Markets, citizenship and rights: state regulation of labour migration in Malaysia and Spain

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5. COMPARATIVE PERSPECTIVE

5.1. TOWARDS CLOSURE

Until the 1980s the demands for closure were somewhat weak in both Malaysia and in Spain. This means, in particular, that the distinction between citizens and foreigners, or the legal barriers to entry and membership, were rather blurred. The paths that led to this situation were, however, different in each case. Malaysia had a colonial past in which immigrant workers (from China and India) were perceived as ‘birds of passage’ or sojourners. After independence in 1957, many of these ‘eternal foreigners’ finally obtained Malaysian citizenship. Yet, this did not make them complete insiders since the distinction between bumiputera (literally, sons of the soil, which includes Malay and other indigenous peoples) and non-bumiputera (basically Malaysian citizens of Chinese and Indian origins) continued defining different statuses. This division, along lines of ethnic origin, between some citizens and others, also determined immigration policies (see Section 3.3). While entry was restricted for Chinese and Indians (including relatives of Malaysian citizens), Indonesians (insofar as they were ethnically Malay) were not always categorised as foreigners and hence they enjoyed free entry to Malaysia and its labour market over a long period of time.

In contrast with Malaysia, Spain was originally a country of emigration and also perceived as such. Accordingly, until the 1980s, policy was essentially geared to emigration, which is to say defining, channelling, selecting and keeping track of the numbers of people leaving the country. Meanwhile, immigration policies were notable for their randomness and general irrelevance. Barriers to entry and stay were minimal because the numbers of immigrants coming to Spain to stay were also minimal. This absence of legal obstacles was still more pronounced in the cases of citizens of former Spanish colonies (except for Morocco). For example, in 1968, when holding a work permit was introduced as the necessary condition for working legally in Spain, foreigners from Latin America and the Philippines were exempted. The citizenship law is another example of how the frontiers were more permeable for some than for others. Unlike other foreigners, South Americans, Filipinos and Sephardic Jews could – and this is still the case – obtain citizenship after two years of legal residence.

In Malaysia, ethnicity closed doors for some and opened them for others. In Spain, cultural or historic proximity facilitated entry and inclusion in a world that was already relatively open. If we now analyse how policies worked in practice, the picture is not so different. Until the end of the 1980s, illegality was practically a non-issue. This is not to say it did not exist but simply that it was not perceived as problematic. While in Spain’s case this normalised illegality made the legal borders still more lax, in Malaysia the de facto porosity reinforced the ethnic bias of immigration policy. This occurred fundamentally because most illegal immigrants were Indonesian and they ended up receiving (legally or illegally) permanent residence status within two or three years of entry and some even within months.
As a result, most of the Indonesian immigrants who (legally or illegally) arrived in Malaysia before the 1990s were able to stay on. This also meant that their children not only obtained Malaysian citizenship but also, unlike Malaysian citizens of Chinese and Indian descent, they were recognised as privileged citizens or bumiputera.

Throughout the 1980s, however, the doors that had formerly been open for entry and membership began to close for everyone and illegality became grounds for exclusion and deportation. This gradual, generalised closing of borders, which we might call a gradual path ‘towards closure’, occurred simultaneously in Malaysia and Spain. The original reasons invoked were, however, different. In Malaysia the demand for channelling rather than stopping labour immigration arose when (mostly Indonesian) migrants began to move to urban areas and, more specifically, to those economic sectors reserved for local (particularly Malay) workers. It was thus the demand to protect the national labour market that ultimately displaced ethnicity as a component of migration policies and their implementation. In Spain, the first demands for closure preceded the arrival of immigrants. In fact, it was Spain’s entry into the European Community that led it to regulate the entry and stay of foreigners. This means that restrictive policies were not introduced to control migration flows resulting from increasing labour demands but represented an attempt to ensure, under EU pressure, that Spain would not become a transit country for people migrating to Western Europe.

In the 1990s, the demand for closure intensified in both countries. In Malaysia, it continued to be associated with protecting national workers. Although it had always been one of the most conspicuous requirements of the Malaysian unions, it was also inextricably entangled with the raison d’être of the State of Malaysia itself. Basically, the increasing presence of immigrant workers was starting to be seen as a threat to State programmes aiming at restructuring the colonial society, which is to say, promoting the Malays socio-economically vis-à-vis Chinese and Indians. After 2002, the demand for lessening dependence on (and the presence of) Indonesian immigrants was added to that of protecting the national labour market. The Malaysian Government argued at the time that the existence of Indonesian migrants in the country represented a threat to national security and that, accordingly, they had to be replaced by immigrant workers of other nationalities. This shift in the position and perception of Indonesian immigrants in Malaysia, who went from being potential bumiputera citizens to a potential threat to national security, is incomprehensible if one does not take into account the context of a general change in nationalist discourse. Until the 1980s, the ‘national’ was defined in ethnic terms (which included many Indonesians inasmuch as they were putative Malays) but, throughout the 1990s, it progressively came to be defined in relation with national territory (which automatically turned Indonesians into foreigners or outsiders).

