

Between legality and legitimacy: The courtroom as a site of resistance in the criminalization of migration

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Abstract

The criminalization of migration-related acts, rather than simply strengthening state authority, also represents a risk of exposing legal legitimacy deficits. By drawing on juridical analysis of court judgements, legal documents, and case law, together with ethnographic observation in court and analysis of media coverage, the article argues for acknowledging the extra-legal aspects of criminalization. By employing the concept of legal consciousness, we bring attention to how bordering processes are challenged from below by using the courtroom to expose potential legitimacy deficits concerning crimmigration enforcement. The article shows how the courtroom is not merely a place for convictions but also a site for resistance and social mobilization: a platform that may give marginalized groups voice and visibility, invoking a complex picture of state power, involving the ability to use force as well as reluctance and ambivalence connected to the questionable legitimacy of criminalization strategies.

Keywords

crimmigration, irregular migrants, legal consciousness, legal legitimacy, mobilization, resistance, the right to work

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Introduction

In recent years, an impressive body of academic scholarship has identified a trend towards the criminalization of migration in the global North. It charts the criminalization of ever more acts related to irregular migration (Aliverti, 2013; Stumpf, 2006) and more stringent controls (Aliverti, 2013; Franko, 2020), as well as the greater use of state bureaucratic technologies against migrants (Bosworth and Guild, 2008), seen in a growing reliance on detention (Bosworth, 2019), deportation (Kanstroom, 2012), expulsion (Van der Woude et al., 2014) and the policing of immigrant communities (Armenta, 2017; Weber, 2013). It has been argued that the trend is driven by the rise of nationalism, punitiveness, and exclusionary sentiments towards migrants, with states aiming to reclaim sovereignty and strengthen their authority through reliance on criminalization (Barker, 2012, 2018).

Far less acknowledged and explored in scholarly literature is the fact that these processes and state actions may be accompanied by a considerable level of ambivalence and reluctance, due to the legitimacy deficit that exists in the use of criminalization to control unwanted migration. This article examines how criminalization, rather than simply strengthening state authority, also represents a considerable risk for its legal legitimacy because courtroom encounters expose the legitimacy deficit in migration enforcement (Bosworth, 2013).

The article focuses on criminalization – one side of the ‘cimmigration coin’ (Weber and McCulloch, 2019: 509) – and begins with an account of two recent criminal cases in Norway. In November and December 2019, Arne Viste and Gunnar Stålsett were accused of employing migrants without the necessary work permits. Although those subjected to the power of criminal law were not ‘non-members’ (Stumpf, 2006), ‘non-citizens’ (Franko, 2020) or ‘enemies of the State’ (Krasmann, 2007), but Norwegian citizens – one of them a retired bishop who personified high moral standards and core societal values – the cases illustrate important dynamics about the use of the courtroom as a site of resistance in the criminalisation of migration. Drawing on the critical approach to legal consciousness, we examine how the different approaches to the law taken on behalf of the accused challenged internal border processes from below by questioning the legitimacy of using criminal law to manage unwanted migration, often referred to as ‘cimmigration’ (Stumpf, 2006).

We begin by outlining the legal circumstances of the two cases, before presenting observation data and notes taken manually to record details of the trials. The article employs juridical analysis of court judgements, legal documents, and case law, together with ethnographic observation in court and analysis of media coverage. The methodological approach is designed to capture the interplay of sociological and legal aspects of the cases. While official court decisions contain assessments of legal factors, they offer no insight into situational factors. By observing social encounters in and outside the courtroom, we provide the social context of the trials, beyond their legal outcomes. We argue the importance

of acknowledging the unintended aspects of criminalization. The courtroom is not merely where the state secures a criminal conviction, but also a site for social mobilization: a platform that gives people a voice and makes them visible, thus providing a more complex picture of state power. By challenging the perception of criminalization of migration as a seamless process, the article aims to develop a more nuanced and dynamic understanding of criminal law within crimmigration studies. An essential aspect of this is the exposure of variations in legal consciousness among state agents and civil society groups. Actors mobilizing against increased crimmigration may challenge its legitimacy by uncovering discrepancies between penal power and core values such as human dignity and compassion. Like recent studies on how bordering processes are transformed from below by migrants and their allies (Fabini, 2019; Fernández-Bessa, 2019; Segrave, 2019; Wonders and Jones, 2019), the article provides insight into the intricate dynamics between the power of the law, resistance, and the potential for social change.

Contested politics of mobility: Legality, legitimacy, and legal consciousness

The two trials took place in the Oslo Court House: the first between 30 September and 2 October 2019 (Viste), the second on 19 December 2019 (Stålsett). Both concerned the employment of migrants without work permits required to leave Norway after their asylum applications had been rejected. According to the 2008 Norwegian Immigration Act, section 108(3) a, anyone who, with intent or gross negligence, makes ‘use of’ the labour of irregular migrants is liable to fines and/or up to two years’ imprisonment. According to the preparatory work, the regulation aims: (1) to ensure a level playing field between industries, and (2) to avoid exploitation of employees (Ministry of Justice and Public Security, 1987: 86; Ministry of Local Government and Regional Development, 2004: 364).

