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Illegal Markets

Boundaries and Interfaces between Legality and Illegality

Renate Mayntz



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Abstract

In sociology generally, the infringement of legal norms is not treated as a special kind of norm violation, the sociology of law being an obvious exception. The study of *illegal markets* therefore faces the challenge of distinguishing illegality from legality, and relating both to legitimacy. There is no conceptual ambiguity about the distinction between legal and illegal if legality is formally defined. In practice, (formal) legality and (social) legitimacy can diverge: there is both legitimate illegal action and illegitimate legal action. Illegal markets are a special kind of illegal social system, constituted by market transactions. Illegal markets are empirically related to organized crime, mafia and even terrorist organizations, and they interact both with legal markets and the forces of state order. Where legal and illegal action systems are not separated by clear social boundaries, they are connected by what has come to be called “interfaces”: actors moving between a legal and an illegal world, actions that are illegal but perceived as legitimate or the other way around, and a gray zone of actions that are neither clearly legal nor illegal, and neither clearly legitimate nor illegitimate. Interfaces facilitate interaction between legal and illegal action systems, but they are also sources of tension and can lead to institutional change.

Zusammenfassung

Die Verletzung von Rechtsnormen wird in der Soziologie – abgesehen von der Rechtssoziologie – nicht systematisch als eine besondere Art von Devianz behandelt. Daher verlangt die Untersuchung *illegaler Märkte*, zwischen Legalität und Illegalität zu unterscheiden und ihre Beziehung zu Legitimität zu bestimmen. Die Unterscheidung von Legalität und Illegalität ist unproblematisch, wenn man diese Begriffe formal definiert. Legalität und soziale Legitimität können auseinanderfallen; es gibt sowohl als legitim erachtetes illegales wie als illegitim erachtetes legales Handeln. Illegale Märkte sind eine durch Markttransaktionen gebildete, besondere Art illegaler Handlungssysteme. Empirisch sind illegale Märkte verbunden mit organisiertem Verbrechen, Mafiaorganisationen und selbst Terrororganisationen, und sie interagieren sowohl mit legalen Märkten wie mit staatlichen Ordnungskräften. Wo legale und illegale Handlungssysteme nicht durch klar definierte soziale Grenzen getrennt sind, werden sie durch Grauzonen unklar einzuordnenden Handelns, durch als legitim wahrgenommene illegale Praktiken (bzw. umgekehrt) und durch Akteure verbunden, die fallweise in legalen und illegalen Systemen agieren. Diese sogenannten Interfaces verbinden legale und illegale Sozialsysteme, stellen aber zugleich eine Quelle von Spannungen dar, die zur Veränderung der formal definierten Grenze zwischen Legalität und Illegalität führen können.

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Illegal Markets: Boundaries and Interfaces between Legality and Illegality

Illegal markets have been sadly neglected in the newly flourishing market sociology (Beckert/ Wehinger 2013). But this is not specific to market sociology. Despite the focal importance of (social) norms in sociological theory and research, the dimension legal/illegal does not play an important role in most sociological sub-fields, the sociology of law being an obvious exception. While “the law” and the legal system are important concepts in sociological macro-theories, legality and illegality are not. The focal analytical dimension in dealing with social norms is not their character, but whether or not they are complied with – in other words, compliant or deviant behavior. Although it is recognized that legal norms are a special category of social norms due to their formally regulated origin and their mode of sanctioning, the infringement of legal norms is not treated as a special kind of norm violation or deviance, again except in the sociology of law. In other words: in sociological theory generally, the dimension compliant/deviant is not systematically related to the dimension legal/illegal. This may be characteristic of a discipline that has developed in countries where what is legal is overwhelmingly also considered to be legitimate – that is, where legality and legitimacy are tacitly conflated. It may have been the study of failing or weak states that called attention to the frequent divergence between what is legal and what is considered to be legitimate, and has made us realize that this is an empirically consequential distinction.

The study of illegal markets thus faces the challenge of defining the “nature of the beast” or its object of cognition more clearly, so as to distinguish illegality from legality and relate both to the dimension of legitimacy. This involves establishing conceptual boundaries, and relating them to empirical phenomena – a tiresome, but essential exercise because conceptual clarification concerning legality, illegality, and the interface between them is a necessary prerequisite for formulating substantive questions about the genesis and control of illegality in markets and related forms of illegal action.