In Spain, the demand for closure continued to be determined by pressure from the European Union. This should be understood not only as arising from the fact that
Spain was now a member state (after 1986) but also as a result of its new role as guardian of Europe’s southern frontier. In particular, the ratification by Spain of the Convention Applying the Schengen Agreement (1993) and the two subsequent European treaties (Amsterdam and Maastricht) led to an expansion of its border infrastructure and more restrictive entry policies. It is not sufficient, however, to believe that the demand for closure came exclusively from outside. Throughout the 1990s, as the numbers of immigrants coming into Spain kept increasing, protection of national workers was another reason for closure. The Spanish trade unions have systematically wielded this argument. Nevertheless, as in the case of Malaysia, they were not alone in this. In Spain, too, the legitimacy of the Spanish State depended in great part on its ability to guarantee this protection. While in Malaysia it was a matter of protecting the state-planned, socio-economic advance of Malays, in Spain the motive was keeping the doors closed in the face of persistent high unemployment figures. In both cases, the official argument has been that of giving priority to the national worker over the foreigner. In other words, as long as there were national workers without a job, or wanting to work, permitting the contracting of foreign workers was not deemed justified.

These demands for closure had the effect of building up border controls and a progressive hardening of the dividing line between citizens and foreigners. Exemplifying this intensifying closure was the position of Indonesians in Malaysia and of South Americans in Spain. Each group ceased to have the standing of quasi-membership in the community and gradually took on outsider status. However, the process of exclusion was different in the two countries. In Malaysia, closure occurred in relation to access to membership rather than entry to the country. In other words, immigration policy did not restrict the entry of immigrant workers but it did limit period of residence, immobilise their presence in the labour market and pare back rights (for example of association, family reunification and medical attention). In this regard, Malaysia is the perfect example of a policy of high numbers and low rights. Letting immigrant workers come into the country while limiting their presence and membership, Malaysia thus seemed to be able to reconcile the demands for foreign labour with the demands for closure.

In contrast with Malaysia, closure in Spain occurred mainly at the point of entry, or in other words, in relation to legal access to the country. More specifically, until 2005, the entry of immigrant workers was subjected to strict evaluation of the situation of the labour market. The result was particularly low numbers of people coming into the country legally. This low-numbers policy has not been accompanied by any policy of high levels of rights. While immigrants in Spain have never been subject to restrictions to the extent they are in Malaysia, in Spain, too, they were received and recognised in their capacity of immigrant labourers. In particular, the temporary nature of residence permits, which depended in the first five years on effective and formal integration in the labour market, meant that their membership was conditional and, in the numerous cases of lapsing into illegal status, variable. In this sense, we might conclude that the situation in Spain has long been characterised by low numbers and conditioned rights. Unlike the
Malaysian case, this policy that is restrictive with regard to entry, and partially so in the case of membership, highlights how demands for closure were apparently given priority over demands for foreign labour.

5.2. THE MARKET RESPONSE

Both the Malaysian and Spanish states opted for some degree of restriction. In both cases, the demands for closure were too weighty to be ignored. In particular, the requirement in both countries to protect the national labour market was not just a claim from the unions but the very legitimacy of the State depended on it. Nevertheless, as I have just noted, the forms the closure took were different. In the Malaysian case, it was access to membership that was restricted. This means that immigrants could keep entering the country to cover the demand for foreign labour but, once they had come in, their stay was strictly controlled. In the Spanish case, entry was restricted and so too was membership, at least in temporal terms. In contrast with Malaysia, the Spanish markets had thus only limited access to foreign labour. The question that then arises is how did these policies function in practice? In particular, how did the Malaysian policy of relatively ‘open entry’ work and to what extent were membership limitations fitted to market demands? In the case of Spain, how did the policy of relatively ‘closed borders’ work and what were its effects in a context of a major demand for foreign labour? What was the response of the markets to the difficulty of legally gaining access to foreign labour?

Entry policies in Malaysia have always sought to define the numbers and characteristics of foreign workers in keeping with specific (and variable) labour demands. The basic idea has been to open up entry in periods of economic growth and major labour shortages and to close it down again at times of crisis and increased unemployment. While this has been the logic and discourse of immigration policies, the reality has been relative and continuous open entry. When in times of crisis (for example 1997 and 2001) the Malaysian State closed down or restricted entry, the employers’ reaction was swift. Even in times of crisis and growing unemployment, the market still depended on foreign labour. Hence, so the employers argued, if the State wanted to continue promoting economic growth, it would have to open up entry again. Given that the State’s legitimacy also depended on its ability to guarantee this economic growth, the government complied (immediately) on each occasion. In this regard, we can conclude that, while on paper (and in the discourse) entry policies were subordinate to the situation of the labour market, in practice they always ended up responding to the employers’ demands for foreign labour.

