevant, to the extent, and if, the legal reality constrains the relationships and actions of the actor (Coutin 2000). Cvajner and Sciortino (2010) seem astonished by their 'discovery' of the seeming contradiction, known for years to legal anthropologists (Comaroff and Comaroff 2006) and socio-legal scholars interested in the structure of legality (Silbey and Ewick 1998) that:

Sociologically speaking, the most interesting feature of irregular migration is the evidence it provides about the possibility of being fully excluded from the political system and still being able to carry on a great deal of social interactions. Irregular migrants are able, albeit with much more existential difficulties, to generate income through work, find places to sleep, fall in love (and sometimes reproduce and raise children), establish personal relationships, buy household appliances and even represent themselves in the public space (Cvajner and Sciortino 2010: 398)

While migration scholars might still need to come up against the theoretical exhaustion that 'the law is all over' (Sarat 1990), empirically driven socio-legal scholarship provides abundant analysis of the 'network of human and nonhuman agents that, together, push

back against' the orthodoxy of the social construction of law, and 'in the process make their own moral – as well as material – claims known' (Maurer 2004: 848).

Just as with ordinary citizens, immigrants' experiences of illegality more or less depend on specific, situational contexts – that of a workplace, hospital, school (or other educational institution), or the courtroom – and only become salient when matched with experiences of exclusion (Gonzales 2011). The laws that define migrants are multiple, intersecting and indeterminate (Coutin 2011), therefore their meaning depends on the actions of the state and non-state entities charged with carrying out the law. This is why Bosniak observed that 'status non-citizens are in fact not entirely outside the scope of those institutions, practices and experiences that we all call citizenship' (2008: 3). A migrant who entered as a student, but is working in breach of immigration conditions attached to his/her status may continue to reside in the host country and access medical help or an educational institution 'based on the facts of their personhood and national territorial presence' (Bosniak 2008: 3), but may experience vulnerability when it comes to standing up for his/her rights in an event of a dispute with the employer.

Similarly, the same contextual experience may be realised *vice-versa* with respect to legality: undocumented work, or work semi-compliant with visa regulations is often accompanied by legitimate tax and insurance contributions; undocumented immigration status would not prevent people from receiving immediate medical assistance or having due process rights in criminal proceedings (Coutin 2011); research demonstrates that in many US states access to education or in-state tuition fees are afforded without the recourse to a documentation check (Abrego 2008; Gonzales 2011). These, in turn, enable participation in various transnational, political, economic, and social spheres that generate new claims of substantive rights (Bosniak 2008; Coutin 2011). In Europe after the rulings of *Metock* [2008] and *Zombrano* [2011] by the European Court of Justice (ECJ), and in the US after the 2006 social movements for regularisation and the debates on the DREAM Act (2011), illegality of one's status produced as an effect of law, but also sustained by social discourse, seems to be less and less totally self-determining.

The closer reliance on semi-legality might therefore be viewed as shifting the focus from illegality to various forms of legality that exist concomitantly with one's immigration status and interact with it in multiple ways. My aim is not to trivialise illegality nor make it benign. On the contrary, the proliferation of various semi-legal statuses demonstrates that the 'impossible subjects' (Ngai 2004) 'hold on' to whatever there is available, and do whatever it takes to get closer to legality, in the sense of rightful and regularised status. Semi-legality therefore presents a more analytically promising avenue for unpacking the presumed 'illegality' into the richness and multifacetedness of various statuses, roles, relationships and identities that constitute one's self.

4 Semi-legality

Although the term is not new and has been used in previous migration scholarship, there is a growing need to conceptualise semi-legality more explicitly. The need is even more acute because of the inherent legal abstruseness of the term, the 'messiness' characterising all borderline cases – as in the situation of Salvadorans in Temporary Protected Status in the US (Menjívar 2006); undocumented Mexican parents living with their US- born children (Chavez

1998); or the '1.5' generation of Latinos who discover their irregular status once they leave full-time education in the US (Gonzales 2011).

