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

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6. CONCLUSIONS

6.1. STATE RESPONSE TO LABOUR DEMANDS

After the guestworker experiences in Europe and the United States during the 1950s and 1960s, there was general consensus that guestworker programmes had failed wherever and whenever they had been tried (Castles 1986; Martin 2000; Martin & Teitelbaum 2001). In particular, the conclusion was that they were inherently flawed because, as the saying goes, there is nothing more permanent than temporary foreign workers. Prominent among the reasons given in the academic literature to explain the propensity of temporary workers to settle was the argument that foreigners in liberal democracies are entitled to rights under the aegis of liberal constitutions (Hollifield 1992). In a similar vein, Freeman (1995) concluded that immigration politics in liberal democracies are ‘expansionist and inclusive’ because the benefits related with immigration are concentrated whereas the costs tend to be diffuse. More recently, along similar lines, Martin and Ruhs (2006) have argued that there is a trade-off, which is to say an inverse relationship, between the number of migrants employed in low-skilled jobs and the rights accorded them: the more immigrants, the fewer the rights. A similar argument leads Arango (2003: 3) to conclude that while democratic countries tend to restrict numbers, non-democratic or autocratic societies tend to restrict rights (see Section 1.4).

The comparison between Spain and Malaysia seeks in the first place to test this argument. In particular, by means of considering the first question of this research – how did the Spanish and Malaysian states respond to the demand for foreign labour? – the aim is to analyse to what extent we are looking at such distinct models. To be more specific, the question might be worded as follows: to what point has Spain had a policy of low numbers and high rights and Malaysia one of high numbers and low rights? At first sight, a quick review of entry policies over the past twenty years leads one to the conclusion that, in effect, the State of Malaysia has opted for a policy of high numbers and low rights. The Malaysian State has not restricted the entry of migrant workers but has placed limits on time of residence, position in the labour market and social and labour rights. In Malaysia as many foreign workers as demanded by employers have entered the country. The restrictions do not appear at the point of entry but are enforced once the immigrants are in the country by limiting their access to membership. In contrast, the Spanish State opted for a particularly restrictive entry policy until 2005. While demands for labour kept growing throughout the 1990s, with particularly acute needs from 2000 to 2007, the government did not respond accordingly by adjusting its immigration policy to let in greater numbers of workers. In this regard, unlike Malaysia and post-war western European countries, Spain exhibited a clear contrast between the economics and politics of immigration. The well-known words of John Berger (1975: 87), ‘To those who have machines, men are given’ would seem not to have been applicable in the Spanish case.
In order to explain the high-numbers policy in Malaysia one needs to refer not only to the role of employers in immigration policymaking but also to the development-oriented project of the State of Malaysia. As noted earlier in Section 3.2.3, the New Economic Policy (1971 – 1990) and its derivations sought to restructure the legacy of colonial society by means of promoting economic growth. While social programmes aimed at situating the Malay in a better position in the labour market, economic growth continued to depend on cheap labour. In this context, there was (and still is) general consensus that employment of migrant workers was necessary for both social stability and economic growth. In Spain, in contrast, the nature of immigration policies arose from very different priorities. First, the demand for closure was determined by European Union requirements. Second, given that unemployment figures had risen to over 20 per cent by the mid-1990s, immigration policies and their implementation tended more to guarantee protection for national workers than to heed the employers’ demands (see Section 4.4.1). Finally, some of the restrictive aspects of Spanish immigration policy should be understood in relation with the fact that the policies did not work well and, more specifically, with the slowness of procedures and the – politically – much-vaunted myth of recruitment in the countries of origin.

However, to conclude that Malaysia is characterised by an open entry policy and Spain by a restrictive one would be to remain on the surface of things, or to settle for an analysis of written policy and its implementation without inquiring into its effects. This distinction between policy on paper and in practice is especially significant in the Spanish case. In Malaysia, the immigration policies produced what they claimed, in other words, many immigrants with very few rights. What happened in Spain was very different. Despite the restrictiveness of its immigration policies, immigrants kept coming in all the same. As many scholars and the stakeholders themselves (starting from the leading political parties) have noted, the mismatch between significant demands for foreign labour and highly restrictive entry policies led to an out-and-out model of illegal immigration. In this regard, if one focuses on how the labour demands were covered in practice, one would conclude that, in Spain, too, the demand for labour led to a situation of high numbers and low rights: high numbers in the sense – to go back to Berger’s formulation – that people with machines obtained men to work them; low rights in the sense that, in their capacity as ‘illegal’, immigrant workers entered the country and worked without having a legal existence. They were bereft of minimal social and labour rights, and their presence did not afford access to permanent residence or citizenship. In short, as with the case of workers in Malaysia, migrant workers in Spain also ‘entered’ but, once ‘inside’, they were still ‘outside’ in any social, labour-related and symbolic sense.

