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The Right to Have Labour Rights

A Study of the Impact of Migration Law on the
Enjoyment of Labour Rights of Third Country Migrant
Workers in Sweden

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Summary

Labour law is facing a challenge in the era of globalisation. Due to new conditions in the landscape of employment relations, the legal field needs to reformulate its legitimacy in order to not risk becoming obsolete. This thesis seeks to contribute to the discussion on the need to reinvigorate labour law with a focus on labour rights protection of third country migrant workers. The thesis analyses the impact of migration law on the enjoyment of labour rights of third country migrant workers in Sweden. The tension between labour law and migration law as well as the relationship between labour migration and the Swedish model will be attended to.

The first step in order to investigate the protection of labour rights of migrant workers is an analysis of the sources of labour rights. Fundamental theories of labour law will be analysed in relation to the discourse on human rights and citizenship. The thesis will not settle the debate on whether labour rights are human rights, but makes the case that as the protective ambit of labour law does not distinguish between workers on grounds of nationality; in claiming their labour rights migrant workers can make use of the discursive force of human rights in combination with the implementation toolbox of labour law in order to dismantle the exclusionary features of citizenship.

The thesis identifies a conflict between the interests of labour law and migration law. In relation to third country migrant workers, migration law seems to be given precedence in labour law matters. The impact of the precedence of migration law is that migrant workers are in a vulnerable position in relation to the employer as the inherent subordination of the worker in the employment relationship is augmented.

In 2017, the Swedish labour migration framework is undergoing revision. The intended purpose is to strengthen the position of the migrant worker on the labour market. The thesis comments on the proposed changes and concludes that in order to improve the enjoyment of labour rights for third country migrant workers, structures for the migrant worker to report abuse of their labour rights without jeopardizing their residence permit must be established. The thesis concludes that the proposed changes do not to a satisfying extent establish such structures.

Sammanfattning

Arbetsrätten står inför utmaningar i globaliseringens era. Nya förhållanden på arbetsmarknaden till följd av ändringar i produktionsförhållanden och ökad migration leder till ett behov av att förnya legitimiteten av det rättsliga området. Detta arbete syftar till att bidra till diskussionen om hur detta förnyande kan ske genom att undersöka det rättsliga skydd migrantarbetare från tredjeland åtnjuter i Sverige. Spänningsförhållandet mellan arbetsrätten och migrationsrätten likväl som förhållandet mellan arbetsmigration och den svenska modellen behandlas i denna uppsats.

Det första steget i undersökningen av det arbetsrättsliga skydd migrantarbetare från tredjeland åtnjuter är en analys av det arbetsrättsliga skyddets källor. Det arbetsrättsliga skyddets syfte kommer att analyseras i relation till diskursen om mänskliga rättigheter och medborgarskap. Uppsatsen syftar inte till att fastslå arbetsrättens förhållande till de mänskliga rättigheterna, men föreslår att ett resultat av att det arbetsrättsliga skyddet inte gör skillnad på arbetare utifrån nationalitet är att migrantarbetare då de hävdar sina rättigheter kan nyttja den diskursiva styrkan av mänskliga rättigheter tillsammans med arbetsrättens implementeringsmässiga verktygslåda för att undvika att deras rättighetsåtnjutande hindras av medborgarskapets exkluderande funktion.

Uppsatsen identifierar en konflikt mellan migrationsrättens och arbetsrättens respektive skyddsintressen. I förhållande till migrantarbetare från tredjeland tycks migrationsrätten ges företräde i frågor av arbetsrättslig natur. Utfallet av migrationsrättens ställning på arbetsmarknaden är att migrantarbetare befinner sig i en utsatt position i förhållande till arbetsgivaren, eftersom den inneboende maktbalansen mellan arbetsgivaren och arbetstagaren ökar.

Under år 2017 genomgår det svenska regelverket för arbetsmigration revidering. Syftet är att stärka migrantarbetarens position på arbetsmarknaden. Uppsatsen kommenterar några av de föreslagna ändringarna och drar slutsatsen att ett stärkt skydd av migrantarbetarens ställning förutsätter upprättandet av strukturer som möjliggör för migrantarbetare att rapportera överträdelse av det arbetsrättsliga skyddet utan att riskera att förlora sin rätt till vistelse i landet. Vidare dras slutsatsen att de förslag som presenterats inte i tillfredsställande grad upprättar strukturer av detta slag.

Preface

I would like to thank Alice and Elin, who have been with me on this journey and have become lifelong friends along the way. Thanks also to Aili, Oskar and Jonatan for your patient and inexhaustible reading of drafts and for your invaluable comments. I owe you.

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Abbreviations

AD	Arbetsdomstolen (Swedish Labour Court)
EEA	European Economic Area
EU	European Union
IACtHR	Inter-American Court of Human Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
LO	Landsorganisationen Sverige (The Swedish Trade Union Confederation)
Migration Agency	Swedish Migration Agency
Prop.	Proposition (Government Bill)
SEK	Svensk krona (Swedish currency)
SOU	Statens offentliga utredningar (Swedish Government Official Reports)
TCO	Tjänstemännens centralorganisation (The Swedish Confederation of Professional Employees)
UDHR	Universal Declaration on Human Rights
UN	United Nations

1 Introduction

1.1 Background

A common narrative in the beginning of the 21st century is that labour law is experiencing a crisis.¹ However, not least for the migrant worker whose employment is the condition for stay, the strength of the enforcement of labour rights is of urgent importance. Therefore, this thesis seeks to show that there is reason to pay attention to this alleged crisis, and reason to not let the legal field of labour law fade away in ruins of greater days. New conditions on the labour market due to increased globalization call for new analysis on the intersection between labour law and other legal fields, in order to map out the road to reinvigoration of labour law.² The aims of labour law have historically been to attend to the humanity in the worker, to acknowledge the inseparability of the work from the person performing it and to alter the unequal power balance between the employer and the employee.³ For the migrant worker, deportability augments the power imbalance.⁴

One of the aims of an updated labour law must be to make visible new forms of abuse of workers enabled by globalisation. Accordingly, in this thesis a renewed need for efficient labour law protection created by an increased globalisation, as it entails an increased movement of labour, is discussed. Situations where migrant workers are deported due to discrepancies between their work conditions and standards required in the Swedish labour market, migrant workers whose residence permit is contingent on an employment offer that cannot be enforced, and asylum seekers who after they have had their asylum application denied apply for a work permit under the regime of “Change of Track” and face different requirements in the establishment of their identity throughout the migration process are examples of when the two legal frameworks of labour law and migration law collide. The impact of the migration law framework on the enjoyment of labour rights in these situations will be investigated in order to analyse how far the labour rights of migrant workers reach within the Swedish context. What legal field is prevailing, and why? How can Swedish law be revised to adapt to the conditions on the labour market today in order to offer third country migrant workers efficient labour rights protection?

¹ It is questioned whether labour law is adjusting to the development in the labour market, in terms of observing the importance of efficiency and flexibility as well as to protect the most vulnerable workers. G. Davidov & B. Langille: “Understanding Labour Law: A Timeless Idea, a Timed-Out Idea, or an Idea Whose Time has Now Come?”, in: Davidov, G. & Langille, B. (eds.), *The Idea of Labour Law*, Oxford, 2011, p. 1.

² In accordance with the latest available numbers from the ILO, out of 232 million migrants globally, 150 million were working or economically active. ILO global estimates on migrant workers, Labour Migration Branch, Conditions of Work and Equality Department, Department of Statistics, ILO, 2015.

³ See section 2.1.

⁴ See section 3.3.

The intersection between labour law and migration law does not take place in a vacuum; rather the topic is highly politicized. The Swedish model, whose traits are debated but can briefly be described as a deal between labour and capital on labour market issues in order to minimize governmental interference, is the setting in which the meeting between labour law and migration law is taking place. In order to not undermine the Swedish model, "conditions equal to collective agreements" is a prerequisite for a labour permit to be upheld.⁵ When an individual is deported due to the fact that those conditions are not upheld, not only supporters of the rights of migrant workers but also antagonists of collective agreements raise their voices. How shall the Swedish model be reconciled with the interest of the migrant worker to not be deported due to minor discrepancies from the adherence with standards in collective agreements? Who is responsible for the efficient enjoyment of labour rights of migrant workers? This thesis seeks to offer a discussion on this topic that seems to have caused the legislator headache.⁶

Inspired by the work of Selberg⁷, it is the standpoint of this thesis that labour rights protection is of intrinsic value and that labour law and migration law shall be able to coexist without undermining each other. Labour rights can be deduced from different sources. In order to analyse the labour rights protection of migrant workers, the efficiency of labour rights based in international human rights law, citizenship and labour law will be analysed.

1.2 Purpose and Research Question

The purpose of this thesis is to analyse the impact of the migration law framework on the enjoyment of labour rights of third country migrant workers⁸ in Sweden. The analysis will attend to the particular vulnerabilities of migrant workers inherent in their employment relationships as an outcome of the convergence between labour law and migration law. As the right to residency of the migrant worker is contingent on the employment, the impact of the notion of deportability will be analysed.

In order to obtain a deeper understanding of the context for the enjoyment of labour rights of migrant workers, the aim is also to analyse the fundamental sources of labour rights; human rights law, citizenship rights and labour law. The purpose is not to settle the debate on whether labour rights are human rights, but to analyse what the particular features of labour law can bring to the table in terms of enforcement of rights of migrant workers. A further aim

⁵ In accordance with the Aliens Act, section 6.2.

⁶ See SOU 2016:91 Stärkt ställning för arbetskraftsinvandrare på arbetsmarknaden, p. 83.

⁷ See in particular N. Selberg, "Arbetsrätt i centrum och periferi. Migrationsrätt, arbetsrätt och (ir)reguljär arbetskraftsmigration", in: A. Persson and Ryberg-Welander, L (eds.), *Festskrift till Catharina Calleman – i rättens utkanter*, Uppsala, 2014.

⁸ Migrant workers from a non EU country.

is to investigate whether it exists a need for changes in the Swedish labour migration framework in order to attend to labour rights of migrant workers, and if so, to discuss how those changes could be designed.

Accordingly, the central research question is:

- What are the consequences of the migration law framework on the enjoyment of labour rights protection of third country migrant workers in Sweden?

In order to analyse this question, additional research questions are:

- What are the bases for the enjoyment of labour rights and what qualifies a person to be protected by these respective sets of rights?
- How is the framework for Swedish third country labour migration constructed, and why?
- What is the relationship between the Swedish model and the labour rights of the third country migrant worker?

1.3 Delimitations

This thesis investigates the labour rights protection of third country nationals⁹ performing work in Sweden. The reason that the thesis does not engage with labour rights of migrant workers from other EU or EEA countries is that their residence permits are not tied to the work permit, thus deportation is not to the same extent as for third country migrant workers creating vulnerability. The focus for the analysis is the Swedish legal framework on labour migration and its relation to human rights, citizenship and the core principles of labour law. Not ignoring the important role EU legislation plays in the field of labour law, due to space constraints an in-depth analysis of this legal framework will not be provided in the thesis. Furthermore, as the European Convention on Human Rights lacks articles regulating labour rights¹⁰, this instrument will not be included in the investigation.

⁹ Directive 2009/52/ EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals Article 2 (a) defines a ‘third-country national’ as a person who is not a citizen of the EU nor a person enjoying the right of free movement as defined in the Schengen Borders Code.

¹⁰ Article 4 of the Convention comprises the prohibition of slavery and forced labour.

In relation to the analysis of human rights as a base of labour rights it should be mentioned that the debate regarding the relationship between labour rights and human rights is a bigger one than can be reviewed within the scope of this thesis. However, a brief overview of the debate is provided.

The, important, area of conditions for undocumented migrant workers mainly falls outside of the ambit of focus for this thesis. The notion of undocumentedness will, however, be discussed as it serves to deepen the understanding of the outcome of the mechanisms operating in the labour migration framework. One outcome of the implementation of the labour migration framework is that undocumentedness is an alternative to deportation. This phenomenon must be seen in the context of the intertwinement between labour migration and asylum migration, and that many migrant workers experience a need of protection.¹¹ A few words should also be said about this intertwinement. The circumstance that individuals who have had their application for asylum rejected choose to apply for a work permit can be described as an example of an intertwinement which the legislator intended to avoid¹², and as Pelling argues¹³ it can be described as an example of a supply-driven labour migration rather than the intended demand-driven equivalent. However, it is not the purpose of this thesis to evaluate whether this intertwinement is a malign phenomenon. The thesis suffices to attend to the factors in the system that enable abuse of the individual migrants in relation to this intertwinement.

Being an accolent phenomenon of high relevance for the situation of third country migrant workers, matters of discrimination will not be analysed in this thesis. Further, the division between productive and reproductive work of migrant workers will be kept short and the particular vulnerabilities of the domestic worker will mainly fall outside of the scope of the thesis. Another related area that will fall outside of the ambit of this thesis is the matter of forced labour. Migratory status has been deemed by the European Court of Human Rights to be a factor of importance in the assessment of whether forced labour is at hand¹⁴, and the factor that the residence permit has been tied to the employment for a particular employer has been discussed accordingly.¹⁵

¹¹ This will be discussed in Chapter 5.

¹² See SOU:2006:87, p. 206ff.

¹³ L. Pelling, "Fristad Sverige? Om skyddssökande arbetskraftsinvandrares villkor, in: C. Calleman, P. Herzfeld Olsson, (eds.): *Arbetskraft från hela världen: Hur blev det med 2008 års reform?*", Stockholm, 2015, p. 264.

¹⁴ See case European Court of Human Rights, Rantsev v. Cyprus and Russia.

¹⁵ See discussion on the Israeli case Kav LaOved v The Government of Israel H CJ 4542/02, in E. Albin, "The Sectoral Regulatory Regime – When Work Migration Controls and the Sectorally Differentiated Labour Market Meet", in: (eds.) C. Costello and M. Freedland, *Migrants at Work: Immigration and Vulnerability in Labour Law*. Oxford, 2014.

1.4 Method and Material

1.4.1 Method

This thesis is a legal study aimed at analysing labour rights protection of third country migrant workers in Sweden. The relevant areas of law are labour law, migration law and international human rights law; areas associated with respective implications for methods of interpretation.

It is common for authors of legal works to refer to traditional legal dogmatism as the method used. Sandgren argues that the content of the term *dogmatism* is unclear and that few who use the term define its meaning.¹⁶ Among the suggested characteristics of the method is that the purpose is to establish the content of the law, and to interpret and systematise the applicable law in accordance with the recognised legal sources.¹⁷

It is possible that the methodology used in this thesis would qualify as legal dogmatism, but in acknowledging the difficulties in establishing the exact content of this method, it is more compelling to use the term “analytical legal method” suggested by Sandgren. He argues that this term is better equipped to encompass the reflective nature of most legal writing handicraft, and that the lion’s share of legal works aim to systematise the legal materia, develop the conceptual framework, analyse argumentation and possible solutions, create principles and conduct a critical examination of the existing law - rather than to establish it.¹⁸ Moreover, it has been argued that it is very well accepted that the legal dogmatism reaches outside of the scope of the current law as it is “(...) fully legitimate for a legal dogmatist to search for ideal solutions.”¹⁹

For the pursuance of the investigation, inspiration has also been found in ideas presented by Anne Orford who, inspired by Foucault, highlights the importance to “make visible precisely what is visible”.²⁰ Orford argues that it is only in the broader system that facts have meaning, and that it is the broader system that will shape why facts are produced and how they are used. In advocating for the practice of description, Orford argues that description requires attention to facts and values, and an understanding of them as historical creations rather than timeless givens.²¹ In relation to the analysis of labour rights of third country migrant workers, these reflections serve as a reminder of how the most basic elements of labour law might be considered as givens to the extent that the factual enjoyment of labour rights of migrant workers are not attended to.

¹⁶ C. Sandgren, “Är rättsdogmatiken dogmatisk?”, *Tidskrift for Rettsvitenskap* 04-05/2005, p. 648.

¹⁷ *Ibid.* p. 649.

¹⁸ *Ibid.* p. 652.

¹⁹ My translation. N. Jareborg, ”Rättsvetenskap som vetenskap,” *SvJT*, 2004, p. 4.

²⁰ A. Orford, ”In Praise of Description”, *Leiden Journal of International Law*, 2012, p. 618.

²¹ *Ibid.* p. 624.

In order to answer the research questions, law and ordinance have been studied. In addition, reasoning in the preparatory works has been analysed in order to provide an overview of the context in which the labour migration of third country migrant workers takes place. Further, relevant doctrinal literature has been used. In order to analyse the implications of the implementation of the migratory framework on the enjoyment of labour rights protection of third country migrant workers, a case study of three situations where the two frameworks intersect has been pursued.