In the case of Spain, the restrictive character of entry policies should also be analysed not only as they appear on paper but in practice. As in the case of Malaysia, the aim has always been to open and close entry in response to demands for labour and protection of the labour market. Nevertheless, in contrast with
Malaysia, this policy was manifested in very restrictive practice until 2005. There are several reasons for this. First, for a long period, contracting foreign workers was subject to very stringent evaluation of the national labour market. Second, when prior evaluation of the demands for foreign workers started to be carried out after 2000, the proposed annual quotas tended to be particularly low. This is explained, on the one hand, by the unions’ fearful attitude vis-à-vis the entry of new foreign workers and, on the other, by lack of foresight on the part of businesspeople with regard to needs of medium-term contracts, and also under-representation of small and medium-sized companies (the majority after all) in the process of determining quotas. Third, and finally, entry policies ended up being more restrictive than initially envisaged due to the complexities of entry procedures and the difficulty of contracting immigrants in their countries of origin.

Indeed, the policy of ‘contracting in the country of origin’, which requires a job contract prior to arrival, has been one of the great obstacles to legal entry into Spain. In the 1990s, the main reason for this was a lack of mediation mechanisms. If the worker did not have some acquaintance in Spain or if the employer had no helpful contacts in the country of origin, it was practically impossible to contract migrant workers. After 2002, when the Spanish government set about trying to manage this mediation with the collaboration of the governments in the countries of origin, there were still several other obstacles. First, not all governments in the countries of origin, which were ultimately responsible for recruitment, were capable of fulfilling this function. Second, even in those cases where mediation functioned properly, not all employers were willing to approve such contracting of their workers. In sectors such as domestic service, small business and the hotel and catering trade, the importance of the previous relationship and trust between employer and worker made contracting through governments an especially difficult process. Third, contracting in the country of origin through the different branches of the administration was only possible where previous bilateral agreement had been reached. This has been yet another element giving rise to tension between State and employers: the State interests that led to the signing of these agreements did not always coincide with those of the employers who had other ideas and preferences about the countries of origin of their workers.

The main effect of these restrictive entry policies (on paper and in practice) has been the creation of a true model of illegal immigration in Spain. In this sense, the market response was very clear: if it were impossible or difficult to contract immigrants legally in their countries of origin, they were found illegally after they had arrived in the country. In other words, even though legal entry of immigrant workers was restricted, migrants kept coming in anyway to cover the increasing labour demands. Faced with this situation, the Spanish government kept insisting on the need to channel labour immigration legally and thereby to prevent illegal immigration. Nonetheless, it was not until 2005, after numerous and voluminous processes of regularisation, that the government introduced a relatively open entry policy for the first time. This shift seems to suggest that the demands for labour had finally managed to prevail over demands for closure. At the same time, what made
this change possible in practical terms was the establishment of significant networks between the immigrant communities in Spain and prospective immigrants in the countries of origin. These social networks ended up playing the mediating role between labour supply and demand that the State had previously been unable to perform. In other words, thanks to the immigrants’ networking, contracting in the countries of origin, the only legal way for an immigrant worker to enter Spain, finally became possible.

While in Spain this mediation between labour demand and supply remained in the hands of employers (who ended up turning to the social networks of the immigrants once they had consolidated) or the governments involved, in Malaysia the recruitment of labour immigrants has always been run by private agencies. These private agencies, called outsourcing companies since 2006, have worked as mediators not only between the worker in the country of origin and the employer at destination but also between employer and State, primarily because they have taken charge of all procedures pertaining to labour immigration, which is to say contracting the immigrant worker, processing the paperwork for entry and renewal of permit, and eventually returning the immigrant to his or her country of origin. Privatisation of the migrant labour system in Malaysia has thus ensured, first, that the complexity of procedures associated with contracting immigrant workers has not become, as in the case of Spain, a deterrent factor in the legal contracting of immigrants. Second, the presence of the recruitment agencies has given rise to a system of ‘importing’ and ‘exporting’ labour, which the State alone, or the State and businesspeople combined, seemed unable to manage. This explains why the State and the employers have always ended up resorting, however much it goes against the grain, to the intervention of the recruitment agencies.