In common usage, semi-legality has often simply been shorthand for 'not exactly legal.' The perceived irrelevance of the term for describing one's immigration status, due to its not being a formal legal category, as well as its *de facto* vernacular origins, have bred ignorance among researchers which arises not from the strangeness of the object of investigation, but from its very transparency. Living with the concept, so thoroughly suffused with its assumptions (so much so that it is even hard to recall when we adopted it), one tends to lose the critical perspective which makes the investigation of migrants' relationship with the law more than simply a recital of what everyone already knows. The common sense of things, the knowledge everyone is sure to have, is precisely the starting point for the investigation.

I argue that semi-legality should be viewed as a multi-dimensional space where legal status – migrants' formal relationship with the state – interacts with various forms of their agency toward the law: their behaviour and attitudes (cf. Kubal 2012). Semi-legality can therefore denote a range of migrants' interactions with law, demonstrating that the divide between legal and 'illegal' is not a strict dichotomy but rather a tiered and multifaceted relationship with degrees of membership that distinguish beyond citizens, permanent legal residents, temporary legal residents and 'other' migrants (cf. Calavita 2006; Guild 2009). The analytical usefulness of semi-legality stems from the fact that it successfully challenges the black and white divisions within the migration and law debate and demonstrates heterogeneity of the 'other migrants' category. Paraphrasing Calavita (2006), the scholarship affirming the 'conceptually clear [and] legally consequential' (Brubaker 1992: 21) distinctions between legality and illegality is generally based on a conceptualisation of legality as a formal status conferring a set of legal rights. In contrast, much of the literature that undermines the legality/illegality binary invokes a broader conceptualisation of substantive legality, that is: 'legality in action' and finds that the boundaries around it are not as 'conceptually clear [and] legally consequential' as the nominal definition of legality would suggest, particularly as applied to migrants, women and people of colour (cf. Calavita 2006: 416).

The dimensions of semi-legality therefore extend beyond formal immigration status. At the level of behaviour, semi-legality captures the potential range of migrants' agency towards the law accompanied by shades of uncertainty that leave them in various types of legal limbos. Given this coupling between the law's indeterminacy and its enforcement for citizens and immigrants alike, the quotidian 'legality' often corresponds with a place where processes are fair, decisions may be reasoned, and rules known in advance, but at the same time it is a space where justice can be achieved only partially – where public defenders do not show up, single mothers cannot receive income support (Zalewska [2008]), judges may act irrationally or disproportionately, and the 'haves' come out ahead (Silbey and Ewick 1998; Silbey 2010: 476).

Menjívar (2006), using the term 'liminal legality', identified the multiplicity of 'in-between', semi-legal forms of behaviour that fall between full lawfulness and legal exclusion (at the opposite ends of the spectrum). She recognised such reality as 'the grey area between the legal categories', characterised by conditions that are neither undocumented nor documented, 'but may have the characteristics of both' (Menjívar 2006: 1008), inveighing against the established distinction as concerns who ought to be where. Semi-

legality as an analytical construct is fuzzy at the edges, it reflects that borders between legality and illegality are: 'difficult, if not impossible to locate' and it is clear that both citizens and migrants operate at times 'as if the boundaries did not exist' (Benton 1994: 229). Plurality of human behaviours does not fall snugly on either side of the divide between legality and illegality (Lindahl 2010: 10), which calls into question the ways in which legal orders draw the distinction between these two. Semi-legality therefore comes in useful as a heuristic device to differentiate between the various forms of statuses, behaviours and attitudes on the multi-tiered continuum between legal and illegal.