In the study of the legal sources of labour law it should be mentioned that in a Swedish context, much of the content, besides what is found in laws, is found in collective agreements. Thus, in order to answer the research questions, the weight given to the collective agreements has been considered.

With regard to the international human rights law framework, international human rights law conventions and declarations have been studied. Doctrinal literature has been helpful in order to analyse the material.

One implication of the nature of the topic is that the amount of case law is scarce due to the risk of deportation that the third country migrant worker faces when bringing attention to the lack of adherence to the required labour rights conditions. Existing case law illustrating the relationship between labour law and migration law has, however, been analysed.

The analysis of the labour rights protection of migrant workers in Sweden is pursued from a theoretical perspective that emphasizes the intrinsic value of labour law. The analysis further acknowledges the notion of deportation as a factor that creates vulnerability.

1.4.2 Material

Throughout the thesis, besides Swedish law and international covenants and declarations, preparatory works, case law, statements from trade unions and doctrinal literature have been used. Due to space constraints, only a limited amount of the doctrinal literature used can be mentioned in this section. The overview of literature also serves as a review of current research in the field of labour rights or migrant workers. It seems that, both internationally and from a Swedish perspective, this area is gaining an increased interest within academia.²² In addition to an augmented globalisation, a possible reason to this interest may be the current political discussion on integration of migrants.

Chapter two of this thesis is dedicated to a theoretical discussion on the bases of labour rights. As a starting point, theories of influential labour law

²² See e.g. preface in J. Howe and R. Owens (eds.): *Temporary Labour Migration in the Global Era*, Hart Publishing, Oregon, 2016.

thinkers historically have been reviewed. Among those, theories of the German social democrat Hugo Sinzheimer, who contributed to the development of labour law during the beginning of the 20th century, have been used. Theories of labour law attributable to the German economist and philosopher Karl Marx on the relation between labour and capital have further been used. Both in relation to Sinzheimer and Marx it should be mentioned that it is interpretations of their work made by other scholars, such as the Irish lawyer Paul O'Higgins, the Scottish Professor of law Ruth Dukes and the Canadian Professor of law Judy Fudge, that have been used. In the study of the purpose of labour law, works of Otto Kahn-Freund have been studied. In order to obtain a Swedish perspective, an article by Jonas Malmberg, Professor of law and president in the Swedish Labour court²³ on the aims of labour law has been studied. The book *The Spirit of Philadelphia* by the French sociologist and Doctor of law Alain Supiot has further served the purpose of analysing the sources of labour law from an international and historical perspective. The book *The Idea of Labour Law* has been used in order to obtain an overview of a critical discourse on the standing of labour law in the 21st century. The book comprises articles of influential labour law thinkers, where among others the Canadian professor of law Brian Langille, the South African lawyer Bob Hepple, the Canadian lawyer Harry Arthurs and the Argentinian professor of law Adrian Goldin can be mentioned. The articles have been analysed in order to provide a background to the discussion on the relationship between labour law, citizenship rights and human rights law. The book *Temporary Labour Migration in the Global Era* should also be mentioned as a book that has served the aim of obtaining an overview of the sources of labour rights protection and possibilities for migrant workers to claim labour rights. Particularly the article "The Membership of Migrant Workers and the Ethical Limits of Exclusion" by the Australian professor of law Alexander Reilly has brought interesting reflections on the relationship between citizenship and labour rights. Further it should be mentioned that the article "Protecting the Rights of Temporary Migrant Workers: Ideals versus Reality" by the British professor of political economy Martin Ruhs has been a useful contribution to the discussion on labour rights of migrant workers as he points our attention to the potential consequences of an extensive set of rights for existing migrant workers in that it can have a dampening effect on the amount of future migrant workers admitted.

The book *Migrants at Work* has likewise been studied for a contextualisation of the conditions of migrant workers. The article "Reconciling Openness and High Labour Standards?" by the Head of Social Policy and General Counsel of the Swedish trade union Swedish Confederation for Professional Employees Samuel Engblom can specifically be mentioned.

As for the discussion on the relationship between human rights and labour rights, which constitutes a debate much larger than what can be reviewed within the frames of this work, the article "Theories of Rights as

²³ Arbetsdomstolen.

Justifications for Labour Law” by the British Professor of law Hugh Collins should be mentioned as it takes a critical standpoint against labour rights as human rights. Another antagonist of labour rights as human rights, whose article “Solidarity First: Labour Rights are not Human Rights” has been studied, is the American Doctor of Law Jay Youngdahl. Arguments that labour rights are human rights are found in the article “Are Labour Rights Human Rights?” by the British legal scholar Virginia Mantouvalou.

In the section on citizenship rights, the text “Origins of Totalitarianism” by Hannah Arendt has been analysed together with articles in the book *Hannah Arendt and the Law*, in order to contextualize her work. To fulfill the aim of positioning the content of the text by Arendt in a labour rights perspective, the article “The Ideology of Temporary Labour Migration” by Canadian Professor of law Catherine Dauvergne and Sarah Marsden has been useful as it discusses theories of rights presented by Arendt applied to migrant workers. On the notion of citizenship rights, the article “Making Claims for Migrant Workers” by Fudge has been analysed. The article “Industrial Citizenship, Social Citizenship, Corporate Citizenship: I just want my wages” by Israeli Doctor in law Guy Mundlak has been useful in order to analyse the relationship between labour law, human rights and citizenship.

Chapter three of this thesis concerns the relationship between labour law and migration law. Here the works of Swedish legal scholar Niklas Selberg, particularly the article ”Labour Law in Center and Periphery. Migration Law, Labour Law and (Ir)regular Labour Migration”²⁴ should be mentioned, as his argument that migration law is prevailing in the meeting with labour law serves as part of the theoretical approach in this thesis. The article “The Rights of Irregular Migrants” by Canadian Professor in political theory Joseph Carens is used as his argumentation in the “Firewall Theory” serves as an illustration of the need for a separation between migration law and the claim for rights of migrants in order for the rights to be made efficient.

On the notion that deportability creates vulnerability, the article ”The Deportation Regime. Sovereignty, Space and the Freedom of Movement”, by scholar of anthropology Nicholas P. De Genova and the article “Migration, Immigration Controls and the Fashioning of Precarious Workers” by British Professor in migration and citizenship Bridget Anderson shall be mentioned.

In the review of the Swedish labour migration framework, the article “Labour, Employee Power and Human Rights”²⁵ by Swedish Doctor of law Catarina Calleman and the article “Empowering Temporary Migrant Workers in Sweden: A Call for Unequal Treatment” and “Binding or Not? Does the Offer of Employment Provide Sufficient levels of Foreseeability

²⁴ My translation. The Swedish title is ”Arbetsrätt i centrum och periferi. Migrationsrätt, arbetsrätt och (ir)reguljär arbetskraftsmigration”.

²⁵ My translation. The Swedish title is ”Arbetskraft, arbetsgivarmakt och mänskliga rättigheter”.

for the Migrant Worker?”²⁶ by Swedish Doctor of law Petra Herzfeld Olsson should be mentioned as they discuss the notions of vulnerability of the third country migrant workers in a Swedish context. The article “Asylum Seekers and the Right to Work – the Content and Possible Consequences of the Regulation”²⁷ by Swedish legal scholar Dominika Borg Jansson has been used in the case study pursued in chapter five. Swedish Doctor in political science Lisa Pelling further contributes to the discussion on this topic from a Swedish perspective. Standard works of Jonas Malmberg and Kent Källström have been useful as they provide an overview of Swedish labour law regulations.

Other sources that should be mentioned are information from the website of the Migration Agency on the requirements in order to obtain work permits, and their handbook on migration. Finally it should be mentioned that statistics from the ILO and from the Migration Agency have been used.

The aim of this thesis is to contribute to the discussion on labour rights of migrant workers through an analysis that ties together the sources of labour rights protection with current challenges emanating from the convergence between labour law and migration law.

1.5 Thesis Outline

Chapter one provides an introduction to the subject, purpose and research questions, limitations, methods and materials. Chapter two includes a theoretical discussion on the bases of labour rights. Chapter three comprises a discussion on the relationship between labour law and migration law. Chapter four provides an overview of the legal and contextual setting for labour migration in Sweden. The Swedish labour migration framework is analysed, as well as international conventions. The notion of deportability is discussed. A brief overview of the relation between labour migration and global inequality is included. Chapter five comprises a case study of the practical implications of the meeting between the labour law framework and the migration law framework in three situations. Chapter six provides a summary and discussion of the findings in the thesis.

²⁶ My translation. The Swedish title is ”Bindande eller inte? Ger anställningserbjudandet arbetskraftsinvandrarerna tillräcklig förutsägbarhet?”.

²⁷ My translation. The Swedish title is ”Asylsökande och rätten att arbeta – regelverkets innebörd och möjliga konsekvenser”.

2 THE SOURCES OF LABOUR RIGHTS

This chapter provides a brief overview of the sources of labour rights protection. The relationship between labour law, human rights law and citizenship rights will be discussed in relation to third country migrant workers. Due to space constraints, a comprehensive overview cannot be provided; the aim is rather to sketch the main features.

2.1 Labour Law

Labour law has been articulated as law regulating the employment relationship with the aim to counteract the imbalance in bargaining power between the employer and the employee in order to secure a more just relationship.²⁸ The conditions in the hands of the employer, such as capital ownership and organisational power, result in a structural asymmetry of power. This asymmetry is expressed both in the creation of the job conditions and the management of the employment relationship. Given these preconditions, the prevailing function of labour law is to restrict the one-sidedness in the employment relationship.²⁹

The concept of *worker* and the understanding of trade unions as cartels on the labour market can be seen as articulations of the idea that the cornerstone of the legal framework is ideas of equality and collectivity. A further implication of this idea is that no worker benefits from the exclusion of other workers from the collectivity, as this undermines the efficiency of labour law.³⁰ The design of the content of labour law differs between countries but it shares the core features that it manages 'labour', in a context of 'employment' and that its purpose is to protect 'workers'.³¹ From an economical perspective, it can be added that in the era following World War II, one central purpose of labour law regulation in Europe was to create an understanding between labour and capital on the need to control wage levels in order to create preconditions for surplus creation so that the surplus could be reinvested in the production.³²

²⁸ O. Kahn-Freund, *Kahn-Freund's Labour and the Law*, London, 1983, p. 18.

²⁹ A. Goldin, "Global Conceptualization and Local Constructions", in: Davidov, G. & Langille, B. (eds.), *The Idea of Labour Law*, Oxford, 2011, p. 70.

³⁰ (no 7) p. 380. My italics.

³¹ H. Arthurs, "Labour Law After Labour", in: Davidov, G. & Langille, B. (eds.), *The Idea of Labour Law*, Oxford, 2011, p. 18.

³² J. Malmberg, "Vad handlar arbetsrättslig reglering om? En essä om arbetsrättens uppgifter", Uppsala Faculty of Law Working Paper 2010:9, p. 10.

According to Marx, one of the characteristics of the capitalist system is that it transforms labour into commodity.³³ In his view, workers are free in that they have the freedom to circulate within the labour market and to sell their labour power to different employers, but unfree in that they have to do so in order to sustain themselves.³⁴ The phrase "labour is not a commodity" has become central in the labour law discourse. Inspired by the standpoint made by Marx, the father of the term is said to be the economist John Kells Ingram who used it at a speech in 1880. According to Kells Ingram, labour was often discussed as something essentially separated from the person performing the work, and treated equally to other forms of goods. The inevitable result of a focus on the similarities between labour and commercial goods would, according to Kells Ingram, be a disregard of the moral ground on which the relationship between the employer and employee rests.³⁵

The aim to prevent the commodification of labour is reflected in the establishing treaty of the International Labour Organisation (ILO) in 1919. In the Declaration of Philadelphia from 1944, where the goals of the ILO were defined, the concept is mentioned as the first principle on which the ILO is resting.

The Declaration of Philadelphia articulates four fundamental principles in its Article 1:

- (a) labour is not a commodity;
- (b) freedom of expression and of association are essential to sustained progress;
- (c) poverty anywhere constitutes a danger to prosperity everywhere;
- (d) the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of Governments, join with them in free discussion and democratic decision with a view to the promotion of common welfare.

As reflected in its Article 1, the Declaration of Philadelphia entails constraints on the freedom of contract in the labour market, and was groundbreaking in that it introduced a new approach in labour law in the articulated aim to alter the inherent subordination in power of the employee in relation to the employer. It illustrates one of the purposes in the creation

³³ P. O'Higgins, "Labour is not a Commodity: An Irish Contribution to International Labour Law". 26 *Industrial Law Journal*, 1997, p. 226ff.

³⁴ J. Fudge, "Making Claims for Migrant Workers: Human Rights and Citizenship", 18 *Citizenship Studies*, 2014, p. 39. In applying this argument on the situation of migrant workers, Fudge argues that the fact that their residence permits are often tied to a specific employer adds another dimension to the limitation of their freedom as workers.

³⁵ (no 32) p. 6.

of labour law norms during this period; the protection of vulnerable workers.³⁶

In accordance with the Declaration of Philadelphia, all individuals have the right to pursue their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity³⁷, and they shall be able to obtain the satisfaction of giving the fullest measure of their skill and attainments and make their greatest contribution to the common well-being³⁸. Supiot comments that the emphasis placed on the freedom in the work of the individual was radically new in the time of adoption of the Declaration as it constituted a shift from the previous conception that the renunciation of the freedom of the worker in the workplace was a technical and not a political constraint, and that social justice concerned distribution and not the creation of wealth.³⁹

The constitution of the ILO in 1919 stipulated that social justice is a necessary base for lasting peace. The Declaration of Philadelphia developed this notion further in that it provided a universal and inclusive definition of social justice, and considered economic and financial realms as explicit means to the achievement of that goal. The Declaration also offers a linkage between the imperative of freedom and security in its focus on human dignity; only if humans have economic security will they be able to achieve freedom and security.⁴⁰ Drawing on the content of the Declaration, Supiot argues that social justice must become the unit of measurement used to assess the adequacy of a legal order. In performing this assessment, the fate of human beings must be in the center of the evaluation of economic performance.⁴¹ On the notion of capacity, Supiot argues that labour law is unique in that it recognizes that the capacity of the individual is anchored in that of the groups to which they belong.⁴²

Another central notion in the labour law discourse is the emphasis on the humanity of the worker. Sinzheimer, who has been credited as being the father of German labour law, used the phrase "die Arbeit ist also der Mensch selbst" in his recognition of the humanity of the worker. He further pointed to the inherent inseparability between the person performing the work and the work performed and characterized the relationship between the worker and the employer as one of subordination, where the subordination emanates from the ownership of the means of production. On the notion of the inseparability between the work performed and the worker, Hepple

³⁶ J. Fudge, "Labour as a Fictive Commodity", in: Davidov, G. & Langille, B. (eds.), *The Idea of Labour Law*, Oxford, 2011, p. 123.

³⁷ Art. II a, ILO Declaration Of Philadelphia, Declaration concerning the aims and purposes of the International Labour Organisation, 1944.

³⁸ Ibid. Art III b.

³⁹ A. Supiot, *The Spirit of Philadelphia*, London, 2012, p. 105.

⁴⁰ Ibid. p. 12ff.

⁴¹ Ibid. p. 101.

⁴² Ibid. p. 111.

argues that this intimate link makes efficient labour law regulation a requirement for survival for many workers.⁴³

According to Sinzheimer, the purpose of labour law is an ambition to free the working individual and transform her from legal person to human being. Sinzheimer crafted his labour law theories in an era of democratization of the economy, as such the goals of labour law was extended further than to look after the imminent needs of the workers in terms of safeguards against abuses from the employer. Without labour law as a tool in the process to democratize the economy, the vast majority of the people risked to remain unfree and under control of an economically stable minority. As a result of the implementation of labour law, the prerogative of the employer would be conditioned on the participation of the will of the workers. The notion articulated by Sinzheimer, that labour law should serve as a tool to emancipate workers and render them autonomy in their working lives is still central in the labour law discourse.⁴⁴

Sinzheimer argued that there are dangers in letting market logic rule employment, as this will inevitably lead to the commodification of labour where low wages and poor working conditions are seen as rational cost-cutting measures offering a country comparative advantage, thus the need for democratic control of the labour market in terms of fundamental labour law norms.⁴⁵ Langille argues that the claim that "labour is not a commodity" is a normative claim rather than a descriptive one. According to him, the fundamentals of the normativity of labour law is that, with regard to the systemic rationale of protection of the person performing work against unfair exploitation, constraints are placed upon what would otherwise be the regulatory framework – general contract and commercial law.⁴⁶ Fudge distances labour from the market in arguing that labour is neither produced as a commodity, nor is the production of it dependent on an assessment of its realisation on the market. She emphasizes that labour is embodied in human beings who all are located in a network of social relations outside of the market. She points to the fact that the supply of labour is not governed by the market, but by the families in their reproduction and by the state indirectly by policies and directly by regulations on immigration.⁴⁷

In order to be encompassed by the protection of labour law, the threshold of admission is to be defined as a worker by the definition of the employment relationship.⁴⁸ Thus, labour law as a source of protection has inclusive

⁴³ B. Hepple, "Factors influencing the making of labour law", in: Davidov, G. & Langille, B. (eds.), *The Idea of Labour Law*, Oxford, 2011, p. 30.

