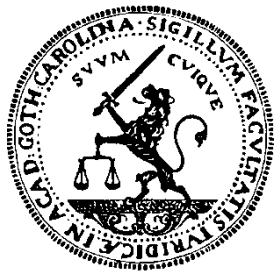

FACULTY OF LAW
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An Old Model in a New Time

- The growing of the precariat and the decline of the Swedish model. A critical analysis of Lex Laval

JURM02 Graduate Thesis

International Human Rights Law and International Labour Rights
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Contents

Summary

In his theory of the precariat Guy Standing gives his view on the current labour market where more and more people has precarious working situations. According to him it is the consequence of a policy that has seen movability on the labour market as the answer to economical problems. At troubled times the politicians have weakened the unions and worsened the employment securities for the workers. The labour market has also been affected by the fact that more and more people are working in another country than their own. The migrants are often both a cause to the growing of the precariat, and those in it that are mostly affected by the consequences. Since the unemployment is high in many countries, the migrants often come to countries where there is a lack of jobs. In that way they contribute to wage competition.

In Sweden the unions have kept the wage competition in check by using collective action to make companies sign collective agreements. In 2004 Byggnads, the union for construction workers, used a blockade to try to force the Latvian construction company Laval un Partneri to sign a collective agreement. Laval claimed that this was against the rules of collective peace since they had already signed a collective agreement in Latvia, and brought the case to the labour court. The labour court requested a preliminary ruling from the European Court of Justice, which agreed with Laval and stated that it is discriminatory if the unions can use collective action against foreign companies that has existing collective agreements.

Sweden was forced to change their legislation. The new legislation states that if a foreign company that is posting workers in Sweden live up to the minimum employment conditions in Sweden, it is unlawful for the unions to take action against them.

The effect of the legislation has been that the Swedish labour market now is open to wage competition. It has also meant that the unions have been weakened towards the foreign companies posting workers in Sweden. There is a proposed change in the legislation of a strict responsibility for all workers of sub-contractors. There is also a proposal regarding better access to information for foreign companies on employment conditions.

The research question of the thesis is if Lex Laval contributes to the creation of a precariat and, if that is the case, the proposed changes can reverse the trend. The conclusion in the thesis is that Lex Laval favours economic interests over rights on the labour market, weakens the unions, open up for an unhealthy competition between workers and treat foreign workers as second-class workers. All this contributes to the growing of the precariat and the question must therefore be answered positive. The proposed legislative changes might improve this, but are not enough to reverse the trend.

Sammanfattning

I sin teori om prekariatet ger Guy Standing sin syn på den rådande arbetsmarknaden där fler och fler människor lever under osäkra arbetsförhållanden. Enligt honom är det konsekvenserna av en politik som har sett rörlighet på marknaden som svaret på ekonomiska problem. Vid problem har politikerna försvagat de kollektiva organisationerna och försämrat anställningstrygghet med mera för arbetstagarna. Arbetsmarknaden har också påverkats mycket av att allt fler människor jobbar någon annanstans än i sina hemländer. Migranterna är ofta både en del av orsaken till prekariatet och de i prekariatet som får känna av konsekvenserna som mest. Eftersom arbetslösheten är hög i de flesta länder kommer migranterna ofta till länder där det saknas jobb. De bidrar på så sätt till lönekonkurrensen.

I Sverige har fackförbunden sett till att lönekonkurrensen har hållits nere genom att driva igenom kollektivavtal med stridsåtgärder. 2004 försökte Byggnads genom en blockad tvinga fram kollektivavtal med det lettiska byggföretaget Laval un Partneri. Laval ansåg att det rådde fredsplikt då de redan var bundna av ett kollektivavtal i Lettland och bestred stridsåtgärderna. Arbetsdomstolen begärde in ett förhandsavgörande från EU-domstolen som gick på Lavals linje. Domstolen fastslog att det är diskriminerande att fackförbund får vidta stridsåtgärden gentemot utländska företag som redan har kollektivavtal.

Sverige tvingades således att ändra sin lagstiftning. Den nya lagstiftningen innebar att om företag som utstationerar arbetskraft tillämpar villkor som är lika förmånliga som minimi-kraven i Sverige råder det fredsplikt.

Effekten av lagstiftningen har blivit att den svenska arbetsmarknaden är öppen för lönekonkurrens. Det har också inneburit att fackförbunden blivit rejält försvagade i förhållande till utländska företag som utstationerar arbetskraft i Sverige. Lagförslag finns om att införa ett strikt entreprenörsansvar för arbetstagare hos samtliga underentreprenörer, samt en förbättrad information om de svenska förhållandena till utländska företag som vill etablera sig i Sverige.

Frågeställningen för uppsatsen är om Lex Laval bidrar till skapandet av ett prekariat och, om så är fallet, om de nya lagförslagen ändrar på detta. Slutsatsen i uppsatsen är att Lex Laval främjar ekonomiska intressen före rättigheter på arbetsmarknaden, försvagar fackförbunden, öppnar för osund konkurrens mellan arbetstagare och behandlar utländska arbetare som andra klassens arbetare. Allt detta bidrar till prekariatet och frågan måste därför besvaras jakande. Lagförslagen kan förbättra detta, men räcker inte för att vända trenden.

Preface

It is now seven years since I mustered up the courage to pack up my belongings, say good-bye to my family and leave Lomma for the big city of Lund. As I hand in this thesis, a chapter of my life comes to a definite end. I would like to thank everyone who has contributed to my time as a student.

First of all, a big thank you to my family for always supporting me in more ways than I can remember, and for always offering a safe place with a full fridge. And thank you Berit for filling my freezer with lunch boxes that have saved me many times when my bank account has told me that it is almost the 25th.

For good parties, fantastic company, amazing friendships and legendary foosball-games, thank you to Olof Cronvall, Oskar Odén, Johan Dahlgren and Martin Larsson, with whom I have shared apartments since I moved to Lund. You are the ones I have shared my everyday life with for the last seven years, and I am forever grateful for that.

A special thanks to Paulina Bolton for a life changing fika just before I started my studies, and for being a great study partner during my thesis writing.

And at last, thank you EFS-Kapellet for so many things. For receiving me when I entered with my newly found mustard seed, for inspiring me, for challenging me, for nursing me, for trusting me, for showing me that the world is bigger than Juridicum and for helping me grow. My grades might have been better without you, but my life would have been much emptier.

I now leave the university behind me, and I leave you with the ancient wisdom of King Solomon the wise:

> *And further, my son, by these words be admonished: of making many books there is no end, and much study is a weariness to the flesh – Ecclesiastes 12:12*

Fredrik Blomberg
EFS-Kapellet, Lund, 27 Maj 2015

Abbreviations

EC	Treaty Establishing the European Community
ECHR	European Convention on Human Rights
ECSR	European Committee of Social Rights
ESC	European Social Charter
EU	European Union
ILO	International Labour Organization
IMF	International Monetary Fund
LO	Landsorganisationen
SEK	Swedish Kronor
SWEA	Swedish Work Environment Agency
UDHR	Universal Declaration of Human Rights

1 Introduction

1.1 Background information

Early in November of 2014 the news in Sweden were dominated by a construction-site accident in Stockholm. Two workers had lost their lives and another was seriously injured. The two dead workers were, not unexpectedly, not Swedish citizens. The situation for foreign workers in the construction sector in Sweden has been widely debated ever since the creation of Lex Laval, a legislation that hinders the unions to use collective action in order to force foreign companies to sign collective agreements. The two workers were not covered by any collective agreement, since their employer had not signed any such agreement. Only six months earlier the Swedish public service television aired the documentary *The unswedish model* in which they painted a grim picture of the Swedish construction sector. In the documentary they proved that posted workers were working for a fragment of wage of the Swedish workers and by this outrivaled the Swedish workers[1]. Once again the debate about Lex Laval and the situation for posted workers in Sweden gained momentum.

The Lex Laval legislation did not appear in a vacuum, it was created due to the outcome of a case against Sweden in the European Court of Justice. But the legislation was also created in the wake of the global financial crisis in 2008. The legislation cannot be viewed and analysed without having the current economical and political landscape in mind. In the theory of the Precariat Guy Standing presents his views on the labour market, the political landscape and on the result of these policies. Standing states that the political agenda combined with the globalisation has resulted in a new class emerging, the Precariat. The Precariat is recognised by the lack of certain securities and by working in precarious employments. Sweden is no exception from that trend, today 17% of those in employment have temporary employments, which is an increase from 11% in the beginning of the 90's[2].

1.2 Purpose and Research Question

The purpose of this thesis is to analyse the Lex Laval legislation from a Precariat point of view. I will apply Standings theory on the background to, and reasoning behind, the legislation, the effects and the suggested changes of it.

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[1] *Den osvenska modellen*, SVT, aired 5th June, 2014. [available at: https://www.youtube.com/watch?v=S_L2pBsBHsc]

[2] Statistics Sweden, *Trends for persons in temporary employment*, AM 110 SM 1501, 2015, p 1.

The research question for this thesis is:
Does Lex Laval contribute to the creation of a precariat?

With the sub questions:
What are the reasons behind the legislation?
What consequences has the legislation had?
If Lex Laval contributes to the creation of a precariat, will the proposed changes reverse this?

1.3 Disposition and Delimitations

The overall outline of this thesis is that the theory used is presented in chapter 2, in chapter 3 the factual circumstances are described and analysed and chapter 4 is the conclusion.

In the theory chapter I will begin with an overview of what the precariat is and then focus on the aspect of migrant workers'[3] role in the precariat. I will also present the vision Standing has for the future regarding the precariat.

In the third chapter I will firstly present the circumstances and the outcome of the Laval-case, then the new legislation, the effects of the legislation on the Swedish labour market and lastly I will present the proposed changes to the Lex Laval legislation. Each section will end with an analysis.

Lex Laval can be, and have been, looked at from many different perspectives, asking different questions. Such perspectives could be an on the ground case study of the effects of the legislation or a comparison between the EU law and the Swedish law. These aspects have been covered in reports from the parties of the labour market and in the preparatory works for the Swedish legislation. This thesis will focus on the underlying reasons for the legislation from a precariat point of view. The effects and the coherence with EU law will only be discussed insofar it relates to the theory of the precariat.

There are also many other interesting aspects of Standing's theory that are relevant for the Swedish society today, such as the role of the private employment agencies and how we organise our social-welfare system. These topics will be mentioned in the theory chapter, but the focus of the analysis will be the role of and situation for the migrant workers, and the balance between the different interests on the labour market.

1.4 Methodology and Material

In the theory chapter I have studied Guy Standing's theory of the precariat, which he has presented in his two latest books.

[3] In this thesis I will use Standing's definition of "migrant workers" which is everyone that for one reason or another work in a country other than their own.

For the third chapter I have used the traditional legal method to examine the established law, which means that I have looked at legislation, case law and the preparatory works from both Sweden and the EU. For the section that covers the effects of the legislation I have used reports produced by the unions and the employers' organisations. For the analyses I have applied the theory presented in chapter two on the material in each section.

