

'Illegal' and criminalised: undocumented Zimbabwean migrant workers as 'unfree' labour in Witbank, South Africa. (By Johannes Machinya)

Restrictive immigration enforcement practices have seen an increasing convergence between immigration and criminal justice systems with undocumented (im)migration becoming more illegalised and criminalised. Criminalising migrant 'illegality' gives legal legitimacy to discrimination and exclusion of undocumented migrant workers. It creates legalised unfreedoms and produces undocumented migrant workers as a subordinate workforce without legal status – a palatable fodder for exploitative employers, particularly in the informal sector.

This paper is based on in-depth interviews conducted for my Doctoral research in Witbank, South Africa, with undocumented migrant workers from Zimbabwe from July 2015 to July 2016 on their experiences of 'illegality' in their everyday encounters with state power. Migrant 'illegality' is a mode of being-in-the-world which works as a powerful disciplining mechanism for undocumented migrants. It is a condition attributed to the unlawful entry, residing and/or working by foreigners in South Africa without official documentation authorising them to do so. However, De Genova (2004:161) argues that migrant 'illegality' should not be simplistically conceived as the "presumably transparent consequence of unauthorised border crossing or some other violation of immigration law"; rather, it needs to be analysed as a complex "juridical status and a socio-political condition" (Willen, 2007:9) experienced in the everyday lives of undocumented migrants.

Undocumented Zimbabwean migrant workers in Witbank have an astonishingly celebrated work ethic as obedient and hardworking. Employers prefer undocumented migrant workers because, due to their illegalised migrant status, they are a cheap and tractable labour-force than South African workers. This invokes the question: Are undocumented migrant workers hard workers by disposition, or there is an invisible compulsion propelling them to work hard?

Opening the sociological optic into the lifeworlds of undocumented migrant workers reveals the actual force behind the perceived work ethic of undocumented migrant workers as one respondent confirmed, "No (we are not hard workers by disposition), it's because we are illegal" (Interview with Melody Murozvi, 15/08/2015). 'Illegal' migrant workers are harder workers, more loyal and reliable, and prepared to work longer hours for a little lower pay due to their lack of choice (Lewis et al, 2014).

(Im)migration control to South Africa

South Africa's economic dominance in the Southern Africa Development Community (SADC) region attracts a lot of migrants looking for better opportunities from across Africa and elsewhere in the world. Cross-border migration, particularly for work, from South Africa's neighbouring countries, has generated offensive apartheid inventions such as 'border jumpers', 'illegal' migrants', 'illegal aliens' directed especially at undocumented migrant groups.

Post-apartheid South Africa inherited from its apartheid past a more restrictive, exclusionary and class-based labour (im)migration regime based on a system of preferences (Peberdy, 2009), which was operationalised through the 'exceptional skills' visa in the Immigration Act of 2002, and those that are deemed a-functional to the country's labour market needs are excluded. However since 2014 there has been much more restriction on 'skilled' immigration, with the general exceptional skills visa being replaced with the much more limited 'critical skills' visa, which applies only to certain designated profes-

sions. Many low and non-skilled migrants enter South Africa through breaching the immigration law and thus becoming 'illegal', less protected by the law and enjoying limited or no rights.

South Africa's contemporary legislative framework on immigration remains rooted in past immigration legislation where persons who violate the immigration law are classified as prohibited or 'illegal' persons (Peberdy, 2009). Such persons are classified as undesirable and are thus left with little/no legal standing as persons (Klaaren and Ramji, 2001). The operative legislative provisions of the immigration law criminalise undocumented migrants, which creates a social hierarchy grounded in legal status as a social position that determines one's life chances and access to rights. The law prohibits the employment of 'illegal' foreigners.

Klaaren and Ramji (2001) lament the institutional corruption that is inherent in the immigration policing regime in South Africa. Many respondents revealed that they pay between R300.00 to R1000.00 in bribes to the police or Home Affairs officials in order to be allowed in the country, something which disputes the clandestinity of 'illegal' migration. Officials consciously allow the flow of undocumented migrant labour into South Africa while simultaneously placing greater controls on and reducing the rights of the 'illegal' migrant workforce – what Sparke (2006) (in Lewis et al, 2014) calls 'carceral cosmopolitanism'.

However, despite the heavy-handed characterisation of South Africa's immigration regime, the country took some steps after 1994 to legalise and formalise a number of foreign nationals who have been living and/or working 'illegally' with the most recent being the special permits granted to undocumented Zimbabweans in 2010 (extended from 2014 to 2017) and also for Lesotho nationals in 2016. However, there are still a lot more migrants who are 'illegal'.

Migrant 'illegality'– the lynchpin of 'unfreedoms' for undocumented migrant workers

The oppressive everyday governmentality of 'illegal' migrants produces them as economically and politically precarious. They live under the constant threat of apprehension and deportation. Immigration enforcement in South Africa tries to make undocumented migrants more uncomfortable and constrained so that the predisposition to precarity and unfreedom increases. Section 29(g) of the Draft Immigration Bill released in 2000 seeks to "promote a climate...which encourages illegal foreigners to depart voluntarily" and communities are encouraged to assist officials in tracking down and arresting 'illegal' migrants (Klaaren and Ramji, 2001).