Employing foreign nationals without legal residency has been illegal in Norway for decades. The 1988 Immigration Act increased penalties from six months to two years (Ministry of Justice and Public Security, 1987: 87). The wording was carried over into the 2008 Immigration Act and remains unchanged. Criminalizing employers accords with the 2009/52/EC EU Directive concerning minimum sanctions and measures against the employers of illegally staying third-country nationals.¹ The Directive aims to combat key pull factors for irregular migration, such as the possibility of obtaining work in the EU. However, Member States may decide not to apply punitive measures related to ‘... illegally staying third-country nationals whose removal has been postponed’ and who are allowed to work under the law.² In Norway, though, there are no exemptions to the criminalization of work if the state cannot enforce deportation. We will show how the two accused, Stålsett and Viste, challenged the legitimacy of the Norwegian regulations.

Much recent scholarship has focused on the concept of legitimacy (Beetham, 1991; Snacken, 2015; Tyler and Jackson, 2014). Jackson defines the narrower term *legal* legitimacy as:

active and willing acceptance of the right of the law to dictate appropriate behaviour... a form of voluntary deference to authority assumed to be grounded in the rightfulness of legal institutions (2018: p. 165).

Clarifying whether normative alignment and obligation to obey comprise one or two dimensions of the construct helps isolating mechanisms at play in links between legal compliance and legal legitimacy (Jackson, 2018: 161). Normative alignment means acting in accordance with the law because it aligns with people's moral values. Obligation to obey exists when legitimacy provides a motive for obedience rather than for acting in accordance with the law, where legitimacy means treating an order or rule as superseding people's own judgment (Bottoms and Tankebe, 2012; Jackson, 2018). Normative alignment requires that powerholders not only exercise power within the frame of rules and regulations but also mirror societal normative expectations (Bottoms and Tankebe, 2012: 151; Snacken, 2015). Thus, the legitimacy of penal power requires powerholders to respect core societal values – values on which there is a broad consensus, and which have foundational validity (Bottoms and Tankebe, 2012; Snacken, 2015; Spates, 1983).

As we will show below, both Stålsett and Viste used concepts such as conscience, decency, and humanity to justify their lack of compliance with regulations prohibiting the employment of rejected asylum seekers. Rather than overestimating the smooth progress of the politics of control, Squire (2011) points out that irregularity is produced through 'the contested politics of mobility', and defined by the movements and activities of both national/international agencies *and* of migrants and citizens. A growing body of scholarship indicates how citizens and migrants transform bordering processes 'from below'. Approaching bordering as a relational process under continuous negotiation (Mezzadra and Neilson, 2013) makes possible empirical analyses of how migrants (Fabini, 2019); employers (Segrave, 2019); and activists (Fernández-Bessa, 2019) shape and resist internal bordering processes in their everyday lives. Similarly, Wonders and Jones (2019), show how borders are done and undone through multiple social processes, and argue that social movements theory provides a useful theoretical tool for analysing how the politics of mobility is challenged from below. Drawing on this body of work, we use the concept of legal consciousness to illuminate the dynamics pertaining to the criminalisation of acts related to irregular migration. Legal consciousness is a concept developed within critical legal theory to explain the persistence of state authority and what has been termed 'legal hegemony' (Silbey, 2005). Hegemony explains how invisible powerholders control the narrative about what the world is like and dictate society's cultural norms. Edelman draws upon this Gramscian concept in arguing that state legitimacy relies on coercion and consent (1988). Michel Foucault (1980) and other scholars have

influentially shown how discipline is central to ensuring consent and thus state legitimacy because the point of discipline is to ‘submit yourself to what the bearers of social power want you to’ (Melossi, 2008: 242). This body of work has also challenged a monolithic understanding of the state and has brought to attention the de-centred nature of contemporary governance (Garland, 1999). The state, therefore, does not ‘want’ one specific thing; the state is always in the making; a provisional outcome of more or less specific ‘state projects’ (Jessop, 1990). Legal hegemony is thus subject to continual negotiation, and resistance plays a vital role in this process (Lazarus-Black and Hirsch, 2012). The range of resistance, from subtle everyday opposition to organised rebellion, indicates that subordinates can think themselves out of hegemony (Lazarus-Black and Hirsch: 8).