1 Legality and illegality

Boundaries can be both conceptual and real. Conceptually, boundaries are definitional distinctions between different properties (for example, red/green/blue, friendly/hostile) or object categories (for example, cats/dogs, Africans/Arabs/Chinese). Where properties define objects, as skin color defines race, the two types of definitional distinction merge. Both for property and for object categories, the defining criteria are rarely

objectively given, as in the distinction between atoms by the number of protons. Where the properties defining an object are continuous rather than discrete variables – as is true of hostility and centralization, as well as of temperature and weight – definition is a labelling process involving arbitrary distinctions between different degrees of the same property. Definitional boundaries, as between races or between life and death, can be drawn in different ways, and they can be more or less sharply drawn. With decreasing conceptual distinctiveness, assigning a given instance to a specific category becomes increasingly difficult.

The boundaries of *social* object categories – for example, what counts as a law, political party, or market – are likewise established by definitions. But underlying the definitions are observable facts that are used to operationalize the concepts, and thus delineate “real” entities such as the Federal Republic of Germany or the European market for dairy products. Definitional boundaries and the observable boundaries of social entities easily shade into each other. Socially accepted definitions are “performative”: assigning a gesture to the category “hostile” and terrorist acts to the category “war” rather than “crime” (Daase 1999), or a market to the category “illegal” has consequences for behavior.

There is no *conceptual* ambiguity about the distinction between legal and illegal as properties of action if we define legal action as action in conformity with a legal norm, and illegal action as action that violates a legal norm. Legal norms are a sub-set of formal rules. Formal rules such as laws, regulations, a charter or statute are set by persons or bodies authorized to do so by law, convention or agreement, and are typically supported by (the threat of) sanctions. This holds for constitutional authorities, as well as for the CEO of an enterprise or the IOC. In daily speech, of course, the word “legal” often includes some substantive quality, such as being just or justifiable in moral terms; but in the study of illegal markets it makes sense to stick to a narrow concept of “legal” in order better to distinguish it from the related concepts “legitimate,” “appropriate” or “moral.” Where we are dealing with legal rules, it is relatively easy to say what is formally illegal. Legal rules can be prescriptions (do rules) or proscriptions (don’t rules) – they command, or prohibit. In some fields, such as tax law, do rules prevail, but in many fields (for example, traffic regulation, consumer protection) we find both types.

The core problem in calling an act “illegal” is the often very large room for interpretation of legal rules. All kinds of formal rules – not only legal ones – use what in German are called *unbestimmte Rechtsbegriffe* (undefined legal terms). This is less true of (regulatory) standards, a category of formal rules that typically include quantitative, measurable terms; standards can be incorporated into law, but can also be based on agreement or convention. While existing legal rules establish what can be called “illegal,” the term “legal” is used in practice in two fundamentally different ways often not explicitly distinguished: either more narrowly to designate action in *compliance* with legal rules, or much more widely designating all actions that *do not violate* any legal rule. This is a highly important distinction, because many actions are not subject to any formal, let alone legal rule – in other words, they are neither prescribed nor proscribed. The Ten

Commandments consist of do and don't rules, but they cover only a very small segment of human action. To the extent that sanctioning is tied to the violation of specific legal rules, the valuation of behavior that does not violate such norms is an open question. It is here that the dimension of legitimacy comes in.

2 Legality and legitimacy

Legitimacy and the lack thereof are of paramount interest in political theory. In political theory, the term "legitimate" is used specifically in relation to authority and authority relations. However, the term is often used without definition (Suchman 1995: 572); some authors judge the legitimacy of a regime by its conformity to or violation of theoretically derived normative standards. In sociological theory, Niklas Luhmann was concerned with legitimacy (Luhmann 1983), but only in relation to "the law," as Matías Dewey points out (Dewey 2016). If legitimacy is defined, reference is made mainly to Max Weber. For Weber, a social order is legitimate if it is considered to be exemplary and binding. This applies not only to legal norms, but also to practices based on tradition, custom or convention. Max Weber distinguished between legality and legitimacy, defining legitimacy not as an objective property, but as the subjective *belief* that a given social order or practice is exemplary and binding (Weber 1956: 26). Thus in a given market order, the observable practices of market exchange considered to be legitimate by participants need not be based (only) on compliance with *legal* norms. The concept of legitimacy has a wider scope than legality. For the analysis of illegal markets, the Weberian concept of legitimacy as belief is crucial. Legitimacy beliefs are social facts to be established empirically. The criteria (or basis) on which legitimacy is attributed to a given authority, social order, or practice vary culturally and historically; legitimacy beliefs are not universally shared in any given society.