If privatisation and commercialisation of recruitment eased the functioning of the migrant labour system, it also meant greater costs for the immigrant. Besides paying for a passport, induction courses, medical examinations and levies, the immigrants also had to finance the flourishing business of the recruitment agencies. This led many immigrants to opt for illegal (jalur belakang – back door) or semi-legal entry by means of aspal (asli tapi palsu – ‘genuine but false’) documents that are counterfeited by someone on ‘the inside’ so as to avoid paying for the costs entailed by legal entry. This resort to illegality has occurred in particular with immigrants entering the country in border zones near Malaysia. In these places, illegally crossing the border (cheaper, easy and fast) seems simply a matter of rational choice: why pay so much and go through so much red tape if Malaysia is right there, just across the sea? In contrast, long-distance immigration (from more-distant Indonesian islands or countries like Bangladesh, Nepal or Pakistan) has mostly taken the legal route, via the recruitment agencies. With the distance involved, there seemed to be no other alternative. Finally, as we have seen in Section 3.4, the presence of these recruitment agencies (and their irregular practices) has tended to place migrants in a particular vulnerable situation and, directly or indirectly, has led many of them to fall into illegality.
In general terms, we can conclude that Malaysia has presented a relatively open entry policy that is expedited by the recruitment agencies. Until 2005, Spain had a relatively closed entry policy, with major deficiencies in mediation between labour demand and supply. After 2005, in order to clamp down on continued illegal immigration, the Spanish government introduced a more open entry policy for the first time. Meanwhile, the consolidation of significant immigrant networks facilitated what had thus far been just a myth of the immigration policies: the employment of immigrant workers in their countries of origin. As for policies regulating residence and hence access to membership, there has been restriction in both cases. While in Malaysia this restriction has been total and indefinite, in Spain it has been partial and temporary, which is to say, it has been applied in specific domains and only during the early years of residence. Nonetheless, again, it is important to distinguish between policies on paper and policies in practice, basically, because here too the markets tended to counteract the conditions that the immigration policies were trying to impose.

In the case of Malaysia, on the one hand, the immobilisation of immigrant workers, not only within an economic sector but also in relation with a single employer, has benefited the employers, because it has prevented any leaking of foreign workers into other better-paid sectors and, again, because the link between residence permit and job contract has in practice truncated the labour rights of foreign workers. On the other hand, the limitations tied to time periods (a contract of a minimum of two years and a maximum of five subject to renewal) have tended to clash with market demands. With regard to the two-year minimum, many employers have deplored the difficulty in contracting foreign workers for temporary projects. In practice, this led to subcontracting of workers (since 2006, via the recruitment agencies) or employment of illegal immigrants. Here, subcontracting or contracting of illegal immigrants, resorts that are frequently related, have been perceived as synonymous with flexibility. As for the five-year maximum, the employers have also complained about the immense turnover entailed. The reason for imposing this time limit has been to prevent ‘foreign workers’ from becoming ‘settled immigrants’. For the labour market, it has meant a constant loss of the skills acquired by workers. In this case, the resort to illegality has been seen as a way of gaining access to immigrant workers whenever needed and for as long as desired.

As for the limits on membership for immigrants in Spain, two major issues should be highlighted. First, the position of the immigrant within the job market is restricted to a particular economic sector and province in the first year. The basic idea is temporary limitation of the immigrant’s stay to the kind of work authorised by the entry permit. However, when the year is up, the immigrant can work wherever he or she wants. This means that, in contrast with Malaysia, the immigrant has unlimited access to the labour market. In fact, this arrangement has not been exempt of tensions. The immigrants’ mobility is feared by employers in the lowest-paid sectors, which tend to have high worker turnover rates. It has also been a matter of concern for the trade unions and the Spanish government itself, which has sometimes noted with no little dismay how the immigrants have moved...
into economic sectors reserved for national workers so that the worst-paid sectors once again become dependent on the entry of new immigrant workers. Second, a further limitation on the presence of immigrants in Spain has been the time factor fixed in the residence permit. In the first five years, the residence permit is subject to official and effective integration in the labour market. This legality, which is conditioned by a formal job in an economy characterised by a high degree of informality, has only led to the legal precariousness of immigrants, who in many cases have (re)lapsed into illegality.

5.3. RIGHTS’ CONSTRAINTS

The restrictions imposed on access to membership, which are, in practice, restrictions on immigrants’ rights, have been incomparably more draconian in Malaysia than in Spain. In the case of Malaysia, the presence of migrant workers has been limited in three fundamental ways. First, their work permit is issued for a specific economic sector and tied to a particular employer. As denounced by most Malaysian and international NGOs, this has resulted in a situation of ‘sanctioned bondage’ as migrants do not have the freedom to move from job to job and their labour rights are in practice restricted since their legal presence in the country depends on their employer. Second, the shift whereby the levy changed from being a tax imposed on employers to being an income tax on foreign workers has raised the price of being legal and, indirectly, the immigrants’ dependence on their employers. Now their bondage is not only defined by the conditions of the work permit but also established in practice through the debt that re-starts each year when the employer advances the payment of the levy and deducts it monthly from the immigrants’ wages. Third, the immigrant workers’ stay in Malaysia is temporary in three different ways: they are ‘returned’ or ‘repatriated’ in case of economic downturn; illness or pregnancy; and after five or seven years of working in the country. The final aim of these different time frames has been to get ‘workers’ instead of ‘migrants’.