Finally, semi-legality is useful when interpreting and making sense of migrants' narratives regarding their own relationship with the legal system of the host country. Although the divergence between what people think and what people do is a well-documented paradox in social science (cf. Kubal 2012), semi-legality casts more light on this gap between normative expectations and peoples' everyday experiences. Conceptualising semi-legality subjectively I drew on Michel Foucault and Michel de Certeau, whose work suggested that investigations of the law's power are most fruitful not at the level of institutions and the state, but at the level of lived experience, where the power is exercised, understood and sometimes resisted. Following from Foucault's conviction that power relations are most interesting to investigate at the sites of resistance (Foucault 1992), semi-legality is exactly such a site of contestation of the seemingly overwhelming power of the state to determine one's status. It is expressed via 'popular procedures', 'ways of operating', by which migrants (as well as citizens) 'manipulate the mechanisms of discipline and conform to them only in order to evade them' (de Certeau 1984: xiv). Legality, the law, 'legal' at the level of lived experience are recognised, resisted and reconstituted by a wide variety of ordinary people going about their lives (cf. Mezey 2001). The lived and expressed semi-legality brings to light the arguments invoked 'by the dispersed, tactical, and makeshift creativity of groups or individuals *already caught* in the nets of "discipline"' (de Certeau 1984: xiv–xv, my emphasis).

5 Conditions of semi-legality

Moving beyond the theoretical presentation of semi-legality, I now turn to the empirically observed conditions of semi-legality that come both from the literature and the empirical material.

5.1 'Incomplete' responses to regularisation programmes

The literature suggests that one of the conditions of semi-legality stems from migrants' incomplete responses towards regularisation programmes (or the so-called amnesties, cf. Coutin 2000; Hagan 1994, 1998). This is often the case when migrants essentially fulfil the criteria set out in the legalisation legislation (e.g. length of stay, employment duration) but their access to change of status is hindered by lack of formal proof, lack of information or the intersectionality of thereof with other structural conditions such as gender, age or access to support networks. Hagan (1998) demonstrated that while the move to regularisation instigated by the Immigration Reform and Control Act in the US (IRCA, 1986) was 'open' to Guatemalan women (and many of them could *de facto* fulfil the legalisation criteria) on an equal footing with Guatemalan men, their isolated employment as live-in domestics, conditioned by gender roles, *de iure* locked them in semi-legality. This revealed

how individual migrants' characteristics and their structural positioning became intrinsic features of semi-legality, demonstrating the highly hierarchical nature of legal prescriptions that created discriminatory tiers of belonging within migrant populations (cf. Salcido, Menjivar 2012).

Our interviews showed that employment in the informal sector, usually associated with a strong gender role division, was indeed a decisive factor in constraining steps towards legalisation. J, a female migrant from Brazil living in Portugal speaks for many live-in carers. Although her employer insisted that J receives a social security number and partakes in the ongoing regularisation programme, she refused to give her an employment contract, which effectively stalled the process:

My boss called me last week and said 'See me, we will try to clarify the social security number for you [to enable regularization].' Then, I said to myself: "I do not have a contract ... I never had a contract for looking after her father. If I have no contract, I am nothing." The employer told me that her accountant had not explained it this way and I tried to argue that to have the social security number I have to have a contract, but she disagreed. You see how difficult it is... (J, female, Brazil-Portugal).

In contrast, many male Ukrainian migrants to Portugal took advantage of earlier regularisation programmes because working on construction sites, in close spatial and cultural proximity with other Eastern Europeans, they could rely on exchange of information. Although many of them also worked without the formal contract required for regularisation, they developed an ingenious strategy of proving their residence in Portugal before the 'cut off' date (30 November 2001) by going to local post-offices and taking proofs of remittance transfers they made to their families in Ukraine. One respondent explained on behalf of his colleagues:

Someone, don't remember who exactly, helped me to find the proof [of residence] – by going to post office and looking for old logs of me sending money to Ukraine. By now I knew well those people working there, who confirmed that I had money sent. [They] called the post office and asked if they had proofs of the sent faxes. Then many other colleagues did the same... we all searched for our papers because we were already here before 2001 (V, male, Ukraine-Portugal).

However, aside from gendered employment roles which conditioned access to support networks, the empirical material also brought attention to other factors that stalled legalisation and locked migrants in the status of semi-legality. One of them was the lack of information about a certain regularisation programme: not necessarily due to the migrants' limited access to information but rather the authorities' interest in not popularising it. The 'legacy' programme in the UK (2007–2011), which dealt with outstanding asylum case records made before the new asylum model (NAM) took over assessing asylum claims in March 2007, is not common knowledge.