2 Theory of the Precariat

2.1 Introduction

In 2011 Guy Standing published the book "The Precariat – the new dangerous class" (The Precariat). Standing is a former Director of the Socio-Economic Security Programme at ILO, current Professor of Development Studies at University of London and founder of the Basic Income Earth Network, an organisation that promotes basic income.[4]

In The Precariat Standing argues that the Neo-Liberal politics of the last three or four decades have resulted in the emergence of a new class, which Standing calls the precariat. He states that the basis of Neo-Liberal politics is flexibility, so that the labour force can be used when and where it is needed. Combined with globalisation this means that governments started competing with each other to make the labour market more flexible and be more attractive to companies. More and more of the employees now find themselves in unsecure, precarious, forms of employment. This distinguishes them from the proletariat and gives them special political interests and needs. According to Standing the precariat is not yet a class in itself, but one in the making.[5]

In this chapter I will present Guy Standings theory of the precariat that he has laid down in his two books, The Precariat and "A Precariat Charter – from denizens to citizens" (A Precariat Charter). I will use this theory to analyse Lex Laval. I will not cover all aspects of the theory, but will focus on the migrant workers after a descriptive overview.

Just like all other theories, Standing's theory of the precariat does not give the whole picture or hold all the answers. And of course it is not un-challenged[6], but I still think it is a theory that has some worth. The reason is that I think it can highlight interesting aspects of, and reasons behind, the Lex Laval legislation.

2.2 What is the Precariat?

2.2.1 The Seven Insecurities

The term precariat is a combination of two words. One is precarious, which has synonyms such as unstable, insecure and unsettled. The other word is

[4] http://www.guystanding.com/resume
[5] Standing, Guy, *The Precariat: the new dangerous class,* London, Bloomsbury Academic, 2011, pp. 8-11. [cited as: Standing (2011)]
[6] See for example, Seymour, Richard, *We are all precarious – on the concept of the 'precariat' and its misuses,* New Left Project. 2012.

proletariat, which is a term used for the workers whose only asset is the amount of work they can perform.[7] This sums up the unifying characteristics of the precariat, a group that otherwise have many different faces, ranging from highly educated persons that are only able to get temporary jobs or jobs below their level of education, to migrants trying to get into the labour market at all.[8]

One can ask oneself why there is a need to define a new class, if this is not simply crossing the river to get water[9], why can the precariat not be seen as a part of the working class and the labour movement? The reason, according to Standing is that the labour movement consisted mainly of labourers, that is, individuals that were employed in stable long-term jobs. Their struggle was that their standard of work and living was not satisfactory and they wanted to improve it. They fought for more influence, more pay, more spare time and safer workplaces, this can be seen by looking at the early conventions from ILO that consist mainly of conventions regarding areas such as freedom of association, working hours, workplace safety and minimum wages.[10] Standing states that the difference between the labour movement and the working class on the one hand and the members of the precariat on the other is that the latter lack important securities that the working class had. Standing identifies seven such rights that are not available to the precariat: [11]

Labour market security – Opportunity to earn an income, backed up by a political aim of "full employment"
Employment Security – A security to keep a job and a protection against losing it arbitrarily
Job Security – The possibility to "retain a niche" and to make a career in that niche. The security not to be thrown around different jobs within the same employment.
Work security – Protection against, and compensation for, accidents at the workplace. Also regulations of working hours.
Skill reproduction security – The possibility to develop at a job through employment training and to put these skills into use.
Income security – The assurance of a steady income that is protected by minimum wages and political aims to have a social security that reduces income inequality
Representation security – The possibility to make themselves heard in a collective way through trade unions and the right to strike. [12]

[7] Standing (2011), p 11.
[8] Standing (2011), p 22.
[9] Swedish Proverb
[10] http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm [accessed May 26th 2015]
[11] Standing (2011), pp 16-17.
[12] Standing (2011), p 17.

Standing later developed the class characteristics in A Precariat Charter where he said that there were ten things that distinguished the precariat as a class.

Firstly there is a new norm on the labour market today. The old norm was long-term stable jobs, and most labour protection was constructed around that. The precariat faces a new norm of uncertain and volatile labour.
Secondly the precariat, due to the uncertain nature of their employments, do not benefit from non-wage remuneration, such as paid vacation, medical leave and parental leave.
Thirdly the precariat has a different relation to the state than, for example, the traditional working class. Being precarious also means being in a state of dependence, mainly towards the state. The precariousness of their work makes the precariat dependant on benefits. The precariat is a necessity in the globalised neo-liberal world, but still they are being criticised for not being in employment. To receive benefits they are subjected to various forms of tests and might have to give up some of their freedoms (for example, they can be forced to take jobs far away from where they are living).
Fourthly the precariat lacks an occupational identity. Moving from job to job, even between sectors the precariat lacks the comfort of having a clear view of their career.
Fifthly the precariat lacks control of their time. New forms of working and employment, such as zero hour contracts and the possibility to work from home means that they are expected to always be prepared to work. The members of the proletariat usually have the day divided into clear segments, work time and leisure time. For many the division is not so clear today and especially so for the precariat. The precariat also do a lot of work for labour, as Standing calls it. Meaning that they have to spend more time than someone in a long-term job to apply for jobs and keep their knowledge and skills attractive on the labour market. This is something that takes up their time, but they are not compensated for it.
Sixthly the precariat members are more detached from the labour they are doing since they are doing so much different labour. This is not only a bad thing, it can be liberating not to search for fulfilment through labour, but it is a characteristic for the precariat nonetheless.
Seventhly the precariat has less possibility for upwards social mobility since it has lessened during the globalisation era.
Eighthly due to the massive increase and commodification of education more workers than ever are over qualified for their job.
Ninthly the precariat is not covered by the traditional labour rights since they were acquired by and designed for the proletariat. Standing criticises these rights for not being rights at all since they were always conditional. They were constructed around the fact that most were in stable employment and the risk for a falling out could be calculated and treated as an insurance. The members of the precariat do not have the luxury of foreseeable problems. Therefore the protection and securities that worked for the proletariat do not apply in the same way to the precariat. This means they are in a more insecure position.

Tenthly the precariat is facing precarity and poverty traps. The welfare state, Standing argues, was built for the proletariat, with insurances paid for by regular contributions from stable work, which kicked in if someone was unfortunate enough to, for example, be out of a job. Now that more and more workers are not in stable jobs and thus can contribute less to, and need more, benefits this system does not work any more. Instead the system is based on means testing to see who is in a bad enough situation, but at the same time, worthy to receive benefits. One problem with this system is that if someone receives benefits the person will lose them if he or she gets a job. This could mean that the person is "taxed" 100% for the work. This taken together with the fact that if this person takes a short term job, he or she will have to start the whole process to apply for benefits over again when the employment ends, means there is no incentive to work since the position is worsened. The government therefore needs to start punishing people to create an incentive to work, forcing unemployed to take any job by threatening to take benefits away otherwise. The precariat is thus forced to take short term, low paid and unqualified jobs, which traps them in precarity. These ten features are what defines the precariat according to Standing, not all of the features are unique to the precariat but they define this "class in the making" taken together.[13]

The reason that there is a precariat is that it is the logical consequence of globalisation combined with the neo-liberal politics that took shape and gained influence through Margaret Thatcher and Ronald Reagan. The root of the school of thought is the analysis made by some economists that if the market and capital in Europe was not allowed to flow freely, the cost of labour would increase and in the end companies would move abroad. This would lead to vast unemployment, increased poverty and a slow down of economic growth. Their solution was to make the labour market more flexible. The flexibility was designed to make it easier for the employers to adjust number of employees, their salaries and their tasks. This, of course, led to more and more workers having more insecure jobs and a more insecure income. According to Standing the effects of the neo-liberal politics was increased due to the fact that the social democrat politicians bought into it as well and therefore did not contest it.[14]

So far the precariat has not had much of a political influence, but some groups of the precariat have already made themselves heard. Through occupations and marches such as alternative May Day parades, the EuroMayDay that is taking place all over Europe and gathers hundreds of thousands participators. The movement still lacks political direction though, thus the limited influence.[15]

[13] Standing, Guy, *A Precariat Charter: From denizens to citizens,* London, Bloomsbury Academic, 2014, pp 16-28. [cited as Standing (2014)]
[14] Standing (2011), pp 8-9.
[15] Standing (2011), pp 2-5.

2.2.2 Why is the precariat growing?

The reason that the precariat is growing is that it is a consequence of the globalisation, which according to Standing lasted from 1975-2008, and the role it has played in the structure of societies during that time. The essence of the policies in that time has been a commodification of everything. In a neo-liberal economy the aim is to have a "global market economy based on competitiveness and individualism"[16]. In such an economy everything is said to have a value in accordance with supply and demand and everything that hinders that, such as trade unions and guilds, needs to be changed or removed. [17]

One reason for the growing of the precariat is the fact that the world simply is more global today. With the fall of the Soviet Union, the opening up of China and India entering the global market as well, taken together with cheaper and more efficient transportation has meant that 1,5 billion workers have joined the global workforce in the last 25 years. This was doubling the size of the workforce, and the "new" workers came from countries where the wage level was a fraction of that in the western world. This resulted in mass outsourcing to these countries, which has affected the work force in the rest of the world.[18]

As mentioned above, one of the securities that the precariat lack is employment security. The neo-liberal view of the workforce is that it needs to be flexible. The argument is that this would create more jobs since companies can hire workers without it being such a big commitment. The result has been a market that, backed up by financial institutions such as the IMF and the world bank, is shifting from stable jobs with high security to temporary jobs facilitated by temporary workers agencies to make it easier to hire short term. During the financial crisis in 2008 companies had to let a lot of workers go. These have not been re-hired, but instead the companies have turned to hiring temporary workers. According to Standing the shift have been accepted by the unions who made sure the regular workers kept their security but opened up for temporary workers that would take the fall in times of trouble.[19]

2.2.3 Denizens

Citizenship is a pre-requisite for the possibility to enjoy many of the human rights. As an example, the right to vote (maybe the prime way of exercising a political right) is in most cases closely tied to being a citizen[20]. The right to remain on a certain piece of land is also tied to citizenship or at least

[16] Standing (2011), p 43.
[17] Standing (2011), pp 43-45.
[18] Standing (2011), pp 46-49.
[19] Standing (2011), pp 53-61.
[20] As an example Article 16 of the European Convention on Human Rights restricts the applicability of the political rights of the convention towards aliens.