Joint analysis of entry policies and regularisation programmes leads one to a similar conclusion, although there is one further nuance. As I have observed throughout this study, the Spanish regularisation programmes operated for a long time as the real entry policy (see in particular Section 4.6). Until 2005, legal entry as an immigrant worker was so difficult that people usually entered the country,
stayed on and worked illegally until eventually becoming regularised. In this regard, while entry policies were particularly restrictive, the mechanisms of regularisation ended up making entry relatively open. However, entry via regularisation has always meant deferment since an immigrant could only opt for regularisation if he or she had been in the country illegally for some time. Making illegality a requisite for legality meant that those who entered the country had to come in with very few rights. This was undeniably a policy of high numbers and low rights but the big difference in this case is that once they were regularised and after some years of conditional residence (see Section 4.5.3), most of the immigrants ended up obtaining a permanent residence permit or even Spanish citizenship. In other words, in the long term, the regularisation policy eventually led to a situation of high numbers and high rights.

Finally, to conclude this account of the Spanish model, 2005 represented a major change in policy. Along with a final regularisation process that involved almost 700,000 applications, the government finally switched to a relatively open entry policy. The main reason for this, as had repeatedly been proclaimed by the government (of different parties and political hues) in the previous few years, was the aim of legally channelling immigration so as to cut down the numbers of illegal immigrants. In fact, the combination of illegal immigration and the periodical regularisation processes could not continue ad infinitum without undermining the legitimacy of the State inasmuch as it had to be seen to be fulfilling its role of controlling immigration flows. Accordingly, in order to extricate itself from the unmanageable situation of continuous correction of a non-functioning migratory system, the government at last opted for an entry policy that was more visibly in keeping with demands for foreign workers. The result was a policy of high numbers and conditioned rights which eventually led to a situation characterised by high numbers and high rights.

6.2. MARKETS, CITIZENSHIP AND RIGHTS

This research started out from the assumption that the State is required to respond simultaneously to contradictory demands in the field of migration control. In Chapter 1, these contradictory demands were identified as a double dilemma. First, while markets require a policy of open borders to provide as many foreign workers as demanded by employers, citizenship seems to require some degree of closure to the outside. Second, while the exclusive character of citizenship demands closed membership, civil and human rights seem to undermine the State capacity to exclude foreigners once in the country. This double dilemma or trilemma between markets, citizenship and rights leads one to the question of how States manage to reconcile such conflicting demands. In the context of this research, the key question to be considered is how the States of Malaysia and Spain attempted to solve this trilemma. As Malaysia and Spain seem to be similar in terms of markets and different in terms of citizenship and rights (see Chapter 2), this question
implicitly entails two other questions: first, whether different features in terms of citizenship and rights lead to different arrangements, compromises or choices in terms of migration control; and second, given these differences, what the cases of Malaysia and Spain tell us about the relationship between markets, citizenship and rights.

In response to these questions it should first be recalled that, as we have just seen in the previous Section, both cases present a policy (either on paper or in practice) of high numbers. Hence in each of the two countries the market has ruled. In both Malaysia and Spain – to return to Berger’s formulation – those who have machines always obtained men. This conclusion coincides with that reached by other scholars vis-à-vis countries ‘without immigration’, or better said although it is not the same thing, ‘with zero-immigration policies’ (Groenendijk & Hampsink 1994; de Lange 2007). In all these cases, the employers always found a way (direct or indirect, explicit or implicit) of obtaining migrant workers. In Malaysia, entry policies have been notable for their sustained openness. When in periods of economic crisis or increased unemployment the State of Malaysia closed or restricted entry, employers reacted by protesting at serious labour shortages and the State always responded by immediately reopening the border. Although Malaysian scholars have interpreted these swings in immigration policy as a demonstration of its ad hoc nature and lack of coherence, they were really part of a continuum. The present study reveals how the entry of migrant workers was in fact never a matter for negotiation: entry policies simply responded to the market demand.

In the case of Spain, the response to markets was for a long time more a question of policy outcomes than policy objectives and implementation. As we have seen throughout Chapter 4, immigration policy in Spain gave priority to demands for closure until 2005. In this regard, if we analysed entry policies alone, we would agree with Joppke (1998a: 19 – 20) who states that in Western Europe immigration policies have tended to be guided by the restrictionist national interest. Nevertheless, as we have seen, the clash between the politics and economics of immigration ended up giving rise to an outright model of illegal immigration. This has had two significant implications. First, it means that immigrants kept coming in and that labour demands could be covered despite the restrictive immigration policies. Second, if the desire was to re-establish State control over migratory flows, the presence of these immigrants had to be recognised (by means of regularisation drives), while the entry of further immigrants had to be legally channelled by means of more open entry policies. This suggests that, in the long term, the factor markets ended up determining not only migration flows but also migration policies.

Given the predominance of markets in both cases, I have explored how the fact that ‘markets ruled’ affected, transformed or adapted to the demands for closure and the extent to which rights posed constraints on the State capacity to control migration. If we take the existing literature into account, Malaysia would seem to have fewer demands for closure and fewer rights constraints than Spain (see Section 2.2). The
former assumption in the literature of few demands for closure has been argued on the basis of Sadiq’s study (2005), which shows that the distinction between citizens and non-citizens is largely meaningless in Malaysia, resulting in what he defines as weakly institutionalised citizenship. The latter argument of low rights constraints is generally inferred from the fact of Malaysia’s being a less liberal or even authoritarian State. However, detailed analysis of the formulation, implementation and outcomes of migration policies in Malaysia and Spain leads one to slightly different conclusions. First, this study makes clear that in both countries there were significant demands for closure. The main difference is how these demands were met. Second, although rights constraints are indeed characteristic of the Spanish case as a liberal state, this does not mean that the State of Malaysia could completely restrict migrants’ presence in the country or that the State of Spain was constrained by rights at all times, or in all domains and geographies of migration control. I shall explain why below.