The doctrine of illegality holds that a person should not benefit from their wrongdoing (Ryan, 2005) and the denial of rights for 'illegal' migrants may be legitimised as a form of collateral damage. The threat of deportation, what De Genova (2002) calls deportability, locks undocumented migrant workers in a life of spatial-temporal imprisonment which confines them to an endless cycle of oscillating between home and work, thus literally segregating them from the wider society. It constrains their free

movement which complicates their ability to find job opportunities in the labour market, thus making them a form of entrapped labour-force. Therefore, deportability is a political-legal constraint that hinders undocumented migrant workers from selling their labour power in the labour market, making them a form of 'unfree' labour.

Deportability creates a sense that they are living off borrowed time, i.e. enforced temporariness, which forces undocumented migrants to maximise every minute they have whatever the conditions of employment. The fear of deportation generates forms of unfreedom which may force them to remain in exploitative employment relations.

The unquestioning acceptance of migrant 'illegality' as a normative consequence of violation of the immigration law, which Menjivar and Abrego (2012) refer to as legal or symbolic violence, needs to be deconstructed in order to understand the making of undocumented migrant workers as a form of unfree labour, thus exposing the hidden injustices they experience. The imposition of illegalised statuses on undocumented migrant workers compels them to evaluate their mode of being-in-the-world through this frame and forces them to accept discrimination, exploitation and abuse as fitting punishment befitting their criminalised status.

The experiences of 'illegality' disqualify undocumented migrant workers as purely free labourers despite their seeming freedom from the conventional clutches of unfreedom and purported voluntary entrance into employment relations. Free labour in the Marxist sense is, on the one hand, 'free' of the means of production, and on the other, 'free' of the non-economic compulsions to work. Unfree labour denotes being "not free to enter into alternative employment relations...not free to exit current employment relations..." (Morgan and Olsen (2009) in Lewis et al, 2014:8). 'Illegality' closes up opportunities for undocumented migrant workers to enter the labour market, leaving avenues only into degrading and exploitative jobs where violation of labour and human rights is common. A number of respondents confirmed that they entered into their current jobs not because they wanted to, but because they were the only jobs available for them as 'people with no papers'.

Those who work in the security and construction sectors testified that it is commonplace for employers to withhold their salaries, a strategy which prevents them from seeking alternative jobs. Another respondent stated that being 'illegal' compels him to work hard;

"I work hard not because my employer pays a lot of money, I work hard because I am illegal. I am afraid that if I do like what South Africans do, I won't get my pay or I lose my job and I don't have anywhere to report" (Interview with Precious Tirivanhu, 01/04/2016).

The commodification of labour power assumes that a worker, as the owner of the commodity, should be free to sell his/her commodity. However, 'illegality' makes unfree the 'illegal' migrant worker in the sale of his/her labour power. The legal restriction of their free participation in the labour market makes illicit undocumented migrants' labour power and forces them to sell it to very few employers who are willing to violate this restriction. This gives employers leverage to dictate the terms and conditions of engagement which are often lower than the wider labour market standards.

In the final analysis of the relationship between (im)migration control, migrant 'illegality' and exploitation, I pose the question: Does a worker have to be a migrant in order to be exploited? By no means! Neither does s/he have to be 'illegal'. I admit that worker exploitation is not uncommon in South Africa, but it is specially so for migrants, particularly 'illegal' migrant workers, which makes their exploitation one of a special type. My argument is not simply that undocumented migrant workers are a vulnerable group, rather I contend that their illegalised migrant statuses create various forms of

unfreedoms which are a result of their exclusion from basic human and labour rights as 'illegal' people and this is a form of symbolic/legal violence which produces them as a form of unfree labour susceptible to 'forced' labour exploitation.

Johannes Machinya is a PhD candidate in the Department of Sociology and a fellow in the History Workshop at the University of the Witwatersrand. He is also an associate fellow with SWOP at the same university.

References

- Ryan, B. (2005) 'The Evolving Legal Regime on Unauthorized Work by Migrants in Britain', *Comparative Labor Law and Policy Journal* 27(1): 27-58.
- Lewis, H., Dwyer, P., Hodkinson, S. and L. Waite (2014) "Hyper-precarious lives: Migrants, work and forced labour in the Global North." *Progress in Human Geography* (p. 1-21).
- De Genova, N. P. (2002) "Migrant 'Illegality' and Deportability in Everyday Life." *Annual Review Anthropology*, Vol. 31(p. 419-447).
- Willen, S. S. (2007) "Toward a Critical Phenomenology of 'Illegality': State Power, Criminalisation and Abjectivity among Undocumented Migrant Workers in Tel Aviv, Israel". *International Migration*, Vol. 45 (3) (p. 8-38).
- Klaaren, J. and J. Ramji (2001) "Inside Illegality: Migration Policing in South Africa after Apartheid." *Africa Today*, Vol. 48 (3) (p. 35-47).
- Menjivar, C. and L. J. Abrego (2012) "Legal Violence: Immigration Law and the Lives of Central American Immigrants." *American Journal of Sociology*, Vol. 117 (5) (p. 1380-1421).
- Interview, Melody Murozvi, 15/08/2015: Spring Valley, Witbank.
- Interview, Precious Tirivanhu, 01/04/2016: Witbank Town.