The 'legacy' was defined as all asylum cases that were launched before March 2007 but which remained either incomplete or had not been processed by regional asylum teams. In other words the programme dealt with a serious backlog of cases, giving consideration to 'residence accrued' as a result of UK Border Agency (UKBA) delays. The reasons for the backlog were often quite embarrassing for the authorities. Under the Freedom of

Information Act 2000, UKBA revealed that many of the outstanding asylum application cases were mishandled, where an example of mishandling included UKBA losing the file, losing the application, or failing to respond to correspondence. By September 2011 UKBA reviewed over half a million unresolved cases, out of which 36 per cent were granted some form of leave to remain, be it limited or indefinite. One of our interviewees, an immigration lawyer in the UK, shared her experience with this 'silent legalisation':

A: Well the majority of cases which I am handling are the legacy cases. But not many people know about it as the government is not coming forward with it. Officially there is no amnesty in the UK, you don't hear about it in the media, but this legacy it's like an amnesty for people who came before March 2007 to claim asylum. And in the majority of the cases, if the Home Office believes they have been here all that time, they haven't had any problem with the police; they get indefinite leave to remain. That's my experience.

I: Why is the government not open about it?

A: I think it's because of how many people are eligible for this amnesty, it may be 450,000. (S, female, UK)

The analysis of the empirical material suggests that such incomplete responses to regularisation programmes, as one of the defining conditions of semi-legality, are quite often part and parcel of the law enforcement – the prevailing feature of the classical conundrum between the 'law in the books' and the 'law in action' (Pound 1910). One respondent summarised the situation in the following manner:

From all of us here, migrants, there are those who have legal status, others who have not, but there is also a third group – many who have not legalised (B, male, Morocco-Portugal).

5.2 On the move: between overstaying and understaying

This asymmetrical regularisation, demonstrating the arbitrariness of borders between eligibility and exclusion as an important condition of semi-legality is often accompanied by more explicit geographical volatility, with the constant 'on the move' experience of migrants. This condition of semi-legality particularly reveals itself in the European context: with some (national) borders removed, others strengthened, and yet others renegotiated. This important feature of semi-legality has been captured by Rytter (2012) with relation to transnational couples sharing their lives between their formal residence in Sweden and work and family life in Denmark. Rytter conceptualised semi-legality when studying migrants' family life as the 'outcome of the differences between Danish and Swedish legislation (...) a condition when married couples move between legal and illegal states of being' (Rytter 2012: 97).

Rytter's ethnography demonstrated how migrant families responded to the social engineering of the Danish immigration regime in 2002, which aimed to curtail the number of transnational marriages and family reunifications. As a result, couples who were legally prevented from settling in Denmark invoked European law as a creative solution to restore 'normal' family life. Nonetheless they always had to be vigilant not to transgress the certain legally defined periods of residence: not to 'overstay' in Denmark or 'understay' in Sweden (Rytter 2012: 98).

Three (out of the four) destination countries where we conducted the research belong to the Schengen area, with seemingly no internal borders. This enabled me to take Rytter's condition of semi-legality as the starting point, and then elaborate on it, drawing on the richness of our empirical material relating to our respondents' experiences of navigating different European borders. Analogous circumstances – though no longer confined to the motives of family life – of overstaying in one country versus understaying in another, emerged from the interviews as another important and underlining condition of semi-legality.

Many of the – at face value 'undocumented' migrants – would have some form of identity documents attained in one or other EU member state:

When I asked her whether her brother helped her moving to Norway she tells me that she did not need help. As she had a residence permit in Germany, she could go where she wanted to. The first two years she lived in Norway, she stayed here as a tourist, with German papers (R, female, Morocco-Norway).