As we have seen throughout Chapter 3, in Malaysia demands for closure certainly played an important role. These demands took on significant dimensions when Indonesian migrants started to move into urban areas and economic sectors reserved for local workers. My main argument is that the frontiers tended to close to the extent that immigration was perceived as a threat to social restructuring programmes and, very particularly, to the socio-economic promotion of Malays. In fact, only by referring to this gradual closure of borders, in combination with weighty and recognised demands for labour, is it possible to explain the setting-up of a guestworker programme in the early 1990s. Like any guestworker programme (see García-Mascareñas 2004), this policy responded to the demands for foreign workers by opening up entry, and to the demands for closure by restricting access to membership. In other words, by letting people in as workers but keeping them out as immigrants, the State of Malaysia attempted to cope with the dilemma between markets and citizenship. However, it is important to note that this situation applies exclusively to Peninsular Malaysia because, as I have noted earlier, Eastern Malaysia is another story. Given the fact that Sadiq’s observations on Malaysia are based on a research done in Eastern Malaysia, it is hardly a coincidence that he comes to such dissimilar conclusions.

Such diversity of worlds within the same national territory should not be overlooked. Although this issue lies well beyond the scope of this research, it is important to note that such variation may have something to do with the nature or the ‘genealogy’ of the State of Malaysia. As observed by Wong (2006: 91), in post-colonial states, border regions tend to remain, to a large extent, rather peripheral to the interests of the national elites installed in the centre. State indifference towards border regions, or this perceived and ideologically constructed ‘beyond’ within the national territory, would explain the existence of this dual logic. On the one hand, in border regions such as Eastern Malaysia, ethnicity rather than citizenship would continue to play a crucial role in drawing the boundary between insiders and outsiders. Therefore, as observed by Sadiq, the distinction between citizens and non-citizens would be largely meaningless there. On the other hand, in the
administrative centre of Peninsular Malaysia, the borders and boundaries of the new Malaysian nation-state would finally be imposed and so too would the demand to distinguish between nationals and foreigners. In this regard, we could conclude that, when focusing on the hearth of the nation-state rather than on its periphery, the Malaysian State does not differ significantly from Spain in terms of claims to sovereignty and forms of citizenship.

In Spain the concrete reasons for closure were multiple. As shown throughout Chapter 4 and again in Section 5.1, closure was determined by pressure from the European Union and the demand to protect the national labour market. These demands for closure turned into severe restrictions on entry and partial restrictions on migrants’ access to membership. While restrictions on entry were in practice thwarted by the market factor, restrictions to membership were challenged by the rights factor. This latter fact should be explained, as Hollifield, Joppke and Guiraudon have pointed out regarding Western Europe, by the presence of a strong and independent judiciary and its power to curtail the State’s capacity to restrict immigration. However, in contrast with what Guiraudon concludes (1998, 2000), most (social) rights were not achieved behind the closed doors of the bureaucracy and the courtroom. The political process, as Freeman (1995) notes referring to the United States, played a major role. In Spain, some of the rights obtained by immigrants came by way of new immigration policies and laws with origins not only in Parliament but also and particularly in a political debate that began outside it, with the Ombudsman, opposition parties, immigrants’ and social organisations and trade unions. Yet it would be erroneous to suppose, as Freeman does, that the State’s position has been neutral or merely ‘responsive’ to the different interest groups. The very legitimacy of the State depends on its ability to guarantee these rights. Hence, when mainly civil society, but also opposition parties, started demanding more rights for foreign residents or greater equality between them and citizens, the State had no alternative but to acquiesce.

However, it would be a mistake to conclude that in Malaysia immigrants can be and are objects of exclusion while in Spain the situation is notable for its legal inclusion. In both cases there are significant if subtle distinctions and it is precisely these nuances that differentiate (or signal the distance of) this study from the line of academic literature (mainly represented by Hollifield, Joppke and Guiraudon) that emphasises the role of rights in liberal democracies. Many of these authors tend to assume that the governments of non-liberal democracies get around rights-based impediments ‘because there are fewer legal or institutional constraints on the behaviour of states vis-à-vis foreign nationals’ (Hollifield 2002: 11). A quick overview of immigration policies in Malaysia would seem to uphold this conclusion: unlike Spain, immigration policies in Malaysia can immobilise immigrant workers, make them dependent on their employers and ensure that their stay is purely temporary. Nevertheless, by paying attention to how these policies worked in practice, this study makes clear that restrictions on migrants’ rights have also had their limits in Malaysia. These limitations were not imposed by legal or political means but, rather, the immigrants themselves directly challenged the legal
and political system in escaping from State control by means of resorting to illegality.

