Labour Law, Trade Unions and Irregular Migrant Workers

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First, I would like to thank the organisers of this conference for the invitation. I will speak to you in two capacities – as a trade unionist and as a labour lawyer – with the aim of highlighting some of issues that arise when trade unions and labour lawyers deal with undocumented migrants.

For a trade unionist, the exploitation suffered by many undocumented migrants in Europe today is a cause for concern. Wages amounting, if paid, to a few Euros a day, earned through long hours of work under difficult and sometimes dangerous conditions does not amount to decent work, fair labour standards, or any other expression we use to describe the minimum standards under which no one, nowhere should work.

At the same time, there is also an evident self-interest in fighting undercutting. If undocumented migrants are paid below the standards set by collective agreements or minimum wage legislation, work longer hours, and under worse health and safety conditions, other workers will see their wages and conditions threatened, as employers prefer the cheaper and more vulnerable undocumented migrants. Another common form in which this competition is played out is when firms using undocumented migrants (or who subcontract the work to such firms) win bids to provide services e.g. in the cleaning and construction industries.

Seen from this perspective, trade union intervention is necessary and natural.

But the debate seldom ends there. Two arguments *against* trade union intervention on behalf of undocumented migrants are particularly common, at least in a northern European context.

The first is that intervention on behalf of undocumented migrants amount to defending undocumented migration and work without a work permit. Most trade unions support the idea that migration should be regulated, and that work permits should be conditioned, in order to make sure that employers do not import labour in order to pay lower wages or offer worse working conditions. In some cases, there are also labour market tests, aimed at preventing labour migration in sectors where unemployment is high, supported by trade unions.

The second argument has to do with the fact that the work of undocumented migrants tend to be undeclared – in the informal sector. Fighting tax fraud and undeclared work is a priority for many trade unions, especially in industries such as construction and restaurants where undeclared work is more common. Employees who chose to take all or part of their pay in cash without declaring it, are commonly seen as crooks, cheating not only the state but their fellow workers as well.

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Both arguments deserve to be taken seriously.

In the first case, the counter argument can be found in the primary role of a trade union – to defend workers interest in the relationship between them and their employer. Trade unions are not migration authorities. If the migration status of a person has the affect that they are denied labour rights and trade union assistance, exploitation will only worsen, producing exactly the result that labour migration regulation is supposed to prevent.

In the second case, it is important to make a distinction between what I would like to describe as "opportunity based" and "necessity based" undeclared work.[1]

If a native born 27-year-old male construction worker accepts an offer to work off the books, giving him a larger take home pay than if the work had been declared, this is based on an *opportunity* to make some extra money, while undercutting his fellow workers and not contributing to the common goods paid for by taxes and social security contributions. That worker will normally have forfeited his right to trade union support and representation.

The situation of an undocumented migrant, for whom the possibility of a job in the formal sector does not exist, is, it could be argued, qualitatively different. His or her undeclared work is based on "necessity", why trade union intervention can be motivated. Whenever possible, such intervention should of course include demanding tax and social security payments from the employer.

An issue that both journalists and academics have had a tendency to focus on is that of trade union membership for undocumented migrants. From a legal a political perspective, this is an important question, which I will come back to below. But from a practical point of view, the low numbers of migrant workers that are members of a trade union earn more to the fact that they work in sectors and companies where trade union presence is low, to the perceived or real risks involved in contacting a trade union –in particular the threat of retaliation from the employer-, and to high-trade union membership fees, than to whether trade unions have explicitly said that they will accept undocumented migrants as members.

So even though welcoming undocumented migrant as trade union members can be important as a political statement, the crucial discussion is more often whether trade unions should help undocumented migrant workers despite the fact that they are not members. In other cases, trade unions are often taking measures to prevent free-riders, for example workers who join a union when a problem arises without having paid their dues on sunny day. Many will therefore question use of fee-paying members' dues to help non-members.

The argument of those that believe that trade unions should intervene on behalf of undocumented migrant workers is, apart from the above mentioned self-interest in fighting low wages and bad working conditions wherever they occur, that undocumented workers should be seen as "not-yet-members" with an acceptable reason (their vulnerable position) for not having joined the trade union. A similar argument has been used in the context of young

[1] This distinction between opportunity and necessity has been inspired by the use of the concepts of *opportunity based entrepreneurship* and *necessity based entrepreneurship* in the study of small businesses. They are explored in Acs, Z.J. and Varga, A. (2004) "Entrepreneurship, Agglomeration and Technological Change. Discussion Papers on Entrepreneurship, Growth and Public Policy" *Max Planck Institute for Research into Economic Systems*. ftp://papers.mpiew-jena.mpg.de/egp/discussionpapers/2004-06.pdf

people who, particularly in the summers, often enjoy free services from trade unions and special phone services motivated by their recent entry into the labour market.