"lawfully residing" in a country[21]. In the European Convention on Human Rights (ECHR) there is a right to emigrate[22], but not a right to immigrate. Standing argues that today not only migrants become denizens but citizens also lose rights that traditionally are tied to the citizenship. This is an interesting and important part of the theory of the precariat, but this thesis is focused on migrant workers and I will instead focus on the parts that concern migrants and the fact that the increased globalisation means that more and more people lack access to many rights where they reside.[23]

The concept of denizens is an old one; it was used in the Middle Ages in England, describing a person in a middle stage between alien and natural born citizen. The denizen usually had economic rights but lacked political ones. The concept of denizens was re-introduced in the early 90's, now meaning a person that was on her way, making progress, to become a real citizen. Today the concept is not only one of aliens becoming citizens but one of members of a society that has different levels of access to rights. According to Standing it is no longer only a progress from alien towards citizen to gain more rights, but also a regress, moving from citizen to denizen by losing rights. There are several ways that citizens can lose rights, for example changes in law can take rights away, as well as the change of status of an individual, such as becoming unemployed. It is important to note that a right does not have to be taken away *de jure* but can also be taken away *de facto* by removing, or not providing, the possibility to attain it. Standing argues that neo-liberalism has created a society with different levels, with different amount of rights on each level.[24]

2.2.4 The role of migrants in the precariat

The number of migrants has grown rapidly since the mid 20th century when globalisation spread and some closed economies, such as soviet and china, opened up more.[25]

Migrants play a big role in the growing of the precariat. They are one of the reasons for the growth of the precariat and they are also those in the precariat that suffer most and are being blamed for problems that they are not the primary reason for. Of course not all migrants face the same problems. Standing lists seven different categories of migrants that have quite different features. Ranging from undocumented migrants and refugees to students and in-corporation migrants[26]. The traditional migrant, according to Standing, is an individual that moves from one country to another and then settles there. With the growth of globalisation with, for example, the

[21] European Convention on Human Rights, Protocol no. 4, Article 2.1.
[22] European Convention on Human Rights, Protocol no. 4, Article 2.2.
[23] Standing, Guy, *A Precariat Charter: From denizens to citizens,* London, Bloomsbury Academic, 2014, pp 2-5.
[24] Standing (2014), pp 7-10.
[25] Standing (2011), pp 153-154.
[26] Those that are working in a company and are being deployed abroad for the same company for a period of time.

free movement within the inner market of the European Union (EU) the idea of the settler migrant needs to be complemented with the seasonal or circular migrant that for a period of time moves from one country to another, often to take a temporary job to bring money home, and then returns to the country of origin again. These seasonal migrants will be the focus of this thesis.[27]

> *"Many other migrants, despite being legal, are left vulnerable to such an extent that any dispassionate observer would be led to wonder whether it is not deliberate, to please some local interests, to placate local workers or because they have no political rights and cannot vote."*[28]

2.2.4.1 How do Migrants fuel the precariat

Standing calls the precariat the "floating reserve" meaning that they can be called in whenever and wherever. According to Standing the politicians in many places have tried to curb the amount of foreign labourers to benefit their own citizens, but they have been opposed by businesses. The businesses want to be able to hire migrant workers since it is much cheaper than to hire local workers.[29]

The seasonal migrant workers affect the whole precariat. They come from poorer countries where the situation is worse than in the country they arrive to. They are used to lower wages and worse circumstances. In a society where flexibility is the main policy of the labour market the workers will have to compete with each other by lowering their standard of employment conditions. Needing less is an advantage in such a society, which means that seasonal migrant workers are "better off" since they do not have the same expenses in their home country. This means that the migrant workers accept lower standards and in turn push down the standard for everyone. Standing does not mean to blame migrant workers for this. He means that this is a structural problem that is wanted by, and a result of, the neo-liberal politics in combination with globalisation. The migrant worker is always a denizen, they have limited or no political voice. Instead they try to keep their head down and go under the radar to avoid being sent home. The risk of being sent home is major disadvantage for migrant workers compared to the citizens who have no such fear of being expelled.[30]

The Neo-Liberal policies often create an us vs. them situation. Since the flexible system encourages competition for the jobs available the working class becomes critical of the migrant workers that come in and "take their jobs". According to Standing this is not true, what to blame is the policies. It would be better for the two groups to unite instead of antagonising each other. The tax system that makes the workers feel they are paying the bill

[27] Standing (2011), pp 153-159.
[28] Standing (2011), p 168.
[29] Standing (2011), pp 174-176.
[30] Standing (2011), pp 192-195.

for the migrants is also a contributing factor of the dividing into groups. Standing says this is a sign of a society where empathy is declining. The result is a society that portraits immigrants as an unwanted part, fuelled by populist politicians.[31]

2.3 What will happen?

2.3.1 If nothing changes

For Standing the worst-case scenario is that the Neo-Liberal politics will continue to be given free reign. What he sees in the future is a society where the individualism increases which in turn leads to a "demonization" of those who struggle and picture them as misfits or villains. According to him we can already see this happen in that social security more and more turns in to a test based benefit system where the poor and unemployed have to prove that they are not lazy and are worthy of a certain benefits by, for example, applying to a certain number of jobs, no matter the standard or the location of those jobs. The control and surveillance of those in a situation of need is increasing through such means. Standing states that this is a first step towards what Jeremy Bentham described as the panopitcon prison. A prison where one guard in the middle of a round prison can see all the prisoners, but they can not see the guard, thus not knowing when they are being watched and not. They are therefore always, out of fear, forced to behave in a certain way. If they are not, some of their privileges will be decreased. They are also to be kept apart because of their possibility to form a collective mind. Standing means that this is also something that is significant for the society today, the collective bodies such as guilds and the unions are being dismantled and their powers are being limited. In a society that rewards individualism and "survival of the fittest" there is no room for collective organs that hinder it. In the panopticon prison the prisoners are made to behave in a certain way, if not they are being punished. They are given the illusion of free behaviour but in the end there is no real choice, instead they are being guided through different negative effects that would happen to them if they were to oppose it.[32]

2.3.2 Standing's solutions

When looking at the solutions proposed by Standing it must be remembered that he is the co-founder and honorary president of the Basic Income Earth Network. His main solution is a completely new social security system based on basic income, which is a sum of money paid out to everyone in a society regardless of job or family situation. The idea is that this will liberate individuals to strive for what they really want, to plan for their

[31] Standing (2011), pp 192-195.
[32] Standing (2011), pp 227-229, 246-251.

future, to be able to take risks and still have a basic security.[33] I will not go much into this since it is too big of a solution for the problem that I am focusing on in this thesis. Instead I will focus on proposals that would have a more immediate effect for the migrant workers in Sweden.

Standing is opposed to what he calls "labourism", meaning that we are too focused on labour, which he describes as "work done for bosses, in subservience, in master-slave relations"[34]. The alternative would be having a more inclusive definition of work, which also would include all work that is not "labour" such as taking care of a relative, staying home with kids or engaging in voluntary work. Standing argues that before the 20th century such work was valued in the same way as labour was and that we should shift again to such a view of work.[35] These are all interesting ideas, but do fall outside of the scope in this thesis. It is more concerned with broader political schemes and statistics, the migrant workers work in the traditional sphere of labour.

An idea that Standing brings up that is highly relevant to this thesis, and for the migrant workers, is that the precariat in general and especially the migrants needs representation through state legitimised and funded agencies that can represent them. [36]This is of course nothing new, but Standing means that the traditional unions probably cannot play this role. The reason for this is that the function of the unions is to represent their members, which means saving jobs and giving those in stable labour a bigger share of the production outcome. This is out-dated, since there today is a lot of flexibility, whether the union wants it or not. The new form of association organising and representing the precariat needs to be able to consider all the work and labour that the precariat undertakes. It needs to be able to bargain with government, employers and the unions (since they do not have the same interests). This new kind of association also has to be able to speak for the precariat in questions regarding its position and possibilities in political matters. Standing means that they need to have a Voice (capital v in voice is used by standing throughout his books) inside policy agencies.[37]

> *"Freedom comes from being part of a community in which to realise freedom in the exercise of it. […] The precariat is free in the neo-liberal sense, free to compete against each other, to consume and to labour. It is not free in that there is no associational structure in which the paternalists can be rebuffed or the oppressive competitive drive held in check"*[38]

Standing says there are four ways for the unions to handle the situation with "atypical" workers such as temporary migrant workers. They can exclude them, subordinate them in relation to their other members' interests, include

[33] Standing (2011), pp 295-299.
[34] Standing (2014), pp 11-12.
[35] Standing (2014), pp 11-12.
[36] Standing (2011), p 272.
[37] Standing (2011), pp. 288-293
[38] Standing (2011), p 288.

them in their overall agenda or actively engage in their issues. Standing here admits that there has been a trend towards the active engagement in their issues, but withholds that there are countries where no interest has been shown at all.[39]

Overall Standing is against any form of subsidies, but in the case of representation unions should receive exactly the same amount that is given to the corporations and the financial capital. The justification of such a subsidy is that the aim would be to achieve equality in bargaining and in the representation of worker interest. The equality is already being undermined says Standing and refers to a situation in the United Kingdom where the right to strike is under attack by a proposal to remove tax credits for those who partake in a strike, a *de facto* removal of the right to strike.[40]

When referring to a new kind of association for the precariat he exemplifies this with a few associations around the world that is working in a new way. There are organisations that organise the precariat not as a union but to arrange different actions and to be a voice towards government. There are organisations that focus on providing services for the precariat, such as pensions and medical insurance. A Jamaican organisation that organises the domestic workers is not negotiating directly with employers but only with employer's federations and also with the government. In mentioning this union he also says that ILO convention 189, although not ratified by Jamaica, has made it easier to put pressure on its' counterparts. [41]

2.3.3 The situation for the migrants

Standing dedicates a good deal of his books to the situation for migrants. This includes not only migrant workers, but also all kind of migrants that for some reason have left their home and resides somewhere else, permanently or temporarily. In many places in Europe today the nationalistic parties have had great successes. Standing rebukes their arguments saying they are only built on prejudices. First of all migrants are still in minority everywhere, in OECD countries the average is 13% migrants. Secondly, having a high share of migrants is related to economic success, not high unemployment and low growth. He takes Italy as an example, stating that with the low birth rate the country would have collapsed economically without migrants,[42] since the population would have been too small and old to keep it running.[43]

When talking about rights for migrants, Standing states that as long as there are nations there will be differences in rights for citizens and migrants. However, that does not mean all differences should be accepted. Two rights

[39] Standing (2014), 2014, p 180.
[40] Standing (2014)2014, p 180.
[41] Standing (2014), pp 181, 186-189.
[42] The same has been argued for in regard to Sweden by the Think Tank "Global Utmaning". See: http://www.dn.se/debatt/ingen-valfard-utan-invandring/
[43] Standing (2014), p. 198.

that Standing specifically points out is the right of access to law and due process, and political rights. Migrants often have *de jure* or *de facto* hinder to exercise their right to access to court. This is a very important right to have, since without it, it is impossible to realise all other rights. The lack of political rights, such as voting and standing for political office, means that migrants are in a much weaker position to make themselves heard and to have influence over their situation. Migrants must in the most possible way be entitled to and have access to the same rights as citizens. Especially since the numbers of migrants in the world is higher than ever before.[44]

Standing states that migrant labourers need to be treated as equals on the labour market. He exemplifies the problem with migrant workers not being treated in the same way as national workers by referring to proposals in the UK that companies with more than 25% foreign workers should report this to the government and that employment agencies should not be allowed to supply workers from one country only. According to Standing the idea behind this was to make it harder for the migrants to enter the market and thus treating them as second-class workers.[45]

[44] Standing (2014), pp 200-204.
[45] Standing (2014), pp 209-210.