Frequently (although the scale of this phenomenon exceeded our estimates), when asked about migration status, our interviewees would point to their documents attained earlier on in their migratory experience. Portugal, in the sample of studied European countries, appeared as the country with the most generous history of regularisation programmes in the first half of the 2000s. This enabled many of the interviewed Ukrainians or Brazilians to attain temporary or permanent resident permits. However, when the economic conditions worsened due to the most recent economic downturn of 2008–2009, and the employment opportunities in the Mediterranean became limited, many of the migrants decided to take Europe as the framework of their choice and move elsewhere in search of work.

According to EU law, the holder of a residence permit (or a long-stay visa, i.e. exceeding three months) obtained in one EU member state is entitled to move freely within other states which comprise the Schengen Area for a period of up to three months in any half year (OJ L 85, 31 March 2010: 1). The recent Regulation (EU) No 265/2010 of the European Parliament and of the Council of 25 March 2010 amended the Convention Implementing the Schengen Agreement and Regulation (EC) No 562/2006 as regards movement of persons with a long-stay visa to the effect that 'the right of free movement [...] shall also apply to aliens who hold a valid long-stay visa issued by one of the Member States'. The legislative changes therefore followed what has been constituted as practice by many 'secondary' migrants leaving their 'original' EU country of residence in search of work (McIlwaine 2011). This is the story of M, who resides in Norway with an Italian residence permit. His story is representative of those nameless migrants, who are ever vigilant not to overstay their presence in one territory and understay in another.³

M, upon obtaining residence documents in Italy in one of the regularisation programmes, was working as a construction worker. Then the project came to an end and he had to find new work, which was difficult in Italy at that time. In 2007 he boarded a plane to Norway. In one of the bigger Norwegian cities he found alternative employment; he is

³ A number of facts have been changed to make it harder to identify this individual due to small numbers of Ukrainians in Norway. Due to the Schengen-wide application and consequences of the time-limited, albeit still transferrable, free movement provisions for third-country nationals, the countries of Italy and Norway are of secondary importance here, and they could effectively be replaced by Spain–Netherlands, Poland–Germany, or Italy–Belgium.

professionally valued in the local community and proudly shows many references. According to EU law M has to make sure however that he does not stay in Norway for longer than three months in any six-month period: he has to make sure he returns to Italy for the remaining time in the year. Otherwise, in accordance with Directive 2008/115/EC, he 'should be required to go to the territory of that other Member State immediately' (OJ L 85, 31 March 2010: 2). Working in construction, balancing various small and medium jobs and travelling to Italy is not an easy task and obviously comes at a cost. M, in fact, has been living under this temporary protected status in Norway for the last five years, and he admits that he hardly ever has any time to travel to Italy. We asked whether he has ever been challenged by the police or immigration authorities on the duration of his stay in Norway – he replied that since he had no stamp in his passport when he arrived in Norway the authorities could not really hold this against him:

I: You have been living in Norway for five years now, have you ever been checked by the police or immigration?

I: You know, I was checked only once [...] After some questioning they drove together with me to my place in order to check my passport...But it is not illegal to stay in Norway with an Italian residence permit. (M, male, Ukraine–Norway).

M admitted that he was trying to register his employment in order to give his residence in Norway a more permanent dimension. On several occasions he applied to the Norwegian Directorate of Immigration (UDI) in order to obtain a work permit. He submitted evidence of vocational qualifications from Ukraine and a job contract. At the final stage he waited over a year to receive an answer, which was negative. With the rejection letter he received a note urging him to leave Norway within the next 48 hours. M challenged this decision:

I asked UDI to show me in the law, in print, black on white, where does it say that as a Ukrainian citizen with a residence permit in Italy I cannot stay in Norway (M, male, Ukraine–Norway).

The immigration authorities could not satisfy this request. As a result M continues to lead his life between Norway and Italy to the detriment of his business. He pays taxes in Norway, yet to the authorities he is just a temporary resident:

I am a Ukrainian citizen with a residence permit in Italy, and [I] stay in Norway as a tourist (M, male, Ukraine–Norway).