In 2008, a number of Swedish trade union organisations, together with an organisation for undocumented migrants, joined to form the Swedish Trade Union Centre for Undocumented Migrants. The purpose was to inform undocumented migrants about their rights in the labour market and if they so wished represent them vis-à-vis their employers.

Apart from a network of trade union organisations, the centre consist of a physical centre, open one afternoon-evening every week and staffed by trade union ombudsmen and officials from the participating organisations and a phone service giving information and helping irregular migrants get in contact with a trade union.

Initially, the centre had many visitors. A great number came out of curiosity, or rather looking for hope. Their questions were more concerned with their migration status than labour matters. The trade unionists staffing the centre had to be extremely prudent not to raise any false hopes concerning the possibilities to receive residence or work permits, sticking to their expertise in labour matters.

Another, smaller, group of visitors sought information about their rights in the workplace. Often, they described their situation, without revealing the identity of their employer, asking for an assessment. Only a handful, however, chose to take the next step, and ask for trade union assistance against their employer. This is not strange. The extremely vulnerable situation of undocumented migrant workers makes it very difficult for them to claim their rights. Firstly, many fear that a dispute will make the employer report them and their whereabouts to the authorities which could result in expulsion. Secondly, they would be sure to lose their jobs and run the risk of being blacklisted by employers in the often tight-knit networks that provide jobs for undocumented migrants.

The centre has also played a role in spreading information about the 2008 Swedish labour migration reform. The reform included a possibility for former asylum seekers who had a job to apply for a work permit without having to leave Sweden, which raised the hopes of many undocumented migrants. In most cases, the hopes where shattered as the possibility to change track from asylum seeker to labour migrant is very limited in scope.

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I will now turn to my other role – that of a labour lawyer.

In a number of countries, the question what status to afford undocumented migrants under labour law has posed a problem.

In some cases, the arguments against affording employee status, and thus labour law protection, to undocumented migrant workers have been technical. Courts in England and Australia have taken the position that contracts, including employment contracts, must be for a legal purpose and performed in compliance with the law – thus denying undocumented migrants status as employees.[2]

[2] Guthrie & Taseff (2008) ”Dismissal and Discrimination: Illegal Workers in England and Australia” *24(1) International Journal of Comparative Labour Law and Industrial Relations 31.*

In other cases – such as the *Hoffman Plastics*-case[3] of the Supreme Court of the United States – the argument has been one of policy. The *National Labour Relations Board's* order of back pay to undocumented migrants who had been unlawfully dismissed due to trade union activity was overruled, as it would "encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations".

In many, European countries, the question whether irregular migrant workers are protected by labour law is untrodden ground. Neither legislators nor courts have explicitly dealt with the question whether a person who does not have the right to work, due to their lack of a work permit and/or residence permit, can claim labour law protection, for example if they are not paid, if their employer violates occupational health and safety legislation, or if they are subject to harassment or discrimination.

Now, the question of whether irregular migrant workers are covered by labour law is on the agenda for two reasons. One is the hardening attitude of many European governments against irregular migrants.[4] Denying irregular migrants rights of various kinds, such as the right to health care and education for their children, has become a tool to discourage potential migrants and to increase incentives for irregular migrants already in Europe to return to their home countries. In that setting, denying irregular migrants labour law protection would be natural.

The other reason is the *Sanctions directive* (2009/52/EC). The directive, which full title is *Directive providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals*, does not contain any provision which explicitly touch on the subject of the applicability of labour law to irregular migrants. It is nonetheless likely that the issue will come up in the process of implementing the directive in the Member States.

I have already mentioned the key arguments against the application of labour law to undocumented migrants. The arguments in favour can be found both in labour law itself and in international law.

Labour Law
From a labour law perspective, denying irregular migrants labour law protection is problematic. The fact that an employer violates one set of rules, those of migration law, would have the effect of granting him immunity or at least reduce the consequences of breaking another set of rules – those of labour law.

Treating undocumented migrants as anything other than employees effectively denies labour law the possibility of fulfilling its task. In most countries, the concept of employee, which effectively defines the personal scope of Labour law, is a mandatory concept. This entails that it is the relationship between the employer and the person performing the work that is to decide whether a person is an employee or not. If a category of persons performing subordinated work was to be excluded for reasons outside the relationship between them and their employer labour law would lose its autonomy.