3 Lex Laval legislation

3.1 EU and Free Movement of Services

3.1.1 Article 49 and 50 EC

The free movement of goods and services is one of the foundations of the European Union. The free movement of services was at the time of the Laval-case regulated in Article 49 and Article 50 in the Treaty Establishing the European Community (EC). The articles state that restrictions on the freedom for nationals to provide services in other member states are prohibited. The national does not have to be an individual but can be a company as well.[46]

3.1.2 The Posting of Workers Directive

One of the major aims of the European Union is to create an inner market where goods and services can be provided across boarders and where there is no discrimination based on citizenship in a member state other than the one where a company or person resides. One area that was in need of regulation for this aim to be fulfilled was the posting of workers in another member state. This was dealt by, in the Posting of Workers Directive[47]. In the reasoning for the adoption of the directive the parliament and the council of the European Union states that in order to promote transnational posting it is important to promote fair competition and the rights of workers. The aim of the directive is to do this by creating a nucleus of minimum rights that are common for all member states. These rights should not be a hinder for employment terms and conditions that are more favourable for the worker. Neither is the Posting of Workers Directive supposed to affect the law of the member states concerning the right to take collective action to protect interests of trades and professions.[48]

The Posting of Workers Directive is applicable to cases of transnational posting of workers for a limited amount of time. The directive says that member states shall ensure that companies that are posting workers within their territory guarantees them the rights they have in the host country. Not all the rights though, only on seven different areas, for example maximum working hours, minimum wages and safety and health at the workplace. The rights, which shall be followed, can be regulated in different ways; it can be through law or through universally applicable collective agreements. The

[46] Conosolidated Version of the Treaty Establishing the European Community art. 49 & 50, 2006 O.J. C 321 E/37.
[47] Directive 96/71/EC of the European Parliament and the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services. (Posting of Workers Directive)
[48] Posting of Workers Directive, Pp 1-2.

collective agreements have to have been declared universally applicable. The directive does, thus, not set a specific, for example, minimum wage, but rather it states that all posted workers shall have the right to the minimum wage in the host country, whatever it is.[49]

To make it easier for the companies to establish in another member state the member states have to set up an office to communicate with other member states. These offices shall make sure the employment terms and conditions that the workers have the right to are accessible to the public. The member states shall also make sure there is a way for workers to have access these rights.[50]

3.1.2.1 The Economic and Social Committee's opinon on the proposal

The Economic and Social Committee was consulted on the proposal to the Directive. One of the comments was that the fundamental aim of the Directive is unclear. It is said to be a directive that aims to promote fair competition, but many of the clauses are related to protection for workers.

Another comment from the Economic and Social Committee was that there should be a social clause included in the contracts. The social clause would prescribe a dual responsibility for both the employer and the principal that contracts the employer.[51]

3.1.3 Analysis

From a Precariat point of view the Posting of Workers Directive was a good one. It laid down a foundation of rules that were to be followed in every member state. These rules were not qualitative, laying down the exact regulations, but instead said what rules, as a minimum, would apply in the same way to posted workers as it did to the national workers. This is good since it would mean that the competition between the national workers and the posted workers would not be based on which group would be able to "sell out" their rights in the most extensive way.

The European Social Committee critiqued the directive for having unclear motives, since the main motive is the free movement of services but it contained several provisions on the right for workers. From a precariat point of view there is no need for critique against this. One of the critiques in the theory of the precariat is that in the era of the neo-liberalism economy has always taken the front seat and the workers' rights have been squeezed in in the back seat. This directive seems to have a different approach by

[49] Posting of Workers Directive, Articles 1-3.
[50] Posting of Workers Directive, Articles 4-5.
[51] Opinion on the proposal for a Council Directive concerning the posting of workers in the framework of the provision of services (92/C 49/12)

incorporating workers rights in a directive with the focus to create an inner market with free movement of services.

It is also a directive that aims to protect workers in a country other than where they are citizens by saying that they should not have fewer rights than the locals on certain areas. In that sense they are creating a floor of rights to stand on for the posted workers. It also opens up for the possibility of more rights than those in the directive. The migrants are thus not treated as second-class citizens. The directive emphasizes that it should not affect the national laws regarding the right to take collective action to defend professional interests, which seems to mean that the directive should not lessen the influence of the unions.

3.2 The Laval case

3.2.1 What happened

The Laval case started with a rebuilding of a school in the Swedish city of Vaxholm in the summer of 2004. The city of Vaxholm hired the Latvian company Laval un Partnieri (Laval) to do the rebuilding, one of the conditions to win the contract was to have a collective agreement. Byggnads, the construction workers' union, initiated negotiations with Laval requesting among other things that the workers should have a salary of 145 Swedish kronor (SEK). Laval did not want to pay more than 109 SEK. In the end Laval decided to sign a collective agreement with a Latvian union instead of Byggnads and meant that this was enough to live up to the commitment to have a collective agreement. Byggnads opposed this and stated that Laval should have an agreement with a Swedish union so that the same rules can apply to the Latvian workers as to Swedish workers. Byggnads response was to notice Laval that they would take industrial action to push away the Latvian agreement and impose a Swedish one in its place. Laval on their turn stated that they had a collective agreement and that there was an obligation to maintain industrial peace.[52]

In November 2004 Byggnads initiated industrial actions against the construction site in Vaxholm. The actions resulted in a complete stop of shipments to the construction site and therefore a complete stop of the construction. During the action by Byggnads their members shouted "go home" to the Latvian workers. This was seen as a sign of the racist and protectionist motives of the union and its members.[53]

[52] Petterson, Lars-Olof, *Vitbok Laval – Vad hände egentligen i Vaxholm,* Svenska Byggnadsarbetarförbundet. 2012, p. 12-13.
[53] Petterson (2012), p. 13.

3.2.2 Swedish Courts

3.2.2.1 Arbetsdomstolen (Labour Court)

Laval brought the case before the Swedish Labour Court. First of all they wanted the court to make an interim decision, forcing Byggnads and the sympathising unions to cease their industrial actions against the company. The court rejected the request.[54]

The Labour Court held its proceedings in the case in March 2005, at this point the Latvian workers had returned home and would not return to the workplace again. At this point there were sympathy strikes at all work sites where Laval was present, which meant that they could not perform work anywhere in Sweden and in the end of March the company was declared bankrupt.[55]

In the Labour Court proceedings Laval claimed that this was a EU matter and that the court should request a preliminary ruling from the Court of Justice of the European Communities (the Court). The Labour Court agreed to this and sent the following two questions to the Court.[56]

> *"'(1) Is it compatible with rules of the EC Treaty on the freedom to provide services and the prohibition of any discrimination on the grounds of nationality and with the provisions of Directive 96/71/EC ... for trade unions to attempt, by means of collective action in the form of a blockade ("blockad"), to force a foreign provider of services to sign a collective agreement in the host country in respect of terms and conditions of employment, such as that described in the decision of the Arbetsdomstolen [of 29 April 2005 (collective agreement for the building sector)], if the situation in the host country is such that the legislation to implement Directive 96/71 has no express provisions concerning the application of terms and conditions of employment in collective agreements?*
> *(2) The [MBL] prohibits a trade union from taking collective action with the intention of circumventing a collective agreement concluded by other parties. That prohibition applies, however, pursuant to a special provision contained in part of the law known as the "Lex Britannia", only where a trade union takes collective action in relation to conditions of work to which the [MBL] is directly applicable, which means in practice that the prohibition is not applicable to collective action against a foreign undertaking which is temporarily active in Sweden and which brings its own workforce. Do the rules of the EC Treaty on the freedom to provide services and the prohibition of discrimination on grounds of nationality and the provisions of Directive 96/71 preclude application of the latter rule — which, together with other parts of the Lex Britannia, mean in practice that Swedish collective agreements become applicable and take precedence over foreign collective agreements already concluded*

[54] AD 2009 nr 89 p 5.
[55] Case C-341/05 *Laval un Partnieri* [2007] ECR I-11845, para 37-38. [cited as: Laval]
[56] AD 2009 nr 89, p. 5.

— to collective action in the form of a blockade taken by Swedish trade unions against a foreign temporary provider of services in Sweden?' "[57]

3.2.3 The EU Court

It took almost three years before the Court of Justice of the European Communities gave a ruling in the case. The judgement was published December 18th in 2007. The Court reformulated the questions in the way that it understood them. They understood the first question as:

Are Article 49 EC and directive 96/71 to be interpreted as precluding a trade union to use collective action to force a company from another EU-member state to pay wages at a certain level when there is no minimum wage in the country, and to force the company to sign a collective agreement that is more extensive than the provisions in Directive 96/71?[58]

The second question was interpreted as follows:

Is there a prohibition in article 49 EC and 50 EC for a country to have a legislation that states that collective action is prohibited when a company has signed a collective agreement, only when the collective agreement is signed with a national trade union?[59]

3.2.3.1 First Question

The Court answers the first question by starting with referring to the relevant rules. Article 49 EC and 50 EC states that restrictions on a national of a member state to establish in another member state are prohibited. This applies also to companies trying to establish in another member state.[60]

There is no prohibition for states to extend parts of their legislation to apply to everyone that works on their territory. Which parts of their legislation that can be applicable for posted workers is formulated in the Posting of Workers Directive. This is only "to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers there"[61]. Among other things the minimum wage level can be extended to apply to posted workers. In Sweden there is no such minimum wage legislation, the parties of the labour market, the unions and the employers instead negotiate the wage levels.[62]

[57] Laval, para 40.
[58] Laval, para 53.
[59] Laval, para 112.
[60] Laval, para 56.
[61] Laval, para 59.
[62] Laval, para 57.

The Posting of Workers Directive is open to other forms of deciding the minimum wage level than through legislation or other forms that are exemplified in the Directive, but these can only be used to decide the minimum level, not, as in this case, a higher level of pay that is requested by Byggnads.[63]

The Court then proceeds by explaining the reason for the Posting of workers Directive, which is to make sure that there is a nucleus of mandatory protection on certain areas. The main reason for this is to ensure fair competition between companies that are stationed in different member states. The competition would be unfair if a company could apply its own country's lower level of protection in another member state when posting workers there. Secondly the reason is to protect the workers.[64]

The Court further states that the Posting of Workers Directive cannot be interpreted to mean that a state can have a wider range of mandatory protection than the directive minimum protection.[65]

When it comes to the right to take collective action it is a right that is a legitimate interest that could justify restrictions in the free movement of services within the union. However, when imposing such restrictions, article 49 EC has a direct effect on those imposing them. It is, thus, not enough to follow the national legislation but community law must also be followed.[66]

The Swedish government stated that the actions in the case were justifiable since the aim was to protect the workers. The Court answered that such actions are justifiable, but only to the extent that it aims to impose the level that is laid down in the Posting of Workers Directive. The same is true for the right to take action to make sure the workers get paid enough, but again only to make the companies live up to the minimum wage decided in accordance with the directive.[67]

In the present case the collective action, the blockade, was used to try to force Laval to sign a collective agreement that had more favourable conditions than those in the Posting of Workers Directive. The blockade was also a try to force Laval to enter into negotiations on the level of wages for the workers. This results, according to the Court, in a big hindrance for the free movement of services since it becomes very difficult, if not impossible, for foreign companies to know how much they will have to pay their workers.[68]

The Court states that neither of these aims are justifiable and the first question is therefore answered as follows: A union cannot use collective

[63] Laval, para 68-70.
[64] Laval, para 73-76
[65] Laval, para 80.
[66] Laval, para 93, 97.
[67] Laval, para102-109.
[68] Laval, para 110.

action to try to force a company that is posting workers in another member state to enter into negotiations regarding wages or to sign a collective agreement when it includes provisions that are more favourable than those in the Posting of Workers Directive.[69]

3.2.3.2 Second Question

The second question is not related to the present case directly, but instead asks if the Swedish legislation that states that collective action is prohibited only when a company has signed a Swedish collective agreement, , is in accordance with EU Law.