Ewick and Silbey’s tripartite scheme of three cultural narratives of legality brought empirical understanding of the postulate of law as a hegemonic power (1998). By examining everyday people’s participation in the collective production of hegemony, they found that some presented a ‘before the law’ narrative, perceiving it as majestic, objective, and neutral. Others, who were ‘with the law’ regarded it as a game, with rules and procedures manipulable to pursue preferred outcomes. Finally, an ‘against the law’ consciousness sees it as a dangerous and oppressive force and rejects it for its failure to achieve personal or social justice outcomes. According to Ewick and Silbey (1998) ‘with the law’ and ‘before the law’ narratives constitute a hegemonic conception of the law and the interplay between the two narratives permit law to maintain its position of domination, while those going ‘against the law’ through tactics of resistance ultimately reproduce its legitimacy. This is because resistance operates within the law’s disciplinary force (Sarat, 1990; Wilson, 2011) and can create possibilities for greater state control (Lazarus-Black and Hirsch, 2012; Longazel and Van der Woude, 2014). However, others (see *inter alia* Fritsvold (2009), Halliday and Morgan (2013)) have challenged the view of legal hegemony as uncontested, introducing a fourth narrative; ‘under the law’. Halliday and Morgan’s (2013) analysis of radical environmentalists, for example, demonstrated that they did not leave legality uncontested. Instead, their rejection of state law, coupled with a game-playing approach to it for counter-hegemonic aims, was fuelled by their faith in legality above state law, and sustained their struggles of dissenting collectivism.

The two cases analysed in this article represent acts of open civil disobedience, which are relatively uncommon in Norway – one is notable for the extent of disobedient behaviour (Viste), the other for the social position of the person responsible for it (Stålsett). The cases raise significant questions about how we should understand people’s creativity and agency in their responses to legal instruments’ marginalising effects (Hull, 2016), particularly to the relationship between legal hegemony and resistance.

The circumstances of the cases

Viste and his company Plog AS were indicted for using the labour of 29 irregular migrants between 2016 and 2018. As a ‘staffing agency’, Plog AS hired rejected

asylum seekers and offered their labour to kebab shops, butchers and supermarkets. Plog's employees were paid the legal minimum hourly rate for unskilled workers. Viste's agenda was to challenge the constitutionality of the Immigration Act; he argued in court that 'everyone living in Norway has a constitutional right to work' (Washington Post, 2019).

Norway's 1814 Constitution, Section 110, declares: 'The authorities of the State shall create conditions under which everyone capable of work is able to earn a living through their work'. Section 89 stipulates that regular courts have the competence and obligation to assess the constitutionality of laws and regulations. Questions of constitutionality are made *ex-post* (related to a concrete case) and not *ex-ante* (related to an abstract case) (Smith, 2012: chapter 7). In March 2014, Viste filed a civil lawsuit against the state at the Ministry of Justice and Public Security, seeking clarification of the constitutionality of laws and regulatory practices that prevent 'un-deportable' asylum seekers from working in Norway. Viste's claim was rejected by Stavanger District Court in April 2014, and by Gulating Court of Appeal in September 2014, because Viste lacked legal standing.³

Having found that constitutionality could not be challenged without a specific case, Viste adopted a more active tactic of resistance (McCammon et al., 2008) to work for social change. In 2015, pointing to the Constitution, he started making his own 'work permits' for rejected asylum seekers, which would supposedly enable them to apply for work anywhere. Although the indictment against Viste mentioned 29 people, about 70 individuals had contracts with Plog AS between 2015 and 2019.

An essential part of Viste's strategy was to hire only rejected asylum seekers who, for various political and logistical reasons, were deemed undeportable and who did not hide to evade deportation. To avoid threatening the level playing field between industries, he also deducted employees' and employers' tax from Plog's income. Because Viste aimed to challenge the Constitution, he ran his company openly. He reported himself to the police, actively tried to pay taxes, and contacted various state agencies. When indicted, he described himself as being '... very, very happy' (Washington Post, 2019).

Viste's actions may be interpreted as expressing a resistant, 'against the law' legal consciousness, marked by a strong sense of right. At the same time, his belief in the 'majestic' nature of the Constitution shows traces of the 'before the law' narrative, while his game-playing approach to the legal system, driven by his belief in the constitutional right to work of undeported asylum seekers, suggests Ewick and Silbey's 'with the law' narrative (1998). His actions resemble those of the climate activists in Halliday and Morgan's study (2013) who used rights discourse and game-playing within the legal system to further their quest for legality beyond the status quo.

The Stålsett case concerned the 84-year-old bishop's use, for 14 years, of the labour of a rejected asylum seeker, Lula Tekle, who started cleaning for him legally, while her asylum application was being processed. When it was rejected, Stålsett found himself in a situation in which his '... conscience and values were

tested' (Norwegian Broadcasting Corporation, 2019). Obeying the law would mean betraying his humanitarian values, since stopping using Tekle's cleaning service would leave her in an inhuman situation. He was thus in the position of '...having no other choice' but to let her continue (NTB, 2019). Unlike Viste, Stålsett did not disobey the law to challenge the *legality* of regulations criminalizing migrants' rights to work; he called his behaviour civil disobedience (VGTV, 2019). However, he shared Viste's feeling that the *legitimacy* of the regulations conflicted with his core values, including human dignity and humanity (VGTV, 2019). Because Stålsett invoked the Constitution and justified his actions in the name of '...core values and one's personal conscience' (Norwegian Broadcasting Corporation, 2019),⁴ his legal consciousness bears traces of both 'against the law' and 'before the law' narratives. While Viste pleaded not guilty, Stålsett applied for a summary trial on a guilty plea. Viste's case therefore lasted four days, Stålsett's only hours.