⁴⁴ R. Dukes, "Hugo Sinzheimer and the Constitutional Function of Labour Law", in: Davidov, G. & Langille, B. (eds.), *The Idea of Labour Law*, Oxford, 2011, p. 57ff.

⁴⁵ Ibid. p. 65.

⁴⁶ B. Langille, "Labour Law's Theory of Justice", in: Davidov, G. & Langille, B. (eds.), *The Idea of Labour Law*, Oxford, 2011, p. 106ff.

⁴⁷ J. Fudge, "Labour as a 'Fictive Commodity'", in: Davidov, G. & Langille, B. (eds.), *The Idea of Labour Law*, Oxford University Press, Oxford, p. 130ff.

⁴⁸ (no 7) p. 376. G. Mundlak, "Industrial Citizenship, Social Citizenship, Corporate Citizenship: I Just Want My Wages", *Theoretical Inquiries in Law* 8.2, 2007, p. 730.

potential as it does not discriminate on grounds of for instance race, gender, nationality or citizenship. However, individuals who perform unpaid labour are in most situations not encompassed by the protective ambit of labour law. Consequently, the exclusionary features of labour law affect for instance domestic workers who do not perform wage work.

2.2 Labour Rights and Human Rights

The idea of human rights in a modern context, resting on natural law antecedents, declares that all human beings are granted certain fundamental rights by virtue of their humanity. These rights are universal and imperative.⁴⁹ The Universal Declaration of Human Rights (UDHR)⁵⁰, includes provisions regulating labour in its articles 23 and 24.

Article 23

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

A reading of these two articles, in combination with other rights articulated in the declaration such as the right to be free from slavery⁵¹, the right to non-discrimination and equal protection of the law⁵², the right to freedom of association⁵³ and the right to social security⁵⁴, supports the notion that labour rights are inalienable and universal and can rest their justification in human rights. Through the elaboration of Articles 23 and 24 of the UDHR into four Articles in the UN Covenant of Economic, Social and Cultural

⁴⁹ H. Collins, "Theories of Rights as Justifications", in: Davidov, G. & Langille, B. (ed.), *The Idea of Labour Law*, Oxford, 2011 p. 140.

⁵⁰ Universal Declaration on Human Rights, 1948. The declaration is not binding but considered to be customary international law.

⁵¹ Article 5.

⁵² Article 7.

⁵³ Article 20.

⁵⁴ Article 14.

Rights which is binding on the states that have ratified the convention⁵⁵, the standpoint that labour rights have principal elements becomes even more robust.⁵⁶

According to Collins, one critique against labour rights as human rights is the critique of human rights themselves. Those who claim that the human rights system is mystical and without force do not find them promising as a source providing strength to the implementation of labour rights.⁵⁷ However, if one accepts the premise represented by the human rights discourse, as articulated in the opening phrase of the UDHR in that the respect for the dignity and autonomy of the individual through rights is a fundament for freedom, justice and peace and that the inclusion of social, economic, political and civil rights in the declaration can be used as tools to realize not only rights for individuals but also for collectives, the question in relation to labour rights is whether universal human rights can provide grounding for normative values within the labour law context.⁵⁸

Elaborating on the question of whether labour rights are human rights, Collins discusses a demarcation line drawn between what he considers to be urgent rights and rights that do not hold the same status of urgency.⁵⁹ Collins notes that labour rights do not apply invariably or universally to all human beings. In order to be applicable they require that the individual holds the status of being a remunerated employee or the status of being in an employment-like relationship.⁶⁰ He argues that it seems likely that what will be considered to be conditions in adherence to the values reflected in the international conventions including labour rights depends on what the relevant society affords, thus the respect for liberty and dignity will be governed by minimum standards and might change over time in relation to changes in the production. As a conclusion of these observations, Collins takes a skeptical stance towards labour rights as universal human rights in considering factors such as the (light) moral weight of the claims, their (non-existing) universal applicability and the (un)strictness of the standards and their variability over time.⁶¹

Collins further argues that there is merit in the exclusion of labour rights from fundamental human rights because the latter has historically been used to distinguish governments that systematically ignore inalienable rights as immoral and illegitimate regimes that do not deserve obedience from their own citizens, neither freedom from interference from the international community. He argues that labour rights, rather than being fundamental human rights, should be looked after as fundamental rights in a

⁵⁵ International Covenant of Economic Social and Cultural Rights, 1966. The articles referred to are 6-9.

⁵⁶ (no 49) p. 141.

⁵⁷ Ibid.

⁵⁸ Ibid. p. 142.

⁵⁹ Ibid. To illustrate the distinction Collins here is using the example of the right to be free from torture versus the right to just remuneration.

⁶⁰ Ibid.

⁶¹ Ibid. p. 143.

constitutional system. In the view of Collins, the inclusion of labour rights in the UDHR is to be seen as an expression of a method for addressing problems arising from globalisation of the economic system, not as a coherent articulation regarding universal human rights with a strong moral imperative force.⁶²

Another critique against labour rights as human rights is that they are inherently different by nature. According to Youngdahl, labour rights are rights that can only be realized through collective struggles based on the idea of solidarity, whereas human rights have an inherent focus on the rights of the individual. He argues that human rights is an unsuitable tool to realize the goals that labour rights aim at as they individualize the struggle at work.⁶³

Noting that labour law and human rights law have developed separately throughout history, Arthurs argues that an integration between labour law and human rights law could be a tool to construct international regimes of international labour law, and could serve to redirect the analysis of the human rights system towards a more collective and social rights based matrix, thus move away from its depoliticized individualism.⁶⁴

As a proponent for labour rights as human rights, Mantavoulou defies the argument presented by Collins that it is possible to distinguish labour rights from human rights on levels of urgency. She argues that for many workers, the realisation of labour rights are of greater importance than the realisation of rights that are by the definitions used by Collins established human rights.⁶⁵

According to Besson, the human rights guarantees in international law are minimal and rely on national guarantees to set the minimal threshold. They are usually meant to be abstract and intended to be fleshed out at the domestic level, both in terms of specific duties attached to a specific right and in terms of the right itself. This complementarity explains why national reception of international human rights law within domestic law is required by international human rights instruments; domestic human rights law contextualises and specifies the human rights. According to Besson, the effect of human rights is to make sure that boundaries between members of a given political community and non-members are constantly questioned and pushed further to include more stakeholders among decision-makers. As such, domestic law can recognize universal human rights and turn them into effective human rights.⁶⁶

⁶² (no 49) p. 144.

⁶³ J. Youngdahl, "Solidarity First: Labour Rights are not Human Rights", *New Labor Forum*, nr 1, 2009, 30-37, p. 31.

⁶⁴ (no 31) p. 22.

⁶⁵ V. Mantouvalou, "Are Labour Rights Human Rights?" *UCL Labour Rights Institute On-Line Working Papers – LRI WP X*, 2012. p. 17.

⁶⁶ S. Besson, "The Right to Have Rights: From Human Rights to Citizens' Rights and Back", in: M. Goldoni and C. McCorkindale (eds.), *Hannah Arendt and the Law*, Oregon, 2012, p. 351.

2.3 Citizenship

2.3.1 Arendt's Theory of Citizenship and Rights

In her famous work *The Origins of Totalitarianism*, Hannah Arendt argues that stateless people and refugees illustrate the limits of so-called human rights inasmuch as these rights appear to suddenly vanish at the exact moment when they are required; when one is no longer a citizen of a particular state, but merely a human being. The rights are in her view contingent on the inclusion in a political community; when one is deprived of membership in such community no rights can be guaranteed.⁶⁷ From this conclusion Arendt puts forward the idea of the inherent limitations following from the concept of the nation state and nationalism. Their relationship to the necessary exclusions following from political membership leads to her distrust of national sovereignty as the inclusion in the political community is governed by the nation state system.⁶⁸ Further, Arendt contends that the fact that international law operates in terms of reciprocal agreements and treaties between sovereign states is a limitation for the realisation of human rights of every individual.⁶⁹

Arendt's theory of rights has been contested and the content of the right to have rights is debated. Arendt defined the right to have rights as a twofold concept; the right includes the right to belong to some kind of political community and the right of every individual to belong to humanity.⁷⁰ It has been argued that the first right relates to the nation state system, whereas the second one can be described as a moral claim to citizenship or legal personhood within the state.⁷¹ James Bohman argues that the prospect of a world in which all persons have basic freedoms and underived legal status is a realistic extension of current constitutional practices, since no constitution would be able to fulfil the demands of the rule of law without some cosmopolitan components implementing the universal status and protections.⁷²

Arendt's discussion on the right to have rights mainly focuses on the particular vulnerabilities of stateless persons in the nation-state system. However, non-citizens have been described as modern variants of stateless persons in that they lack security and basic rights in the countries to which they have migrated.⁷³ Dauvergne and Marsden argue that Arendt's concept

⁶⁷ H. Arendt: "The Origins of Totalitarianism", Orlando, 1978, p. 296, 299 and 302.

⁶⁸ (no 66) p. 339.

⁶⁹ (no 67) p. 177f.

⁷⁰ (no 67) p. 296f.

⁷¹ J. Bohman, "Citizens and Persons: Legal Status and Human Rights", in: M. Goldoni and C. McCorkindale (eds.), *Hannah Arendt and the Law*, p. 333.

⁷² Ibid. p. 334.

⁷³ (no 34) p. 37.

of rights relating to citizenship can be read as a study of labour under the conditions of globalisation.⁷⁴ In 1958, Arendt wrote that the main difference between the slave and modern, free labour is not that the labourer possesses personal freedom of movement, economic activity and personal inviolability, but that the labourer is admitted to the political realm and fully emancipated as a citizen. In other words, the dichotomy Arendt is using is not citizenship vis-a-vis non-citizenship but rather citizenship vis-a-vis slavery.⁷⁵

The migrant worker is forced by economic necessity to leave her home country to become a migrant worker in a country where she lacks citizenship. The unfreedom inherent in the lack of full participation in the political community where she works and resides constitutes the basic condition for the migrant worker, an unfreedom that rights cannot fully resolve.⁷⁶ When applying Arendt's concept of the right to have rights, the subordination of the migrant worker can be explained accordingly.⁷⁷

In Jacques Ranciere's development of Arendt's ideas of the right to have rights, he focuses on the exercise of the claim of rights as the location, in other words the enacting of equality. As a furtherance of this idea, an example referred to is the performative part of the exercise of rights in relation to undocumented migrants who by acting as if they have the rights they lack actualise their political equality. Between Arendt and Ranciere, a demarcation line has been identified when it comes to the view of equality. Arendt considers equality as something that has to be constructed, whereas Ranciere treats it as axiomatic in that it does not have to be created or proven, only asserted and enacted.⁷⁸

Ranciere argues that it is not the recognition of the claims that is important. In claiming rights the individual takes the form of a subject and for Ranciere, in contrast to Arendt, it is not of importance whether the subject is recognized as an equal by the political community. Using the thoughts of Ranciere in relation to migrant workers, Fudge argues that international human rights gain their significance when they are used by migrant workers to assert their equality with citizens. Fudge concludes that migrant workers illustrate the need to rethink our old paradigm of nation-state citizenship and to embrace tools including human rights to contest the unfreedom that subordinate workers in a globalised world.⁷⁹

⁷⁴ C. Dauvergne and S. Marsden, "The Ideology of Temporary Labour Migration in the Post-Global Era", 18:2 *Citizenship Studies*, 2011, p. 225.

⁷⁵ H. Arendt, *The Human Condition*, Chicago, 1958/1998, p. 217. (no 37) p. 36.

⁷⁶ (no 34) p. 37.

⁷⁷ (no 34) p. 38.

⁷⁸ C. Barbour, "Between Politics and Law: Hannah Arendt and the Subject of Rights" in: M. Goldoni and C. McCorkindale (eds.), *Hannah Arendt and the Law*, Hart Publishing, Oregon, 2012, p. 314.

⁷⁹ (no 34) p. 42f.

2.3.2 Migrant Workers and Citizenship

Fudge argues that in a globalized world, the Westphalian notion of citizenship is creating a mismatch between the scale of justice, which has historically been located within the nation-state, and structural causes of many injustices.⁸⁰ During the 20th century, the role of citizenship in defining the nation has been complicated through the increasing movement between states. As a result of this development, the political community has become increasingly heterogeneous and membership can no longer be assigned simply as a product of birth or ancestry. Citizenship has become not only a status but an entitlement to rights, and it has been argued that the transformation of the content of citizenship has reduced its importance of citizenship as a status; core economic, political and social rights are offered not only to citizens but also to non-citizens.⁸¹

However, notwithstanding the decreased importance of the nation-state system in relation to the enjoyment of rights, according to Reilly we are located in an era of trans-nationality, and the post-national world is not yet upon us. In the current era, influenced by immense movement across state borders, citizenship continues to play an important role in drawing the lines of exclusion. In attending to human rights of migrant workers, the membership in a particular state is of importance in enjoying fundamental rights; state sovereignty still limits the human rights regime. According to Reilly, the limits of international law protection of workers is a product of the dual function of citizenship – it has an exclusionary function as a determinant of membership at the same time as it ensures equality of rights as a function of inclusion for the members.⁸² The alien cannot hope to achieve equal rights with citizens, as the very rationale behind excluding others is to maintain privileges and advantages of the citizenship. This points us to the distinction between citizenship rights and international human rights; the former are derived from the relationship between the individual and the state, whereas the latter emanate from universal notions of human dignity. The best that international law can do to protect migrant workers is to replicate rights conferred on citizens within the state.⁸³

In the view of Reilly, the success of the international community to require states to provide civil, political, economic and social rights to migrant workers has been limited.⁸⁴ According to Reilly this reflects the function of migrant work in the global economy; a tool to increase wealth production in receiving states. In his words, "the exclusionary function of citizenship has moved from the border, and now occurs within the state". Migrant workers

⁸⁰ (no 34) p. 29f.

⁸¹ A. Reilly, "The Membership of Migrant Workers and the Ethical Limits of Exclusion", in: J. Howe and R. Owens (eds.): *Temporary Labour Migration in the Global Era*, Oregon, 2016, p. 281.

⁸² Ibid. p. 282.

⁸³ Ibid. p. 283.

⁸⁴ Ibid. As an example he points to the fact that the 1990 International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families has the least number of ratifications of any mayor international human rights treaties.

are not refused entry to the state but are admitted with reduced rights vis-à-vis members.⁸⁵ He concludes that high-income states want migrant workers and if workers were granted membership in their entry, states would have to choose between the modernisation of their approach to citizenship or to miss out on the benefits of migrant labour.⁸⁶

Ruhs addresses what he calls the big gap that exists between the rights migrant workers are entitled to in accordance with international human rights instruments, and the practical circumstances migrant workers face in high-income countries. Applying what he refers to as a realistic approach, he argues that some inequality between migrant workers and national workers is motivated by a pragmatic stance on rights based on the argument that labour migration is taking place in a world that is based on deep inequalities between nations. As such, the argument goes, it is motivated that migrant workers make a trade-off in terms of trading some rights in order to gain access to work opportunities. Thus, a strict universalism cannot realistically be employed.⁸⁷ Furthermore, he argues that there are trade-offs in high-income countries between openness in admitting migrant workers and some of the rights granted to those workers. He points to the phenomenon that insistence on greater equality of rights generally come at the price of more restrictive admission policies, particularly for low-skilled workers.⁸⁸

The work of Ruhs rests on a discussion of the interests and roles of nation-states in granting and restricting rights of migrant workers. His conclusion is that key features of labour immigration policies in high-income countries are consistent with a rational national policy-making process based on costs and benefits, where values such as economic efficiency, distribution, social cohesion and national identity are of importance.⁸⁹ Ruhs argues that rights that should be within the scope of rights that states can restrict for migrant workers are the free choice of employment, equal access to means-tested public benefits, the right to family reunification and the right to permanent residence and citizenship. In his view the restriction of rights must be evidence-based in that it must be certain that these rights cause specific costs that the receiving country wants to avoid or minimise in order to enable a more open admission for migrant workers. The outcome of this policy change would, according to Ruhs, lead to that the overall protection of migrant workers would increase.⁹⁰ His argument is that a human rights approach applied to labour migration runs the risk of protecting the good in

⁸⁵ (no 81) p. 283.