In the case of Spain, one should not forget that the policy of high rights was the outcome only in the last instance. First, given the mismatch between the politics and economics of migration, most immigrants in Spain were there illegally. Hence, we speak here of low rights in the sense that illegal immigrants were only partially recognised in the social domain and not recognised in the labour domain, while their presence in the country did not pave the way for their remaining in the country as permanent residents or citizens. Although a number of Court cases and a series of modifications to the immigration laws extended the rights of illegal immigrants (see, for instance, Section 4.3.3), in general terms their situation has been one of vulnerability in the legal, social and job spheres. Second, in the early years of residence, immigrants acquired only conditioned rights. As I have noted at different points above, legal residence has depended on the first five years of formal and effective integration into the labour market. While the rights of legal immigrants were being extended throughout the 1990s, this dependence ensured that legality (and its associated rights) was nothing more than a status that was conditional on having a formally recognised job. As a result, given the significant immigrant presence in the informal sector of the Spanish economy, this status was in reality changeable and precarious.

To conclude, in both Malaysia and Spain, entry has been determined by their respective markets. Basically, in each case, as many immigrants as have been required by employers have entered the country. In this situation, characterised (explicitly or implicitly, directly or indirectly) by what might be described as ‘open borders to foreign labour’, both states have attempted to block access to membership. The main difference lies with the time factor. While in Malaysia the aim has been to make exclusion total and indefinite, in Spain it has only been possible in a partial and temporary form. In both cases, then, the functioning of the external exclusive dimension of citizenship has led to the inflicting of forms of exclusion from within. However, in the case of Spain, the possibility of indefinite (with regard to both legal and illegal immigrants) exclusion has been foiled by rights constraints. In Malaysia, neither legal nor political processes have been able to restrain the power of the State to control and limit the presence of immigrants in the country. In this sense Hollifield would be correct in stating that the non-democratic states are less encumbered. Nonetheless, to think that in the absence of legal or political limits there are no limits at all, is to think exclusively within the parameters of ‘la pensée d’état’. In Malaysia, too, the words of Max Frisch apply: the State ‘asked for workers, but human beings came’. In this case, as we will see in Section 6.4, the humanity of migrant workers has not been upheld by the courts or by social and political actors but rather by the immigrants themselves by means of opting for illegality.
6.3. THE ILLUSION OF MIGRATION ‘MANAGEMENT’

By the 1970s and 1980s, as noted above, there was general consensus that guestworker programmes had failed as instruments for managing temporary labour migration. Ever since then, most studies in Western Europe have focused on family immigration, refugees or the processes of integration. When different scholars have discussed labour immigration, they have tended to confine their focus to analysing entry policies, while overlooking the effects of these policies on migratory flows and how they have combined with other measures such as regularisation programmes. If we take the whole, which is to say entry policies plus their effects, and entry policies in combination with other migration policies, the scenario that appears is very different from the one ‘imagined’ from the State perspective and, frequently too, from the standpoints of the social and political sciences. For instance, if we think that, in the case of Spain, the situation can be defined in terms of ‘open borders to foreign labour’ and partial exclusion of migrant workers in the first years of residence, the result is not so different, in fact, from that of the notorious (and more than once pronounced ‘dead’) guestworker programmes.

One major difference between past and present in Europe is that, in the past, the partial and temporary exclusion of migrant workers was part of an explicit policy while, in recent decades, it has to some extent come about as a result of the policy effects or, in other words, what was not committed to writing. This brings us to another important difference. As I have remarked above with regard to what is not explicit and not written, this unspoken policy has run the risk of undermining the legitimacy of the State vis-à-vis its function of controlling migration flows. In contrast with the past, this has not always been policy agreed on by three parties (State, employers and trade unions), or one with broad-based social and political support. It has been more a case of the effects of a ‘want-to-but-can’t’ policy, which has therefore needed constant revision by means of periodical regularisation drives. On the one hand, migrants were demanded by employers. On the other hand, they were not wanted in the new contexts of the European Union and high levels of unemployment in Spain. This ‘want-to-but-can’t’ policy was resolved in practice by both policy outcomes (illegal migration) and the combination of different migration policy measures (entry policy plus regularisations). At the same time, in being unspoken and non-explicit, this policy run the risk of being experienced and labelled as ‘failed policy’. This explains why the Spanish Government decided in 2005 to opt for a more open entry policy that would at last demonstrate a certain degree of State regulation and control over migratory flows.

Despite these differences, the great similarity between past and present in Europe is to be found with the tension between demands for foreign labour and those for closure or, more specifically, between wanted foreign workers and unwanted migrants. There are also some common points in the outcome of this dilemma. In the cases both of post-war guestworker programmes and the situation in recent decades in Spain, with a model that has combined illegality with regularisation programmes and, subsequently, legal entry with conditional membership, we have
a policy that is essentially marked by \textit{high numbers, low or conditioned rights in the first years and high rights in the long term}. The first part of the equation (high numbers and low or conditioned rights) is the result of taking immigrants as pure ‘temporary workers’. In this sense, the resemblance with the Malaysian case is clear. In all three cases (post-war guestworker programmes, Spain and Malaysia) migrants have been authorised by governments to cross their borders to look for wages on a temporary basis; they have been guests and aliens in states that have defined them essentially as workers; and, finally, in all three cases they have been expected to leave the country on expiry of their contracts, or at the end of the period of economic growth that brought them there. To sum up, both in the past and in more recent decades in Spain and Malaysia, states have operated under the illusion that immigration is an ‘economic matter’ and that migrants are thus commodities that can be imported and exported at will.