As mentioned earlier, the circumstances surrounding trials may be as interesting as their legal features. During the two trials, the courtroom seemed like a stage for social mobilization. It was packed with journalists and rejected asylum seekers from the organization Humans in Limbo. The latter wore T-shirts printed with a picture of a person squeezed inside a locker – bringing higher levels of visibility to their resistance. The first day of Viste's trial began with demonstrations in front of the court, with banners bearing the slogans 'Let us contribute' and 'Right to work for the undocumented'. In Stålsett's case, after the judgment was pronounced, and everybody had stood while the judge left the room, the leader of Humans in Limbo announced a 'press conference'. Stålsett explained his feelings about the judgment on national TV before answering questions from journalists. These situational factors were processes of collective mobilization, performed not only by the two men indicted, but also by rejected asylum seekers.

Predictably, Viste and Stålsett were both convicted. Beyond any reasonable doubt, they had used the labour of migrants without work permits. The court concluded that section 110 of the Constitution does not confer a concrete right to work, but is a guideline for policy. The Supreme Court rejected Viste's appeal in May 2020, indicating that section 110 does not raise any legal questions of principle. The 1996 International Covenant on Economic, Social, and Cultural Rights and the 1950 European Convention on Human Rights prevail over national legislation in cases of conflict, but neither contains an unconditional right to work that prevents national authorities from making exemptions when migrants lack legal residency. To some extent, Stålsett and Viste were sentenced in line with the prosecution cases: Viste was given a one-year suspended prison sentence and Stålsett a 45-day one. Stålsett was fined NOK 10,000 (US\$1,000), Plog AS NOK 1.5 million (US\$150,000), with the prosecution calling for the confiscation of NOK 3 million – approximately what was earned from the illegal use of labour. However, due to Viste's humanitarian motives, the judge made an exemption seldom used in criminal cases and waived confiscation.⁵

The outcome of the cases could be interpreted as supporting the argument that resistance reproduces legal hegemony. However, we suggest below that the picture is more complex: the legality of the Immigration Act was upheld, but its legitimacy challenged. Focusing solely on the convictions might be misleading, and obscure the considerable ambivalence and reluctance on the part of various state authorities.

The reluctant penalizer

Viste and Stålsett challenge the usual narrative of irregular migrants' being exploited by their employers (De Giorgi, 2010). As Segrave argues, 'being employed matters, and the act of employing an unlawful migrant . . . counters the nation-state's effort to insist that those who are unlawful must be excluded' (2019: p. 203). They did not use undocumented work for economic exploitation, but rather perceived migrants' right to work as essential to maintain their humanity and dignity, which had been greatly eroded by the country's increasingly restrictive immigration regulations. As the defendants were both clearly driven by humanitarian motives, the cases challenged the legitimacy of the punitive action taken against them.

The cases have some similarities to the legal proceedings taken by EU Member States against private entities involved in SAR operations in the Mediterranean. In recent years, several EU Member States have started criminal and administrative proceedings against humanitarian actors involved in search and rescue (SAR) activities (European Union Agency for Fundamental Rights, 2020). These developments have been criticised by the European Commission, which recently recalled that EU law 'does not intend to criminalise humanitarian assistance' (2020: p. 8). Another comparable case is that of a French farmer, Cédric Herrou, who invoked his moral obligations when indicted for helping over 250 migrants to cross the border irregularly. In 2018 Herrou was acquitted by the French constitutional court on the grounds that: 'The concept of fraternity confers the freedom to help others, for humanitarian purposes, without consideration for the legality of their stay on national territory' (The Independent, 2018).

The following excerpt from the Oslo District Court's judgment reveals how Viste, like Herrou, for five years actively challenged state actors to clarify the illegality of his actions:

When the civil lawsuit [of 2014] was dismissed, 'A' decided to employ 'un-deportable' asylum seekers to obtain legal clarification. During the summer of 2015, 'A' notified the Stavanger police and the tax authorities about the first person employed. In 2015 the police decided not to initiate criminal proceedings against [FIRM] AS, because of the lack of the usual requirements for prosecution.