⁸⁶ (no 81) p. 297.

⁸⁷ M. Ruhs, "Protecting the Rights of Temporary Migrant Workers: Ideals versus Reality", in J. Howe and R. Owens (eds.): *Temporary Labour Migration in the Global Era*, Oregon, 2016, p. 299.

⁸⁸ Ibid. p. 301.

⁸⁹ Ibid. p. 307.

⁹⁰ Ibid. p. 309, 312 and 319. Sweden is mentioned as an exception, as the implementation of the new labour migration legislation in 2008 does show that a trade-off between openness and rights is not inevitable. Ruhs argues, however, that the tension between openness and rights will eventually come to the fore.

the area of promoting rights of existing migrants but at the same time doing harm when it comes to migrant workers to be. In his view this is a dilemma that agencies promoting rights of migrant workers have been reluctant to engage with.⁹¹

⁹¹ Ibid. p. 308.

2.4 Labour Rights, Human Rights or Citizenship Rights?

	Citizenship	Human rights	Labor rights
The premise of rights	Rights of membership in a community	Rights of humanity	Rights derived from the need to address asymmetry in the labor market
Universal or communal	Community-based	Universal	Universal objectives; adapted to community
Relativism	Allows variation in the prescription of rights across communities (as long as all members of the community receive equal rights)	Less tolerant about relative construction of rights	Acknowledges broad differentiation of rights across nation-states, but also in different occupations and sectors
Active participation	Emphasizes active participation	Right of participation in economic sphere is under-developed	Active participation is one of many values, all of which are judged by their impact on the labor-capital axis
Public and private	Public rights	Public rights, but in some countries extended to the private sphere as well	Private sphere rights with implications for the public sphere as well
Inclusion/exclusion	Equal membership rights for the constituents of the community; exclusion of non-constituents	Equal rights for all; allows multiple claims by individuals and groups; the rights of some may trump the rights of others	Rights of labor that promote equality on the basis of class; excludes non-waged workers and peripheral workers in the labor market
Major contribution	Membership, participation	Universality	Power, class

G. Mundlak, 2007.

The figure above is used by Mundlak to sketch an overview of the citizenship-human rights-labour rights nexus.⁹² He argues that citizenship rights focus on a link to membership, backed by enforceability mechanisms.

⁹² G. Mundlak, "Industrial Citizenship, Social Citizenship, Corporate Citizenship: I Just Want My Wages", *Theoretical Inquiries in Law* 8.2, 2007, p. 731.

Human rights are in this context used in order to require universal minimum standards of treatment of workers, and labour rights aim at addressing the vulnerabilities that are associated with the unequal power relationship between employers and employees. These three frameworks are in his view complementing each other.⁹³ Citizenship contributes to the analysis of labour market institutions in that it emphasizes the public nature of the rights of workers but may, on the other hand, compromise the capacity of workers to negotiate basic labour rights. Human rights, in contrast, are a preferred tool to distinguish fundamental rights from ordinary rights and labour rights are best suited to address matters of power structures.⁹⁴

Mundlak criticises citizenship as an effective tool to negotiate fair remuneration, protection from dismissal and dignity of labour. He argues that labour law can be used as a way to bypass the traditional and exclusionary structure of citizenship as the basis for rights.⁹⁵ According to him, rights associated with citizenship may not be emancipating to all, since it does not resolve the class conflict.⁹⁶ According to Mundlak, the distinction between citizenship rights and human rights is unclear and neither provides a complete rights-based solution to all social problems. However, one main difference between the two sets of rights is according to Mundlak that citizenship rights aim at the establishment of a relationship between individuals and groups and the community, often the nation-state. In contrast, human rights emanate from a perception of humanity that extends beyond the nation-state. As an example of the practical implications of this distinction in relation to migrant workers Mundlak is discussing the extension of social rights. In order to include migrant workers in the enjoyment of those rights, one path to take is to extend the rights associated with citizenship beyond the formal constituency of citizens to also include individuals deemed to be outsiders of the community, the other is to use the argument that migrant workers are entitled to the enjoyment of social rights as part of their human rights despite the fact that they are lacking membership in the society.⁹⁷

In the view of Mundlak, a fundamental principle in the search for the most appropriate institution for the advance of the interests of labour is that of power, as it is the power to negotiate that is intrinsically asymmetrical. Several meanings of power are relevant; the power to negotiate in a market, the power of workers to act in concert and define joint objectives and the power of workers and employers to overcome conflict and design institutions that foster mutual trust.⁹⁸

Mundlak sketches a quite ambivalent picture of labour law as he argues that it does not assume universality in the same way as the human rights

⁹³ Ibid. p. 719.

⁹⁴ Ibid.

⁹⁵ Ibid. p. 720.

⁹⁶ Ibid. p. 722.

⁹⁷ Ibid. p. 728.

⁹⁸ Ibid. p. 729.

framework. He points to differences across states, sectors and occupations. At the same time, he points to the fact that labour studies do not insist on the national community as the appropriate unit of analysis, and the fact that the conflict between labour and capital is not limited by state boundaries. His conclusion is that the framework of labour rights is more similar to the human rights framework than that of citizenship.⁹⁹

One conclusion that can possibly be drawn from this chapter is that human rights, regardless of whether they are to be defined as comprising labour rights, and rights contingent on citizenship, are state centric in the sense that they depend on the state for the implementation. A further conclusion is that labour law, in the sense that its scope of protection serves to encompass all individuals who perform work, does not discriminate on grounds of nationality.

This discussion on the location of rights of migrant workers will serve as a background to the discussion on the relationship between labour law and migration law in the next chapter.

⁹⁹ Ibid. p. 729f.

3 THE RELATIONSHIP BETWEEN LABOUR LAW AND MIGRATION LAW

This chapter provides an account of the relationship between labour law and migration law. The standpoint that labour law protection is of intrinsic value will be elaborated on. Further, the notion that deportability is a factor that creates vulnerability will be developed.

3.1 The State Prerogative to Regulate Migration

All nation states have the right to regulate their immigration. The right of everyone to leave their country, found in the UDHR Article 13, is not met by a corresponding article that provides a right to admission to another country. This right to control immigration is part of the personal sovereignty of the state and has ancient origins in international law. By signing conventions on human rights and refugee law however, states have agreed to limit their sovereign right to control who is entering their territory. The main limitation is the prohibition of refoulement found in the 1951 Refugee Convention and the Convention on against Torture.¹⁰⁰ The personal sovereignty of each nation state further entails that sovereign states may require of particular categories of migrants to have certain skills and experience. Thus they can place restrictions in their migration laws on the freedoms, privileges, rights and entitlements of migrants who enter their territory. If the state decides so, it can allow immigration of foreign labour one day and prohibit it the next. The state is also free to differentiate admission between well-educated labour and labour with little or no education. This has implications for the supply of labour as the migratory processes can produce precarious employment norms; migration law regulates who is allowed to be part of the workforce of a particular state, at the same time migration law creates different power relations between the workers and their employers. The latter notion supplements the rife understanding of labour migration which focuses on how national work permit systems are motivated by a wish to obstruct low wage competition and to defend wage levels in the domestic labour market.¹⁰¹

¹⁰⁰ G. Noll, "The Asylum System, Migrant Networks and the Informal Labour Market" in *Swedish Studies in European Law, 2008*, in: Bull, T, and Cramér, P, (eds.) p. 3. 2008.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984. The Refugee Convention, 1951. Member states of the European Union are also obliged to adapt to union legislation governing labour migration, see section 4.3.

¹⁰¹ (no 34) p. 30. (no 7) p. 377.

In relation to the International Covenant on Civil and Political Rights (ICCPR), consent for entry to the territory of a state may be given subject to conditions relating to for example residence and employment. However, once a foreigner is allowed to enter the state territory they are entitled to the rights set out in the covenant.¹⁰²

3.2 The Different Interests of Labour Law and Migration Law

The labour law system has been described above as a system to compensate for a subordinate bargaining position between the employee and the employer.¹⁰³ The rationale behind the migration law system, on the other hand, is to regulate the access of the individual to state territory.¹⁰⁴ The interplay between the legal frameworks of labour law and migration law can take different forms; labour law can be used as a tool to dampen demand for migrant workers, it can also liberalise labour migration.¹⁰⁵

Regarding the distinction between labour law and migration law, Selberg argues that the creation of political and administrative limits constituting state borders and the distinction between who is admitted to the territory of the state and who is not are arbitrary by nature as they are created by legal means and does not presume, as does labour law, an adamant insistence on principles of equality, uniformity and collectivity. The criteria required in order to be able to enter and reside and work in states are contingent and will vary over time. Admission to labour law, on the other hand, is objective in that it follows from the activity of the human being – the work performed.¹⁰⁶

Selberg argues that the realisation of labour law does not threaten the realisation of migration law, whereas the opposite is not true. The realisation of migration law principles in the labour market would abolish the labour law system. His argument is that only if the inherent principles of labour law are given precedence in the labour market can both labour law and migration law coexist in an autonomous relation to each other. If migration law principles are given precedence, the other legal framework is abolished. Selberg describes the relationship between the two fields of law as that “Working human bodies have to be equals in relation to the concept of worker, if they are not the existence of labour law is threatened. At the same time, this equality on the labour market does not threaten the existence of

¹⁰² HRC Gen Comment nr. 15: The Position of Aliens under the Covenant, point 6. International Covenant on Civil and Political Rights, 1966.

¹⁰³ See section 2.1

¹⁰⁴ (no 7) p. 380.

¹⁰⁵ M. Freedland. and C. Costello, “Migrants at Work and the Division of Labour Law”, in: (eds.) Freedland. M and Costello C. “Migrants at Work: Immigration and Vulnerability in Labour Law”, Oxford, 2014. p. 14.

¹⁰⁶ (no 7) p. 381.

migration law.”¹⁰⁷ Against this background, the normative conclusion is that labour law should be given precedence and be inclusive of all who are excluded through the migration law system.¹⁰⁸

Older preparatory works for Swedish labour law legislation reflected the fundamental idea that work is the base for all welfare and that the will of the people to work is the most important asset for the nation.¹⁰⁹ Selberg argues that this notion should be transformed into the era of globalisation in that it should welcome the will to work of all people, not only the citizens, and that this will to work should be seen as an asset, not as a threat against the nation or be constructed as an opportunity to exploit migrant workers.¹¹⁰

A few landmark cases on the relationship between labour law and migration law, both Swedish and international, should be mentioned to illustrate considerations that have been deemed of importance by the courts. In 2002, the U.S. Supreme Court in the case of *Hoffman Plastic Compounds, Inc v. NLRB* subordinated labour law to migration law as an undocumented worker whose employment had been terminated due to union organizing was denied back-pay. The judgment was divided along ideological lines and in their dissenting opinion, liberal justices expressed their concern that immigration law would be used as a tool for employers to relieve themselves from obligations according to labour law provisions.¹¹¹ The Swedish Labour Court took a similar stance in its case 1979 no 90 as migratory status impacted the enjoyment of the possibilities for the claimant to enjoy her labour rights.¹¹² In accordance with the ruling, undocumented workers do not possess the right to labour law protection in relation to the termination of the employment as lack of residence permit is considered to constitute a substantial ground for dismissal. However, the court expressed its concern that the different laws seem to be in conflict and that this conflict creates a vulnerable position for the migrant in that the employer must not observe protective labour law provisions if they imply criminal responsibility on the employer.¹¹³ In contrast, as an example of a ruling where the court has taken a stance in protection of labour rights for migrant workers, in its advisory opinion OC-198/03 The Inter-American Court of Human Rights (IACtHR) ruled that labour rights arise from the circumstance that someone is a worker. The IACtHR concluded that migration status can never be a justification for the deprivation of the enjoyment and exercise of human rights, including those relating to employment.¹¹⁴

¹⁰⁷ (no 7) p. 381.

¹⁰⁸ *Ibid.*

¹⁰⁹ (no 7) p. 383.

¹¹⁰ *Ibid.*

¹¹¹ *Hoffman Plastic Compounds, Inc v. NLRB*, 535 U.S. 137 (2002).

¹¹² AD 1979 no 90.

¹¹³ N. Selberg, “The Swedish Labor Market and Irregular Migrant Workers. Reflections on Interest Representation on a Segmented Labor Market and on the Future of Neo-Corporatist Labor Relations in Sweden”, 2012, p. 14. In accordance with the Aliens Act it is a criminal act to employ someone who lacks a work permit.

¹¹⁴ Advisory Opinion OC-198/03 133-134.

3.3 The Effects of Deportability on the Enjoyment of Labour Rights

Kountouris has defined migration status as a legal determinant making the employment relationship precarious; migratory status plays a crucial role in determining whether the migrant worker will be able to enter a secure and rewarding work contract or relation. Notwithstanding that international conventions stipulate that migration status shall not be an obstacle to the enjoyment of labour law protection, the impact of immigration status on labour rights enjoyment differs between legal systems.¹¹⁵ According to Costello, migration status can distort the employment relationship in that the migratory status of an individual tends to govern whether she is deemed worthy of labour law protection. Thus, migration law is altering the nature of the legal subject of labour law.¹¹⁶ De Genova argues that the legal vulnerability of undocumented migrant labour, materialized by deportability, augments the inherent subordination in the relationship between the employer and the employee.¹¹⁷ These reflections mainly refer to labour rights of undocumented migrant workers. For documented third country migrant workers the vulnerability lies in that their right to reside in the country is contingent on the employment for a particular employer.

According to Anderson, immigration controls are systems producing specific migratory statuses which determine where in the labour market the migrants can be employed. Thus, immigration controls determine not only the conditions for entry but the conditions for stay. Due to the dependence on the employer for migratory status, an effect of the construction of immigration controls is that they create specific groups of workers considered desirable for certain occupations, as the risk of deportation makes it less likely that they will claim their rights. This entails that not only undocumented workers, but also those who are residing in the country legally can be considered as precarious workers as they are subject to deportation.¹¹⁸ A comparison between migrant workers in Sweden who have permanent residency and migrant workers who do not has shown that the latter group tends to be treated better at work places in that they are given less heavy tasks and better work hours. Furthermore, the possibility to change employer is an important factor in order to increase the salary. The fact that the work permit is tied to a particular employer during the first two years thus impacts the wage levels of migrant workers.¹¹⁹ Mantouvalou concludes that work is a key factor for migration and argues similarly to

¹¹⁵ N. Kountouris, "The Legal Determinants of Precariousness in Personal Work Relations: A European Perspective" *Comparative Labor Law and Policy Journal*, Vol. 34, nr 1, 2012, p. 26f.

¹¹⁶ (no 105) p. 15.

¹¹⁷ De Genova, N, "The Deportation Regime. Sovereignty, Space and the Freedom of Movement", in: De Genova, N and Peutz, N (eds.) "The Deportation Regime. Sovereignty, Space and the Freedom of Movement", Duke, 2010, p. 47.

¹¹⁸ Ibid. p. 46. B. Anderson: "Migration, immigration controls and the fashioning of precarious workers", *Work, Employment & Society*, Vol. 24, nr 2, p. 308ff.

¹¹⁹ (no 13) p. 262.

Anderson that migration law contributes to the creation of groups of workers that are more attractive to employers due to the vulnerability that makes them more prone to exploitation.¹²⁰

3.4 The Firewall Argument

As discussed in the previous section, the practical enjoyment of labour rights of migrant workers may be hampered by the circumstance that the claiming of rights is associated with a risk of deportation. This section provides an account of a theory that aims to enable a separation between rights claims and deportation.