It is clear from the Courts previous case law that the free movement of services implies a removal of all forms of discrimination based on nationality. The definition of discrimination is when different rules are applied to the same situation or the same rules are applied to different situations. In the present case foreign companies that has signed collective agreements, although with foreign unions, are being treated in the same way as Swedish companies that have not signed any collective agreement, both can be the target for collective actions.[70]

Such discrimination can be justified if the reason for the discrimination is public policy, public security or public health. According to the Court the reason for the Swedish legislation is to ensure competitiveness and that workers are being paid the same amount that is usual in Sweden. Therefore there are no justifiable grounds for the discrimination. The discrimination is therefore not in line with community law and the Swedish Law must be changed.[71]

3.2.4 Analysis

The judgement in the Laval case can be criticised on many points from a precariat standpoint. The Posting of Workers Directive seemed to have taken the rights of the posted workers into account, but the Court watered down the rights for the workers significantly. The directive had balanced the aim of the inner market and the possibility to provide services easily in another member state against the rights of the workers. The Court focused solely on the free movement and removed as many hinders that it possibly could. What hade been introduced as a floor of rights was now not only a floor, but also a roof of which rights could be demanded through collective action. The Court did this despite the fact that the directive says that it should not be seen as hinder for more beneficial employment conditions. It still does not hinder it, but it hinders the possibility of the workers to attain them, which means that the employment conditions outside of the nucleus of minimum rights can only be given voluntarily by the companies posting

[69] Laval, para111.
[70] Laval, para 113-116.
[71] Laval, para 117-120.

workers. They are therefore no longer rights, but instead they are privileges given as gifts from the companies that choose to give them.

The decision of the Court weakens the unions considerably in regards to the companies that are posting workers in Sweden. In turn this leads to the union being weakened when it comes to protecting the Swedish workers as well, since if they demand something the employer does not agree to, the employer can easily bring in foreign workers instead of the Swedish ones. The result of this is tension between two groups that would benefit from uniting instead of competing with each other. The tension was clear during the blockade when the Swedish workers shouted “go home” to the Latvian workers. The ruling opened up for competition based on a lowering of the rights for the workers. If the workers were to unite, they would not have to compete with each other by lowering the employment conditions. This would presuppose that the Swedish workers and unions would not oppose foreign workers since the foreign workers would not have any incentives for such an agreement otherwise.

In a situation of posting of workers there will always be some problems to solve. There will be some things to resolve when a company from one country is trying to establish in another, such as figuring out what wages have to be paid. The legislation and the Court decide who will have to carry this burden. It could place the burden on the company trying to establish in another state, obliging them to follow the regulations in the hosting state, even though they might be difficult understanding how to apply them at first. The option is to make it as easy as possible for the employers, which would mean that the workers would have to carry the burden instead. In this case the Court clearly wanted to make it as easy as possible for the employers to establish in another state. The Court states that it is almost impossible for the companies to find out how much they have to pay the workers. In reality it probably would not be that difficult, a phone call to the union or bringing in a consultant with experience from the Swedish labour market could have solved the problem. This would be an extra effort for the companies, although not a major one. Since the burden is lifted from the employers it is instead placed on the workers. To make it as easy as possible for the companies, the rights of the workers are limited to a minimum, which means they have to work in worse employment conditions and get less money for it. In the balance of economy and rights, the Court clearly favoured the economy.

The ruling from the Court also opens up for a treatment of migrant workers as second-class workers. For some reason the Court finds it reasonable that migrant workers should only be entitled to minimum conditions. This is good as a floor, but limiting the possibility of the workers to attain a higher level of employment conditions means that workers in Sweden are treated differently only because they come from a different country, which of course is discrimination.

3.3 The Legislation

3.3.1 Swedish Labour Law

"The labour law in Sweden has some characteristics that makes it different from the labour law in many other countries. To begin with the number of workers that are members in a union is very high, even though it has dropped from almost 90% to about 70% in the last 15 years. The high number of union members has its origin in the early worker's movement in Sweden. In the beginning of the 20th century the movement had more power on the labour market than it had politically. Therefore more regulation was adopted by agreement between the worker's and the employer's organisations than in law by politicians. The laws that were adopted in the coming decades did not provide many new obligations, but merely codified and strengthened the current system. For example there was a right of freedom of association and rules about the collective agreement. Even in the 70's when the legislature was active on the area of labour legislation, most of the laws were codifying regulations that were already in place due to agreements between the parties of the labour market. As an example the role of the union representative on the workplace received legal protection.

The result of the strong position that the worker's and the employer's organisations have is that Sweden has relatively few laws regulating the labour market and a strong role is played by collective agreements. The fact is that Sweden has no law on minimum wage, instead the minimum wage is regulated in agreements by the representatives in each sector of the labour market. To keep the unions and the collective agreements strong, the unions have a wide right to strike, blockade and to take other industrial action. The unions even have the right to include members not personally affected by a situation in a strike. Through sympathy strike a strike against a minor company in a remote area of Sweden can become a nation-wide strike."[72]

3.3.2 Lex Britannia

In 1989 the Swedish Labour court gave a judgement in what is known as the Britannia-case. It regarded a collective action that was taken by a Swedish union against a ship-owner in order to force the company to sign a Swedish collective agreement for its workers. The ship-owner had already signed a collective agreement in the Philippines and claimed there was an obligation to maintain industrial peace, and that the collective action was unlawful. The labour court agreed with the ship-owner and stated that industrial peace

[72] Blomberg, Fredrik, *The right of access to justice for foreign workers in Sweden,* Lunds University. 2015, pp 7-8.

was to be maintained when a company has signed a collective agreement, even if this agreement is not with a Swedish union.[73]

The Swedish social democratic government thought that this judgement would have a bad effect on the Swedish labour market since collective agreements is the main way to protect workers. An alternative would be to regulate the labour market with minimum-regulations on such areas as wages. The government stated that this is not desirable since the Swedish model is working fine. Instead the aim of the legislation should be to facilitate for the parties of the labour market to enter into collective agreements. The government also said that this model needs to be strengthened in order for the unions to be able to protect the workers on a future market with more trans-national workers as it was likely that Sweden would join the EU in a few years. Therefore it was necessary for changes in the law so that companies that are operating in Sweden apply wages and employment terms in level with what is customary on the Swedish market.[74]

The solution was to change the law so that the obligation to maintain industrial peace was only applicable when the 1976:580 Employment (Co-Determination in the Workplace) Act was applicable on the collective agreement. The employment act is only applicable on collective agreements that have a close connection to Sweden. Meaning that foreign collective agreements could be set aside by a Swedish one by the use of collective action. Some of the bodies considering the proposed legislation were critical of this solution and claimed that it would not live up to the EU regulation if Sweden were to enter the EU. The government answered that this would not be discriminatory and not in conflict with EU regulations. Alternative solutions were suggested, such as that the industrial peace could only be set aside when the collective agreements did not meet a certain standard. This was completely opposite to Swedish labour law tradition according to the government.[75]

3.3.3 Proposition

When the European Court of Justice had given their ruling in the Laval-case it was clear that Sweden had to change their legislation and adapt it to EU-Law. In 2009 the centre-right government presented their proposal for change in the legislation, which was also passed as law by the Swedish parliament.[76]

The Government said that the Court had been clear in laying down how article 3.7 in the Directive should be interpreted. Article 3.7 in the Directive says that the previous regulations in the article are not to be seen as preventing conditions of employment that are more favourable for the

[73] AD 1989 nr 120.
[74] Proposition 1990/91:162, *om vissa fredspliktsregler* pp. 4-6. [cited as: prop. 1990/91:162]
[75] prop. 1990/91:162, pp 6-9
[76] Proposition 2009/10:48, *Åtgärder med anledning av Lavaldomen*. P. 12 [cited as prop. 2009/10:48]

workers. With the Laval-judgement the Court had said that this was not to be interpreted as allowing a demand for more favourable conditions or as allowing collective action to attain more favourable conditions. Therefore any legislation that allowed such action is in conflict with EU-law. When the Directive was incorporated in Swedish law it was interpreted to be a minimum requirement and that there was nothing in the Directive that prohibited collective action to force a company to accept conditions that went beyond those minimum requirements laid down in the directive. The Government said that the Court had gone against this interpretation made earlier by Sweden, and that it is no longer valid. As a consequence the right to take collective action needs to be more limited than it was at the time. The Directive now must be seen not only as floor but also as a roof for what can be required by a company that are stationing workers in Sweden.[77]

When coming up with suggestions for changes in the Swedish legislation the government had a few premises for their suggestions. The first premise was to, to an as far extent as possible, maintain the model of the Swedish labour market where the parties of labour market decide the wage levels without interference by the government. The second premise was, when the EU law allowed for different solutions, to create the best balance possible between the relevant interests, namely between a well functioning inner market with free movement of services, a sound competition between national and international companies on the one side, and a maintaining of the Swedish standard when it comes to employment conditions for workers stationed in Sweden. The third premise was to follow the international conventions that Sweden has ratified, such as various ILO conventions.[78]

The solution presented by the government was to make changes to, and add paragraphs in the Posting of Workers Act[79] and the Employment (Co-Determination in the Workplace) Act[80]. In the Posting of Workers Act a new paragraph (5a) was introduced. It says that collective action is allowed only when it is used to achieve employment conditions that are (1) included in a central collective agreement, (2) only relating to minimum standards in such agreements, and (3) are more favourable than those conditions in law. Furthermore such action shall be prohibited if the employer shows that the workers already have conditions that are overall as favourable as those in the relevant collective agreement. To be able to support claims on a collective agreement it should be handed in to the Swedish Work Environment Agency (SWEA) according to the new paragraph 9a.[81]

In the Employment (Co-Determination in the Workplace) Act two new paragraphs were introduced. Paragraph 41c that says that collective action that is taken in conflict with the above mentioned paragraph 5a is unlawful. The former exception that said that collective action to push aside a foreign

[77] prop. 2009/10:48, pp 23-25.
[78] prop. 2009/10:48, pp 25-26.
[79] SFS 1999:678 Lag om utstationering av arbetstagare.
[80] SFS 1976:580 Lag om medbestämmande i arbetslivet.
[81] prop. 2009/10:48, pp. 5-9.

collective agreement was allowed was complemented by an exemption to the exemption that says that it is not allowed to use collective action when a company is posting a worker in Sweden in accordance with the Posting of Workers Act.[82]

The Swedish government chose this solution since it wanted to keep the Swedish model as intact as possible, but still be in accordance with EU-law. They said that the directive and the Court had accepted the model by opening for the possibility to extend a collective agreement to apply to posted workers, at least in the nuclear parts, in article 3.8 of the directive. Sweden had not used this opportunity to extend a collective agreement when the directive was incorporated in Swedish Law though, which is why paragraph 9a in the Posting of Workers Act was necessary. The Confederation of Swedish Enterprise and the Swedish Agency for Government Employers critiqued the solution, stating that the unions had no obligation to protect the posted workers, which could mean that the system would not offer enough securities for the posted workers. The government responded that the unions had incentive enough to perform such control.[83]

The government further laid down what employment conditions can be demanded through collective action. First of all, as mentioned above, it must be conditions that are in a central collective agreement that has been handed in to the SWEA. It is also limited to the areas in the Directive that has been implemented through the Posting of Workers Act, and it can only be minimum requirements in such collective agreement. The Posting of Workers Act already contains minimum standards on all areas except on wages. So the question was if it was possible at all to use collective action to demand a company to follow rules on this area. There were three different views on this. Stockholm University was of the view that the Laval-case had shut the door completely for the use of collective action to demand conditions more favourable than those already existing in law. The government said that this was still possible since there was a possibility in the Directive to extend a collective agreement to apply to stationed workers. The unions stated that it was enough to demand a company to live up to the regulations in law to take collective action. The government denied this, saying that it would be against EU-law to use collective action to demand conditions that workers are already entitled to, through, for example, legislation. Therefore the conditions demanded must be more favourable than those in the posting of workers act.[84]

The unions stated in their consultation body-answers that it should be allowed to take collective action in order to make a company posting workers in Sweden sign insurances covering the workers in case of accidents, since article 3.1e in the Directive says that the nucleus of

