Labour migration and the regulation of the labour market

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Migration and labour

- **Migration law** → regulates fluxes and conditions of access and stay;
- **Labour law** → regulates the territorial application of law to those working in the labour market;
- **Insiders v. outsiders, or...Local workers v. migrant workers**;
  - Worker – employer → unbalanced relationship equalised by law and trade union activity;
  - Temporary/permanent regular migrant worker – employer → worker subject to law on migration and weaker party;
  - Irregular migrant workers – employer → worker is outside the law, not covered by any protection, exposed to abuses and blackmail;

→ Fragmentation of labour market through the regulation of migration;
→ Labour market as a space of conflicting interests;
→ Illegalising certain groups and legalising other in very particular ways.
Labour migration and labour market fragmentation

• [T]he importance of paying close attention to the relation between labour markets and immigration controls which not only illegalise some groups, but legalise others in very particular ways. In practice, as well as a tap regulating the flow of workers to a state, immigration controls might be more usefully conceived as a mould constructing certain types of workers through selection of legal entrants, the requiring and enforcing of certain types of employment relations, and the creation of institutionalised uncertainty.

• Immigration controls effectively subject workers to a high degree of regulation, giving employers mechanisms of control that they do not have over citizens. This means that for certain often very specific occupations, immigration controls may not function as a means of protecting jobs for citizens but effectively create a group of workers that are more desirable as employees through enforcing atypical employment relations such as fixed term contracts or self employment and direct dependence on employers for legal status.

Labour migration and labour market fragmentation

- Terms of the discussions on labour migration
  » Ageing population;
  » Labour market shortages
  » Funding social services
  » Wage dumping;
  » Protection of migrants also in irregular conditions.
Labour migration regimes

• Competing models for selecting economic-stream immigrants:

1. **Points-based model (led by the State or gov’s agencies):**
   - Transparency and adjustment to labour market shortages → «Human capital accumulation» and «brain waste»;
   - Protection of labour market conditions → initial period of unemployment;

2. **Employer-led system:**
   - Driven by companies’ needs → Employers select immigrants through recruitment;
   - ‘Market’ looks for needed skills → room for exploitation and search for cheap labour;

3. **Hybrid system.**
The Swedish regime for labour migration – Historical features

• Debate and policy-making played by **State, employers** and **trade unions**;

• 1950s: Liberalised regime of labour migration / Bilateral agreements for collective transfer of labour immigrants to remedy more labour shortages and tourism of labour immigration;

• 1960s: Challenged by LO → coordination between labour market council and trade unions and the country of origin;

• 1960s: Restrictions to labour immigration from non-Nordic countries → controlling that labour migration would match needs of country and preserve the bases of the welfare state.

• Actively supported by LO:
  » avoiding social stratification and fragmentation of labour market;
  » Migrant-related difficulties for trade union movement;
  » Avoiding wage dumping
  » Prioritising native marginal groups.
The Swedish regime for labour migration –
Historical features

• 1970s strict regulation of labour migration but launch of the universal welfare system including migrant workers;

• 1970s/80s restrictions to labour migration but asylum-seekers and family members;

• 1990s economic crisis and EU membership → increased fragmentation in the labour migration regime;

• 2000s new political front for liberalising labour migration:

The Swedish regime for labour migration – The 2008 regime

• From an authority-based regime grounded on the market test made by state’s agencies on labour shortages or recruitment difficulties…to an employer-oriented system and entirely demand-driven.

• OECD → «Sweden has introduced an almost entirely demand-driven system, where employers may recruit workers from abroad for any occupation, as long as they […] guarantee respect for wage and conditions in prevailing collective contracts. […] This replaced a system that was very restrictive, in which trade unions had, and used an informal veto on recruitment.»
The Swedish labour market regime for migrant workers

- **The Gov’s suggestions** (Prop. 2007-2008/147):
  - Foundation:

    «The authority-based labour market review shall cease. The employer’s assessment on whether in the individual case there is the need to recruit labour from third countries shall be the starting point for deciding on cases of residence and work permit»

  ➢ «it is the individual employers that have the best knowledge about the recruitment needs in their own activities»

→ Employers’ association (SN) supporting the Government initiative / Liberalising labour migration control.