Initially, it can be mentioned that most states do protect some labour rights of migrant workers but do not completely insulate them from migration law concerns. Mantouvalou argues that labour law should seek to isolate its worker protective aspects from migration law in order to include all workers irrespective of their migration status, as that order would protect national workers from undercutting in wages while at the same time protecting migrant workers from unfair or unjust treatment.¹²¹ According to Gregor Noll, one of the reasons that an increase in migration of documented migrant workers will not decrease the demand for undocumented migrant workers is that the latter group of workers lacks visibility and possession of certain rights, thus they are cheaper.¹²² As for documented third country migrant workers, Herzfeld Olsson emphasizes the importance to attend to the combined effect of migration law and labour law when discussing employment protection of this group. If the migrant worker risks losing her employment when trying to enforce the work conditions she is entitled to, the price of enforcement of labour rights will be very high as the right to residency is linked to the employment. The migrant worker in this situation risks double punishment as she might lose both her employment and right to residency.¹²³

In order to facilitate for irregular migrants to make use of their rights without risking deportation, Carens introduces what he calls the “The Firewall Argument”.¹²⁴ The starting point for the argument is the descriptive statement that the existence of legal entitlement to rights does not equal a factual possibility to make use of them. In relation to undocumented migrants this is exemplified by the deterring effect of their well-founded worry about being deported. In the view of Carens, this creates serious

¹²⁰ V. Mantouvalou: “Organizing against abuse and exploitation”, in: (eds.) Freedland, M and Costello C. *Migrants at Work: Immigration and Vulnerability in Labour Law*, Oxford, 2014, p. 384.

¹²¹ (no 105) p. 16.

¹²² (no 100) p. 14.

¹²³ P. Herzfeld Olsson: “Empowering Temporary Migrant Workers in Sweden: A Call for Unequal Treatment” in J. Howe and R. Owens (eds.): *Temporary Labour Migration in the Global Era*, Oregon, 2016, p. 205.

¹²⁴ J. Carens, “The Rights of Irregular Migrants”, *Ethics & International Affairs*, Vol. 24, p. 167.

normative problems for democratic states in that people are provided with formal rights in human right treaties, whereas practical conditions make their effective enjoyment impossible. Consequently, Carens suggests that a “Firewall” should be built between immigration law enforcement and the protection of basic human rights; a firm legal principle entailing that no information gathered by those responsible for the protection and realization of basic human rights could be used for immigration enforcement purposes. Carens draws on the examples that irregular migrants should be able to visit hospitals and report crimes without risking deportation.¹²⁵ According to Carens, policies of this sort have been adopted, both formally and informally and the rationale has been partly the concern for the basic human interests of the migrants themselves and partly the concern for wider public benefits of securing cooperation of undocumented migrants for the achievement of certain purposes such as the gathering of information in crimes or the reducing of the spread of contagious diseases.¹²⁶

In discussing the practical outcome of the “Firewall”, Carens makes a distinction between rights of such fundamental nature that they must be granted to undocumented migrants, and rights that should not be included. He contends that the enjoyment of work-related rights of undocumented migrants is more contested than the enjoyment of basic human rights.¹²⁷ The granting of work-related legal rights to undocumented migrants directly undercuts the claim of the state to control the terms of entry in a way that the granting of basic human rights does not. Nevertheless, the view of Carens is that considerations of principle and policy outweigh the interest of the state in not granting those rights to irregular migrants. In relation to the right to earnings, he argues that it is wrong for the state to announce that employers are free to extract work performed by irregular migrants and withhold the promised pay. Consequently, the right to receive pay for work performed is to be considered a basic human right according to Carens, and workers should be able to pursue legal remedies to receive the payment without being exposed to immigration authorities.¹²⁸

In relation to working conditions, all democratic states set up limits for minimum standards under which economic activity should be conducted within its borders, and these standards should apply to all workers within its jurisdiction. According to Carens, the decisive consideration in relation to undocumented migrant workers is that they are members of the national workforce. Carens notes that the capacity of the state to secure those minimum standards for its own citizens and documented migrants is contingent on their capacity to ensure them for undocumented migrants. This relates to the paradoxical rationale for denying work-related rights to undocumented migrants; that the denial of those rights will reduce incentives for them to arrive in the first place. The denial of rights has a

¹²⁵ Ibid.

¹²⁶ Ibid. p. 168.

¹²⁷ Ibid. p. 166. As examples of basic human rights Carens mentions rights that are usually enjoyed not only by citizens but by tourists and temporary visitors, such as the security of one’s person and property.

¹²⁸ Ibid. p. 173f.

counterproductive outcome in that it creates a comparative advantage for employers who hire undocumented migrant workers, and leads to an increasing demand for this particular work force.¹²⁹ Carens concludes that the only way to secure effective work-related rights for undocumented migrants is to apply the “Firewall” between the enforcement of them and the enforcement of immigration law. The implementation of such a “Firewall” also benefits citizens and documented migrants in that it decreases the likelihood that employers are able to gain financial advantages by hiring irregular migrants not likely to claim their rights.¹³⁰

Could the “Firewall argument” also be of relevance in relation to documented third country migrant workers? Taking into consideration the vulnerability of this group of workers as their right to residence is tied to the employment, Herzfeld Olsson proposes a guarantee that the documented third country migrant worker shall be able to enforce her labour rights¹³¹ without risking the termination of the employment.¹³² The “Firewall Argument” in relation to third country migrant workers will be discussed in chapter six.

¹²⁹ Ibid. p. 176.

¹³⁰ Ibid.p. 177.

¹³¹ The example of labour rights used is the enforcement of the employment contract.

¹³² (no 123) p. 222.

4 LABOUR MIGRATION – THE CONTEXTUAL AND LEGAL SETTING

This chapter provides an overview of the legal and contextual setting for labour migration in Sweden. Relevant international law, as well as the Swedish labour migration framework and proposed changes of the framework currently undergoing assessment will be reviewed.

4.1 International Law

4.1.1 The United Nations

In the aftermath of World War II, the United Nations (UN) was created with the aim of establishing a secure world order. In 1948, the UDHR was adopted, comprising of human rights encompassing all human beings. Article 23 and 24 of the declaration entail work-related rights. The ICESCR includes work-related rights in its Articles 6-9.¹³³ In contrast to the UDHR, the ICESCR is binding for all states that have ratified it. Being a ratifying party to the convention, Sweden therefore has an obligation to observe the rights stipulated in the covenant. However, of relevance for the enforcement of the rights is that the system does not offer a possibility for individuals to make claims.¹³⁴

In 1990, a binding convention on the protection of migrant workers and their families (ICPRMW) was adopted by all member states of the UN.¹³⁵ The convention does not distinguish between documented and undocumented migrants and comprises an extensive set of rights including the right to equal treatment with domestic workers regarding protection against termination of employment, unemployment benefits and rights to form associations and trade unions. The convention came into force in 2003. However, the fact that few receiving states have ratified the convention¹³⁶ makes the impact of it on the situation of migrant workers moderate.¹³⁷

¹³³ See section 2.2.

¹³⁴ H. Hydén, “Mänskliga rättigheter: Svenska regelsystem med internationella kopplingar”, in: A. Staaf and L. Zanderin, (eds.), *Mänskliga rättigheter i svensk belysning*, Malmö, 2011, p. 43f.

¹³⁵ International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families, General Assembly resolution 45/158 of 18 December 1990.

¹³⁶ No EU member states have ratified the convention.

¹³⁷ C. Calleman, “Arbetskraft, arbetsgivarmakt och mänskliga rättigheter, In: Vänbok till Claes Sandgren –Utblick och inblick, Uppsala, 2012, p. 135. It has been argued that one reason that few states have ratified the convention is that most rights included in the convention are covered by other conventions on human rights that already cover migrant workers. Calleman argues however that a ratification of the convention would serve as a signal of migrant workers.

Therefore, a thorough analysis of the convention will be left aside. However, it should be noted that Article 79 of the convention stipulates that nothing in the convention shall affect the right of the state to establish criteria governing admissions. This Article taken together with the preamble which emphasizes the importance of protecting the rights of undocumented migrant workers makes an interesting reading.

4.1.2 The International Labour Organization

Established in 1919, the International Labour Organization (ILO) engages with labour and employment matters on an international level. Since 1946, the ILO is an independent organ within the UN operating with the aim to improve working conditions and contribute to social justice within the member states. The ILO has attended to the situation of migrant workers. Convention number 97 on Migration for Employment¹³⁸ and Convention number 143 on Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers¹³⁹ specifically target the rights of migrant workers. Among other rights, the conventions provide for equal treatment between migrant workers and national workers in relation to wages, the enjoyment of benefits from collective bargaining and social security.

Article 1 of Convention number 143 stipulates that all states bound by the Convention undertake to respect the basic human rights of all migrant workers. Article 8 of the Convention stipulates that the loss of employment shall not entail that the migrant is considered illegal, and shall not lead to withdrawal of authorization of residence or withdrawal of work permit if the migrant worker has resided legally in the territory. The second part of Article 8 entails that the migrant worker shall enjoy equal treatment with nationals in respect of guarantees of security of employment.

In comparison with the ICPRMW, ILO conventions number 97 and 143 have been ratified by a larger number of receiving countries. Ratifying countries are obliged to observe the provisions in the conventions, but the conventions lack efficient sanction systems. That the ILO has failed to produce binding conventions including rights exceeding those in previous conventions has been deemed as a symptom of the political limitations in reshaping labour law through international labour regulations.¹⁴⁰

¹³⁸ Migration for Employment Convention (Revised), 1949, (No. 97).

¹³⁹ Migrant Workers (Supplementary Provisions) Convention, 1975, (No. 143).

¹⁴⁰ L. Vosko, "Out of the Shadows? The Non-Binding Multilateral Framework on Migration (2006) and Prospects for Using International Labour Regulation to Forge Global Labour Market Membership", in: Davidov, G. & Langille, B. (eds.), *The Idea of Labour Law*, Oxford, 2011, p. 377.

4.2 Labour Migration and Global Economic Inequality

The focus of this thesis is to analyse sources of protection for third country migrant workers, and to investigate the relationship between labour law and migration law. There is, however a dimension in the discourse on the movement of labour which focuses on labour migration as an enabler for the increase of global economic inequality and exploitation. This dimension will not be discussed in deeper detail, but this section provides an overview of the critique.

As a justification for immigration restrictions the phenomenon of “brain drain” is sometimes mentioned. The term refers to migration of skilled workers, a group of migrants that states are most willing to admit. The argument of justification entails that emigration from developing countries lead to stagnation in development as the educated part of the population leaves the country. Countervailing factors, such as remittances sent home to family members in home countries is a compensator that may lead to a net gain for the developing countries.¹⁴¹ However, Kiernan Oberman argues that developed states have other measures than the restriction of immigration policies that should be used in first place in order to counteract stagnation of development in developing countries. These alternative measures include taxing emigrants in the receiving state and recruiting replacement workers to work in the sending state. As such, in order to justify restriction on immigration as a means to counteract brain drain it has to be taken into consideration that restrictions on the movement of individuals are restrictions on a basic liberty, and the infringement of such liberty cannot be taken lightly.¹⁴² As a long-term strategy to reduce labour migration, development in regions with high emigration has been deemed necessary. It has been argued, however, that it is of importance that this strategy is not implemented at the expense of protection of migrant workers.¹⁴³

Another angle of critique of the consequences of movement of labour focuses on what is described as a “global care chain”. The “global care chain” is typically exemplified by a situation where a woman in a rich country enters paid employment and as a result needs someone to take care of household work. This work is often performed by a woman from a developing country, and not seldom has the care-taking woman herself left a situation in her home country where another woman has to look after her household. Consequently, a chain of care is produced where the domestic work performed by women “down” in the chain is often unpaid; the domestic care work is “outsourced” and often entails migration. These

¹⁴¹ K. Oberman, “Can Brain Drain Justify Immigration Restrictions?” *Ethics*, 123(3), 2013, p. 428.ff.

¹⁴² *Ibid.* p. 455.

¹⁴³ R. Cholewinski, *Migrant Workers in International Human Rights Law*, Oxford, 1997, p. 407.

chains have been described as catalysts for global injustice as the women performing low paid or unpaid domestic work in most cases are unable to educate themselves.¹⁴⁴

As has been mentioned above in section 2.1, the labour law concept does not include domestic labour as it lacks the criterions that fit the *worker* definition. Thus, as women are more often than men performing domestic work they are to a larger extent excluded from labour law protection.

4.3 Labour Migration in Sweden – a Background

From being a country from which people migrated in the latter part of the 19th century, Sweden has since the mid-1970s had larger immigration than migration.¹⁴⁵ In the era of economic development and increased production after World War II, the demand for labour was high and labour immigration escalated during the 1950s.¹⁴⁶ In 1967, a requirement of a work permit in order to work in Sweden was introduced. Such permit would only be granted when motivated by the situation on the Swedish labour market. The principle for labour immigration was that migrants should be able to live under the same economic conditions as the national population, ensured through an assessment of the conditions in the employment. Trade unions were granted the opportunity to express their views on the conditions before the permit was issued.¹⁴⁷ Labour immigration constituted the dominating part of immigration to Sweden up until the end of the 1970s. Since the last decades of the 20th century, large groups of people fleeing persecution and conflict or economic misery in their home countries have come to Sweden in order to seek asylum and protection. Consequently, people migrating to Sweden today constitute a heterogeneous group consisting of, among other groups, migrant workers, asylum seekers and their family members and returning Swedes.¹⁴⁸

Within an EU context, the principle of freedom of movement is fundamental and entails that citizens of member states and their family members are able to move freely within the union. The principle is pivotal for labour

¹⁴⁴ N. Yeates, "Global care chains: a critical introduction", Global Migration Perspectives No. 44, Global Commission on International Migration, 2005, p. 3.

¹⁴⁵ Statistiska centralbyrån, "Från massutvandring till rekordinvandring", <http://www.scb.se/hitta-statistik/sverige-i-siffror/manniskorna-i-sverige/in-och-utvandring/>, checked 2017-07-31.

¹⁴⁶ C. Calleman and P. Herzfeld Olsson, "Inledning", in: C. Calleman, P. Herzfeld Olsson, (eds.) *Arbetskraft från hela världen: Hur blev det med 2008 års reform?*, Stockholm, 2015, p. 10.

¹⁴⁷ Ibid. p. 11.

¹⁴⁸ (no 145). Statistiska centralbyrån, "Flera skäl till invandring idag", 2013-03-06, <http://www.scb.se/sv/Hitta-statistik/Artiklar/Flera-skal-till-invandring-idag/> checked 2017-07-31.

migration of EU citizens and through being a member state, Sweden is encompassed by the regulations of freedom of movement for workers within the EU.¹⁴⁹ The freedom of movement for EU citizens within the union has however been criticised for contributing to that the EU has closed its doors to the rest of the world.¹⁵⁰ The estimated 20 million third country migrants residing regularly within the union are not encompassed by the principle of freedom of movement.¹⁵¹ As mentioned above, an assessment of EU law on third country labour migration falls outside the scope of this thesis. However, it should be mentioned that efforts are being made in order to broaden the scope of protection of the freedom of movement within the union.¹⁵² Through being a member of the EU, Sweden has to observe these legal frameworks. Article 79.1 of the FEUF stipulates that the EU shall ensure that third country migrants residing within the union shall be treated fair. In addition to being bound by EU law in relation to labour migration, Sweden is obligated to observe the standards contained in the international conventions it has ratified.¹⁵³

In 2008, the Swedish system for labour immigration underwent extensive revision.¹⁵⁴ As mentioned above, before 2008 the labour immigration system included a labour market examination and work permits were issued where a shortage of labour was identified. Guidelines were issued after that associations of employees and employers were given the opportunity to deliver their opinion.¹⁵⁵ After the changes in 2008, it is the demand on labour of the individual employer that governs labour migration. Today, the labour immigration system does not contain point systems or quotas and no particular skills are required in order to obtain a work permit in Sweden; what is required is that the migrant worker has been offered a job by an employer prior to entering the country.¹⁵⁶ Following EU recommendations and policy suggestions, one of the ambitions with the changes was to make it easier for employers to recruit third country labour. The Migration Agency¹⁵⁷ performs the assessment on whether the work conditions in the employment offer are in accordance with what is required for national workers but trade unions are still given the possibility to express their view

¹⁴⁹ The principle of freedom of movement is established in Article 18 of the FEUF that prohibits discrimination on grounds of nationality. Article 20.2 of the FEUF stipulates the right for every citizen of the EU to move freely and reside within the territories of the EU member states, Articles 45-48 include fundamental rights for the free movement of labour.

¹⁵⁰ B. Nyström, *EU och arbetsrätten*, Stockholm, 2017, p. 133.

¹⁵¹ *Ibid.*

¹⁵² Among these, Directive 2003/109/EG concerning the status of third-country nationals who are long-term residents, Directive 2014/36/EU, on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers and Directive 2009/52/EG providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, should be mentioned.

¹⁵³ See section 4.1.1. and 4.1.2.