The second part of the equation (high rights in the long term) is the result, as we have seen, of constraints imposed by the legal and political systems. The conclusion to be drawn in this case is as follows: it is not the case that immigrants could not be excluded in liberal democracies but that they have only been excluded in a partial and temporary way. This is the big difference with Malaysia, where it has been possible to exclude migrants totally and indefinitely. Yet the attempt in Malaysia to turn foreign workers into mere merchandise to be imported and exported as and when demanded has not been completely successful either. Here, too, the deluded notion that immigration is a purely economic matter to be managed by the State has been challenged by the fact that ‘human beings came’. While in the European case (with guestworker programmes and in Spain over recent decades) this humanity of migrant workers has been translated, in the medium and long term, into permanent residence, in Malaysia it has been translated into the illegality of rationally-acting human beings. One might well ask to what point these two outcomes might be explained by the political context and the role of rights. To be more precise, to what point has the illusion of migration ‘management’ as an economic matter been translated over time into permanent migration in the liberal democracies and illegal migration in the non-liberal democracies?

Europe, past and present, would constitute the perfect example of the former. The Gulf States and other Asian countries would exemplify the latter. Several studies have revealed that, as with Malaysia, in other countries illegality has been a way of escaping State control (see, for instance, Moors & De Regt 2008: 163). While these examples would seem to confirm the relationship between rights and policy outcomes, this should also be nuanced. First, as in the Spanish case, a very restrictive policy vis-à-vis low-skilled immigrants despite huge labour demands do not result in the short run in permanent residence but rather in illegal migration. In the case of the United States, as there have been no regularisation programmes in recent decades, illegality turned into a rather indefinite status. It it true that there is always the promise of future legalisations but, without being materialised, this promise translates into a mechanism of disciplining illegal migrants (by
encouraging them to insure their identification and traceability and being ‘good illegal migrants’) rather than as a door to legal recognition and permanent residence (see Chauvin & Garcés-Mascareñas, forthcoming). Second, Taiwan and Singapore are examples that would almost tempt one to think that the dream of migration ‘management’ is possible in some places. In both these cases, the State appears to have managed to regulate and control labour immigration in all three aspects of entry, stay and return (see, for instance, Lu 2008). Though a closer look is needed to confirm this conclusion, one might ask here to what extent this ‘success’ of immigration policies is due to a better balance between markets and citizenship in a context of few rights and high migration control, or to what point, given the insular nature of the two places, geography would primarily account for the difference.

6.4. THE STATE’S PRODUCTION OF ILLEGALITY

Illegal immigration has tended to be explained as a socio-economic phenomenon that just happens despite migration policies and states. From this standpoint, many scholars have reached the conclusion that socio-economic factors make it difficult, if not impossible, to enforce policy restrictions. The next conclusion has been that states have failed to control migration flows or that they simply do not have the capacity to do so (Cornelius et al. 2004). In contrast with these approaches, this study makes it clear that illegal immigration is not an independent phenomenon that simply occurs, whatever the State or its immigration policies. While immigrant flows are indeed motivated by the importance of the structurally-embedded demand for foreign workers in different receiving societies, of cross-national economic disparities and transnational economic, social and historical ties, these factors alone do not explain why (a significant) part of these flows takes place illegally. In other words, the option (or the chance) of migrating legally or illegally cannot be understood without taking into account the obvious factor of the State and its migration policies, not only because it is the State that defines who might enter and who not, but also because the State itself produces the migrants’ illegality.

In speaking of the State’s production of illegality, I do not mean, as other authors have argued (see, for example, Calavita 2005), that the non-legal recognition of the immigrant’s existence and work seeks to create a cheap, flexible labour force. It is true that borders might be instrumental in this. As Sassen observes (1988: 7), border enforcement facilitates ‘the extraction of cheap labour by assigning criminal status to a segment of the working class – illegal immigrants’. The case of Spain is, in fact, a very clear example of that. Yet the State’s production of illegality is much more than this. It is linked with the intractable antagonism between demands for foreign labour and demands for closure. Attempts were made to find a solution to the dilemma in both Spain and Malaysia by means of the aforementioned gambit of ‘the illusion of migration management’, or the conviction and intention that foreign labour could be ‘imported’, controlled, limited and, where necessary, ‘exported’ at
will. However, labour is not, and never has been, just a commodity. In neither of the two cases, with or without rights, has the State succeeded in commodifying foreign labour. The first and foremost result of this ‘failed’ attempt has been the production of the illegal immigrant or what others (see Cornelius et al. 1994, 2004) have dubbed a gap between migration policies and outcomes.

In the Malaysian case, illegality has been the result, first, of a bureaucratised and commercialised border. Entering Malaysia as a foreign worker has involved a great deal of red tape and paying out for an endless series of papers with the governments in the countries of origin as well as the Malaysian embassies. Moreover, the existence of a chain of intermediaries has only increased the costs of a journey which, for people just across the border, are exorbitant and unnecessary. Due to the bureaucratisation and commercialisation of the border, illegal entry has represented for would-be immigrants in nearby zones a much faster and cheaper option. Second, as I have mentioned, control over immigrants has clashed with the interests of employers who want a more flexible and also permanent workforce. Then again, there is the resistance of immigrants to being turned into mere manpower in the thrall of the interests of State.