'A' has asked the Norwegian Directorate of Immigration, the Ministry of Justice, the Parliamentary Control and Constitution Committee, and the Attorney General to

clarify ‘the legality of denying these people the opportunity to work’. He has, on several occasions, been in contact with the police and asked for this same clarification. In 2017, ‘A’ phoned the police and asked to be indicted for running the business [FIRM] AS. In 2017, Stavanger Police Department opened an investigation but decided to drop it because of lack of evidence. On 10 April 2019, Oslo Police Department indicted [FIRM] AS and ‘A’.⁶

The above indicates the accused’s deeply-held belief that the law is illegitimate. Viste was strongly supported by his local church community, which suggests a considerable level of religiously-motivated resistance to the country’s immigration policies (Bendixsen and Wyller, 2019). Stålsett too based his actions on the country’s Christian and humanitarian heritage – one of the cornerstones of the Norwegian Constitution (Norwegian Broadcasting Corporation, 2019).⁷

The reluctance of state actors challenged by Viste to act may be interpreted as an indication of uncertainty – not about the judicial interpretation per se, but about exposing a potential legitimacy deficit. Normative resonance with the public is essential for the legitimacy of penal power (Bottoms and Tankebe, 2012). There was a risk that a trial could fail to successfully communicate its justifications for punishment and thus decrease legal legitimacy. When performed visibly, rather than producing greater control (Lazarus-Black and Hirsch, 2012), resistance may become an opportunity for social mobilization.

The reluctance to punish seen in the Viste case is also found regarding other sections of the Immigration Act. Indictments for illegal stay, for instance, are rare in Norway. Illegal stay has been criminalized in most Western countries (Aliverti, 2013; Provera, 2015), as it has been in Norway since 1988.⁸ However, a systematic search on the Norwegian Law Database reveals only 12 convictions for illegal stay in the last decade (Haddeland, 2020). These were mostly combined with violations of the penal code, and those charged had seldom come to Norway for the purpose of seeking asylum. A similar dynamic is present in cases of working without a work permit⁹ which, like illegal stay, is punishable by a fine or imprisonment for up to six months.¹⁰ Although the indictment against Viste contained the full names of 29 asylum seekers, those workers were not indicted.

A legitimacy deficit alone may not adequately explain the low number of convictions related to illegal stay and working. There is a general judicial principle that coercive measures should only be applied when alternative sanctions are unavailable or insufficient.¹¹ Unlike in the US, in Europe, penalties remain seldom-used and function mostly as threats (Aliverti, 2017). Instead, administrative sanctions, particularly deportation, along with expulsion (by means of an entry ban), have become much commoner in the past decade (Franko, 2020). Administrative measures are often a less visible expression of state power, yet they can achieve the primary goal of immigration policies.

Consequently, the legitimacy deficit of crimmigration offences is seldom tested in Norway, as cases are seldom brought to court. One notable exception is penalties for violations of an entry ban, which have increased both formally (from six

months to two years in 2014)¹² and de facto – mainly due to decreased discretion being available to prosecutors (Ministry of Justice and Public Security, 2013).¹³ According to Statistics Norway, unconditional prison sentences for breaches of re-entry bans have risen from less than 1,000 prison days a year before 2009 to 74,000 in 2016 (2018). However, these cases concern external bordering; they seldom attract media attention and are thus less visible, as migrants often get arrested when entering the country.

Although cases involving the employment of migrants without work permits are quite rare, growing attention to the issue has increased the number of indictments in recent years.¹⁴ Existing case law typically involves obvious exploitation, such as low wages and poor working conditions.¹⁵ Since they satisfy the harm principle otherwise often lacking in immigration offences (Aliverti, 2017), such cases have not raised questions of legitimacy but have rather accorded with core social values like dignity and human rights. This existing case law, presented by the prosecutor in Viste's and Stålsett's cases, did not therefore quite fit their circumstances.

The police's reluctance to indict was debated in court. Viste argued that the police had 'been afraid' to charge him, because they were unsure of the Immigration Act's constitutionality. Since several employers has been convicted for hiring people without legal permission, the prosecutor had good reason to challenge Viste's argument. Nevertheless, the question of why the police had not indicted Viste in 2015 when the first use of illegal labour was revealed, was not entirely clarified by what was said in court.

Legally, 'use of...labour' is interpreted widely, and includes work without payment (Vevstad, 2010: 603), but such a strict interpretation may be open to question where providing informal jobs like babysitting or housecleaning, is based on humanitarian motives. Some Norwegian NGOs let rejected asylum seekers 'work'; in cafeterias or soup kitchens, for instance. These NGOs have not yet been taken to court, although they are using the labour of irregular migrants. The interrelation between mental health and work is well known (Paul and Moser, 2009) and these organizations are neither exploiting migrants nor damaging fair competition in the market. When asked why Stavanger Police Department had not charged Viste in 2015, when they first came across his activities, a police officer said this was due to the 'lack of public interest'. Interpreting their reluctance as an expression of legal doubt, Viste intensified his efforts. For two more years he wrote to government departments and used the media to bring attention to the illegality or otherwise of his actions. Stavanger Police Department dismissed the charges again when Viste reported himself in 2017, this time because of lack of evidence. Various newspapers covered the story, and the case had become well known by the time the Oslo Police finally charged him in April 2019.