¹⁵⁴ Prop. 2007/08:147. K. Källström and J. Malmberg, *Anställningsförhållandet*, Uppsala, 2016, p. 313.

¹⁵⁵ SOU 2006:87, p. 127f. K. Källström and J. Malmberg, *Anställningsförhållandet*, 2016, p. 334.

¹⁵⁶ For sectors other than certain sectors with labour shortages.

¹⁵⁷ Migrationsverket.

on the conditions.¹⁵⁸ One of the rationales behind this requirement is to avoid undercutting in wage levels on the Swedish labour market.¹⁵⁹ As an outcome of this ambition, the offer of employment must contain a specification of wages, insurances and other terms of employment in parity with the equivalents provided for in relevant collective agreements.¹⁶⁰ This feature also reflects the aim to strengthen the Swedish model, as the conclusion of a collective agreement can be considered the easiest way for the employer to ascertain that the conditions in the employment adhere to the standards required.¹⁶¹

Another change in the labour migration framework in 2008 was that the possibility to grant permanent residency to a migrant worker ceased to exist. According to the current labour migration framework, the first work permit can be granted for a maximum of two years, and can be extended two years. When four years have passed a permanent residency can be obtained.¹⁶² Further, in 2008 a possibility for individuals who have had their asylum applications or applications for protection on other grounds denied to apply for a work permit without having to leave the country was introduced.¹⁶³

Calleman and Herzfeld Olsson have criticised the revised labour migration system for reflecting a focus on deregulation rather than structures for control of the factual circumstances of work conditions for the migrant workers.¹⁶⁴ Calleman argues that EU law and Swedish legislation on labour migration reflect a tension between the aim to enable an employer-driven labour migration with a simple and non-bureaucratic procedure, and the protection of interests such as the equal treatment with workers already existing in the country.¹⁶⁵ According to TCO¹⁶⁶, the cooperation between the Migration Agency and the trade unions that shall be given the possibility to express their views on wage levels and conditions at the work place has not been successful.¹⁶⁷

The description that the labour migration system is purely employer-driven can, according to Pelling, be questioned. When taking into consideration the amount of reported fake employments in order to obtain work permits, prevalent especially among groups of migrants from countries dominating asylum migration to Sweden, Pelling argues that it is relevant to describe the system as, at least partly, driven by the needs of the migrants.¹⁶⁸

¹⁵⁸ Prop. 2007/08:147, p. 37.

¹⁵⁹ Ibid. p. 1 and 26, 27ff.

¹⁶⁰ (no 123) p. 207.

¹⁶¹ The Swedish Confederation of Professional Employees, "Åtgärder mot missbruk av reglerna för arbetskraftsinvandring", 2013-11-19, p. 9.

¹⁶² (no 158) p. 2.

¹⁶³ (no 158) p. 46 and 52.

¹⁶⁴ C. Calleman and P. Herzfeld Olsson, "Avslutande reflektioner", in: C. Calleman, P. Herzfeld Olsson, (ed.): *Arbetskraft från hela världen: Hur blev det med 2008 års reform?*, Stockholm, 2015, p. 512.

¹⁶⁵ (no 1437) p. 128.

¹⁶⁶ The Swedish Confederation of Professional Employees.

¹⁶⁷ (no 161) p. 3.

¹⁶⁸ (no 13) p. 264.

In 2014, the rules governing labour migration were revised. Among the changes was the introduction of provisions targeting abuse of the labour migration framework in that work permits shall be withdrawn if the conditions are not met during the entire period of the work permit or when the work has not begun within four months after the first day of validity of the work permit.¹⁶⁹

4.4 The Swedish Model and Labour Migration

The Swedish labour market regulation rests on a principle of cooperation between labour and capital, in that the conditions in the labour market as far as possible shall be regulated by agreements between associations of employers and associations of workers. During the 20th century, several important central agreements of this sort laid the ground for a stable labour market with few conflicts in the work place.¹⁷⁰ Involvement by the state through legislation is limited. This system has been established as "the Swedish model", a way of observing core interests of both capital and labour in order to ensure wealth creation. However, the non-involvement by the state was modified in the 1970s and onwards, as some laws on protection of workers' rights were enacted.¹⁷¹ This entails that the implementation of labour rights is pursued in a tri-partite structure where the responsibility is shared between the workers represented by the trade unions, the employers in associations of employers and the state as legislator.

One of the core features of the Swedish model is that the trade unions, due to the high level of unionization among workers on the labour market, have high legitimacy. During the last decades however, the density of union membership has seen a decline.¹⁷² Another core feature of the Swedish labour law system is that in contrast to a minimum wage, conditions of the employment are found in collective agreements concluded between trade unions and associations of employers or individual employers. As a consequence of the status of the collective agreement, the main responsibility for the enforcement of work conditions and wages is carried

¹⁶⁹ Prop. 2013/14:213, p.16f, p. 21f.

¹⁷⁰ Decemberkompromissen 1906, Huvudavtal mellan Svenska Arbetsgivareföreningen och Landsorganisationen Sverige, 1938.

¹⁷¹ R. Meidner, "Förord", In: *Saltsjöbadsavtalet 50 år – Forskare och parter begrundar en epok 1938-1988* (ed.: Sten Edlund m.fl.), Helsingborg 1989. s. 14, T. Sigeman: "Från legostadgan till medbestämmandelagen – om huvudlinjerna i den svenska arbetsrättens utveckling", In: *Svensk Juristtidning* 1984 s. 875-892. p. 885. The content of some of the most relevant laws will be reviewed in this Chapter.

¹⁷² (no 113) p. 17.

by trade unions.¹⁷³ Approximately nine out of ten workers in the Swedish labour market are covered by collective agreements. The density of coverage by collective agreements does however vary between different sectors, and migrant workers are to a large extent employed in sectors that are unionized and covered by collective agreements below average.¹⁷⁴ Of relevance for non-unionized migrant workers employed by an employer covered by a collective agreement is however that the legal construct of collective agreements entails that if the employer is covered by a collective agreement, it must be applied also on employees who are not unionized.¹⁷⁵

As no general application of collective agreements exists in the Swedish labour law system, the employer and the employee are free to conclude an employment contract within the frames of what follows from non-dispositive labour law protection.¹⁷⁶ This entails that the parties can agree on wages below the level in collective agreements. As will be discussed below, the outcome of a situation where the agreed terms are below the levels provided for by the Foreign Act, meaning not in accordance with relevant collective agreements, is that the work permit can be revoked. The migrant worker cannot derive her labour rights from the Aliens Act, rather the basis for her demands is found in the employment contract and applicable labour laws.¹⁷⁷

Through the abolishment of the labour market examination in 2008, the influence of trade unions on the issuance of work permits decreased.¹⁷⁸ Their responsibility to assure that requirements of conditions in the employment of third country migrant workers are observed remains, however, and the efficiency of this control mechanism is obstructed by the circumstance that a large number of third country migrant workers are employed in sectors with low levels of unionization and collective agreements.¹⁷⁹ As a result, migrant workers are likely to face a situation where they themselves have to safeguard the standards of their work conditions. Herzfeld Olsson identifies a further complicating factor for the enjoyment of work conditions for the migrant worker being an often

¹⁷³ K. Källström and J. Malmberg, *Den kollektiva arbetsrätten*, Uppsala, 2016, p. 19f. A. Adlercreutz and J. Mulder: *Svensk arbetsrätt*, 14th Ed., Stockholm, 2013, p. 18. Landsorganisationen i Sverige, Svenska modellen, http://www.lo.se/start/solidarisk_lonepolitik/svenska_modellen, checked 2017-08-02.

¹⁷⁴ S. Engblom, "Reconciling Openness and High Labour Standards? Sweden's Attempts to Regulate Labour Migration and Trade in Services", In: (ed) Freedland. M and Costello C. "Migrants at Work: Immigration and Vulnerability in Labour Law", Oxford, 2014, p. 354. Avtalsrörelsen och lönebildningen 2016, Medlingsinstitutets årsrapport, 2017, p. 13. Migrationsverket, Arbetstagare – de största yrkesgrupperna, <https://www.migrationsverket.se/Om-Migrationsverket/Statistik/Arbetstagare---de-storsta-yrkesgrupperna.html> checked 2017-08-02.

¹⁷⁵ K. Källström and J. Malmberg, *Anställningsförhållandet*, 2016, p. 183.

¹⁷⁶ Ibid, p. 187f.

¹⁷⁷ (no 123) p. 215.

¹⁷⁸ (no 12) p. 127. (no 175) p. 313.

¹⁷⁹ (no 174), Siffror och diagram om medlemsantal, organisationsgrad och kollektivavtalsäckning, Medlingsinstitutet, 2014 http://www.mi.se/files/PDF-er/ar_diagram_och_tabeller/ar_2014_diatab/yrkesverksamma.pdf checked 2017-08-02.

prevalent information asymmetry between the employer and the migrant worker in relation to the labour rights the migrant worker is entitled to.¹⁸⁰

4.5 Swedish Legislation Regulating Third Country Migrant Workers

The Aliens Act¹⁸¹ governs the conditions for work permits for third country migrant workers. As has been discussed in section 4.3 above, the conditions on the Swedish labour market are mainly governed by collective agreements. In addition, the laws regulating conditions in the work place apply indiscriminately to all workers pursuing work in Sweden.¹⁸² This section provides an overview of the relevant laws.

4.5.1 The Aliens Act

In order for a third country migrant to travel to Sweden a visa in accordance with the Aliens Act section 2.3 is required. If the third country migrant wishes to work in Sweden, a work permit in accordance with the Aliens Act section 2.7 is required. This requirement does not apply to Nordic citizens or third country migrants with a right to residence or with a permanent residence permit. The Aliens Act section 5.10 stipulates that a temporary residence permit may be granted a foreigner who wishes to reside in the country for the purpose of work. According to the Aliens Act section 6.4, the main rule is that an application for a work permit shall be submitted prior to entrance in the country. However, in accordance with the Aliens Act section 5.18, exceptions from this rule are made regarding applications for extensions of work permits and applications for work permits in accordance with the Aliens Act section 5.15 a, regulating applications by migrants who have had their asylum applications rejected.¹⁸³ In accordance with the Aliens Act section 5.3, the work permit is not required during the period when an application for an extended work permit is under assessment. Section 6.3 of the Aliens Act stipulates that a work permit may be granted to a foreigner who has a temporary residence permit if no reasons attributable to the reason for the residence permit speak against it, such as the circumstance that the residence permit is based on a temporary visit for studies or for treatment of a disease.

¹⁸⁰ (no 123) p. 205.

¹⁸¹ Utlänningslag (2005:716).

¹⁸² Arbetsmiljöverket, Svenska lagar och regler om arbetsmiljöbrott gäller alla som arbetar på svenska arbetsplatser, <https://www.av.se/arbetsmiljoarbete-och-inspektioner/utlandsk-arbetskraft-i-sverige/utstationering---utlandsk-arbetskraft-i-sverige/vilka-regler-galler-for-utlandska-arbetslagare-och-arbetsgivare/svenska-lagar-och-regler-om-arbetsmiljobrott/> checked 2017-08-02.

¹⁸³ The latter provision will be reviewed in chapter five.

In accordance with the Aliens Act section 6.2, a work permit may be granted to a foreigner who has been offered an employment, if the employment makes it possible for her to support herself financially. This provision entails that the remuneration from the employment must reach an amount making it possible for the foreigner to support herself without receiving financial support in accordance with the Social Security Act.¹⁸⁴ Importantly, this provision only refers to what the migrant worker has been offered, and not to the factual conditions for the employment. The employment offer which is required in order to obtain a work permit in accordance with the Aliens Act section 6.2 is not legally binding. The amount established as a minimum in order to be able to support oneself is a monthly wage of no less than 13 000 SEK.¹⁸⁵ Additional requirements are that the wage, insurance conditions and other employment conditions shall be no less beneficial than conditions applying to national workers in Sweden as established in Swedish collective agreements or customs within the area of business. If the conditions do not meet these standards, the work permit shall be withdrawn. This situation should be distinguished from the situation where the migrant worker, due to reasons of e.g. sick leave or parental leave has earned less than the minimum amount.¹⁸⁶ According to the preparatory works, the rationale for these requirements is that the labour migration system shall not facilitate for dishonest employers to employ migrant workers in employment conditions worse than those applying to national workers.¹⁸⁷ In order to ascertain that the conditions are not worse than those applying within the area of work, the Migration Agency shall, in accordance with the Aliens Ordinance¹⁸⁸ section 5.7 a, offer the opportunity for trade unions within the relevant area to express their opinion on the conditions in the employment offer. There is however no obligation for the trade unions to do so.¹⁸⁹

Further, the Aliens Act section 6.2 stipulates that the work permit is tied to a specific employer and to a specific type of work during the first two years. After the first two years the permit is only tied to a specific type of work. In accordance with the same article, the work permit may not be granted for a longer time period than two years and it must not be granted for a longer time period than the time for the employment.

If the migrant worker wants to extend their work permit they have to apply for an extension of the work permit. In that assessment the Migration Agency will investigate whether the conditions for the permit are

¹⁸⁴ Socialtjänstlagen (2001:453).

¹⁸⁵ Migrationsverket, Krav för arbetstillstånd, <https://www.migrationsverket.se/Privatpersoner/Arbeta-i-Sverige/Anstalld/Krav-for-arbetstillstand.html> checked 2017-08-02. See also case law from the Supreme Migration Court MIG 2015:11.

¹⁸⁶ Prop. 2013/2014:227 p. 38.

¹⁸⁷ Prop. 2007/08:147 p. 27.

¹⁸⁸ Utlänningsförordningen (2006:97).

¹⁸⁹ (no 175) p. 313f.

fulfilled.¹⁹⁰ The Supreme Migration Court¹⁹¹ has established that an application for an extension of a work permit cannot be accepted if the requirements for the work permit have not been fulfilled during the entire previous work permit period.¹⁹²

Chapter 7 of the Aliens Act covers withdrawal of residence permits. Section 7.1 stipulates that a permit may be withdrawn if a foreigner has intentionally given false information or remained silent on circumstances of importance in order to obtain the permit. From the Article follows that if the foreigner has resided in the country for more than four years, the permit may only be revoked if particular reasons are at hand. According to the preparatory works, the reason behind this is that it is of importance for humanitarian reasons that a foreigner who has resided in the country for a certain amount of time shall be able to feel safe here and not have to worry about being deported.¹⁹³

In accordance with the Aliens Act section 7.7 e, the work permit shall be withdrawn when the preconditions for the work permit are not fulfilled or if the foreigner has not started the employment within a period of four months from the first day of the validity period of the work permit. As mentioned above, the requirements are that the employment shall suffice for the migrant worker to support herself financially and that the wage and insurance conditions and other work conditions are not worse than what follows from Swedish collective agreements or customs within the area of business. In the preparatory works for the provision, the interest to defend the Swedish labour migration system was given more weight than the consequences for the individual migrant worker who would get her work permit withdrawn. When the preconditions for the work permit have not been fulfilled during the period for the permit, there ought not to be a possibility for a discretionary assessment regarding if the work permit shall be withdrawn.¹⁹⁴ However, as will be discussed in section 4.5.5, changes in relation to when the work permit shall be withdrawn are underway.

In accordance with the Aliens Act section 7.3 point 2, the residence permit of a foreigner who has travelled to Sweden may be revoked if the foreigner has been granted a work permit in accordance with the Aliens Act section 6.2, if the employment has been terminated and the foreigner has not within a period of three months obtained a new employment covered by the same work permit or has applied for a work permit relating to a new employment and that application is accepted.

¹⁹⁰ Migrationsverket, Förlänga arbetstillståndet, <https://www.migrationsverket.se/Privatpersoner/Arbeta-i-Sverige/Anstalld/Du-som-redan-ar-i-Sverige/Forlanga-tillstand.html> checked 2017-08-02.

¹⁹¹ Migrationsöverdomstolen.

¹⁹² MIG 2015:11.

¹⁹³ Prop. 1997/98:38 p. 22ff.

¹⁹⁴ (no 186) p. 18.