The conceptual distinction between (formal) legality and (social) legitimacy is empirically relevant where not everything that is formally legal is deemed to be legitimate by "rule takers." Formal rules are issued by a competent authority, but authority may be claimed only by rulers, not granted by the ruled; this can hold for clan chiefs, for CEOs and for governments. In this case, imposed sanctions are experienced as the unwarranted exercise of power/force; a certain tax may then be seen as unwarranted political expropriation. On the other hand, actions formally defined as illegal can be considered legitimate. In *both* cases, (formal) legality and (social) legitimacy diverge. If the legitimacy of a political authority is contested, or if a political authority cannot impose threatened sanctions, illegality is only formal. Where formal legality and social legitimacy diverge, legitimate illegality flourishes.

There is a conceptual overlap between the concept “legitimate illegality” – in other words, behavior deemed legitimate, although known to be illegal – and economic action termed “informal.” According to Hart, informal economic action escapes state regulation – either because it is not regulated or because, although formally regulated and possibly violating existing rules, it remains invisible to the bureaucracy (Hart 2010: 141–149). “Informal” thus covers more than “illegal.” There is also a conceptual overlap between legitimacy, defined in the Weberian tradition, and what March and Olsen (2006) call “appropriate” and define as behavior that is expected and seen as natural and rightful for members of a given collectivity playing a specific role in a given situation. While there is a clear distinction between legality and legitimacy, the concepts of informal economic action and of “appropriate” market transactions gloss over the difference: informal economic action, as well as appropriate behavior, can be legal as well as illegal, which ignores the tension that exists where legality and legitimacy diverge.¹ It is the possible divergence between the dimensions legality/illegality and legitimate/illegitimate that is theoretically significant, because the resulting tension impacts on behavior. In fact, as the divergence between legality and legitimacy grows, its practical relevance increases. It is therefore a crucial theoretical question what generates congruence or divergence between legality and legitimacy.

3 Illegal markets and other kinds of illegality

Illegality can be the property of individual acts and of different kinds of social action systems. Illegal markets are but one kind of illegal action system that must be distinguished both from individual illegal acts, such as corruption and financial crime, and from other types of illegal action systems, such as organized crime, mafia organizations, and terrorist organizations. The elements constituting an illegal market are illegal market transactions. Market transactions can be illegal for different reasons (Wehinger 2011): because the good exchanged is illegal per se (for example, certain kinds of drugs), because it is produced illegally (for example, illegally mined diamonds), because it is illegal to trade it (for example, human organs), or because it is traded in violation of restrictive rules (for example, arms). Illegal actions need not be executed by members of an illegal (for example, mafia or terrorist) organization. Generally law-abiding citizens may participate in illegal action systems, occasionally giving shelter to a terrorist or buying counterfeit goods.

The specificity of illegal markets is best thrown into relief by trying to distinguish them from other kinds of illegality, but it is often difficult to draw a clear line between different kinds of illegality. Mafia organizations and illegal markets are closely related

1 Admittedly, it is difficult to empirically separate legitimacy beliefs from beliefs about appropriate behavior, and both from moral beliefs.

empirically, and corruption is a strategy also used by organized crime, mafia organizations, and in illegal markets. Conceptually, however, corruption and financial crime such as fraud and embezzlement can be distinguished from illegal markets by virtue of being specific categories of acts or interactions.

There exists a vast literature on corruption (see, among others, Rose-Ackerman 1999; Transparency International 2007; Rothstein 2015) and a large, if highly dispersed literature on financial crime.² Corruption – granting official favors (for example, export licenses, public building contracts) by a legal actor in violation of formally established rules or withholding sanctions in exchange for money or other rewards – typically takes place in bilateral interaction, where the corrupting actor may be the CEO of a legal business firm, an illegal trader, a mafioso, or a member of a drug cartel.³ The proximate purpose of bribing may be the evasion of legal sanctions, but the main driving motive of corruption is economic gain, whether such gain simply means profit or is a condition of the corrupting actor's economic survival. Economic gain is also the driving motive in financial crime. In the typical case of financial crime, otherwise legal individuals (for example, traders in a financial institution, accountants in a corporation) commit formally illegal acts, either in their personal interest or for the benefit of their organization. Perpetrators who identify primarily with their organization will not necessarily consider their behavior to be illegitimate, even though they are conscious of the fact that they are infringing a legal rule. As is true of corruption, acts of financial crime tend to be kept secret.

Market actors may engage in corruption and commit financial crimes, but this does not constitute illegal markets. Illegal markets are systems composed of illegal market transactions. By definition, a market presupposes multiple sellers or potential buyers, and market transactions are assumed to be voluntary on the part of sellers and buyers (see Aspers/Beckert 2008: 225f.). There is a fluid boundary between voluntary and constrained engagement in legal as well as illegal market transactions, but “selling” mafia protection to enterprises is clearly extortion rather than a market transaction. The driving motive in illegal markets is generally economic; some actors may simply seek sustenance or even survival rather than profit.