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[3] *Hoffman Plastics Compounds, Inc v. NLRB 535 U.S. 137 (2002).*
[4] Sergio Carrera and Massimo Merlino (2009) *Undocumented Immigrants and Rights in the EU: Addressing the Gap Between Social Sciences Research and Policy-making*. CEPS. http://www.ceps.eu/book/undocumented-immigrants-and-rights-eu-addressing-gap-between-social-sciences-research-and-polic

International law
The necessity of applying labour law to migrant workers, regardless of their legal status, has been acknowledged by the International Labour Organisation (ILO).

The ILO's *Committee on the Freedom of Association* (CFA), which interprets the two most important conventions of the ILO, no 87 and 98 on the right to organise and bargain collectively, has on repeated occasions ruled that also irregular migrant workers are entitled to fundamental trade union rights. In Case 2121, concerning Spain, the CFA reached the following conclusion: [5]

> *With the regard to the denial of the right to organize to migrant workers in an irregular situation, the Committee recalled that all workers, with the sole exception of the armed forces and the police, are covered by Convention No. 87.*

When the CFA a few years later ruled on the earlier mentioned Hoffman-case from the United States it urged the US Government "*to explore all possible solutions, including amending the legislation to bring it into conformity with freedom of association principles, in full consultation with the social partners concerned, with the aim of ensuring effective protection for all workers against acts of anti-union discrimination*."[6] Currently, the CFA is dealing with a case concerning the freedom of association for undocumented migrant workers in South Korea.[7]

Also *ILO Convention 143 on migrant workers* contains provision that give rights to irregular migrants. This convention, which has only been ratified by four EU member states[8], asserts that the human rights of all migrant workers must be respected, regardless of their status under migration law. Further, ILO 143 grant equality of treatment to those in irregular status in respect of rights arising out of past employment as regards remuneration, social security and other benefits. They are also entitled to equality of treatment in working conditions.

Recently (March 2010), the ILO published an ambitious report on labour migration.[9] The report discusses several important legal issues, including the extent to which irregular migrants are covered by international labour standards and human rights instruments. The ILO points out that "Migrant workers, whatever their status, are always entitle to human rights, as are all members of the human family in every part of the world".[10] Two out of three instruments that together comprise the International Bill of Human Rights – the Universal declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, contain provisions that lend support to the idea of including irregular migrant workers in the scope of labour law.

In the *Universal Declaration of Human Rights*, Articles 23, 24 and 25 specifically address work and employment, granting e.g. just and favourable conditions of work, equal pay for equal work without any discrimination, just and favourable remuneration, the formation and

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[5] Case 2121 (Spain). This and other cited cases can be found in the Libsynd database: http://webfusion.ilo.org/public/db/standards/normes/libsynd/index.cfm?Lang=EN&hdroff=1
[6] Case 2227 (United States).
[7] Case 2620 (Republic of Korea).
[8] Cyprus, Italy, Portugal and Sweden. The convention is nevertheless defined as an up-to-date convention by the ILO.
[9] ILO (2010) International Labour Migration – A rights-based approach. In particular pp 31f, pp 79f, pp 99ff and pp. 117ff.. http://www.ilo.org/public/english/protection/migrant/download/rights_based_approach.pdf
[10] Ibid, p. 118.

membership of trade unions and rest and leisure, including reasonable limitation fo working hours and periodic holidays with pay.

The *International Covenant on Economic, Social and Cultural Rights*, which is legally binding on those States that have accepted it by ratification or accession, include, among economic rights, the right to just and favourable conditions of work, fair wages and equal remuneration for work of equal value, to safe and healthy working conditions, to rest, leisure and reasonable limitations of working hours, to forma and join trade unions and to take strike action (Articles 6-8).

As labour law can be said to constitute the practical implementation of the above mentioned rights in national legislation, denying irregular migrants labour law protection could be seen as not respecting the country's international commitments.

Even though the Sanctions directive (2009/52/EC) do not mention anything about the labour law status of irregular migrant workers, it is likely that implementation process will raise the issue in at least some Member States. In countries where neither legislators nor courts have had to tackle the issue before, the implementation of the Sanctions directive could there come to have important effects also in this respect. Hopefully, the implementation of the directive will lead to more countries explicitly acknowledging that irregular migrant workers are protected by labour law. It can, however, not be excluded that the effect will be the opposite, with legislation or statements that explicitly denies irregular migrants workers labour rights.

It could be argued that Article 6 of the directive, which contains provisions regarding back pay, implicitly acknowledges that irregular migrants have the right to remuneration for their work. As this right typically arises from the contract of employment, this entails that irregular migrant workers should be considered as employees. (Law makers could, however, solve this by legislation that grants irregular migrant workers the right to back-pay without being considered as employees.)

The arguments in favour of the application of labour law to irregular migrants presented above can all be used when arguing that part of the implementation of the Sanctions Directive should be an explicit acknowledgement that also irregular migrants are employees.