Viste's increasing self-promotion in the media drove the police to act. Similarly, when Stålsett admitted in an interview in August 2019 that the undocumented Tekle had been working for him for 14 years, media outlets started debating the case. The matter being in the public domain, the police opened an investigation. Questions of legitimacy may thus not only be relevant to understanding

police reluctance to bring charges but also influence decisions to do so. Just as legitimacy implies satisfaction of societal normative expectations, the cultivation of legitimacy also implies that police should react to legal violations (Bottoms and Tankebe, 2012).

Strategies of legitimation: Normative arguments in court

Stålsett and Viste both rejected the legal legitimacy of the Immigration Act prohibiting the employment of undeportable, rejected asylum seekers. Both felt that legal compliance was incompatible with their core values. Their actions arose from doubts about the reasonableness of denying rejected asylum seekers the right to work if they remained in the country, and the moral basis of such a prohibition, given the human right to dignity. The cases also raised issues involving emotion, moral reflection and compassion for rejected asylum seekers, and indirectly appealed to the public's sense of justice, as the actions of both men were motivated by compassion. Such normative, emotionally-based arguments may also carry legal weight, as the Norwegian Supreme Court often refers to the 'public sense of justice' (Eriksen, 2016).

Stålsett and Viste admitted they had used the labour of rejected asylum seekers. The interrelation between the Norwegian Constitution, section 110, and the Immigration Act did not spark challenging factual and legal debates during court proceedings. In fact, during Viste's case, which lasted four days, neither the defence nor the prosecution spent much time on legal issues. The facts were relatively clear: by pleading not guilty, Viste wished to question the constitutionality of the Immigration Act and current normative arguments concerning the dignity of rejected asylum seekers. The prosecutor began by saying to the members of the public attending the trial – mostly Viste's supporters – 'Many of you will be disappointed.' He told them the courtroom was not a forum for debating the political or moral side of immigration politics, saying 'Those questions belong in Parliament and not in court.' The statement accords with the role of Norwegian courts, including the Supreme court: strong parliamentary sovereignty means they are very reluctant to intervene in political matters. In a way, the case did turn out to be just such a 'political' forum. The core point at issue was not a question of legal interpretation, but the moral nature of various acts and actors, most notably the asylum seekers involved in the case, as well as asylum seekers as a general category.

Defence and prosecution called witnesses to present two divergent positions on rejected asylum seekers. The defence argued that rejected asylum seekers who are 'un-deportable' have a legitimate reason to stay, and thus to work and enjoy dignity. The prosecution argued that, though they cannot be deported by force, they can leave voluntarily. Refusing to do so is a criminal offence, and undermines the institution of asylum. In Viste's case, it was striking that several witnesses, including those called by the prosecution, did not provide information relating to the case itself. Apart from two from Oslo and Stavanger Police Departments and one from the National Criminal Investigation Service, the rest seemed to represent two sides of a political debate. Nearly two days were devoted to the presentation of

normative arguments about the legitimacy of the regulations preventing rejected asylum seekers from working.

The witnesses called by the prosecution were government employees. A representative of the Norwegian Directorate of Immigration answered questions about how asylum cases are processed. The point being made seemed to be that the procedure for asylum cases is fair: those who get rejected have no reason to fear persecution, and thus undermine the institution of asylum by not leaving voluntarily. A witness from the National Police Immigration Service answered questions on whether the rejected asylum seekers Viste had hired were in fact, 'un-deportable'. According to the police, only one of the 29 employees mentioned in the indictment could neither leave voluntarily nor be deported by force. The defence called a trade union witness, who said that, judging by his experience of labour inspections, providing regular work paid at the minimum rate to rejected asylum seekers prevented exploitation rather than encouraged it. A psychiatrist testified to the importance of work for mental health.

Although, strictly speaking, the witness testimonies about the processing of asylum applications and the concept of deportability did not play a role in proving the legal arguments of the case, they were intended to strengthen the normative standing of the Norwegian asylum regulations. One way of interpreting the prosecution strategy is that it was felt that Viste deserved a normative discussion, considering all the energy he had spent on his project. At the same time, marshalling arguments to support prohibiting rejected asylum seekers from working may reflect the prosecution's awareness of the exposure the case represented and the consequent importance of defending the legitimacy of the regulations. This interpretation accords with the idea that the legitimacy of penal power requires engagement with the audience (Bottoms and Tankebe, 2012), by grounding normative arguments for penalization in core values (Snacken, 2015). The prosecution's strategy thus reveals that what was at stake was the legitimacy of the prohibition to work and, ultimately, of the asylum system as such.