The social acceptance (legitimacy) of formally illegal trades/markets varies considerably. In social contexts of contested legality, where “the law,” whether because of its source or its content, is not considered legitimate, the legal/illegal boundary is only weakly drawn, and what is formally illegal may become accepted everyday practice. The more diffused the perceived legitimacy of formally illegal acts, the less is the felt need to hide them; examples are the Argentinian market La Salada described by Dewey (2012), and the Open Eye markets described by Nina Engwicht in her dissertation (Engwicht 2015).

2 A literature survey on financial fraud is currently being conducted at the MPIfG (Reurink 2016); in contrast to corruption, financial crime has not been a popular topic for sociologists.

3 There is, again, a fluid boundary between the activities of lobbyists and corruption.

Illegal markets can be conceptually distinguished more clearly from terrorist organizations than from organized crime and mafia organizations. Illegal markets differ from terrorist organizations in the main driving motive (economic rather than political), in the type of social order or governance (market versus organization), and in the role of physical violence. The market is traditionally associated with peaceful exchange, and contrasted to violent strife and war (for example, Hirschman 1977). Whereas violence, the spectacular murder of uninvolved people, is a defining feature of terrorism (see for instance Daase 2007), actual violence – in contrast to the threat of violence – is a strategy of last resort in mafia organizations, organized crime, and even more so in illegal markets. Terrorist organizations commit such crimes as extortion, kidnapping, and bank robbery, but terrorism is also considered a crime in itself. Terrorist organizations differ from organized crime in the driving motive rather than the nature of their actions. While for criminal organizations, extortion and drug trafficking are a source of profit, terrorist groups commit these criminal acts to fund their political activities.

Illegal markets and organized crime are connected in so far as criminal organizations specializing in car theft or art robbery act as suppliers to the corresponding illegal markets. In fact, the distinction between illegal markets and organized crime seems to turn mainly on a conceptual, or classificatory distinction – the difference between “illegal” and “criminal.” Not all illegal acts are violations of criminal law and can thus be classified as crimes; illegal market exchange is often in violation of trade law, not criminal law. Profit is the dominant driving motive in illegal markets and in organized crime, and the same kind of good can be involved. There are even similarities with respect to organization, with criminal organizations being often much more loosely structured than the term suggests. In fact, the *Oxford Handbook of Organized Crime* has a whole section on illegal markets (Paoli 2014). But illegal market activities are more likely to be socially tolerated than the activities associated with organized crime – stealing, blackmail, and extortion are generally judged to be morally wrong.

The *Oxford Handbook of Organized Crime* cited above also has several chapters on mafia organizations, treating them as one kind of organized crime among others; obviously these classificatory categories overlap. The distinction between mafia organizations and illegal markets is also difficult, though less for semantic than for empirical reasons. Mafia organizations typically engage in illegal market activities, but in mafia organizations the driving motive is not merely economic. Mafia organizations try to establish a monopoly on *several* types of illegal markets (drugs, prostitution, garbage, toxic waste disposal and so on) in a *specific territory*; the driving motive is thus both economic and political.⁴ The means–end relation between profit and territorial power is variable. In a given illegal system, the relative dominance (or rank order) of the economic (profit) and the political (power) motive can change, and it may be difficult to tell which is

4 There is a vast literature on mafia organizations, including excellent sociological studies (for example, Gambetta 1992; Sciarrone 2011) and documentary studies in the form of novels (for example, Saviano 2006).

the means and which the end. It is basically the means–end relation between the two – the dependence of economic gain on territorial power and of power on money – that makes for their empirical interrelation and the fluid boundary between illegal markets, mafia organizations, and organizations involved in armed conflict in civil wars.

4 Interfaces between legal and illegal action systems

All social action and action systems that are formally illegal are surrounded by, and in constant interaction with, actors complying with and actors bent on defending legal norms. Illegal markets interact with legal markets, and with official guardians of legality, in particular the police and courts. There is an important difference between these two relations: while the relation between legal and illegal (sections of) markets is at its worst one of competition, the relation to the “forces of order” is in principle repressive, but there are cases of tolerance by the police and even by political authorities, as in the case of the Argentinian market La Salada (Dewey 2012) and the illegal diamond market in Sierra Leone (Engwicht 2015). Political repression used against illegal markets varies in intensity, not only between fully developed modern nation states and so-called fragile states, but also within states; in both cases this is due to differences in the extent of divergence between legality and legitimacy. Where formal legality and perceived legitimacy diverge, or where actions are neither illegal nor considered inappropriate, non-repressive interaction between formally legal and formally illegal actors and action systems is facilitated. In such cases, legal and illegal action systems are not separated by clear social boundaries, but connected by what has come to be called “interfaces.”