In the case of Spain, the State’s production of illegality resulted from two different processes. First, as noted above, the mismatch between the economics and politics of migration led to nothing less than an outright model of illegal immigration. This mismatch is related with restrictionist national interest but also with a bureaucracy that was unable to cope with burgeoning and ‘unforeseen’ requests for entry. Second, the policy of periodical regularisations both reduced and produced illegality. If each regularisation campaign was launched with the aim of taking the illegality count back to zero, each regularisation process produced new or recurrent illegality. This must be explained by the fact that, until 2001, time of residence rather than holding a job was the main requisite for regularisation while, with the first renovation after a year, having a job rather than residence was the chief requirement for maintaining legal status. What ended up creating illegality, then, was the combination of relative (though deferred) open entry by means of regularisation and the preservation of a form of conditioned membership. In other words, illegality (or what Spanish scholars have called ‘relapse into illegality’) was the aftermath of a regularisation policy that applied to residents and a renovation policy that only covered workers with a (formally recognised) job.

It might be asserted that any kind of regulation entails its opposite or, to put it slightly differently, legality bears the seeds of illegality within it. While this may be true, there is more than that. In particular, this study shows how it is precisely ‘the illusion’ of considering and treating immigrants only as workers, as manpower that can be imported, kept under constraints and exported at will, that produces this illegality. The reason for this is simply that the condition of immigrants is much more than that of mere bracero (literally arm-man) or of a commodity that can be subjected to barriers, tariffs and limits. This does not mean that borders and State control do not matter. In fact, illegality is proof of their existence and relevance. It
means, rather, that illegality – and this is the main thrust of my argument – should not be explained in outside terms but from within, from the context of immigration policy itself and the contradictions besetting the nation-state with regard to labour demands. Here, the historical perspective throws some light on the matter. If one compares the cases of Malaysia and Spain with the earliest forms of world labour transfer (basically to the colonies), there are three outstanding differences that also throw light on why labour demands tend to produce illegality in the context of modern nation-states.

First, in colonial times, the contradiction between the politics and economics of migration that can appear nowadays (as in the case of Spain) did not arise. Second, although the colonial situation was essentially one of forced labour and forced migration, the immigrants arrived in the country to stay. As I noted at the start of this study, slaves belonged to an employer until the end of their days, while indentured workers were generally encouraged to stay on after their contracts expired. Third, those who emigrated outside (or who left) the State-regulated migration system (for example, the Chinese in colonial Malaya) were not located outside the law. In other words, irregularity (being outside the regular system) did not mean illegality (see Garcés-Mascareñas 2008a). These three differences – the fact that as many workers as needed were allowed to enter, indefinitely and independently of whether they migrated within or outside the State-regulated system – are essentially explained because the presence of these workers never represented any challenge to the polity. Their presence gave them no access to membership. It was precisely because of this that as many people as were required by employers could enter and even stay for good.

In contrast, sovereignty led to an identification of community or polity with territory. Accordingly, the entry of foreigners into the territory was seen as a potential threat to the economic, social, political and cultural boundaries. In particular, in the context of the nation-state, migrants have been seen as competing with local workers, as a burden on the welfare state and its limited distributive power, as non-legitimate voters or as cultural aliens. As I remarked at the outset, the tendency towards universalist inclusion within nation-states is intrinsically interlocked with systematic exclusion of people classified as non-members, non-citizens or foreigners (Bader 1995: 212). The key question has been how to achieve this exclusion in the face of huge labour demands. In Malaysia, the attempt was made by imposing the exclusion from within: letting them in but only as temporary foreign workers with few rights. In Spain, exclusion was imposed at the point of entry and with the first years of residence. However, as this study shows, the balance between inclusion and exclusion has always been shaky: in Malaysia this is because it has not been easy in practice to restrict and control migrants' presence in the country; in Spain because the markets are not willing to do without migrant workers and because migrants tend to stay on even when they have not fulfilled the function assigned to them, that is, that of being formally-employed workers. At the end, in both cases, it is precisely this always-precarious equilibrium between inclusion and exclusion that is the bottom line when it comes to explaining
Illegality.

6.5. Meanings of Illegality

The literature on migrant illegality, as we have seen in Chapter 1, presents different approaches. Some scholars have analysed the implications of legal exclusion with regard to illegal immigrants’ lives. These writers speak, for example, of how the category of ‘illegal’ tends to construct a subordinate labour force, pure manpower without access to social services and facilities, non-legal subjects, or to ‘bare life’ excluded from legal existence (Agamben 1998). Other scholars have brought out the ways in which illegal immigrants are incorporated through informal, everyday practices. This strand of the literature is concerned with how individual and collective coping strategies, of the migrants themselves, non-governmental organisations, and sympathetic civil servants have paved the way for an opening up of loopholes for illegal immigrants in the job market or in the realm of the welfare state. From a comparative standpoint, the present study is a blend of both types of research.