In both cases, the verdicts mentioned that the use of irregular labour undermines respect for the Immigration Act, which underpins essential policies regulating migration. The judgments also considered how using the labour of irregular migrants undermines the values Norwegian labour regulations are based on. The fact that rejected asylum seekers are vulnerable to exploitation, such as unfair wages and working hours, already observed in scholarly literature was also noted in the judgment against Viste. Viste admitted he did not check all his employees' workplaces, so that it could not be excluded that there had been such exploitation. The judgment aimed to achieve a measure of re-legitimation, by defining a victimhood requiring protection – that of rejected asylum seekers.

Consequences of visibility: The court as an arena for political change

The centrality of normative questions was also apparent in the Stålsett case. During his time as a bishop in Oslo, Stålsett was a progressive voice supporting gay marriage in church. He received prizes for his peace work and was a member of the Nobel Peace Prize Committee. In Norway, Stålsett is thus not only a public figure but also a moral icon. His case, therefore, unlike Viste's, led to a broader political debate about whether rejected asylum seekers should be able to work until deported. On 5 December 2019, Parliament voted on a proposal suggesting to evaluate whether undeportable rejected asylum seekers should have the right to work. The proposal was a direct consequence of the debate sparked by the indictment of Stålsett and would have been unthinkable only a few months earlier. This shows how civil disobedience, particularly that of high-profile individuals perceived to have impeccable moral standards, may be a powerful catalyst for political debate. Stålsett's resistant behaviour had a spillover effect from the court to Parliament and did thus challenge the legal legitimacy of the prohibition to work. Although his resistance was not 'strategic' in the sense that he employed Tekle to mobilize for social change, his actions had that effect. His and Viste's examples show 'the different ways in which irregularity is contested, resisted, appropriated and/or re-appropriated' (Squire, 2011: 8) and how the politics of mobility can be challenged from below. However, their cases also raise questions about the social position of those contesting the politics of mobility and those able to achieve actual transformation from below.

However, not even the moral stature of Stålsett could induce Parliament to change the regulations relating to the criminalization of the employment of rejected asylum seekers. After the judge had read the judgment, Stålsett addressed the crowd thus:

We cannot rest until our Parliament realizes the seriousness of this issue . . . as long as this legal section remains, these people continue their lives in limbo, without housing, work, education, and health care. That is what this case has been about, and I feel that we leave this process empowered. (Stålsett in court, 19 December 2019).

He said that his beliefs and moral compass had caused him to disobey the law and that being sent to jail would have been a small price to pay for making the issue visible. He declared, 'The way ahead of us remains clear,' telling the press and activists in the courtroom how they could mobilize further. Although the expansion of human rights instruments in recent years has brought about some changes, the Norwegian courts have rarely been used as tools for social change (Langford et al., 2019). One reason for this is the requirement for legal standing, which meant Viste could not test his questions on constitutionality in court before he broke the law.

The concept of the ‘strategic’ use of courts for social change is mostly associated with civil cases, particularly climate litigation. In criminal cases – X against the State – the prosecution frames the case. The word ‘use’ may thus not be appropriate when this framing is not entirely under the user’s control. Concepts such as ‘cause lawyering’ (Sarat and Scheingold, 2001) are not readily transferrable to the Scandinavian context, where the courts do not come into the political domain of parliamentary sovereignty. Stålsett did not employ Tekle as a ‘strategy’. As he made clear, he simply found himself in a situation where he had to choose between civil disobedience, to remain true to his personal beliefs, or obedience to the law. His legal consciousness thus led him to decide not to let the law shape his behaviour (Marshall and Barclay, 2003). However, he used the case strategically for mobilization during the trial. Viste’s actions, on the other hand, could be called ‘strategic civil disobedience’ which invited indictment, and accepted the risk of criminal sanctions to mobilize for social change.

Conclusion: The collateral consequences of criminalization

The article has sought to explain how courtroom encounters may expose the potential legitimacy deficit of criminalization strategies, and provide a platform for social mobilization and transformation of internal bordering practices from below by migrants and citizens. The findings contribute towards a more nuanced understanding of the criminalization of civil society actors in the field of migration. While others have documented the significant burdens that criminalization strategies impose on NGOs and civil society actors by limiting migrants’ and asylum seekers’ access to humanitarian help (Carrera et al., 2019), there is less evidence that criminal prosecutions of these actors are common. Viste’s case shows state authorities are aware of legitimacy issues and therefore may be reluctant to bring charges. The findings of the article contribute to the growing scholarly concern with how migrants and civil society actors help transform borders from below and the multi-scalar nature of these bordering processes (Aas, 2013; Van der Woude, 2020). The cases reveal how examples of local social marginalization were brought to national attention (involving matters of constitutional interpretation and parliamentary debates), as well as invoking broader global struggles for migrant rights. We used the socio-legal, critical approach to legal consciousness to examine individuals’ actions in the light of perceived state failures. The cases of Stålsett and Viste illustrate the co-existence of and tensions between hegemony and counter-hegemony, resistance, and assent (Halliday, 2019) and the complex legal consciousness of the indicted. On the one hand, Viste and Stålsett reproduced legal hegemony because their resistance to the exclusionary internal mechanisms of the border was challenged within the frame of the law’s disciplinary force (Ewick and Silbey, 1998; Lazarus-Black and Hirsch, 2012; Wilson, 2011). They were both found guilty, and both expressed confidence in the legal system. On the other hand, by combining a gaming approach towards state law (using the courtroom as a mobilizing arena), and a belief in legality beyond state law, the cases illustrate the significance of collective agency for counter-