[82] prop. 2009/10:48, pp. 5-9.
[83] prop. 2009/10:48, pp 28-32.
[84] prop. 2009/10:48, pp32-34.

conditions covers safety, health and hygiene at the workplace. According to the government the Laval-judgement denied this possibility.[85]

The unions wanted the possibility to force a company to sign a collective agreement even when the company lived up to the minimum standards, since having a collective agreement is what makes it possible for the union to control that a company lives up to the commitments they have made. A company that says that they do live up to the minimum standards might as well sign a collective agreement to confirm the conditions. The prohibition to use collective action should only be applicable when a foreign company already has signed a collective agreement in another member state that lives up to the minimum standards in Sweden. The government's response was that it would not be in conformity with EU-law since the possibility to control companies is not a justifiable reason to make restrictions of the free movement of services. The government agrees that it is important that it is possible to control the companies in some way, but not through forcing them to sign collective agreements through collective action. Instead their solution is to make it mandatory for companies posting workers in Sweden to prove that they are living up to the minimum requirements by showing proper documentation. If they can do that, the unions will have to maintain collective peace. The unions opposed this, saying that it will be easy for the companies to create fake documentation. The government did not think this was a big problem.[86]

Another critique against Sweden in the Laval-judgement was that it was difficult or even close to impossible for Laval to find out what could be expected of them in regard of conditions for their workers. To come to terms with this it is suggested that the SWEA should be strengthened in its role to provide foreign companies with the employment conditions that can be demanded from them.[87]

3.3.3.1 Estimated consequences of the new legislation

The government made the assessment that the new regulations would not have a major impact on the Swedish labour market. They did state though that foreign companies would have the competition power improved since they could compete with slightly lower wages and that they are more protected against collective action than the Swedish companies. The government pointed out that the employment organisation in the construction sector had 56 foreign companies as members and they were already bound to follow the collective agreement and he law would, thus, have no effect on them. The government failed to mention that this might have been because they were afraid to face collective action if they would not have signed.[88]

[85] prop. 2009/10:48, p 34.
[86] prop. 2009/10:48, pp 34-39.
[87] prop. 2009/10:48, pp 47.
[88] prop. 2009/10:48, pp 52-56.

In a Swedish Government Official Report that was published ahead of the preparatory works and used as a basis for the government proposition the parties of the labour market gave their views on the estimated consequences the new legislation would have. The unions gave voice to grave concerns on what would happen on the Swedish labour market if the law would pass. They said that if foreign companies posting workers in Sweden would only pay the minimum wages in the collective agreements instead of the general wages the economic and social tension would be serious and it would have a big impact on the wages of the Swedish workers.[89]

The employers' organisations were not worried of such a development saying that it would be no problem as long as the minimum wages were actually followed. They also stated that there might be more competition from foreign companies that would be given a slight advantage, but that such a development was desired, even if it meant some wage-competition. The committee drafting the report did not take a stand regarding the effects, but instead said that according to national economic theories it could have some socioeconomic gains, but that it could also have bad effects for the workers that are exposed to the competition.[90]

3.3.4 Analysis

In the end of the 80's the social democratic government hindered the growth of the precariat when they strengthened the unions after they had been weakened by the decision in the Swedish labour court. One of the aspects that are contributing to the creation of the precariat is the weakening of collective bodies, since they restrict the free reign of the market. Therefore it was an important legislation made by the government that empowered the unions to keep their function of protecting workers on Swedish territory even in a time of more globalisation.

The effort was nullified by the judgement in the Laval-case, and the Swedish government was forced to change the Swedish legislation. The government still had a few different possibilities on how to adjust the Swedish legislation to be in accordance with EU-law, which makes it worthy of an analysis.

One of the things that the government did, and did well, was to create an administrative way for foreign companies to find out the employment conditions they are bound to follow. The government stopped a little short though, they could have made it mandatory for the unions to hand in all collective agreements, and prescribed the SWEA to gather them. This solution could have meant that the question of who is to carry the burden of the aspiration for free movement on services, the companies or the workers, could have been solved by the government taking the burden, by making it

[89] SOU 2008:123 p. 341-342.
[90] SOU 2008:123 p. 342.

easy for foreign companies by providing information of the conditions they were expected to apply to its workers. Unfortunately the Laval-case also meant that only the minimum conditions in the agreements could be demanded through collective action. Which means that the workers still have to carry the burden.

When it comes to how the working conditions for the posted workers are to be controlled without collective agreements being in place on a labour market where such agreements play an essential role, it can seem like the unions were empowered. The government gave this task to the unions in order to respect the Swedish model, but they failed to give them the tools to do so. The new law states that it is enough for the companies posting workers in Sweden to show some form of documentation that they are applying the minimum standards to be safeguarded from collective action. It is near to impossible for the unions to control if this documentation is actually true. The result is an even more weakened union in regard to the foreign companies and that the posted workers are protected neither by the unions or the government. Just like the EU Court the Swedish government treat the foreign workers as second-class workers not entitled to the protection and the rights that Swedish workers have. The legislation, just like the Laval-case, is discriminatory, not towards the companies, but towards the workers.

The Swedish government also changed the Lex Britannia legislation more than was necessary. The essence of Lex Britannia was that Swedish unions could use collective action to push aside foreign collective agreements. This was seen as discriminatory since foreign companies was treated differently from the Swedish companies that had signed collective agreements. The logical change of legislation would have been to state that foreign companies that have signed collective agreement in their home country are protected from collective action. Instead the new legislation states that it is enough for the foreign companies to live up to minimum conditions in the relevant collective agreement in order to be protected from collective action. Thus, it is not necessary for the companies posting workers to sign collective agreements in their home countries, which weakens the position for both the Swedish unions and the unions in the companies country of origin. It also has a negative effect for the posted workers when their employer easily can avoid signing collective agreements. Through this the government clearly favoured the possibility for companies to establish in other member states over the protection of workers.

The statement from the government that many companies had become members of employers' organisations, which means they are bound by collective agreements anyway and that the new legislation would not have a very big impact is very questionable. The government assumes that these companies became members voluntarily and was not affected at all by the possibility of collective action being taken against them if they would not join such an organisation. It is also remarkable that both the government and the employers' organisations expects wage competition, but sees no actual

problems with it. The government says that there probably will be competition from companies applying "slightly lower wages". In the Laval-case Byggnads wanted the workers to have 145 SEK/h, Laval refused to accept anything above 109 SEK/h. The slightly lower wages could thus mean a 25 % decrease in the wage level.

3.4 The effects of the case and the legislation

3.4.1 The situation for posted workers in Sweden

Landsorganisationen, LO, the Swedish trade union confederation for workers in the traditional "working class" sectors, presented a report in 2013 in which they had mapped the posting of workers within their sectors. They did so by sending out a questionnaire to the local departments of their organisation. LO said themselves that it is very difficult to make a 100% correct assessment of the number of posted workers, but believe that they did not over-estimate it, rather the other way around.[91]

The survey showed that posting of workers is most common in sectors where there is a high use of contractors and sub-contractors, such as construction, transportation, farming and forestry. LO claim that there are various reasons for the use of posted workers. In some cases it is due to a shortage of qualified workers, but in construction and forestry one of the big reasons are wage competition. Those two sectors are also those where the most posting of workers occurs. The survey showed that there were about 15'000 posted workers in the construction sector compared to almost 80 000 members in Byggnads. In the forestry sector the posted workers make up for about 10% of the workforce.[92]

The numbers are contested though, Sveriges Byggindustrier, the employers' organisation in the construction sector, presented their own report, written by a consulting group. They estimated the number of posted workers to be 8900 per year. A number they got by visiting 42 construction sites (selected by Sveriges Byggindustrier) and counting the number of posted workers at these sites, calculating the percentage of posted of workers and then multiplying the number by the total number of construction workers in Sweden.[93]

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[91] Jonsson, Claes-Mikael, Larsson, Göran, *Gäst i verkligheten – om utstationerad arbetskraft i praktiken,* Landsorganisationen i Sverige, 2013, pp 7-10. [cited as: Jonsson & Larsson (2013)]
[92] Jonsson & Larsson (2013), pp 10-12.
[93] PA Consulting Group, *Lyft Debatten! – Om utstationerad arbetskraft inom byggsektorn,* 2014. P. 15 [cited as: PA Consulting Group (2014)]

In 2013 a new law was introduced that obliges companies posting workers in Sweden to register that they are doing so to the SWEA[94]. Their statistics show that the number of posted workers has varied from about 7000[95] to 10 000 workers in the last year[96]. The difference between the numbers estimated by LO and the registered number can have several reasons. It could be that not all companies actually register their posted workers, due to large infrastructure projects at the time of the report, or it is just bad estimates. When asked about the number of posted workers in the construction sector an employee at the SWEA said, "I have no clue, I'm asking myself if anyone can know that so far"[97]. It is, thus, very difficult to get an exact number.

Since the judgement in the Laval-case there has been no collective action taken by a union member in the LO against a company regarding posted workers. The authors of the report cannot say for certain why this is. One reason is that many companies demand that the contractors sign collective agreements. Another more negative reason is that it is very hard for the unions to make sure that they have the right to take collective action. According to the new legislation it is enough for the foreign companies to show that they are living up to the minimum employment conditions to avoid collective actions. When representatives from the unions have contacted the companies, they have responded that they live up to the set minimum standard. Sometimes this has been proven with proper documentation, but other times with self-made documents or just orally. It is very difficult for the unions to validate the documentation. The local offices replying to the survey is of the understanding that many of the posting companies have fake contracts that they show to the unions. Another difficulty is that very few of the posted workers become members in the unions, which makes it harder for the unions to control that the contracts are actually being followed. An understanding among the local branches of the unions is that the posting companies has learned that they should sign collective agreements, but knows that there is no one that has the possibility to make sure they actually follow them. The result has been that they sign collective agreements but forbid their workers to have any contact with the unions. If they do they are being sent home. Another difficulty is more of an economic one. The unions are weakened due to the fact that they have to spend money (for example on translators), resources and time to control the compliance of the agreements.[98]

The new order where unions have limited possibilities to do their part on the labour market for posted workers has resulted in unfair competition from foreign companies that can win public procurements due to the possibility to

[94] SFS 1999:678 Lag om utstationering av arbetstagare. §10.
[95] January is an exception with 4000 workers, probably due to workers going home for Christmas and New Years Eve.
[96] Arbetsmiljöverket, *Månadsstatistik från utstationeringsregistret per den 1 april 2015.*
[97] PA Consulting Group (2014), pp 16.
[98] Jonsson & Larsson (2013), pp 20-23.

pay lower wages. In a study made by LO that reviewed three infrastructure projects by visits to the workplaces and interviews with workers that had returned home to the sending state, it was shown that the wage level for the posted workers were 55-80% of that of the Swedish workers. The wage gap between Swedish workers and posted workers was increased due to some companies making reductions on the wages to pay for travels and accommodation during the posting. To do so is a violation of the Posting of Workers Directive. Interviews with construction workers from Poland that had been posted to these projects revealed that many posted workers worked more than the Swedish for that money. In some cases the posted workers worked up to 230 hours per month with no over-time compensation.[99]

A posted worker interviewed by Sveriges byggindustrier is more positive regarding the situation for the posted workers. The wage is much better than in his home country and the workplace is more secure.[100]

In the report from Sveriges Byggindustrier they looked at all available cases from the Stockholm first instance court and the Labour court. In the first instance court, which is the instance responsible for work related disputes when the worker is not a member of a union, there were no disputes regarding posted workers. In the Labour court there was only one dispute related to posted workers in 2013. The conclusion from this in the report is that there are no problems regarding the labour standards for the posted workers. Another sign of this, according to the report, is that there have been no local disputes between unions and foreign companies since 2009.[101]

Sveriges Byggindustrier also interviewed actors with different roles and interests in the issue (none representing the unions). The asked[102] said that there were no problems for posted workers in the companies connected to Sveriges Byggindustrier, but only to smaller, less serious companies that have not signed collective agreements and that the overall problems for posted workers are diminishing. However, some of the interviewed stated that there are problems for the posted workers. Working time and safety issues were specifically mentioned. The posted workers have an interest of working long hours because they are only abroad to earn as much as possible and then have a longer period of time back home. The posted worker in the report was working 12 hour-days six days a week for three weeks and then had one week off when he could go home. The safety issue specifically mentioned was that posted workers were working on heights with no security. The suggested reasons from the interviewed regarding safety issues were cultural background, language and education.[103]

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[99] Jonsson, Claes Mikael, *När arbetskraftskostnaderna pressar priset – en genomlysning av offentliga investeringar i infrastruktur.* Landsorganisationen i Sverige, 2010, pp 24-26, 31.
[100] PA Consulting Group (2014) p 22.
[101] PA Consulting Group (2014) pp 19-21.
[102] One of the actors was a posted worker, but he was not asked about the circumstances for posted workers.
[103] PA Consulting Group (2014), pp. 22-26.