5.3 Employment beyond visa restrictions

The example of M and many other migrants sharing an unprotected status – feeling suspended between residences in two countries – is also illustrative of another condition of semi-legality. This was first studied by Ruhs and Anderson (2006) regarding the notion of semi-compliance with reference to Eastern Europeans working in the low-waged, low-skilled niche of the British labour market beyond the conditions specified in their visas or residence permits. In other words: while M's temporary presence in Norwegian territory might be indisputable even by the Norwegian immigration authorities, it is valid as long as he remains a tourist or person of independent means. This demonstrates another important condition of semi-legality, namely how it can be entangled with gainful employment.

Kubal(2009, 2012) demonstrated how Eastern European post-2004 EU Enlargement migrants – EU citizens – pursued employment in the UK in contravention of immigration (Accession 2004 Regulations) and certain employment regulations. Their semi-legality with regard to immigration law and the workplace was experienced in various forms, from working and fulfilling the general UK workplace regulations (personal National Insurance Number, payment of taxes) but generally in violation of immigration regulations (Workers Registration Scheme - WRS) attached to their status as 'Accession' nationals, to residing in the UK fulfilling the immigration conditions (WRS) but working in breach of the general UK workplace regulations. The latter took various shapes: from steady employment with a contract to precarious employment; from taxes deducted to some or no taxes deducted; from engagement at a workplace that respects labour laws to the abuse of basic labour laws such as compensation or health and safety. Quite often – and contrary to popular understandings – formal legality with relation to immigration status was not congruent with substantial legality relating to their workplace, where migrants often experienced disadvantages in comparison to other workers, or were discriminated against (Kubal2012).

Many such ambiguities concerning the relationship between residence and pursuit of gainful employment can also be found in our empirical material, colouring semi-legality with various local shades of the respective workplace regulations in different European countries. Many of the interviewed migrants who arrived in the UK, the Netherlands, Norway or Portugal with some form of visa or residence authorisation, admitted to engaging in employment in spite of the official limitations of their permit:

I came on a tourist visa for three months at a time, so my stay here was legal. But I was working and earning money. I did this four years in a row – coming to Norway on a tourist visa and working; the money I made during the three months in Norway would last me for the rest of the year in Brazil (A, female, Brazil-Norway).

I knew I could not work because it was clearly written on my visa. I was a bit nervous with that because I thought I was doing something wrong, but I later accepted my situation... I was working but it was not a proper job, I was looking after a boy with a family, and they would pay me like £50 a month, something like that, I used that money to pay for my school... (S, female, Brazil-UK).

The majority of the respondents were aware of the limitations stemming from their residence permits; it did not mean however that they engaged in employment in an un-reflexive manner. The questions of legality and illegality suffused the interviews; migrants' elaborations ranged from contestation of the law, via attempts to rationalise their choices, to practical acceptance of their conditions. Many of them demonstrated a highly specialised knowledge of the law and the changing conditions, often accompanied with examples of how their personal example has 'fallen through the cracks':

My brother obtained a tax number. With this he would work legally and he would even have paid taxes. These people are called 'white illegals'. They worked in 'white' or legally but they resided in the Netherlands illegally. This was possible until 1991 so he got it at the very last moment because he only arrived in 1991. In 1998 a new law was passed, simply put, linking work to residential status. Files from immigration services and the tax department

were linked. This meant that people like my brother could no longer work legally. They have a rather ambiguous legal status now (A, male, Morocco-Netherlands).

Semi-legality was often characterised by un-codified, yet often mutually beneficial employer–employee relations (Cobb 2005: 52), revealing the degree of agency that both semi-legal migrants and their employers have *vis-à-vis* legal frameworks of the state. This relationship – beyond the scope of state law – could be attributed to the fact that migrants, as temporary workers, display a target-earning strategy and distinctly different objectives from other workers (Cobb 2005: 57), but meet the expectations of employers in relation to maximising their profits. This reflects what Montomura (2010: 1783) terms ‘a national ambivalence toward immigration outside the law.’ Many migrants who arrive on short-term visas do not have the same lifestyles as more established workers; they do not have family with them or obligations beyond work or studying. As a result, various statutory laws, such as those regulating working time and overtime payments, may not be of much use to those workers displaying target-earning strategies. Most of the semi-legal migrants worked longer than permitted by their visas, but with hours spread over two jobs, having to juggle between different shifts and work schedules, formal and informal payment arrangements.