In Spain, the first Ley de Extranjería (Immigration Law – 1985) only envisaged short-term visas and did not recognise the right to family reunification. Later, however, this started to change. The increasing inflow of immigrants and consequent pressure coming from civil society and opposition parties forced the Spanish government to regulate the right to family reunification (1994 and 1996), extend the duration of permits and to introduce the permanent residence permit for the first time (1996). Later, the new Ley de Extranjería of 2000 introduced the right to family reunification in terms that were coherent with the laws of the European Court of Human Rights and that tended to equality of rights between legal residents and citizens (freedom of circulation, meeting, association etcetera). However, as shown above, two basic restrictions remained: the restriction of the work permit to a certain sector and province during the first year, and dependence on a formally-recognised job for legal residence during the first five years. Despite these
limitations, the rights of immigrants in Spain are much more robust than those of immigrants in Malaysia. Besides recognition of their social rights (for example, the right to unemployment or to family reunification), the former have been able to settle in the country and obtain not only permanent residence but also citizenship.

To sum up, immigrants’ rights are very limited in Malaysia and they can be limited with ease. In Spain, immigrants’ rights were relatively limited but expanded as the burgeoning presence of immigrants in the country made it necessary to make their rights equal to those of Spanish nationals. Civil society and the opposition parties have played a highly significant role in this legal inclusion of immigrants. The government was not able to oppose their demands for equality before the law for otherwise it would have been jeopardising its own democratic credentials. As the Catalan government argued when an employers’ association proposed contractually binding newly-arrived immigrants to their employers, such discrimination is ‘illegal’ or anti-constitutional. This explains why Spain did not opt, as Malaysia did, for a policy that drastically restricted access to membership. As a liberal democracy, it simply could not do so. This raises further questions. What actually happened in practice? To what extent has Malaysia, as its policies suggest, been able to convert immigrants into mere temporary workers or, in other words, labour that can be imported or exported at will? And to what extent has Spain really been inclusive with its immigrants?

In Malaysia, the restrictions imposed on migrants’ stay have tended to make legality a disadvantage so that, in many cases, resorting to illegality or remaining illegal has been positively advantageous. First, in comparison with legal immigrants, illegal immigrants are not bound to an employer. The fact of not having a signed contract means in practice that immigrants tend to be freer to change jobs when they want and hence they have more possibilities for negotiating pay and working conditions. Second, being illegal can be cheaper. It is cheaper in avoiding all the costs associated with legal entry and cheaper, too, once they are in the country since they do not have to pay the levy. Third, illegality tends to make the stay in Malaysia rather less temporary. Unlike legal immigrants, illegal immigrants are not automatically repatriated in case of economic crisis, illness or pregnancy, or after five years of working in the country. In short, the resort to illegality both for migrants who enter the country illegally and those who become illegal after ‘running away’ from their employers, has made the immigrant worker situation in Malaysia less manageable and flexible than the country’s immigration policies would suggest. On paper, the policies indeed trim down the rights of immigrants. In practice (and this is quite curious when considered from the western standpoint), this limiting of rights has tended to encourage illegality as the better alternative.

If in Malaysia illegality has been one way of getting around the restrictions imposed on the presence and rights of immigrants, in Spain illegal immigration has brought about the rather different situation of having immigrants but without recognising their rights – or at least trying not to. Unlike legal immigrants, illegal
immigrants have only limited social rights. For example, they do not have right to unemployment benefits or to family reunification and no labour rights. These rights may be formally recognised but illegality often means they cannot be exercised in practice. Finally, their position in the labour market is mainly confined to the informal economy or to those economic sectors most marked by a high degree of labour precariousness. If we bear in mind that a major proportion of labour immigration in Spain has been illegal at some point, we might then wonder to what extent illegal immigration has not been a de facto way of obtaining immigrant workers without rights or with only minimal rights.

This seems, in fact, to be the case. Illegal immigration has effectively constituted a way of covering the demand for cheap foreign labour without needing to open up the borders to entry and membership. In this regard, we might conclude that, in the Spanish case, illegal immigration seems to have enabled reconciliation between demands for foreign labour and demands for closure. Nonetheless – and here rights constraints enter the picture once again – illegal immigrants could not be completely excluded. If the first Ley de Extranjería (1985) hardly recognised any rights of illegal immigrants, different legal rulings and multiple modifications to immigration law have changed this situation. Legal rulings have constituted progressive recognition of their basic rights. The new immigration law of 2000 made access to health services and education conditional on registration in the municipal census and not legal residence. This means that illegal immigrants obtained access to minimal social services. In brief, due to the rule of law and the political process, illegal migrants could not be totally excluded. Nevertheless, while they were gradually included in some aspects of the social sphere, in work terms they continued to represent a legally non-existent and hence rightless labour force.