→ LO opposing the reform / Coordinated and regulated labour migration.
Work permit

• **General rules** → Work permit is needed to work in Sweden (UtlL 2 kap 7 §) / Work permit to be requested before travelling to Sweden (UtlL 6 kap 4 §)

• **Requirements for work permit** (UtlL 6 kap 2 §):

  «Temporary work permits shall be granted to an alien that has an offer for a job that can provide her with earning a leaving. The conditions of the offered job shall not be worse than the conditions set by the Swedish collective agreement or practice in the profession or branch»

• **Length of the work permit** (UtlL 6 kap 2a §):

  «A temporary work permit cannot be longer than 2 years. It may not cover a period longer than the period of employment» / «An extension can be demanded from within Sweden and before the expiration» / «An alien who in the last 7 years has received residence permit for work for at least 4 years, can be granted with permanent residence permit if the initial conditions still apply » (UtlL 5 kap 5 §).

• **Termination of employment** (UtlL 7 kap 3 §):

  «The residence permit for an alien whose employment is terminated while the work permit is valid, shall be revoked, unless the alien can find a new job within three months or apply for a new job and a new work permit is granted»
Refugees and right to work

• "Freedom to work is a right that is fundamental to the protection of refugees and others seeking protection which must not be confused with the reasons for their flight”

• “It is also in the interest of countries of refuge that refugees are allowed to work. The ability to engage in decent work empowers refugees, enabling self-reliance and contribution to the economy and society”


• The right to work in the Refugee Convention (1951):
  » Art. 17: right to engage in wage-earning employment;
  » Art. 18: right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies;
  » Art. 19: right to practice liberal professions.
Refugees and right to work in Sweden

• Asylum-seekers and right to work:
  » No need to apply for work permit for refugees (*Utlänningsförordning* 2006:97 kap 5 4 §)
  » Work permit for asylum-seekers waiting for > 4 months;
  » Need to collaborate in clarifying identity;
  » Notification of income for financial assistance.

• Positive assessment of such a system:
  » Tax revenues;
  » Integration;
  » Self-supporting.
Refugees and right to work in Sweden

- **Work permit for rejected asylum-seekers (UtlL 5 kap 15 §):**

  "An alien whose application for residence permit as refugee has been rejected, shall be entitled to apply for work permit without being obliged to leave the country" (also valid for family members)

  "For the work permit to be granted, the applicant must have been employed for at least 4 months. The employment shall be a permanent position or lasting at least one year from the date of application"

  » For an efficient labour market;
  » Unfair to the person who has been working;
  » Against the employer’s benefit if the person has to leave

- Consequences on the protection of labour rights / consequences on the labour market?
The 2016 changes

• Act on temporary restrictions of the possibility to receive residence permit in Sweden (SFS 2016:752)

• **Employment is the key to permanent residence!**
  → An alien that has received a temporary residence permit can apply for permanent residence permit if she has an employment that allows earning a living, that has not worse conditions than those set by Swedish coll. agreem. or praxis in the sector;

  → The employer shall notify the hiring to Skatteverket within the next month in which the employment started;

• Gov’s motivations:
  – Incentives to work and become self-sufficient;
  – Integration;
  – Control of *Migrationsverket* against deterioration of labour market conditions
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«Irregular» migrant workers

• Tensions between labour law and criminal law → «illegal residence» v «illegal employment»;

• Labour Court recognised the work performed «illegally» → rights stemming from an employment contract (although irregular);

• Employers condemned for anti-union conduct → missed application of collective agreement;

• Act (SFS 2013:644) on the right to salary and compensation for work performed by a foreigner who has no right to stay in Sweden;

• EU Directive 2009/52 on sanctions against employers of illegally staying third-country nationals:
  » Prohibition of employment of “illegally staying third-country nationals in order to fight illegal immigration”;
  » Right of the migrant worker to receive the salary and compensation for the work performed;
  » Migration policy tool.
«Irregular» migrant workers

→ Policy of distinguishing «migrant status» and «employee status»;
→ Organising role of the trade union also for «irregular» migrant workers.

→ Internal divisions between protection of the migrants and of the labour market;
→ Creation of the Trade Union Center for Undocumented Migrants (legal aid, informations, etc.)
→ Different approaches of the Federations (eg.