With regard to the first matter, suffice to say that illegality does not always mean confinement to a subordinate identity or imprisonment within the bounds of non-recognition. Better said, it is not always more the case than it is with legality. As I have noted several times throughout this study, in Malaysia, the resort to illegality, both by people who entered the country illegally and those who became illegal immigrants on leaving their employers, has made it possible for people to ‘escape’ the restraints imposed by the State-regulated migrant labour system. More to the point, illegal immigrants, unlike ‘legal’ immigrants, can change jobs, can to some extent negotiate their salary and working conditions, do not have to pay extra to enter or remain in the country and can prolong their stay independently of the economic situation or their state of health, or beyond the five years stipulated by law. This resort to illegality is not unique to the Malaysian case. ‘Spontaneous migrants’ to Northern Europe in the 1960s and early 1970s or Eastern European migrants recruited by commercial employment agencies from the late 1990s onwards and who found themselves in extreme coercive situations, did also escape from the restrictions imposed by the migrant labour system by migrating or looking for work on their own. In all these cases, illegality constitutes a form of resistance, one that is, in fact, not so different from the kinds of resistance adopted by Malay peasants in colonial times, as described by James Scott (1985). This resistance is not organised or collective by nature and neither is it verbalised or staged in any way, but rather it is carried out on the basis of small, everyday, individual actions, on the basis of leading an invisible – or invisibilised – existence which, precisely as such, contrives to escape from, and thereby reveal itself to, State control.

As for the dichotomy between exclusion in the formal sphere and inclusion in the informal one, the Spanish case is paradigmatic in the way its legal system at once
excludes and includes. By this I mean the way in which ‘the tension between illegal status and certain citizenship rights does not always set up an opposition between formal law, on the one hand, and informal practices, on the other: it is always located within the law itself’ (Chauvin & Garcés-Mascareñas, forthcoming). First of all, while illegal immigrants are undocumented on the national level (by the central government), their registration in the municipal census (in Spanish, *el padrón*) gives them documents at the local level. Second, while legal and, in particular, political processes were including illegal immigrants in some spheres of the social domain, in terms of work, they still fell into the category of legally non-existent, and hence right-less manpower. This flexible line between exclusion and inclusion, between outside and inside, reveals how illegality should be understood as a differentiated form of inclusion rather than as absolute shutting-out. Furthermore, it makes it possible to identify the more sheltered or protected aspects of citizenship. In particular, in the Spanish case, it would seem clear that the dividing lines that affect illegal immigrants are much less permeable in the national domain and *with respect to the labour market* than they are in the local domain and *with respect to the welfare state*.

Finally, if we compare the meanings of illegality in Malaysia and Spain, it is important to identify a number of major differences and similarities. If illegality is defined as an in-between state of regularisability (the possibility of being regularised) and deportability (the possibility of being deported), we could conclude that the situation of illegal immigrants would tend more to deportability in Malaysia and more to regularisability in Spain. Related to this, another difference between the two countries appears with the relationship between legality and illegality. In Malaysia, illegality should be understood above all as an alternative to legality with regard to both arrival and stay. Moreover, illegality tends to represent a cul-de-sac in terms of rights and legal recognition. In contrast with Malaysia, illegality in Spain has ended up representing a transition, path or requisite for legality. Despite these fundamental differences, both cases make it clear how legal status and illegal status are not fixed. On the contrary, immigrants move from one status to the other (from legality to illegality in Malaysia, and from illegality to legality and vice-versa in Spain) with relative ease. Finally, in both cases, one can see that to speak of illegality is also to speak of what might be called the theatre of illegality, which is to say, of the staging of migratory control over the illegal immigrant (De Genova 2002: 436).

As De Genova (2002: 436 – 437) has demonstrated for the case of the United States, this staging (or show) of migratory control is mainly carried out by means of arrests, detentions and deportations. It is by deprivation of free movement and forced physical expulsion that State control is deployed in its most heightened expression. If, in the sphere of labour, the illegal immigrant is stripped of his or her rights as a worker, with deportation he or she is directly dispossessed of freedom of movement (De Genova 2009). The aim of deportation policies is not so much to reduce illegal immigration as to delimit a symbolic precinct of illegality. While this is common to both Malaysia and Spain, the basic difference between the two
countries is to be found in the geographic domain or space in which the illegality show is staged. In Malaysia, deportation policies are put into practice at the very heart of national territory. In Spain, they are carried out in particular on the geographic frontier and beyond. This difference between the geographies of deportability suggests that the deportees are different in each case. In Malaysia, essentially workers are deported, while in Spain deportation is mostly applied – and one might almost say in a preventive fashion – to those who have not yet managed to get in.

6.6. TOWARDS A THEORY OF BORDERS AND CONFINES

This comparison between two such different countries or what some would call a comparison of ‘the incomparable’, has aimed to trace relationships and deconstruct categories that are too often taken for granted in particular historical and national contexts. This purpose has been achieved in different ways. First, the comparison has shown how the trilemma between markets, citizenship and rights develops differently in liberal and non-liberal states although with unexpected and relevant similarities as well. For instance, in both cases, markets have ruled. In both cases, demands for closure were met by attempting to block access to membership. In both cases, the State ‘illusion of migration management’ and, in more general terms, the intractable antagonism between the demands of markets and the demands of citizenship, or those for foreign labour and those for closure, have produced illegal migration. Second, the comparison has revealed that, contrary to what it is assumed from a western perspective, illegal migration does not mean the same everywhere. Illegality mirrors the contours of legality and therefore, in those places where these contours are very narrow, illegality does not necessarily mean a more subordinated form of existence. Finally, although this goes well beyond the scope of this research, the comparison shows how borders act in very different ways or, to be more specific, have different implications and meanings when considered in the light of migratory flows.