5.4. REGAINING CONTROL

As we have seen, demands for closure were met differently in Spain and Malaysia. Despite the differences, the measures introduced to restrict entry and/or membership tended in both cases to produce illegality. In Malaysia, the costs associated with legal entry and the commercialisation of recruitment made illegal entry a faster and cheaper option. Obstacles to membership also tended to make illegality an advantage. In Spain the difficulty of contracting workers in their countries of origin meant that illegal contracting on arrival was to become the norm. The fact that legality is conditional upon a formally-recognised job in the first five years of residence, along with the snail’s pace of the paperwork for permit renewal were also factors that led to many immigrants losing their legal status. In short, in both cases, while the main aim of immigration policies was to regulate and control immigration, one of its consequences has been illegal immigration, which is characterised precisely by lack of regulation and control.
Faced with this situation, Malaysia and Spain responded with different kinds of regularisation programmes. Both countries attempted to regulate and control those immigrants who had escaped from regulation and control. More than being a form of inclusion, these regularisation campaigns should be understood as a means of regaining control. Since the meanings and forms of this control were different in each country, the motives and mechanisms of regularisation also present significant differences. In the case of Malaysia, the basic goal was, as one Malaysian official declared, ‘to keep track of their number, location and origin’ (Business Times, 25 July, 1996). In other words, it was an attempt to reintroduce the illegal immigrants into the labour system, by determining their number and origins, guaranteeing their immobilisation within the labour market, making their residence temporary and dependent upon one single employer, and obliging them to pay taxes. Inasmuch as the immigrants were exclusively perceived as workers, it is not surprising that the regularisation only applied to workers with a job. In fact, on each occasion, it was the employers that regularised their workers. While the employers’ associations tended to welcome these processes, the trade unions and the opposition parties systematically opposed such measures, viewing them as yet another episode of backing down by a government that was yielding to the employers’ insatiable demands for more and more foreign workers.

In Spain, until 2001, the regularisation procedures functioned (and so they were presented on each occasion) as corrective measures a posteriori to immigration policies that had failed in their most basic aim: regulation of immigration. Whether it was because legal entry was so difficult or because the few immigrants who entered legally (or who were subsequently regularised) lost their legal status with the years, or because many illegal immigrants were excluded from the regularisation processes, the government was obliged to introduce frequent regularisation programmes (in 1989, 1991, 1996, 2000 and 2001). Each occasion was an attempt to achieve what the immigration policies had as yet been unable to do, and also to bring the numbers of illegal immigrants down to zero before introducing new immigration policies or laws. In these processes, duration of residence rather than having a job was the main requisite for regularisation. Those people who were unable to produce a receipt of their inscription in the municipal census tried to produce as many bits of paper as they could as proof of the length of their stay. In many cases, then, regularisation depended on this amassing of back-up documents and the willingness (or otherwise) of the provincial administrations to recognise them as valid.

In comparison with these processes, the regularisation process of 2005 was different. After five years of a particularly restrictive entry policy (which coincided with the second mandate of the right-wing party Partido Popular), this time the aim was to regularise those workers (and employers) for whom the immigration policies had left no alternative other than the resort to illegality. Unlike previous attempts, the aim of the exercise this time was clearly to regularise those workers with a job and even, it might be said, their employers. Moreover, it was the result of a clear agreement between the government, employers and the trade unions.
With this regularisation, the government sought to gain greater capacity of control – at a time when it was calculated that there were more than a million illegal immigrants – and to ensure that more people would be paying Social Security contributions. The employers saw in this regularisation a form of recognition of their demands for foreign workers and a way of having them within the law and therefore on more stable terms. Finally, the trade unions pushed for this regularisation process with the aim of stamping down on the informal economy and thereby imposing minimal wage and working conditions.

A perusal of the results of the regularisation processes in Spain and Malaysia reveals one significant difference. While in Malaysia the results were always numerically limited, in Spain the numbers of people involved kept rising. In order to explain why the regularisation processes had limited results in Malaysia, employers have always referred to the long, complex and costly procedures of regularisation both in the countries of origin (normally Indonesia) and in Malaysia. In fact, this would explain why in 1992 and 1996 most of the immigrants who were initially registered never came to be regularised or, in other words, were lost somewhere along the way. Another explanation for the limited results of regularisation processes in Malaysia is that one might suppose that not all the employers were keen to regularise their workers. As noted above, illegality was also a means of increasing the flexibility and length of stay of foreign labour. Just as not all employers were interested in regularising their workers, many workers might not have been willing to be regularised either. If illegality was a way of getting around the limitations imposed on legal immigrants, the regularisation processes would seem to have little to offer to those immigrants who had opted to remain illegal.