In accordance with the Aliens Act section 7.4, in the decision to withdraw the permit, considerations shall be made to the connection the foreigner has to the Swedish society and other circumstances speaking against withdrawal. The criterions that shall be considered are the situation of the foreigner, if the foreigner has children in Sweden and considerations in relation to the situation of the children, other aspects of the family situation of the foreigner, and how long the foreigner has resided in Sweden.¹⁹⁵

4.5.2 The Employment Protection Act

The Employment Protection Act¹⁹⁶ contains provisions which define the different forms of employment and ensures that the employee enjoys a level of protection, particularly in relation to the termination of employment. The most central forms of employment, also in relation to third country migrant workers, are time-limited tenures or tenures until further notice. With regard to termination of the employment, the employee is free to end the employment under observation of the notice. If the decision to end the employment is made by the employer, the form of employment dictates the conditions the employer has to observe. If the form of employment is limited in time, the employee is guaranteed employment during the contracted time, as long as the business of the employer is not ceasing to exist.¹⁹⁷ If the employment is of the form until further notice, substantial grounds are required for dismissal. Articles 7-10 of the Employment Protection Act stipulate that dismissal must be based on reasons emanating from personal circumstances relating to the employee or be a result from lack of need for labour force at the work place.¹⁹⁸ If the dismissal ground is lack of need for labour force, the reasonableness is seldom questioned. In contrast, dismissals contingent on personal circumstances are more thoroughly assessed. In accordance with Article 7, substantial ground for dismissal is not at hand if it is reasonable to require that the employer offers other form of employment. An individual assessment is performed where the interest of the employer to dismiss the employee vis-a-vis the interest of the employee to keep the employment is investigated. In accordance with the above-mentioned ruling by AD in 1979 no 90¹⁹⁹, the loss of a work permit is considered to be a reasonable ground for dismissal.

4.5.3 The Work Environment Act

In accordance with section 1.1 of the Work Environment Act²⁰⁰, the purpose of the law is to achieve and maintain a safe and healthy work environment. Section 1.2 stipulates that the law is applicable on all work performed by a

¹⁹⁵ (no 187) p. 20.

¹⁹⁶ Lag om anställningsskydd (1982:80).

¹⁹⁷ (no 12) p. 136.

¹⁹⁸ Ibid. p. 135. (no 175) p. 119.

¹⁹⁹ See section 3.2.

²⁰⁰ Arbetsmiljölög (1977:1160).

worker for an employer. Chapter 2 of the law contains provisions regarding the environment at the work place and stipulates that it shall be satisfactory and take into consideration the nature of the work and the social and technological development in society.

4.5.4 Control Mechanisms

In 2012, the Migration Agency restricted the control of employers who wish to employ third country migrant workers in areas where the prevalence of the risk of abuse is considered to be high. This control entails that the employer must show that they have the financial means to cover the salary of the migrant for a minimum of three months.²⁰¹

In 2014, the Migration Agency was given mandate to pursue controls of whether the conditions for the work permit are fulfilled.²⁰² In accordance with the Aliens Ordinance section 6.6 a, the Migration Agency has the mandate to control that the migrant worker who has been granted a work permit has begun their employment within four months from the starting date of the work permit and that the conditions for the permit are fulfilled. The rationale behind the control is to defend the Swedish system for labour immigration and to obstruct abuse of foreign labour.²⁰³

In accordance with the Work Environment Act section 7.1, the Work Environment Administration²⁰⁴ is responsible for the control of the adherence of the provisions in the Act. In addition, trade unions are responsible for the assessment of whether work conditions meet the standards in accordance with collective agreements. The Codetermination Act²⁰⁵ regulates the collective labour law and its aim is to further worker participation in work conditions. Article 18 of the Codetermination Act renders the trade union the right to information. In accordance with this Article, the employer is obligated to submit documents called for by the trade union. However, the control performed by the trade union is limited by whether the employer is covered by collective agreements. Following Article 11 of the Codetermination Act, if the employer is not covered by a collective agreement, the obligation to negotiate with the trade union on matters of dismissal is limited to dismissals based on shortage of need for labour or business transitions. As mentioned above, third country migrant workers are often employed in sectors with low levels of unionization. As a large part of the control of adherence to work conditions is incumbent on the trade unions, the low levels of unionisation has implications for the

²⁰¹ Engblom, 2014, p. 356. Migrationsverket, "Högre krav för arbetstillstånd inom vissa branscher", <https://www.migrationsverket.se/Andra-aktorer/Arbetsgivare/Anstalla-fran-lander-utanfor-EU/Hogre-krav-for-vissa-branscher.html>, checked 2017-08-02.

²⁰² (no 186) p. 26f.

²⁰³ Ibid. p. 27.

²⁰⁴ Arbetsmiljöverket.

²⁰⁵ Medbestämmandelagen (1976:580).

efficiency of the control of work conditions of third country migrant workers.

4.5.5 A Strengthened Position for Migrant Workers in the Labour Market?

In 2016, the Swedish Government presented a proposal for changes in the legal framework governing labour migration. The explicit aim of the changes is to strengthen the protection of the migrant worker. The proposal is currently undergoing assessment. In the proposal, the Government responds to critique expressed against the labour migration framework in that it lacks sufficient protection of the migrant worker. Among other areas, attention is given to the implications of the fact that the employment offer is not binding and that the worker is the one carrying the burden when the employer has failed to fulfil their obligations in accordance with the requirement that the work conditions shall make it possible for the worker to support herself financially and be equal to what follows from collective agreements.²⁰⁶

The proposal emphasises that the application for work permits and applications for asylum or protection on other grounds are communicating vessels; if the likelihood that a person will obtain asylum is low, an application for a work permit may be an alternative. The Government points at how a restriction in the work permit area may lead to an increase in asylum applications, which may lead to increased expenses for the state finances as such applications require more resources.²⁰⁷

The proposal entails a new provision aiming at the protection against fake employment, providing the Migration Agency an extended mandate to control the adherence to the conditions in the employment offer.²⁰⁸ The Government emphasises that the risk that the migrant worker gets her work permit withdrawn if they report abuse or exploitation is an important factor leading to that migrant workers abstain from reporting. Therefore, the proposal entails criminal sanctions against employers who have intentionally not met the conditions in the employment offer resulting in that the work permit is not extended or has been withdrawn.²⁰⁹

It is further suggested that the work permit shall not be withdrawn in cases where the employer has pursued self-correction. The rationale behind this is that it will allow for the migrant worker to inform the employer about failures in the observance of the work conditions without risking deportation.²¹⁰ If the employer themselves has not initiated a correction, the failure to meet the conditions will lead to a withdrawal of the work

²⁰⁶ Kommittédirektiv 2015:75, (no 6).

²⁰⁷ (no 6) p. 110.

²⁰⁸ Ibid. p. 63.

²⁰⁹ Ibid. p. 60.

²¹⁰ Ibid. p. 84.

permit.²¹¹ The Government did not consider exemptions from the requirement that the work conditions shall have been fulfilled during the entire work permit period, as they concluded that any solutions where failures corrected after that the Migration Agency has attended to them would benefit dishonest employers.²¹² The proposal further contains an introduction of criminal sanctions against an employer who has willfully employed a migrant worker in conditions that do not adhere to the requirements in section 6.2 point 1 of the Aliens Act or has offered a migrant worker employment solely in order to abuse the system of labour migration.²¹³

On the matter of including a requirement of a legally binding employment contract in the application for a work permit, the Government referred to scholars that have argued that a requirement of a binding employment contract in the application process might lead to a cooling effect on labour migration as it entails a bigger risk for the employer in the recruitment process.²¹⁴ One further argument is that such a requirement would not lead to the diminishment of the conclusion of parallel employment offers. The proposal refers to the Swedish model in that it is incumbent on the parties on the labour market to conclude what the conditions on the labour market should be, and that the prohibition on the conclusion of new employment contracts after the work permit has been granted would be in conflict with the principle of freedom of contract. Furthermore, it is argued that it could possibly constitute discrimination to offer this level of protection to a particular sort of worker. It is concluded that the overall effects of the inclusion of a binding employment contract in the application process are negative.²¹⁵

The proposal has received criticism for not attending to the perspective of the migrant worker in that it still does not provide protection against deportation if the employer has failed to observe her obligations, as it is only if the employer has initiated the correction that the work permit will not be revoked. Criticism has also been expressed regarding the writings in the proposal indicating that it is the system of labour migration that is the subject for protection, not the individual migrant worker.²¹⁶

The proposal has resulted in a Governmental Bill in 2017 where the suggestion of introducing a possibility for the employer to pursue self-correction in order to avoid that the migrant worker loses her work permit is suggested to be enacted in the end of 2017. The other proposed changes are undergoing further assessment.²¹⁷ In the end of June 2017, the Government

²¹¹ Ibid. p. 14f.

²¹² Ibid. p. 124.

²¹³ Ibid. p. 69.

²¹⁴ Ibid. p. 114.

²¹⁵ Ibid. p. 115.

²¹⁶ TCO, ”Yttrande gällande SOU 2016:91 Stärkt ställning för arbetskraftsinvandrare på arbetsmarknaden, 2017-02-20, Ju2016/09057/EMA.

²¹⁷ Prop. 2016/17:212 Möjlighet att avstå från återkallelse av uppehållstillstånd när arbetsgivaren självant har avhjälpt brister.

initiated a special investigation on whether the employer shall be given the opportunity to correct minor mistakes also after the Migration Agency has identified the discrepancies between the factual work conditions and what is required in the Aliens Act.²¹⁸ The results of the investigation will be presented in December 2017.

²¹⁸ Regeringen, ”Möjligheten till rättelse av mindre misstag efter att migrationsverket påtalat brister i arbetsvillkoren utreds”, 2017-06-22, <http://www.regeringen.se/pressmeddelanden/2017/06/mojligheten-till-rattelse-av-mindre-misstag-efter-att-migrationsverket-patalat-brister-i-arbetsvillkoren-utreds/> checked 2017-08-02.

5 THE INTERSECTION OF LABOUR LAW AND MIGRATION LAW – A CASE STUDY

In order to fulfil the aim of assessing the extent of labour rights protection third country migrant workers enjoy in Sweden in the current labour migration regime, this chapter will investigate three cases where the frameworks of labour law and migration law intersect. The chapter provides a discussion of the consequences for the third country migrant worker of the conflict between these two legal frameworks.²¹⁹

The first case that will be investigated is the “Change of Track”, where a migrant who has had their application for asylum or protection on other grounds rejected applies for a work permit in accordance with the Aliens Act section 5.15 a. The second case that will be investigated is where the employer has failed to observe the conditions required in accordance with the Aliens Act section 6.2. The third case that will be investigated are the implications of the fact that the “Offer of Employment”, required in order to obtain a work permit, is not legally binding.

As mentioned above, the labour law protection provided for by Swedish labour laws shall apply indiscriminately to all workers who are performing work in Sweden.²²⁰ As such, provisions regulating worker protection in situations of dismissal and conditions at work places apply to third country migrant workers. In addition, Sweden is bound by the Articles covering labour rights in the UDHR, the CESCRC and the ILO convention 143.²²¹

5.1 The Change of Track

5.1.1 Background

Since 1992 it has been possible for an asylum seeker to work in Sweden during the period when the application for asylum is under assessment. This exemption from a requirement of a work permit has been motivated by the argument that it is considered to be a duty of everyone in the society, including asylum seekers, to sustain themselves economically as far as possible.²²² Another argument for the introduction of the exemption was a

²¹⁹ See section 3.2 on the conflict of interest between labour law and migration law.

²²⁰ See above section 4.5.

²²¹ See above section 4.1 and 4.2.

²²² Due to space constraints, in this section a person that has applied for asylum or protection on other grounds will be referred to as asylum seeker.

worry that unoccupied asylum seekers would affect the Swedish public opinion against asylum seekers negatively.²²³

The exemption from the requirement of a work permit is regulated in the Aliens Ordinance section 5.4. The requirements for the exemption of a work permit during the assessment period are that the person is an asylum seeker in accordance with the Aliens Act chapter 4. Further requirements are that the person can provide approved identity documents, or is cooperative in the establishment of the identity, that the asylum application shall be assessed in Sweden, and that it is well-founded.²²⁴

In 2008, a possibility for migrants who have had their application for asylum or protection on other grounds rejected to apply for a work permit without having to leave the country was introduced. This new way to obtain a residence permit has been called "Change of Track".²²⁵ The relevant provision is the Aliens Act section 5.15 a, which entails that the requirements are that the asylum seeker has worked for no less than four months in employment conditions in adherence with that is stipulated by the Aliens Act section 6.2. The application needs to be submitted within a time period of two weeks from when the decision to reject the application for asylum is issued.

According to the preparatory works, the rationale behind this new possibility for an asylum seeker to transform to a labour migrant was the notion that an asylum seeker who has worked during the period of assessment of the application has established themselves on the Swedish labour market. Further, it was emphasized that an order where the individual who has obtained such establishment on the labour market has to leave the country in order to apply for a work permit contradicts the aim with the overall revision in the legislation on labour migration; to facilitate a more efficient system. Furthermore, the Government argued that such an order would entail costs for the individual migrant and her family, as well as for the employer who would suffer economic damage if the employee had to leave the country in order to apply for a work permit.²²⁶

Nation states distinguish asylum migration from labour migration. However, the motives behind why an individual chooses to migrate are often many and can change over time. Individuals who flee persecution and oppression can also migrate in order to improve their possibilities to work and sustain

²²³ Prop. 1993/94:94 p. 36f.

²²⁴ Migrationsverket, Arbets under tiden som asylsökande, <https://www.migrationsverket.se/Privatpersoner/Skydd-och-asyl-i-Sverige/Medan-du-vantar/Arbeta.html> checked 2017-08-02.

²²⁵ C. Calleman: "Byta spår – ett nålsöga mellan asyl och arbete", in: C. Calleman, P. Herzfeld Olsson, (eds.): *Arbetskraft från hela världen: Hur blev det med 2008 års reform?*, Stockholm, 2015, p. 293. Calleman notes that using the term "change of track" for this situation, when an individual who experiences a need for protection but has had their application for asylum denied and subsequently applies for a work permit which might be the only remaining option, can sound cynical. However, this term will be used for the sake of simplicity.

²²⁶ (no 187) p. 47f.

themselves, and labour migrants can be transformed to refugees if the situation in their home countries deteriorates. Therefore, it can be difficult to make a clear distinction between the motives of a refugee and a labour migrant.²²⁷ The governmental investigation before the changes in the labour migration framework in 2008 was negative to the introduction of a possibility for asylum seekers who have had their application denied to apply for a work permit as it would risk to hollow the right to asylum and lead to an intertwinement between the labour migration and the asylum system.²²⁸ There are indicators that an intertwinement between the two regimes of asylum and labour migration has taken place; between 2009 and 2014, seven of the 15 dominating countries of origin for migrants applying for work permits in Sweden were among the 15 dominating countries of origin for individuals applying for asylum in Sweden.²²⁹ A possible explanation to this intertwinement is that, in contrast to an asylum seeker, a labour migrant with a work permit can travel to Sweden legally. As such, labour migration can be a way for individuals who want to apply for asylum to travel to Sweden without having to take dangerous routes.²³⁰

In relation to what was discussed above in section 3.3 regarding the relationship between deportability and vulnerability, it should be added that deportability has particularly severe implications for the vulnerability of asylum seekers who apply for work permits. Pelling argues that this group, in other words migrants who experience that they are in need of protection in Sweden, is in a particularly exposed position on the labour market as their dependence on the employer increases their vulnerability.²³¹

5.1.2 The Requirement of Identity Documents

As discussed in the section above, one of the requirements in order for an asylum seeker to be able to work during the period of assessment of the asylum application is that she can present approved identity documents or is cooperative in the establishment of the identity. The notion of identification has implications for the possibility to use the change of track if the application for asylum is rejected.

Through being a member of the EU, Sweden is obligated to perform investigations of the identity of all individuals who enters the EU through the borders of the country. The purpose behind the identity controls is to efficiently counteract irregular migration and trafficking, and to prevent threats against the security of the EU member states, the public order, public health and international agreements. Identity controls are also performed to

²²⁷ (no 13) p. 253.

²²⁸ (no 223) p. 297.

²²⁹ (no 13) p. 245.

²³⁰ (no 13) p. 256.

²³¹ (no 13) p. 261.

prevent terrorism and to prevent that irregular migrants enter the EU.²³² Section 2.1 of the Aliens Act stipulates that a foreigner who resides in Sweden shall have a passport. The requirement of a passport serves the overall purpose to ensure the general control of foreigners and to establish the identity of foreigners who travel to and reside in Sweden.²³³

The requirements regarding level of certainty of the identity does however differ between different categories of migrants²³⁴, and the difference may have implications for the enjoyment of labour rights of the migrant worker as different levels of certainty can be required throughout the migration process.