This particular aspect of semi-legality – its entanglement with gainful employment – also challenges the overwhelming power and importance of one’s formal legal immigration status, and the popular belief that once the legal status is ascertained, access to rights and justice will automatically follow. The evidence stemming from the interviews, particularly with Brazilian migrants legally residing in the UK, the Netherlands or Portugal (as permitted by their Italian, Spanish or Portuguese citizenships), reveals how they *de iure* complied with formal immigration conditions regulating their access to the labour market, but engaged in employment in partial contravention of the labour or tax regulations. The low-wage, low-skilled niche of the labour market, where migrant workers are overrepresented (Ruhs and Anderson 2010a) is well known for rather erratic law enforcement, with employers often ‘turning a blind eye’ not only towards migrants with unknown residence status, but also towards a battery of other workplace regulations, including tax deductions, national insurance contributions, hours of work or health and safety provisions:

[I was working in a] very posh restaurant, dance place, you know just on the Thames, and they have beers and they cost like £5, £6. Very posh! I was working 7 days a week, no days off, no minimum wage and I worked for 3 months and got paid only for two. 7 days a week, no Sunday, Saturday, you know it’s too much, I said, no I’m going and then, I don’t know if I went for something better but, one week later, I got a job in a corner shop, they were paying me £3.50 [per hour]. (T, male, Brazil-UK)

This was analogous to what Kubal(2009, 2012) observed with Eastern European migrant workers sharing the ‘3D’ (dirty, dangerous and demanding) work in the UK. Their undisputed legal status – as EU citizens – did not protect them enough from practices of unscrupulous employers or even discrimination (Kubal2012).

The empirical material demonstrates, however, how semi-legality, as an analytical concept, challenges the stereotypical image of the victimised, undocumented immigrant facing the abusive employer (cf. Anderson 2008). It reveals that the interactions between migrant workers and employers that arise from these diverse employment strategies are far

more complex (Kubal2012) and range on a scale between opportunism and exploitation. Migrants engage in a significant trade-off when they enter into semi-formal relationships that undermine the protection they have been given by labour laws and yet they quite often perceive this trade-off as empowering – in their own interests and to their benefit. In this way, they challenge the institutional role of the state in enacting laws imposing restrictions on immigrants and they undermine the strong power of the state in its sole capacity to deprive migrants of their rights (Yamamoto 2007: 95).

5.4 Attitudes to law: asserted though fragmented presence

The common theme that emerges from, but also bridges the above exemplary categories as found in migrants' narratives is the shared experience of presence in one context but not in another. Our interviewees demonstrated how their claims of belonging in certain social spheres (e.g. education, healthcare, housing) were combined with contextual experiences of liminality and exclusion in others, thereby posing an empirical challenge to Menjívar's (2006) arguments of the hierarchy of spheres under the dominance of the immigration law.

The examples of 'legitimate presence' (Coutin 2000) were commonly invoked in an attempt to ascertain as many elements of legality as possible, in the sense of rightful and authorised conduct, contesting and resisting the overwhelming 'illegality' label resulting from the lack of valid residence documents:

MA: [I was] always here, always working. I cannot understand the lack of a link between organs. That is, I'm a person who is not 100% correct, but I pay taxes, have a bank account, have health insurance, I have everything. I have everything like a normal person.

I: And what about your relationship with the employer?

MA: Yes, [I have] the contract, all normal (M, female, Brazil-Portugal)

The accounts of eligibility in many socio-legal contexts expressed through payment of taxes, possessing a driver's licence, pursuing a course at university or having medical insurance were put forward in the interviews as if to compensate for the very fact of 'visa expired' status. The local and seemingly insignificant social practices that contribute to the making and remaking of the large social structures (like the law) were informed and constrained by the meanings and opportunities that our respondents attached to those very structures (cf. Silbey and Ewick 1998). Migrants in their narratives of their legal status readily invoked the 'pieces of legality' that could qualify them 'beside' and 'above' the 'illegal' to claim legitimate spaces for themselves (cf. Abrego 2008; Gonzales 2008; Wong 2006):

J: I have a contract for home, for a lot of stuff, I have social security record. But I do not have a contract [for work], so whenever the authorities call me it turns out I cannot legalise [apply for residence permit]

I: And they never deported you?