The concept of “interface” has not been used much in sociological writing, and lacks an accepted definition. However, an “interface” between two distinct social entities presumably designates a relationship other than conflict or cooperation. “Interface” is sometimes used to refer to boundary-spanning institutions, such as notaries, brokers and attorneys; these actors mediate between two parties or systems, belonging to neither of them. In this case, the boundaries of the two systems that are connected by a third party are clearly drawn. More relevant for the study of illegal markets is, however, a concept of interface closer to “interpenetration” (Münch 1991) than to boundary spanning, a concept referring to cases where the boundary between legality and illegality loses its distinctiveness. This happens where legality and legitimacy diverge. An “interface” between legal and illegal social systems that links, but at the same time blurs the boundary between them can take different forms.⁵

5 I do not include hybrid phenomena among “interfaces.” Hybrid phenomena possess “defining” properties belonging to both categories in a dualistic pair. If legality is *formally* defined, there can be no genuine hybrids of legal/illegal.

First, there are *ambivalent* phenomena, actions/actors that are *assigned* to opposed categories on the dimensions legal/illegal and legitimate/illegitimate. The resulting combination of properties – legitimate illegality and illegitimate legal action – appears contradictory, if in everyday experience these dimensions are normally correlated. If they diverge, actors are forced to choose between two different orientations, acting legally while knowing this violates an informal norm, or acting legitimately in the full knowledge of violating a legal rule. The mafia member who testifies in court has decided to violate the informal norm of *omertà*, while the seller of a counterfeit Rolex watch decides to violate a legal norm.

There is, secondly, a gray zone of phenomena that *cannot be clearly assigned* to one specific category on the dimensions legal/illegal and legitimate/illegitimate. This can be due to a number of reasons. For one thing, as already underlined, there are gaps in legal regulation, where actions can be judged only by the legitimacy accorded to them, or more generally by their appropriateness. In regulated areas, legal norms are often subject to interpretation. When does “taking” become “stealing” in the legal sense, and making use of an opportunity “cheating”? However, not only the legal, but also the social definitions of cheating, stealing, and lying can be fluid and uncertain. Where actions are not legally regulated, and where the legitimacy of a legally unregulated action is unclear, the subjectively felt uncertainty is greatest.

Finally, there are *actors* who, at different times or in different situations, engage both in legal and illegal actions, who are *moving between* two worlds, acting legally and then again illegally, or the other way round. In the typical case the actors themselves are generally law-abiding citizens, but occasionally commit illegal acts. There is the honest businessman selling garments produced in mafia sweatshops in his boutique, the renowned firm that, off and on, dumps (or allows the dumping of) its waste illegally, and the law-abiding citizen giving shelter for a couple of days to a criminal on the run. Similarly, the sympathizers surrounding a terrorist organization may on occasion render active support, moving as it were between two worlds (Malthaner/Waldmann 2012). In these cases, otherwise “legal” actors act illegally. But as Nina Engwicht (2015) has shown, there is also the illegal trader of illegally mined diamonds who sells them to a legal export firm, and the seller of counterfeit goods who invests his profit in a legal business or legally buys an apartment.

The close empirical connection between illegal markets and terrorist organizations, mafia organizations and what is called organized crime is reflected in the difficulties, evident in Section 3 of this paper, involved in distinguishing between them conceptually. The conceptual boundaries between these different types of illegal action systems are fluid. Interfaces, however, are real social phenomena that can be empirically established, even where they are subjective, as are beliefs. The term “interface” can refer to phenomena (both actions and social systems) that are formally illegal, yet considered to be legitimate, or legal yet considered to be illegitimate; it also refers to phenomena whose legality and/or legitimacy is open to interpretation, and to actors participating

with their actions in both a legal and an illegal system. Actors who move between two distinct social worlds serve as linking pins between them. Ambivalent phenomena force actors to make choices, blurring the hard edges of social categories. These kinds of interface bind together what is socially distinct, provide scope for innovative action, and permit flexible adaptation. Gray zones can create tension in everyday behavior; they are also a challenge for legislators, and thus a source of institutional change. Selling complex CDOs that speculate on expected losses did not infringe any legal norm and was accepted practice before the recent financial crisis, but has come to be considered illegitimate, and may become illegal in the course of regulatory reform. The boundaries between legal/illegal and legitimate/illegitimate are not stable: they shift. The observation of interfaces between legality and illegality, stimulated by the study of illegal markets, does not so much alert us to the dark side of the social world as to the many shades of gray that lie between black and white.

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