In these closing paragraphs, I should like to sketch by way of conclusion what we might call an incipient theory of borders and confines. By border I understand the territory where one state ends and another begins, or the geographic line between different states. By confine I mean, using the term and definition of Mezzadra (2005: 112), the ‘line of division and protection of constituted and consolidated political, social and symbolic spaces’ (original in Spanish). Thinking about borders and confines from a comparative point of view, my impression (and here it should be understood that this is not to be taken as any kind of conclusion but rather as a door or window opening into further research) is that what is engraved on the experience of immigrants is mainly the confine in the case of Malaysia and mainly the border in that of Spain. In Malaysia the geographic border is not erected as a wall separating those inside from those outside. Through the country’s airports or aboard small boats, legal and illegal immigrants cross the borders of Malaysia
without much difficulty. Once they are inside, however, the confine is imposed on both groups. In the case of legal immigrants, the confine is established when they are immobilised in the job market, made dependent on their employers, and defined as purely and exclusively temporary labour. In brief, the confine of legality is marked by the idea of reducing legal immigrants to the condition of being mere ‘foreign workers’. As for illegal immigrants, the confine is constructed over the threat of deportation, or the possibility of being physically ‘expelled’ from national territory in a more than less judicial and more than less arbitrary fashion.

In this regard, we might conclude, as I have argued elsewhere (Garcés-Mascareñas 2010), that what marks the experience of immigrants in Malaysia is not so much crossing the border (legally or illegally) as being on the outside even when physically inside. This may have to be explained by referring to two different factors. First, we should once more refer to the rights factor. As recalled many times in this book, it is because rights can be very restricted that the State of Malaysia could implement a policy of letting migrants in but only as temporary foreign workers. In other words, the border to legal entry could be minimised as the confine is awaiting legal migrants once they are inside. Second, the ease of illegally crossing the geographic border should be explained by the fact that this frontier does not work as an impenetrable wall between different worlds. As observed above, the border territories of postcolonial states have remained to a large extent at a great remove from the interest of the national elites installed in the centre. The elites’ indifference towards these regions explains why most migration control takes place at the very heart of the nation-state (Peninsular Malaysia and particularly Kuala Lumpur) instead of at the geographic border. Therefore, in contrast to what we increasingly see in Western countries, the experience of being identified and named as an unwanted outsider does not take place when the immigrant is ‘on the way’ or trying to ‘get in’ but when he or she is in the heartland of the national territory.

In Spain – and this point can be extended to most Western countries – it is especially on the border where the largest-scale and most frequent forms of exclusion occur. It is at the border, and even beyond it, in the countries of origin, where the meagre trickle of those who may enter are separated from those who may not, or where those who seem to be trying to get in anyway are rejected and turned back. In other words, in contrast with Malaysia, it is especially on the border where not only the illegality show is staged but also the ultimate performance of immigration policies. As I have observed throughout this book, the dominance of the border over the confine is a form of excluding immigrants where exclusion is still possible, which is to say, where the State can still get around the constraints imposed by the legal and political systems. From this point of view we might conclude that the relationship between border and confine is connected with the nature of the State (postcolonial state versus old nation-state), the market factor in migration policymaking processes (favouring the entry of workers or not) and the role played by rights (and their application) within national territory. Regarding the last aspect, it would be too facile to conclude, however, that the confine is
characteristic of non-democratic or autocratic countries while the border is imposed as the only form of exclusion in liberal democracies. In short, it is not a question of either/or.

First, by entering by sea or through the Pyrenees or with a tourist visa on arrival, the borders in Spain have been much more porous than what one would expect from the mainstream discourse of Fortress Europe. Second, the present study shows how in Spain there are also significant confines that affect both legal and illegal immigrants. The difference with Malaysia does not lie so much in the existence or absence of the confine but rather in its duration. In other words, and as I have noted in the last few pages, the important fact is not that, in Spain, there has been no exclusion from within, but that it has only been possible to enforce this exclusion during the first years in the country. In the long term, both legal and illegal immigrants have ended up being recognised as permanent residents or fully-fledged citizens. Third and finally, several studies (Balibar 2005; Bigo 2002; Salter 2004; Mezzadra 2005; Walters 2006) have signalled an increasing tendency towards ‘de-localisation’, ‘de-territorialisation’ or ‘disegregation’ from the border inwards. Hence, along with the reinforcement of exterior walls and the externalisation of the border towards the countries of origin, another ‘border that is implosive, infinitely elastic, and in effect, truly everywhere, within the space of the nation-state’ (De Genova 2009: 30) may also be under construction. It remains to be seen how far it is possible to go with this exclusion from within, and to what extent rights, or the rule of law, will really continue to play such a fundamental role.