In the report from Sveriges Byggindustrier the interviewed are also asked about the role of the unions. It is said that much of the work to control that laws are followed is up to the unions. This is due to a lack of resources for the government agencies. At the same time it is difficult for the unions to get access to the workplaces. The unions are critiqued for focusing to much on workplaces that are easy to access and already have a well built union organisation, and for not handing in their collective agreements to the SWEA, which would make it easier for foreign companies to know what is expected of them. It is also stated that many posted workers are not members in any union and that this could be because they are afraid to speak with the unions, since they risk their job if the do so. The incentive for the posted workers to join the union is also limited if the unions are too focused on raising their wages, since this would make it harder for them to compete with the Swedish workers. Another reason that is given is that the unions have a bad reputation since it was their actions in the Laval-case that forced the workers to go home.[104]

3.4.2 Critique from international bodies

3.4.2.1 ILO

In 2013 ILO's Committee of Experts (the Committee) critiqued Sweden for the Lex Laval legislation. The issue was raised before the Committee by the Swedish unions, stating that it was in violation of ILO Convention 87 on Freedom of Association and Protection of the Right to Organise. The concerns raised by the unions was that it is very difficult for the unions in advance to know what is lawful and what is not when it comes to taking industrial action. This can be seen by the fact that no industrial action has been taken against a foreign company since the Laval-case and the following legislation. The result, according to the unions, has been a fall in the number of collective agreements, which in turn means that the foreign workers are less protected and that the Swedish workers faces competition from workers with fewer right and much lower wages. What is especially concerning for the unions is the fact that they are prohibited to take collective action against a foreign company, regardless if the company has signed a collective agreement or not, as long as the company live up to the minimum standard according to the posting of workers directive.[105]

The employers' organisations state that the free movement is a vital part of the European Union that will benefit all. Furthermore they state that it is still possible for workers and employers to enter into agreement voluntarily and that it is now much easier and more foreseeable for foreign companies to

[104] PA Consulting Group (2014), pp 26-28.
[105] Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), International Labour Conference, 102nd Session, 2013, pp. 176, 178. [cited as: ILO Committee of Experts (2013)]

work in Sweden since they now know how much they are obliged to pay their employees.[106]

The Committee raises concern of the fact that the unions are prohibited to take collective action against a foreign employer, even if the workers are members of a union. This means that the nationality of the company decides which rights a union has to take industrial action in order to protect their members. For that reason the Committee requests the government to review the legislation to enable the unions to have better possibilities to protect their members.[107]

3.4.2.2 European Social Committee

The unions also filed a complaint to the European Committee of Social Rights (ECSR) who is the complaint mechanism for the European Social Charter (ESC) raising mostly the same complaints as they did to the ILO Committee of Experts. In sum that the Swedish legislation is an infringement of the unions right to take collective action against a foreign company posting workers in Sweden. Stating that unions in Sweden are obliged to accept collective agreements that have lower standards of wages and protection than the collective agreement of the Swedish workers. This leads to worsened employment conditions for Swedish workers and it has also resulted in that a lot fewer collective agreements have been signed. In 2007 107 agreements were signed, in 2010 only 27. It has also had the effect that no collective action has been taken against a foreign company since 2007. In this case they state it is a violation of Article 6.2 and 6.4 of the ESC, which says that the state should promote collective agreements and recognise the right to take collective action. They also state that this is a violation of article 19:a-b of the ESC that says that migrant workers lawfully within the territory of a state shall have a treatment not less favourable than nationals when it comes to remuneration, working conditions, membership of trade unions and collective bargaining.[108]

The government responded that the Lex Laval legislation was necessary in order to be in compliance with EU legislation. It also states that the possibility to sign a collective agreement voluntarily still exists.[109]

The ECSR begins by pointing out that the right to bargaining collectively and to take collective action is fundamental in order to ensure other rights in the ESC, such as working conditions and protection in cases of termination of employment. The ECSR also states that the legislation results in substantial limitations for the trade unions when it comes to taking

[106] ILO Committee of Experts (2013), pp 176-177.
[107] ILO Committee of Experts (2013), pp 176, 178-179.
[108] European Committee of Social Rights, *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden,* Complaint No. 85/2012, para. 79-97, 126-130. [cited as: European Committee of Social Rights (2012)]
[109] European Committee of Social Rights (2012), para 98-99.

collective action. When it comes to the posted workers the Swedish legislation does not promote collective agreements and are therefore in violation of article 6.2 of the ESC. Regarding the right to take collective action the ESC opens up to limitations of the right as long as it is proportionate to the legitimate aim pursued. The ECSR states that:

> *"legal rules relating to the exercise of economic freedoms established by State Parties either directly through national law or indirectly through EU law should be interpreted in such a way as to not impose disproportionate restrictions upon the exercise of labour rights as set forth by, further to the Charter, national laws, EU law, and other international binding standards. In particular, national and EU rules regulating the enjoyment of such freedoms should be interpreted and applied in a manner that recognises the fundamental importance of the right of trade unions and their members to strive both for the protection and the improvement of the living and working conditions of workers, and also to seek equal treatment of workers regardless of nationality or any other ground."*[110]

> *" Consequently, the facilitation of free cross-border movement of services and the promotion of the freedom of an employer or undertaking to provide services in the territory of other States […] cannot be treated, from the point of view of the system of values, principles and fundamental rights embodied in the Charter, as having a greater a priori value than core labour rights, including the right to make use of collective action to demand further and better protection of the economic and social rights and interests of workers."*[111]

The ECSR states that the restrictions on the unions to take collective action when an employer can show that the workers employment conditions that are as favourable as the minimum standards in a central collective agreement are disproportionate and therefore a violation of article 6 of the ESC. It is also a violation of Article 19 since Sweden does not protect the foreign workers in the same way as they protect the Swedish workers.[112]

3.4.3 Analysis

When looking at the consequences of the Lex Laval legislation it must first be noticed that there is a lack of objective facts. The available reports are produced either by the unions or by the employers' organisations, and they give two different pictures of the situation. This in itself says something about the legislation. The unions are critical and want a change, the employers' organisations think the legislation has had mostly positive effects. From this it can be concluded that Lex Laval is a piece of legislation that favours the employers and not the unions.

[110] European Committee of Social Rights (2012), para 121.
[111] European Committee of Social Rights (2012), para 122.
[112] European Committee of Social Rights (2012), para 123, 125, 136-142.

The two sides do agree on certain things, one of these is that there has been no collective action against a company posting workers in Sweden since the new legislation entered into force. However, they do not agree on how to understand this. The employers state that this shows that there are no problems on the Swedish labour market. The unions mean that this is due to the new legislation, which has taken away the right to take collective action. The ILO committee of experts agree with the unions. From a precariat point of view this is of course very serious. It means that today there is a large group of workers that has no possibility to make collective demands. Both the unions and the posted workers have been weakened.

According to the employers another fact that shows that the situation is good on the labour market is that there has been very few individual cases regarding posted workers. This is a conclusion that makes it difficult to take the report seriously. What it shows is that the posted workers have limited possibilities to bring their claims to a court. The report from the employers says that the posted workers might be scared of talking to the unions, how much more so when it comes to bringing a case to the court? Again this shows that the posted workers have limited rights compared to their Swedish colleagues.

Another aspect that makes it hard to take the report seriously is that it states that it is in the workers interest to work long hours when they are in Sweden in order to be able be home for a longer period of time. It then shamelessly moves on to informing that the posted worker in the report works 12 hours per day, six days a week when he is in Sweden, but then have a whole week of. This amounts to 54 hours of work per week, including the week off. This shows an ignorance of the situation for the posted workers.

The employers' report does lift one interesting aspect on why the posted workers are not members of the union in the same extent as the Swedish workers. It could be because of the unions actions towards Laval. The effect for the Latvian workers was that they became unemployed due to the blockade against the construction site. It could also be because they want to be able to compete with their wages against the Swedish workers. This raises the question if the Swedish unions actually are not so concerned by the situation for the posted workers, that their aim actually is to protect the Swedish workers from competition. Standing says that this is a problem with the unions and this is the reason he proposes a new form of collective bodies that protect everyone in the Precariat, not only those that are in stable employment.

What is positive from a precariat standpoint is that the European Committee of Social Rights makes a clear statement that the free movement of services cannot have a higher priority than labour rights. According to Standing the prioritization of free movement and economy over rights is one of the key reasons for the growing of the precariat, a prioritization that needs to be reversed.