→ Trade Union Federation rejecting the proposal of organising «irregular» migrant workers
→ Trade union Federation actively and openly organising «irregular» migrant workers;

→ Workplace organising;
→ Public shaming of employers;
→ Workers’ register and job control.
Migration and the International Labour Organisation (ILO)

- Protection of vulnerable groups of workers;
- 1919 ILO constitution → “protection of workers when employed in countries other than their own”;
- 1998 Declaration → “special attention to the problems of persons with special social needs, such as ... the migrant workers”;
- 1999 Decent work agenda → formal and informal economy.
ILO and Migrant workers

• Illegal employment of migrant workers favoured by pressures to emigrate and closing of borders → closing of legal channels opens the illegal channels;

• Basic human rights for migrant workers in irregular situation include the core labour rights and do not require citizenship or residence;

• Illegally employed migrant workers shall not be deprived of their rights in respect of the work actually performed;

• Right to regularise the irregular situations;

• Protection from illegal employment → sanctions to employers employing illegally migrant workers and manpower traffickers.

• High skilled v. low skilled workers and the ‘brain drain’ phenomenon.
ILO and Migrant workers

- **Migrant Workers Conv. No. 143** (1975 – 23 ratifications) (aka *Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers*)

- Two parts:
  - Part I covers all migrant workers → “migration in abusive conditions”;
  - Part II applied only to migrant workers admitted on a regular basis → principle of equal opportunities and treatment between migrant and national workers.
Migrant Workers Conv. 143 (1975) – Part I

- Preamble: “labour is not a commodity” and right to migrate;
- Obligation to respect of basic human rights of all migrant workers (Art. 1);
- Obligation for States to determine situations of illegally employed migrant workers in their territory (Art. 2);
- Obligation to determine violations of international law or agreements and national law in situations of migration for employment (Art. 2);
- Involvement of representatives organisations of workers and employers in defining national law and policies (Art. 7);
Migrant Workers Conv. 143 (1975) – Part I

• Obligation to suppress clandestine movements of migrant for employment and illegal employment of migrants (Art. 3);

• Prosecution of manpower traffickers and effective detention of employers illegally employing migrant workers (Art. 6);

• No illegal or irregular situation for the regularly admitted migrant worker in case of loss of job (Art. 8);

• Equality of treatment in respect of rights arising out of past employment as regards remuneration, social security and benefits (Art. 9.1);

• In case of legal proceeding, possibility to receive proper defence (Art. 9.2);

• Right to stay and take up a legal employment (Art. 9.3);

→ Basic employment rights for migrant workers in irregular situations.
Migrant Workers Conv. 143 (1975) – Part II

• **Only for migrant workers in regular status**;

• Obligation of national policies promoting **equal treatment** and **equal opportunities** in respect of employment and occupation, social security, trade union and cultural rights (Art. 10);

• Policies for integration of migrant workers and families and for preserving national and ethnic identities (Art. 12);

→ equality of treatment AND equality of opportunity AND integration AND preservation of identity.
ILO and Migrant workers’ rights

→ Primary status of individuals is the worker status!

- Spain (2001): Spanish law making the exercise of trade union rights for migrant workers to be dependant on authorisation of their presence in Spain violating ILS;

- Korea (2010): Refusal to register the Migrants’ Trade Union and arrests and deportations of members → undocumented migrant workers are entitled to trade union membership and to have their working conditions improved through collective agreement.
EU labour migration regime

• Intra-EU:
  – Freedom of movement for workers (Art. 45 TFEU):
    1. Freedom of movement for workers shall be secured within the Union;
    2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
  – Posting of workers:
    » Dir. 96/71
    » Temporary migration related to freedom to provide services.

• 2004 – 2007 Enlargement and social dumping / social tourism / ‘race to the bottom’.
EU labour migration regime

• Extra-EU migration → Art. 79 TFEU:

“The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings”.

• Competences on regulating conditions of entry and stay, and rights of third-country nationals / illegal immigration and residence…

“This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed”.

