The borderlands of legality

Theme intro

Willem van Schendel
Guest editor

As you are reading this newsletter, you may be indulging in illegal activity. Are you authorised to be in the place where you are reading this? If you are online, did you pay for the software you are using? Are you wearing fake designer clothes? Has that cigarette in your hand been smuggled into the country? And who is cleaning your house?

This special issue of *IIAS Newsletter* looks at practices that states prohibit, but are nevertheless widespread and often regarded as acceptable. Although such practices are in no way exclusively Asian, there are many ways in which examples from Asia can shed light on them. The authors assembled here share an interest in practices that are transnational, that is to say, involve movement across national borders.

Globalisation and transnationalism, though not new phenomena, have become more prominent over the past decades, resulting in worldwide movements of money, goods and people which have captured the imaginations of social scientists as never before. Most studies of transnational flows are framed in terms of the modern nation-state because most social scientists, consciously or unconsciously, take state territories as their starting point. Even international relations – a field that seeks to understand the world beyond the state – uses the state as its foundational unit of analysis. We thus rely on analytical categories that presuppose social immobility to understand mobile practices.

This issue explores the limitations of 'seeing like a state' and privileges the perspectives of participants in cross-border activities. This leads us to different understandings of processes of transnational movement, and to focus on a theme that is rarely highlighted in the study of transnational practices: the interface of legality and illegality. We do not start from the common image of societies as consisting of a moral core of upstanding citizens and a state guided by legal institutions to which criminals 'out there' lay siege, an approach that leads to thinking in terms of good guys and bad guys and the language of law enforcement. Key words reserved for bad guys and their organisations (syndicates, cartels, gangs, triads, secret societies, mafias, guerrilla outfits, traffickers and terrorist networks) all denote their special and separate status of being unauthorised, clandestine and underground. Such language constructs conceptual barriers between outlawed bad-guy activities (smuggling and trafficking) and state-approved good-guy activities (trade and migration) that obscure how these are often part of a single spectrum. It makes sense to break down such simple dichotomies and to accept that legality and illegality are interwoven in the lives of a great many people – and that most people who are involved in practices that are not (wholly) legal do not think of themselves, or of each other, as criminals. In other words, they may engage in illegal transnational practices, but do not represent global syndicates of 'organised crime.'

Defining what is illegal is no easy task. No global legal authority exists to define it, so the law almost always refers to states. And what is legal in one state may be illegal in another, just as what a state considers illegal today may become legal tomorrow. It is therefore impossible to objectively distinguish between the illegal and the legal when it comes to flows of people and commodities crossing international borders. What makes matters more confusing is that those who violate laws are not necessarily outside state structures; state personnel regularly – some would argue structurally – engage in illegal practices. For example, 'reasons of state' may impel them to tap their fellow citizens' phones, get rid of embarrassing documents, or undermine a neighbouring government. In addition, bent cops, corrupt officials, smuggling border guards and vote-selling parliamentarians are familiar characters who use their positions within states for personal gain. In short, what customarily passes for 'international crime' is a coherent whole whose parts are sometimes legal, sometimes illegal.

Discussions of 'legal' and 'illegal' can be furthered by introducing the distinction between 'licit' and 'illicit'.* These latter terms refer less to state law than to social perceptions of activities defined as right or wrong. Thus you may feel entitled to reside in a certain state's territory, even though the laws of the land make you an unauthorised immigrant. You may have no qualms about using illegally copied software, wearing fake designer clothes or smoking that cheap smuggled cigarette. And you may happily employ a house cleaner who is an illegal resident. In all these cases you may know that you are doing something illegal, but you certainly would not consider yourself a criminal. On the contrary, you feel you are doing something acceptable, or licit, and are likely to be in continual dialogue about what is and what is not permissible. Some Japanese may freely use heroin while others will frown upon it; some Pakistanis will enjoy drinking illegally-imported whisky whereas others will condemn it as un-Islamic; you may take a dim view of informal money transfers known as *hawala* that your neighbour uses to send money back home. Discerning between what is licit and what is illicit is even harder than defining the legal and the illegal; the former concerns group norms that are not codified and are often difficult for outsiders to access.

What social groups define as licit behaviour may well coincide with the rules that states set down. In that case what is licit is also legal. In this issue, however, we look at cases where there is a poor match between the two points of view. These cases show that we need to consider multiple legal perspectives as well as perceptions of licitness if we are to find satisfactory explanations for transnational practices that cross the boundaries of what is legal and what is not. <

Willem van Schendel
University of Amsterdam
h.w.vanschendel@uva.nl

* For detailed discussion and case studies, see Willem van Schendel and Itty Abraham, eds. 2005. *Illicit Flows and Criminal Things: States, Borders, and the Other Side of Globalization*. Bloomington: Indiana University Press.