In contrast, there are three factors that would explain the success of the regularisation processes in Spain. First, many employers did opt to regularise their workers. This was especially clear with the regularisation of 2005, which suggests that in many cases (and particularly in the early years of the present century) employment of illegal migrants was much more a result of the restrictiveness of entry policies than a way for employers to have access to a cheap, malleable labour force. Second, in all the regularisation processes, the State was the most interested party in the drive to regularise illegal immigrants. If the State did not reduce the already-existing numbers of illegal immigrants, it would be difficult to introduce policies and laws that would finally lead to regulation and control of immigration. This would explain, for example, why the State decided in 2001 to revise the applications that had been denied in the regularisation of 2000. Third, analysis of the implementation of the regularisation processes in Spain highlights the key role of social organisations, immigrants’ associations and trade unions. From the early 1990s, these organisations, which saw in regularisation a form of recognition and extension of immigrants’ rights, were crucial both in publicising and conveying information and in selection and processing prior to the applications being made.

At a more general level, this difference in the results of the regularisation drives in
Malaysia and Spain should be understood in relation with the meaning of illegality itself. In Malaysia, illegality occurred in tandem with legality. In 2006, there were almost two million legal immigrants and an estimated one million illegal immigrants. The latter either came from zones close to Malaysia or had become illegal upon escaping from their employers. In contrast with Malaysia, in Spain, thanks to a tremendously restrictive entry policy, illegality was, until 2005, the only way of entering the country. If one wished to work in Spain, the (almost) only alternative was to come into the country (usually as a tourist), stay on, work illegally and then eventually apply for regularisation. Unlike Malaysia, the regularisation processes have worked for a long time as the entry policy. Joint analysis of entry policies and regularisation processes together would lead one to a very different conclusion with regard to the way in which the dilemma of markets and citizenship was resolved in Spain. It is not the case, as I have noted above, that until 2005 the State gave priority to demands for closure over demands for labour. The fact is that while the entry policies apparently responded to the demands for closure, the regularisation processes effectively made it possible to legally cover the demands for labour.

However, this use of regularisation processes as entry policy has two significant implications. First, it makes illegality a requisite for legality. In other words, in order to live and work legally in Spain, one had to live and work illegally beforehand. This means fewer social rights and few (or very few) labour rights. In other words, semi-recognition in the social sphere and non-recognition in the labour domain became the antechamber to the eventually ‘earned’ social and labour recognition. Second, using regularisation processes as the main form of entry, while residence (in the first five years) was conditional upon formal integration in the labour market, has had only resulted in more illegality. This is basically because, until 2001, while period of residence rather than holding a job was the chief requisite for regularisation, with the first renovation after one year, work and not residence became the sine qua non condition for staying legal (see Section 4.6). This means that even while the immigrant might have managed to become regularised, this was of no help at all if, after the one-year period had expired, he or she was unable to demonstrate effective and formal integration (with a formally-recognised job) into the labour market. Accordingly, many regularised immigrants became illegal once again.

5.5. FINAL EXCLUSION

If regularisation is an instrument for regaining control, deportation policies have been presented in both Spain and Malaysia as the way of reducing illegal immigration by resorting to the physical expulsion of illegal immigrants. This physical expulsion of individuals without residence permits has been justified in both countries under the pretext of national sovereignty, alluding to the idea that the State not only has the right but also legitimate authority to control any activity
in national territory, and thus to determine who might enter this territory and come
to live there and who not. National sovereignty has functioned not only as a way of
justifying these policies but also as an end in itself basically because their
application has aimed at both demonstrating and staging (normally with mass
media fanfare and political acclaim) State control over national territory. Moreover,
in both Malaysia and Spain, discourse on deportation has sought the penalisation of
the immigrants’ illegal status. In both cases, the logic has been punishing by
deportation those individuals who dared to enter the country and remain without
permission. This punishment, frequently presented in terms of ‘just deserts’, has
taken the form of removing the illegal immigrants as fast and as far as possible
from national territory.

While the discourse about deportation of illegal immigrants has been notable in
both countries for its emphatic bluntness, the implementation of the policy has
been somewhat limited. First of all, the shortfall is explained by the high costs
associated with deporting illegal immigrants. These arise from monitoring and
detention campaigns, the expenses incurred in maintaining illegal immigrants in
detention camps and, finally, of deportation itself. Second, deportation policies
have also been constrained by legal considerations. In both Malaysia and Spain, the
State has always wanted more control (or more capacity of control) than it has
actually had. This has led both states to extend this possibility of control by
increasingly swifter and more expeditious measures, essentially by means of
reducing judicial control. In Malaysia, this has taken the form of privatisation of
detention processes, which have been handed over to the paramilitary civil
volunteer corps RELA (Volunteers of Malaysian People) and, in Spain, prohibiting
judicial suspension of expulsion orders. Moreover, lacking the power to extend its
capacities without restraint, the State has tended in both cases to infringe the
legally-imposed limits. Defined by Malaysian immigration officers as ‘extra-
oficial practices’ or ‘back door policies’, this has implied deportation practices
(with orders of collective expulsion, expulsions at the border or deportation to
third-party countries) that can be labelled as ‘illegal’.