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EU labour migration regime

- Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (The Blue Card Directive) → attracting and retaining highly qualified labour migrant for contributing to EU competitiveness;

- Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State → setting rights for non-EU workers legally residing in a EU state;

- Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers (The Seasonal Workers Directive) → facilitating and regulating seasonal labour migration;

- Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (The ICT Directive) → facilitating the entry of multinationals’ personnel like managers, specialists or trainees.
The Blue Card Directive

• This Directive should be without prejudice to the right of the Member States to determine the volumes of admission of third-country nationals entering their territory for the purposes of highly qualified employment (Recital 8 – Art. 6);

• This Directive should provide for a flexible demand-driven entry system, based on objective criteria, such as a minimum salary threshold comparable with the salary levels in the Member States, and on professional qualifications (Recital 10);

• This Directive fully respects the competences of Member States, particularly on employment, labour and social matters (Recital 11);

• In implementing this Directive, Member States should refrain from pursuing active recruitment in developing countries in sectors suffering from a lack of personnel (Recital 22, ‘Brain-drain clause);

• Purpose: determining the conditions of entry and residence for more than three months in the territory of the Member States of third-country nationals for the purpose of highly qualified employment as EU Blue Card holders, and of their family members (Art.1)
The Blue Card Directive

• Definition of ‘highly qualified employment’ (Art. 2):
  – In the Member State concerned, is deemed as an employee (…exercising genuine and effective work for, or under the direction of, someone else);
  – Remunerated;
  – Required adequate and specific competence, as proven by higher professional qualifications [at least 5 years of professional experience of a level comparable to higher professional (= post-secondary) education].

• Exclusions (inter alia):
  » Third-country nationals under temporary protection or international protection;
  » Researchers for research projects;
  » Family members of EU citizens who exercised movement rights under Citizenship directive 2004/38;
  » Seasonal workers;
  » Posted workers under directive 96/71;
The Blue Card Directive

• Criteria for admission (Art. 5):
  – Presenting valid work contract or binding job offer for highly qualified employment of at least one year in the MS concerned;
  – Presenting relevant and valid diplomas or certificates attesting the qualifications for the job or job offer;
  – Presenting valid travelling document or visa as determined by national law;
  – Gross annual salary at least 1.5 times of average gross annual salary in the MS concerned → MSs may require compliance with labour legislation and collective agreements;
  – Gross annual salary at least 1.2 times “for employment in professions which are in particular need of third-country national workers and which belong to the major groups”:
    » Top-rank civil servants;
    » Professionals.
The Blue Card Directive

• Issuing of Blue Card (Art. 7):
  – Third-country national fulfilling the requirements;
  – Standard period of validity between 1 and 4 years or according to length of work contract plus 3 months;

• Grounds for refusal (Art. 8):
  – Missed fulfilment of requirements or fraud in application;
  – Priority to national or EU-national workforce, or third-country nationals already residing in the MS;
  – Possible rejection if employer has been sanctioned for undeclared work or illegal employment.

• Rejections shall be open to legal challenges (Art. 12).
The Blue Card Directive – The Rights

• Access to Labour Market (Art. 12):
  – Restricted for the first 2 years, after equal treatment with nationals for access to highly qualified employment;

• Temporary unemployment (Art. 13):
  – No reason for withdrawing of Blue Card unless for more than 3 months or more than once under the validity period;

• Equal treatment (Art. 14):
  – Working conditions, pay, protection and H&S;
  – Freedom of association and trade union membership;
  – Education and vocational training;
  – Access to good and services;
  – Free movement in the territory
What is at stake?

• “Skilled labour migration into Europe boosts our competitiveness and therefore our economic growth” – José Manuel Barroso (former) EU Commission President

• “This is a new form of colonization …[southern countries] spend a lot of money educating and training technical students and then in the end the northern countries will cream off the best” - Tajeddine El Hussein, Professor of International Economic Law

• Immigration cannot be an easy solution for dealing with labour market shortages and demographic change. The social partners must be involved in assessing real labour market needs, and investment in training of unemployed workers – including those from a migrant or minority ethnic background – is a first priority. We will also have to make jobs in sectors where there are shortages more attractive to the locally unemployed in terms of wages and working conditions – John Monks, (former) ETUC Secretary General

• Member States autonomy v. EU coordination.
Implementation

• Utlänningslag (2005:716) kap. 6a;
• Issue of minimum wage;
• Conditions (6a.1)
  » Salary threshold of 1.5 times of average gross salary;
  » Employment conditions not worse than those set in collective agreements or praxis in the sector;
  » Prior application to health insurance covering 3 months before entrance
• Family reunification granted for the length of the Blue Card (6a.10);
• Obligation to notify to Migrationsverket 1) end of employment 2) salary no longer exceeding the threshold (6a.9).
Seasonal Worker
The Seasonal Workers Directive