3.5 Proposed legislative changes in regard to the posted workers

3.5.1 Introduction

In 2014 the EU passed a directive on how the Posting of Workers Directive shall be enforced[113] (hereinafter: the Enforcement Directive) In a response to the Enforcement Directive the Swedish government appointed a committee to inquire how to implement the new directive in Swedish legislation. To begin with the committee was not to investigate the possibility to implement an entrepreneurial responsibility or better access to information regarding collective agreements, since the centre-right government did not desire this. When the left wing government won the election in September 2014 they broadened the scope of the inquiry to include those aspects as well.[114]

Among the original instructions to the committee one of the tasks was to investigate how the rights of posted workers could be strengthened. This will also be covered in this chapter.[115]

3.5.2 Responsibility for contractors

Article 12 in the Enforcement Directive opens up for the possibility to introduce a solidary responsibility for all contractors and sub-contractors in regard to the workers. One of the reasons for such a possibility is that it is especially important to protect workers' rights in such chains. The Committee on the Labour Market had already identified this problem in 2012. It stated that the Swedish model generally worked well but that there were some difficulties to make sure that posted workers in longer chains of sub contractors were paid, sometimes due to the fact that it was hard to distinguish who was the actual employer.[116]

The proposed change is to introduce a responsibility for all entrepreneurs in a chain from the original contractor to the actual employer. The parties of the labour market were asked what they thought about the suggestion. Not surprisingly the unions thought that the responsibility should be as wide as

[113] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of servicesand amending Regulation (EU) No 1024/2012 on administrative co-operation through the Internal Market Information System.
[114] SOU 2015:38, *Tillämpningsdirektivet till utstationeringsdirektivet – del II,* Stockholm, 2015, pp. 33-35 [cited as: SOU 2015:38]
[115] SOU 2015:13, *Tillämpningsdirektivet till utstationeringsdirektivet – del I,* Stockholm, 2015, pp. 53-55. [cited as: SOU 2015:13]
[116] SOU 2015:38, pp 77-80.

possible, which means that the solidarity should cover all the sub-contractors, not only the one contracting the employer. Even the main contractor can have responsibility for an employee furthest down in the chain. It also means that the contractors have a strict responsibility. The contractors can thus not avoid responsibility by taking reasonable control measures. The employers' organisations, of course, thought the opposite. First of all they did not think there should be such a responsibility at all, and if so it should only be relevant for the company hiring the employing company, one step in the chain that is. They also wanted a possibility to avoid responsibility by taking reasonable actions to hire serious and responsible sub-contractors.[117]

The committee agreed with the unions and suggested a strict entrepreneurial responsibility that covers all the entrepreneurs in the entrepreneurial chain. They stated that such a responsibility would lead to self-sanitation in business, since contractors would have to be more careful in their selection of contractors in order to avoid additional costs at a later stage.[118]

The reason for the responsibility to be strict is that if there were no such responsibility it would be more difficult, more uncertain and take longer time for the worker to receive his or her wages. The committee states that the strict responsibility is a big disadvantage for the contractors, but it is more important to protect the workers in this case. It is also the contractor that has the possibility to decide what sub-contractors to hire, which give them more control, and therefore more responsibility, over the situation.[119]

The committee makes an analysis of what effects the proposed legislation would have. It states that this change would have a positive effect for the posted workers, since it gives them another possibility to claim the rights they are entitled to. A more causal effect is that the change will lead to a more difficult market for irresponsible companies, which in turn would lead to safer workplaces and a lessened risk for the workers. The proposed changes would affect all contractors on the Swedish market, both national and international ones. The companies would have to spend resources on administration to evaluate the contractors they are thinking of hiring, in order to avoid having to pay wages for a worker employed by a sub-contractor. The positive effect of this is that serious companies would outrival less serious ones, but it could also lead to smaller companies having a harder time entering the market, since they don't have the resources to control sub-contractors.[120]

3.5.3 Better access to information

In the implementation directive article 5.4 it says that the employment conditions that relates to article 3 in the posting of workers directive shall be

[117] SOU 2015:38, p 105.
[118] SOU 2015:38, pp 107-113.
[119] SOU 2015:38, pp 123-124.
[120] SOU 2015:38, pp 170-171, 174-175.

accessible for foreign companies. The parties of the labour market shall be involved to make the conditions available to foreign companies. The conditions should at least include the relevant wages the companies can be expected to pay.[121]

The above mentioned information was partly introduced after the Laval-case (see något kapitelnummer), but the changes did not have the desired effect. Very few collective agreements were handed in to the SWEA. The committee therefore proposes a change in the legislation that will clarify that unions have an obligation to hand in collective agreements. The unions are also obligated to assign a **contact person** that can provide information of conditions to companies interested in posting workers in Sweden.[122]

The unions were against introducing an obligation to hand in collective agreements since it would be an infringement on the Swedish model. The collective agreements should only be between the parties of the labour market. Instead they supported the proposition to introduce a contact person. The employers' representatives stated that it was inappropriate for someone with a partisan interest to exercise public authority. Especially so when there is a disagreement between the parties about the level of minimum wages.[123]

The committee estimates that the improved access to information regarding the employment conditions would benefit the workers. It would make it easier for them to know their rights, which in turn would make it easier for them to claim their rights. It would also benefit the foreign companies that want to enter the Swedish market, since it would be easier for them to know what is expected of them. In turn this would benefit the free movement of services on the inner market. The unions would have to spend some resources to have a contact person available to answer questions from companies and workers.[124]

3.5.4 An extended possibility to use collective action

When the social democrats won the election in the fall of 2014 they issued an order to a committee to investigate how the role of the collective agreements can be strengthened in the area of posted workers. The government stated that the Lex Laval legislation has serious errors that open up for competition through lower wages and worse employment conditions. One example of possible action that the committee was to investigate was the possibility for unions to use collective action to force a company posting workers in Sweden to sign a confirmation agreement. Confirmation agreements could be used when companies state that they are applying

[121] SOU 2015:38, pp 56.
[122] SOU 2015:38, p 62.
[123] SOU 2015:38, pp 63, 67.
[124] SOU 2015:38, pp 170-171, 186.

conditions that live up to the minimum threshold. Today it is difficult for the unions to control that this is really the case, and monitor the actual application of the conditions. The deadline for the report is 31th May 2015 and was not published at the deadline of this thesis.[125]

3.5.5 Analysis

How do these changes correspond with the theory of the precariat? The solidary responsibility for all sub-contractors is a change that clearly puts a new burden on the employers and creates a wider possibility for workers to claim rights. This can be seen as a slight shift in policy from both the EU and the Swedish government. It seems like they are not so scared of laying burdens on the employers in order to protect the workers. Previously this would have been regarded as a hindrance for the free movement of services on the inner market. It can still be questioned how much it will help the posted workers since they probably still have the fear of bring charges to a court.

With the proposal regarding the access to information the government corrects the flaws in the original legislation regarding access to information. It is now mandatory to hand in all collective agreements and there is a clear procedure on how to access them. To provide information is good since it both promotes free movement and protects workers' rights. It also put a bit of a burden on the unions, but they have the more interest in the system and it is therefore justified.

The proposition that unions can have the possibility to use collective action to get the foreign companies to sign confirmation agreements is the one that would have the most effect. It is unclear if this is in line with EU-law, but that is outside the scope of this thesis. It would definitely strengthen the position of the unions, even though they would still not be able to force the foreign companies to apply the same employment conditions as the Swedish ones. From a precariat point of view it can be questioned if this stronger role of the union is desirable since one effect could be that foreign companies, and the foreign workers will be shut off from the Swedish labour market. This would not be a beneficial outcome for the posted workers, and those that hope to have the possibility to work in Sweden.

[125] Dir 2014:149, *Tillägsdirektiv till Utstationeringskommittén (A 2012:03)*

4 Conclusion

According to Standing's theory there are a few major reasons for the growing of a new precariat-class. The main one is the political agenda that favours economic interest above workers' security and protection. Another is that, due to globalisation, migrant workers changes the dynamics on the labour markets to which they come. In the European Union this change of the labour market has been driven by the vision and political goal of the inner market, where goods and services can move freely between the member states. With the tearing down of much of the inner market border control, more workers from foreign countries within the union entered Sweden. This raised questions on how to uphold the labour rights and the Swedish model in this new time when free movement of services demands as few hindrances as possible.

The Social Democrats and the centre-right coalition have handled the clash between the Swedish labour rights system and the free movement of the inner market differently. Already five years ahead of the national referendum on if Sweden was to join the EU or not the Social Democrats strengthened the Swedish model by the Lex Britannia legislation. By this the Government took a stand for labour rights over the economic interests. They were critiqued for creating a law that would not be in conformity with the EU law, but their assessment was that it would not be a problem.

The centre-right government did not have the luxury of making assessments, they faced a judgement from the European Court of Justice that clearly stated that Swedish law was not in line with EU law. The government had to change the legislation and they were forced to weaken the protection for the unions and the protection for the posted workers. Undoubtedly that was the result of the Lex Laval legislation. The government should not be blamed too much for this though, since they were forced to do so by the EU. What the government can be criticised for is that they went further than the judgement forced it to do. The judgement stated that the foreign companies were being discriminated because those with collective agreement were in a worse position than the Swedish companies that had signed collective agreements. It did not say anything about the foreign companies that had not signed any collective agreements in their member states. The EU law and the Court's interpretation of it shows a policy that favours economic interests by creating a roof of what rights can be claimed by unions, in order to make it easier for companies to establish in other member states. The government's creation of Lex Laval shows a policy that favours economic interests by weakening the unions even more than the Court did.

The other main aspect of the creation of a precariat class that I have chosen to focus on in this thesis is the role of and the situation for the migrant workers. In his theory, Standing points out the double nature of the migrant workers. They are contributing to the precarious working conditions by

creating an overflow of workers and being prepared to work for lower wages and worse conditions than the national workers. At the same time they are the ones in the precariat that suffers the most, since they often do not have much of a choice other than moving abroad to find work, and in order to compete on the market they have to accept conditions no citizen would accept. They are also facing discrimination since governments want to protect the jobs for their own workers. It is also very difficult for them to make themselves heard, since contacting the union and bringing claims to court could mean a one-way ticket home.

Lex Laval is a legislation that put the posted workers both in a better and a worse situation at the same time. It is better since it is now fully legal to use posted workers in order to lower the wage costs. This puts the posted workers in a good position to compete with the Swedish citizens. The negative side is that they are competing with their wages and their employment conditions. Lex Laval also mean that the posted workers can count on being protected by the unions since they have been limited to demand much from the companies regarding the posted workers. They will have to accept the situation that they are second-class workers on Swedish market. Even if they are as competent as the ones they are competing with, they will not receive the same pay, protection or, in the long run, access to the justice system. This can be seen from the fact that there has been no collective action against companies posting workers in Sweden or no cases brought before the Swedish labour court regarding the situation for a posted worker.

To sum up, Lex Laval is a law that follows a policy that favours economic interests over the worker's security, it weakens the unions, it creates a market with wage competition between workers and it treats the posted workers as second-class workers. All of these are key ingredients in the creating of a precariat and it is thus a legislation that adds to the creation of a precariat.

4.1 Can the trend be reversed?

The proposed legislative changes are trying to reverse the effects of the Lex Laval legislation. The Social Democrats have been protesting against the law ever since it was proposed. Now that they are in power they will do what they can to change it. The proposed changes do have a different perspective than Lex Laval had. There is not the same kind of reluctance to impose burdens on the companies in order to protect the workers. The scale with the economic interests and the workers' security is more balanced. This is also due to the Implementation Directive which has the aim of protecting the workers to a greater extent than the original Posting of Workers Directive did, at least compared to how it was interpreted by the Court. The proposed changes strengthen the unions and create more securities for the posted workers.

Some of the main issues still remain untouched though. The unions still will not have the same possibilities to take collective action to protect the posted workers, and the posted workers will therefore still not be entitled to the same level of wages and other employment conditions. The labour market will therefore still be divided between cheap foreign labour and more expensive Swedish labour, and the competition based on wages and lowering of employment conditions will remain.

According to Standing the strengthening of the unions is not the way to help those in the precariat. He states that the unions are designed to protect those already in stable long term jobs and that a new kind of organisation is needed to protect the precariat. In the case of Sweden I both agree and disagree with him. I think that the Swedish unions have shown that they not only protect their own and their jobs, but also that they are taking a real interest in the posted workers and the conditions they work and live under while they are here. Therefore I disagree with him regarding the focus of the unions, but I agree that the unions need to be supplemented by more efforts. In Sweden the government has tried to stay away as much as possible since the Swedish model is based on an extensive freedom and responsibility for the parties of the labour market. Maybe it is time for the government to take a more active approach when it comes to the posted workers, with more inspections as a suitable first step, not only regarding security but also contractual matters such as correct wages actually being paid out, instead of outsourcing the task to the unions. This might be seen as an infringement on the Swedish model, but in a time when the Swedish labour market is only a part of the European labour market Sweden might need to have a more European model.

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