hegemonic struggles (Halliday and Morgan, 2013). Collective resistance challenged the legitimacy of penal power by revealing its failure to accord with normative values such as human dignity (Snacken, 2015) and humanitarianism.

The trials had extra-legal consequences that furthered Viste's and Stålsett's objectives and created 'dissonances, interferences and interruptions' (Mezzadra and Neilson, 2013: 133) that challenged bordering practices from below. Most notably, Stålsett's case initiated a parliamentary debate, thus demonstrating how resistant behaviour has the potential to bring about social change. This finding chimes with Wonders and Jones' claim that resistance from below can create 'political pressure for wider normative and cultural acceptance of border crossers, which can bridge the gap between legal and policy change over time' (2019: p. 150) as well as with recent contributions on how the criminalisation of mobility creates the conditions for the formation of countermobilisation by migrants and their allies (Fernández-Bessa, 2019; Mezzadra and Neilson, 2013; Michalowski and Solop, 2019; Segrave, 2019; Squire, 2011; Weber, 2019). The two trials are examples of what Fernández-Bessa terms 'migrant struggles' and 'de facto citizen struggles': During the trials, the courtroom became an important platform providing visibility and media exposure to rejected asylum seekers who, despite their illegal status, were present in the audience and demonstrated for access to work outside the courthouse to 'achieve public sympathy and recognition as political interlocutors' (2019: 161). As Abrego (2011) demonstrated in the US, social support is essential to overcome a legal consciousness affected by stigma, which is a barrier to claims-making by illegalized migrants. Strategies of legal resistance support this process of provisional inclusion, by increasing these migrants' social standing and belonging (Wonders and Jones, 2019). The collective agency of Viste and Stålsett as employers, Humans in Limbo as an organization, and the illegalized migrants themselves, functioned as an 'embodiment of inclusionary bordering practices that disrupt the overreaching nation-state' project of exclusion (Segrave, 2019: 195).

While a considerable body of criminological and socio-legal scholarship has brought attention to the negative consequences of criminalization, we suggest that scholarly attention should also be turned to its potentially empowering collateral consequences, such as social mobilization, visibility, the gaining of a voice, and the construction of a socially accepted identity. The two cases presented involved two resourceful and far from marginalized individuals who gladly accepted the possibility of conviction. They are thus by no means representative of defendants in most crimmigration or criminal cases. Nevertheless, their trials reveal the need for greater nuance in understanding the dynamics of criminalization, both as regards state reluctance to impose legality under conditions of low legitimacy, as well as its potential as a conduit for social change.

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Notes

1. EU Directive 2009/52/EC, preamble (1–2) and articles 10, 14. The Directive is not legally binding for Norway because Norway is not a EU Member State.
2. EU Directive 2009/52/EC, article 3.3.
3. Civil Disputes Act 2005, section 1–3.
4. Stålsett also referred to the values in court, 19 December 2019.
5. The Penal Code 2005, section 67(1). The Ministry of Justice and Public Security describes the exemption as being extremely narrow in Ot.prp.nr 90 (2003–2004), page 461.
6. TOSLO-2019–59563 (paragraph 2–5), unofficial translation.
7. Stålsett also referred to the values in court, 19 December 2019. The Norwegian Constitution 1814, section 2, stipulates: ‘Our values will remain our Christian and humanist heritage.’
8. Immigration Act 2008, sections 108(2) and 55(2).
9. LF-2016–111651; LB-2015–191525; LB-2013–191362; TOSLO-2017–170537; TROMS-2016–60998.
10. Immigration Act 2008, sections 108(2) and 55(1).
11. Penal Process Act 1981, section 170a.
12. Immigration Act 2008, section 108(3)e.
13. See also: RA-2014–1, IV(4); RA-2015–1, IV(4).
14. Search on Norwegian Legal Database, conducted April 2020, resulted in 17 cases between 2008–2020.
15. Examples of gross exploitation of migrant workers: Rt-2010–1118; LG-2019–26808; LB-2015–15634; LB-2014–9300-1; TSTAV-2018–72212; TBERG-2015–164820-3; TTONS-2015–149805; TNERO-2010–164058. Cases without the element of gross exploitation: HR-2019–599-A; LB-2015–32135; LA-2008–112013; TVEFO-2019–60701; TOSLO-2018–161574; TAHER-2017–10208; TAHER-2017–197265.

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