• Effective management of migration flows for the specific category of seasonal temporary migration (Recital 7);

• Ensuring decent working and living conditions for seasonal workers, by setting out fair and transparent rules for admission and stay and by defining the rights of seasonal workers (Recital 7);

• Providing for incentives and safeguards to prevent overstaying or temporary stay from becoming permanent (Recital 7);

• Considering the specially vulnerable situation of third-country national seasonal workers and the temporary nature of their assignment, there is a need to provide effective protection of the rights of third-country national seasonal workers (Recital 43)
The Seasonal Workers Directive

- **Scope (Art. 2):** *This directive shall apply to third-country nationals who reside outside the territory of the Member States and who apply to be admitted, or who have been admitted under the terms of this Directive, to the territory of a Member State for the purpose of employment as seasonal workers.*

- **Exclusions:**
  - Employees of undertakings est. in EU and posted workers;
  - Family members of EU citizens who exercised free movement rights ex Dir. 2004/38
  - Those migrants who enjoy free movement rights under bilateral agreements.
The Seasonal Workers Directive

• Definitions (Art. 3)
  – ‘seasonal worker’ means a third-country national who retains his or her principal place of residence in a third country and stays legally and temporarily in the territory of a Member State to carry out an activity dependent on the passing of the seasons, under one or more fixed-term work contracts concluded directly between that third-country national and the employer established in that Member State.
  – ‘activity dependent on the passing of the seasons’ means an activity that is tied to a certain time of the year by a recurring event or pattern of events linked to seasonal conditions during which required labour levels are significantly above those necessary for usually ongoing operations.

• MSs can list the ‘seasonal sectors’ in the implementation phase in consultation with social partners (Art. 2.2).
The Seasonal Workers Directive

- Conditions for application and requirements (Arts. 5 and 6):
  - Valid contract / job offer with:
    » Place and type of work / duration / remuneration / working hours / amount of paid leave / others…
  - Sickness insurance;
  - Accommodation;
  - Compliance with labour law and collective agreements;
  - No recourse to social assistance;
  - No risk of illegal immigration or overstay;
The Seasonal Workers Directive

• Grounds for rejection (Art. 8):
  – Missed fulfillment or fraud;
  – Employer sanctioned for undeclared or illegal employment (national law) or violation of the directive (Art. 17, compensation to the worker in case);
  – No real economic activity taking place;

• Withdrawal of authorization (Art. 9):
  – Same conditions as ‘rejection’, plus…
  – Employer failing to meet legal obligation on social security, tax, labour rights, working conditions;
  – Employers failing to respect the employment contract;
  – Creation of an on-purpose vacancy by abolishing a full-time position.
The Seasonal Workers Directive

• Duration may vary according to MSs decision → less than 90 days / more than 90 days;

• Max period between 5 months and 9 months in a year, unless a new permit is granted by the State (Art. 14.1);

• MSs shall determine a max period within 12-month period for employers to hire seasonal workers (Art. 14.2);

• Possibility to extend the permit with the same employer or with a different employer (Art. 15);

• Facilitation of re-entry for seasonal workers (Art. 16).
The Seasonal Workers Directive

• Right to equal treatment (Art. 23)
  – Terms of employment, pay, protection, working hours, etc.
  – Right to strike and industrial action, freedom of trade union association and membership;
  – Social security benefits;
  – Education and training;

• Accommodation (Art. 20)
  – Ensuring adequate standards of living
  – Guarantees if arranged by employers
Implementing challenges

• Recruitment of seasonal migrant workers through employment agencies and scope of the directive;
• Compensation of the seasonal worker in case of failure of the employer (only unfair dismissal?);
• Fragmentation of the labour migration regime;
• Precarious employment and precarious status;
• Concerned with avoiding seasonal migrant workers to become permanent residents;
Conclusion

→ Centrality of trade unions in the labour rights protection in the Swedish system;

→ Tensions between migration control and labour market regulation;

→ Trade union dilemma (Protectionist v Protective?);

→ Labour rights as migrant workers’ human rights.
Thank you for your attention!

QUESTIONS? COMMENTS?