It is with regard to the State’s possibilities of control and deportation of immigrants
that one of the major differences between Malaysia and Spain emerges. In
Malaysia it has been possible to whittle away the rights and legal protection of
illegal immigrants in favour of greater (and more effective) State control.
Moreover, in political terms, the Malaysian State has been able to practise its so-
called ‘back door policies’ relatively openly without having to retract or justify
these practices. In contrast with Malaysia, in Spain, the State has been doubly
constrained. On the legal plane, for example, when the first immigration law of
1985 aimed to ‘[...] equip the executive with the legal means to defend Spanish
society more effectively against gangsters and delinquents’ (Congreso de
Diputados, 19 February 1985), a number of constitutional and legal rulings almost
simultaneously limited the possibilities of detention and deportation, creating a
body of laws that were critical of administrative excess. On a more political level,
and also by way of example, when the Partido Popular government deported
(collectively and without legal guarantees) a hundred African immigrants, there was an immediate outcry from the Ombudsman, the trade unions, NGOs and some opposition parties denouncing this action. As a result, the Ministry of the Interior had to offer an explanation before the Comisión de Justicia e Interior del Parlamento (Parliamentary Commission for Justice and the Internal Affairs).

In this regard, we might conclude that, in Spain, it is not so much the case that the State has not attempted to restrict the rights of illegal immigrants as a means of increasing its control but rather that, in both legal and political terrains, it has been kept in check by the power of the judiciary, civil society and the opposition parties. If one bears these constraints in mind, it is not so surprising that, in the case of Spain, the space from which the greatest number of deportations has occurred has shifted from the heartland of national territory to the border and beyond. In the fringe area of the border, the Spanish State has deported would-be immigrants without having to open up administrative procedures, know the origins of the immigrants or count on the governments of the countries of origin being in agreement with the repatriation. Similarly, beyond the border, in the so-called transit countries, it has been possible to detain immigrants (or prospective immigrants) and deport them without major accountability. A perfect example of this are the detention camps in countries like Morocco and Mauritania (in many cases financed or directly constructed by the Spanish State) or the deportations and subsequent dumping in the desert of immigrants who were rejected at the Spanish border.

This outwards displacement of migratory control clearly contrasts with the Malaysian model. In the postcolonial State of Malaysia the outer frontiers have mostly been of only peripheral interest to the national elites located in the centre. While these ‘remote places’ have tended to remain at the margins of the border logic, migratory control has tended to be carried out well within the national territory. It is Kuala Lumpur in particular where the detention campaigns have taken place. It is there where the migratory control has been staged and, as a result, there above all where illegality has become synonymous with deportability. This has a particularly significant implication with regard to the deported illegal immigrants: while in Spain deportability looms in particular over those immigrants who are trying to enter the country, in Malaysia it affects those who are already in the country and, in most cases, working. Here, deportation of illegal immigrants has another meaning. If one bears in mind that, in Malaysia, the deportation campaigns tend to coincide with periods of economic crisis, it might be said that deportation is not only a form of control over the territory but also a way of imposing temporality on the work of illegal immigrants. Although illegal immigrants tend to escape State control and its ‘temporalities’, the deportation campaigns seek to turn illegal immigrants, too, into a flexible labour force that is ‘importable’ and ‘exportable’ at will.

Finally, it would be too simplistic to conclude that Malaysia’s deportation policies unfold within national territory while Spain’s are carried out on the borders and
beyond. What has happened in Spain is rather more complex than this. While the State keeps asserting its authority in deciding who can stay and who not, legal and political restraints thwart its chances of deporting illegal immigrants once they have entered national territory. It is not that there is no control but it often happens that this control cannot be translated into deportation. Unlike Malaysia, where the majority of detained illegal immigrants are deported, in Spain only one in every five detainees ends up being deported. The rest, after 40 days of detention, are freed pending an expulsion order. This implies that the threat for illegal immigrants once they are in Spain is not so much deportation as being legally expelled but in practice non-expellable (see Section 4.7). Until 2008, having a non-executed expulsion order meant, moreover, not being able to opt for regularisation, which meant being non-expellable but irregularisable. This legal limbo, fruit of the internal contradictions of a system that aims to expel the immigrants but that is unable to see the project through, is precisely what characterises the Spanish model. Once inside the country, the illegal immigrant runs fewer risks of being physically ‘outside’ but neither does this mean that he or she is legally ‘inside’.