J: No, never. They know everything. (J, male, Brazil-Portugal)

In a practical sense, it is therefore the everyday implementation of immigration law, more than formal legal proceedings, that situates individuals as subjects within legal categories. Legal status and immigration enforcement are integral components of a regime through which society's 'others' might be excluded but also, sometimes, granted oblique membership (cf. Coutin 2011).

These narratives stressing belonging and legality in different contexts, as points of identification and legitimisation, were often accompanied with an equal emphasis on the fact of 'breaking the law' only in part, when referring to remaining in the country without valid residence permits:

I feel bad about my status. As if I broke some law. Well, actually I did break *a part* of it. But you know, except for it I don't do anything bad to people! (T, female, Ukraine-Netherlands) [my emphasis]

I have never done anything wrong neither in Brazil, nor here. I know I was here illegally *at some point* and that was wrong, but I never wanted to participate in anything that is not legal, like stealing for example (M, male, Brazil-UK) [my emphasis]

These accounts illustrate a clear break from the idea that illegality might determine perceptions regarding the moral worthiness of migrants (Dauvergne 2008: 16). Migrants themselves demonstrate that semi-legality is a viable alternative to illegality, helping them to ascertain their presence aside from their legal status:

I must tell you at the beginning that my living in Norway was *not fully* official. I will be open with you (A, male, Ukraine-Norway) [my emphasis]

I'm a person who is *not 100% correct*, but I pay taxes, have bank account, have health insurance, I have everything (M, female, Brazil-Portugal) [my emphasis]

'Not fully official', 'not entirely authorised', 'not totally legal', 'not 100% correct' emerge from the interviews as dominant categories that the respondents not only feel more comfortable and more at peace with, but also that they believe more accurately reflect their situation. In that sense semi-legality moves conceptually beyond status and denotes a dialectic composed of general normative aspirations and particular grounded understandings of social relations (Silbey 2010: 476).

6 Conclusion

This paper has attempted to systematise the various and complex conditions of semi-legality, to 'move beyond the binary categories of documented and undocumented to explore the ways in which migrants move between different statuses and the mechanisms that allow them to be regular in one sense and irregular in another' (Gonzales 2011: 605). It proposes a conceptualisation of semi-legality as a multi-dimensional space where migrants' formal immigration status interacts with various forms of their agency towards the law – often accompanied by circumstances that are neither undocumented nor documented, 'but may have the characteristics of both' (Menjívar 2006: 1008).

Drawing on the empirical material and the existing literature I distinguished three broad areas – borderline, or liminal cases – which contest the 'illegal' as a globally meaningful identity label (Dauvergne 2008: 18). First, semi-legality defines the situation of migrants' 'incomplete' responses to regularisation programmes: *de facto* fulfilling the legalisation conditions, yet *de iure* facing problems or barriers to formally corroborate this. Second, it is a useful concept to help to understand and theoretically account for the situation of migrants (third-country nationals) in the Schengen area of the European Union, many of whom have some form of legal residence in one member state, but remain 'on the

move' having to strike a balance between time-limited transferability of their free movement. Lastly, semi-legality can also cast more light on the relationship between immigration law and the labour market, in the context of migrants' gainful employment, where their residence in a country is lawful, but their work exceeds the restrictions permitted by their visas.

Semi-legality can also be found in the narratives of migrants describing their relationship with the legal system of the host country, where it presents itself as a site of contestation of the invincible role of the law in defining individuals. Semi-legality pushes back against illegality as a self-referential and rather empty term which as Guild (2009: 15) observes happens to 'someone, in respect of whose presence on the territory, the state has passed a law making [their] mere existence a criminal offence.'

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