The established procedure in order to prove identity is to provide a passport that establishes name, date of birth and citizenship. However, when the asylum seeker lacks a passport, other documents and testimonies from relatives in Sweden can be used. The originality of the documents shall not be questionable, and they shall be issued in a, from an identity perspective, satisfactory way.²³⁵ In order to be granted asylum, the requirement is that the identity is probable.²³⁶ This level of requirement does not necessitate identity documents; other forms of proof suffice.

For an asylum seeker who applies for an exemption from the requirement of a work permit during the period of assessment of the asylum application in accordance with the Aliens Ordinance section 5.4, what follows from the website of the Migration Agency is that the requirements for the establishment of the identity are that the asylum seeker provides acceptable identity documents, or is "being cooperative in the establishment of the identity".²³⁷ According to Borg Jansson, what is stipulated by the wording "being cooperative in the establishment of the identity" is unclear.²³⁸ As the exemption from the requirement of a work permit is found in ordinance and not law, no guidance on what is required in order to obtain the exemption can be found in preparatory works.

Of interest for the requirement in the Aliens Ordinance section 5.4 are the writings found in the Handbook for the Migration Agency from 2015²³⁹

²³² Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code). Point 6. The Stockholm Programme – An open and secure Europe serving and protecting citizens, Official Journal C 115 of 4.5.2010, pp. 1-38.

²³³ See MIG 2009:1.

²³⁴ D. Borg Jansson: "Asylsökande och rätten att arbeta – regelverkets innebörd och möjliga konsekvenser". In: C. Calleman, P. Herzfeld Olsson, (ed.): *Arbetskraft från hela världen: Hur blev det med 2008 års reform?* Stockholm, 2015, p. 334.

²³⁵ Ibid. p. 338ff.

²³⁶ Ibid. p. 334.

²³⁷ (no 224).

²³⁸ (no 235) p. 336.

²³⁹ Migrationsverket, *Handbok i migrationsärenden*. The handbook provides guidance for migration officers in the migration process. The handbook is currently undergoing revision. *Handbok i migrationsärenden*, <https://www.migrationsverket.se/Om->

where uncertainty is expressed regarding what the requirements are in order to fulfil the criterion of being cooperative in the establishment of the identity. According to the handbook, an *in casu* assessment must be made and an asylum seeker who provides identity documents which in combination with other documents suffice to make the identity probable shall be granted the exemption. If the asylum seeker lacks identity documents she needs to be cooperative in the establishment of the identity in order to obtain the exception. The handbook stipulates that it is not only the matter of whether the asylum seeker has been able to establish the identity, but also the level of cooperation that is of relevance for the assessment. It is required that the asylum seeker makes use of the available possibilities to obtain documents. What is deemed as sufficient is, as mentioned above, established through an *in casu* assessment. It is not sufficient, however, that the asylum seeker expresses a will to cooperate in the establishment of the identity. An example of sufficient cooperation is that the asylum seeker is able to present reasonable explanations to why she is not able to provide identity documents and has made efforts to obtain other relevant proof.²⁴⁰ Borg Jansson concludes that it seems to be unclear how the criterion "being cooperative in the establishment of the identity" is to be interpreted, but argues that it seems likely that the level of proof of identity required in order to obtain the exception from the requirement of a work permit is stricter than the requirement of making the identity probable in asylum cases.²⁴¹

As mentioned above, the different levels of requirements of identity documentation throughout the migration process can have implications for the enjoyment of labour rights of the migrant. If the asylum seeker who has been granted the exemption from the requirement of a work permit in order to work during the period of assessment of the asylum application has their application for asylum rejected and wants to make use of the change of track, the Migration Agency requires a valid passport.²⁴²

The practical implications of the strict requirement of a valid passport in order to obtain a work permit through the change of track is that an asylum seeker who has been granted the exemption from the requirement of a work permit in accordance with the Aliens Ordinance Section 5.4 in fulfilling the identification requirement through being "cooperative in the establishment of the identity", may face difficulties in obtaining a work permit. This entails that due to the differences in strictness of identification requirements throughout the migration process, an asylum seeker who has established themselves on the labour market during the period of assessment of the

[Migrationsverket/Styrning-och-uppfoljning/Lagar-och-regler/Handbok-i-migrationsarenden.html](#) checked 2017-08-02.

²⁴⁰ Migrationsverket, Handbook in migration, "Cooperation", 2015.

²⁴¹ (no 234) p. 349.

²⁴² Migrationsverket, Hire an Asylum Seeker, <https://www.migrationsverket.se/Andra-aktorer/Arbetsgivare/Anstalla-nagon-som-redan-ar-i-Sverige/Asylsokande.html> checked 2017-08-02.

asylum application may lose her employment if she lacks a valid passport. This follows from the abovementioned ruling AD 1979 nr 90, which stipulates that the fact that the migrant is not granted a work permit is a reasonable ground for dismissal.

Another implication of the requirement of a valid passport in order to pursue the change of track is that the Migration Agency in accordance with the Aliens Act section 9.4 may dispose of the identity document of a migrant, during the period until the migrant has been granted a residence permit or a decision has been made that the migrant must leave the country. This entails that the migrant, who has had her identity documents disposed of by the Migration Agency, and has an expired passport and therefore needs to apply for a new passport at the consulate or embassy of her home country in Sweden might face practical obstacles to do so. Some embassies do not accept photocopies of the passport, and as the Migration Agency does not allow the migrant to access her passport it becomes impossible to enjoy the opportunity of change of track. A decision of the Migration Agency to not hand out the passport needs not to be motivated and cannot be appealed. It seems that the final resort for this, perhaps not very frequent but yet troubling situation for the individual migrant, is to file a complaint to the Parliamentary Ombudsmen.²⁴³

5.1.3 The Requirement of Work Conditions in Accordance With the Aliens Act

In order to obtain a work permit through the change of track, the asylum seeker needs to be able to show that she has worked for no less than four months under conditions stipulated in the Aliens Act section 6.2. These circumstances may lead to that the asylum seeker is less likely to report problems in the work place, as the loss of employment jeopardizes the chance to obtain the work permit. Another factor that deepens the dependence on the employer is the fact that the asylum seeker faces high thresholds in order to access the formal labour market.²⁴⁴

During the period the asylum seeker has worked when her application for asylum has been assessed, there are no requirements for certain levels on wages or other work conditions, in other words the conditions for the employment is regulated in accordance with the Swedish model as described in section 4.4, where no minimum wages apply and great weight is given to collective agreements between trade unions and employers or employer unions. Consequently, the requirement that the conditions need to have been in parity with levels in collective agreements in order to constitute grounds for the granting of a work permit through the change of

²⁴³ Case law from the Migration Agency available on request. Justitieombudsmannen.

²⁴⁴ E. Okumus: "Få asylsökande har jobb trots tillstånd", Arbetet, 2015-06-05, <https://arbetet.se/2015/06/05/mycket-fa-asylsokande-har-jobb-trots-tillstand/>, checked 2017-08-02.

track may be an obstacle for the practical possibility to enjoy this alternative way to obtain a work permit. As suggested by Calleman, a possible way to remedy the situation for the individual migrant who wants to pursue the change of track would be to offer the employer an opportunity to retroactively pay the difference between the conditions stipulated by the law and the wage and other conditions that the individual has been paid during the period of assessment of her asylum application.²⁴⁵

5.2 Withdrawn Work Permits due to Failures Contingent on the Employer

5.2.1 Background

In 2014, the legal framework for labour migration legal was amended. The changes aimed at facilitating the discovering and hindering of abuse of the rules governing labour migration. Among the changes was the introduction of extended possibilities for the Migration Agency to withdraw the work permit if the conditions for the permit have ceased to be fulfilled, or, when an extension of the work permit is applied for, if the conditions have not been fulfilled during the entire period of the previous work permit.²⁴⁶ These changes were motivated with a referral to the aim to protect the system of labour migration.²⁴⁷ In the preparatory works, consultive bodies criticized the changes for impairing the situation of the migrant worker in that they entail that a failure of an employer to apply the required level of working conditions mainly would affect the migrant worker who risks losing the residence permit if alternative work is not found during the time limit stipulated by the Aliens Act.²⁴⁸

Recently, a series of cases have been reported in the media where third country migrant workers have had their work permits withdrawn or not extended because the Migration Agency has found minor discrepancies between the factual employment conditions and the ones stipulated by the Aliens Act.²⁴⁹ Selberg has argued that this order, where the migrant worker is the one who gets to pay the price when the employer has failed to observe her commitments against the migrant worker, is unacceptable.²⁵⁰ The alternatives for the migrant worker who is employed by an employer who does not respect her commitments towards the migrant worker in terms of

²⁴⁵ (no 223) p. 324.

²⁴⁶ (no 186) p. 16.

²⁴⁷ Ibid. p. 17.

²⁴⁸ Ibid. p. 15. Engblom, 2014, p. 355f. On the time limit, see section 4.5.1.

²⁴⁹ See among others A. Boscanin: "Utvisa inte dem som gör rätt för sig", GP, 2017-06-01.

<http://www.gp.se/ledare/straffa-inte-de-som-g%C3%B6r-r%C3%A4tt-f%C3%B6r-sig-1.4315395>, S. Engblom and E. Källström: "Förbättra invandringen av arbetskraft till Sverige", DN, 2016-12-01, <http://www.dn.se/debatt/forbatta-invandringen-av-arbetskraft-till-sverige/> checked 2017-08-02.

²⁵⁰ (no 7) p. 386.

adhering to work conditions, is either to leave the country or to go underground as an undocumented worker.²⁵¹

In accordance with EU law²⁵², citizens and documented third country migrant workers shall enjoy equal treatment in relation to work conditions, where, among other rights, the ones regulating wages and conditions for dismissal are mentioned. However, as Selberg argues, the difference in treatment between citizens and third country migrant workers created by the impact of the migration law framework, is considered as equal treatment in that the migratory legal framework is considered superior to the labour law framework.²⁵³ As the provisions in the Aliens Act entail that even small discrepancies between the factual work conditions and conditions in accordance with collective agreements is ground for dismissal, it is questionable whether the equal treatment between citizens and third country migrant workers in relation to conditions for dismissal is real. As mentioned in section 4.5.5, the legislator has attended to the consequences of this legislation, and a change of the law has been proposed to be enacted in December 2017. The suggested change of the law will improve equality between national workers and migrant workers as abuse of requirements of work conditions will not to the same extent risk leading to termination of the employment and deportation of the migrant worker, however, the change will not remedy the fact that it is only when the employer has themselves identified and corrected a discrepancy that the work permit will not be withdrawn. During fall 2017, a special investigation is assessing whether it shall be possible for the employer to pursue correction of minor discrepancies also after the Migration Agency has identified them. Below, the merits of such a discretionary assessment will be evaluated.

5.2.2 The Lack of a Discretionary Assessment

In the preparatory works for the current legal framework on labour migration, the Government stated that no discretionary assessment shall be made when differences between the conditions of the employment and what is stipulated in the Aliens Act are identified. The Government acknowledges the severe consequences the migrant worker suffers from a withdrawal of the work permit, but concludes that the importance that the system governing labour migration is not hallowed is a prevailing interest.²⁵⁴

The Supreme Migration Court has in its cases MIG 2015:11 and MIG 2015:20 ruled in accordance with an absolute requirement of a withdrawal of the work permit when the conditions have not been fulfilled during the entire period for the work permit. The possibility for a discretionary

²⁵¹ Ibid.

²⁵² Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State. Article 12.1.

²⁵³ (no 7) p. 384.

²⁵⁴ (no 186) p. 18.

assessment of whether minor discrepancies discovered by the Migration Agency between the factual work conditions and those required in the Aliens Act shall result in a withdrawal of the work permit was not investigated in the proposal for changes in the labour migration framework presented in 2016.²⁵⁵ As mentioned above, it stops at suggesting a possibility for the employer to pursue self-correction. Remarkably, however, references are made to the fact that first instance courts have, subsequent to the above mentioned rulings by the Supreme Migration Court, ruled in favour of a discretionary assessment. In these cases the migration court did not find legal evidence that smaller and temporary discrepancies in relation to wage levels shall, unconditionally, lead to the withdrawal of the work permit.²⁵⁶

The change in the Aliens Act proposed to be enacted in December 2017, mentioned in section 4.5.5, that will allow the employer to correct minor failures to meet the work conditions required in the Aliens Act does not avoid that the migrant worker faces a situation where small negative discrepancies from the standards stipulated in the Aliens Act will result in a withdrawal of the work permit or a denial of extension of the work permit if the employer has not reported the discrepancies themselves. This leads to a situation where small flaws that the employer might not even be aware of will put the migrant worker in a vulnerable position. Furthermore, the argument that the proposed changes will enable for the migrant worker to call to the attention of the employer that the work conditions do not fulfil the requirements reflects an underestimation of the consequences of the subordination of the migrant worker in relation to the employer created by the link between the employment and the right to residence in the country. Consequently, as will be discussed below, it is questionable whether the migrant worker will be likely to report abuse of the work conditions they are entitled to. Therefore, it is welcome that the Government has initiated a special investigation to consider the introduction of a possibility of a discretionary assessment of whether the employer shall be given the possibility to pursue corrections of smaller discrepancies from the conditions required also in situations where the Migration Agency has identified the discrepancies.

An introduction of a discretionary assessment would be a step in the direction of strengthening the position of the migrant worker in that the migrant worker would not be depending on the employer for the identification of discrepancies from the requirements of the conditions in the Aliens Act in order to not risk deportation. However, this would entail a shift of focus from the protection of the labour migration regime to the protection of the individual worker, and could be a slippery slope towards the undermining of the legitimacy of the Swedish model as the importance of the collective agreements might be negatively impacted. The matter will further be subject to assessment for the Supreme Migration Court in early

²⁵⁵ (no 6) p. 124.

²⁵⁶ The cases are UM 4690-15 2015-09-29, UM 2574-15 2015-08-05 and UM 7473-16 2016-08-12.

fall 2017, as a case where the Migration court decided to withdraw the work permit of a third country migrant worker who earned a few hundred SEK less than what was stipulated by the relevant collective agreement²⁵⁷ has been granted approval for appeal. The matter the Supreme Migration Court has considered being of interest for assessment in order to establish a precedent is whether an extension of a work permit may be granted when the wage during a period has been higher than the requirement of subsistence, but below the level in the collective agreement.²⁵⁸

5.2.3 The Dependency on a Particular Employer

That the migrant worker is bound to a particular employer has been described as the most striking feature of migration law determining the nature of work.²⁵⁹ In relation to the implications of when the employer has not respected her obligations towards the migrant worker in adhering to the conditions in collective agreements, this dependency is relevant for the position of the migrant worker. As her residence permit is contingent on the employment, and the employment during the first two years is tied to a particular employer, she has few other options than to remain at the workplace where she is employed. The possibility to quit the employment and, in accordance with the Aliens Act section 7.3.3, apply for a new work permit during the time limit of three months is arguably a thin remedy for the dependency the migrant worker faces.

5.3 The Legal Status of the Offer of Employment

5.3.1 Background

One requirement in order to obtain a work permit is that an employment offer shall be provided to the migrant worker before entry to Sweden. The migrant worker needs to submit a standardised document to the Migration Agency called "Offer of Employment". The offer of employment shall include a specification of the wage, applicable insurance, period of employment, working time and information on whether the employer has a collective agreement. The main rationale behind these requirements is that the migrant worker must be able to support themselves economically,

²⁵⁷ UM 2255-16 25 2016-11-25.

²⁵⁸ Centrum för rättvisa: "Migrationsöverdomstolen meddelar prövningstillstånd i fallet med utvisningshotade Danyar Mohammed från Jokkmokk", 2017-02-20, <http://centrumforrattvisa.se/uncategorized/migrationsoverdomstolen-meddelar-provningstillstand-i-fallet-med-utvisningshotade-danyar-mohammed-fran-jokkmokk/> checked 2017-08-02.

²⁵⁹ (no 105) p. 19.

meaning that her income must exceed the level for upholding social assistance in Sweden.²⁶⁰

In accordance with Swedish law, an employment contract is concluded when the parties declare a common will to establish such a contract. There are no form requirements; the employment contract can be oral or written and general principles of contract law apply.²⁶¹ In order for the employment contract to be enforceable the employee needs to accept the contract. As the offer of employment does not fulfil the binding procedure of acceptance by the employee, it is not considered to be legally binding. Accordingly, it is possible for the employer to give the migrant worker another "real" offer that will be binding between the two parties. In accordance with jurisprudence from The Swedish Labour Court, notwithstanding that the conditions included in the employment offer provided to the Swedish Migration agency can be used as evidence when the court seeks to establish the true content of the employment contract, if the employer can prove that conditions other than those in the employment offer have been established between the employer and the migrant worker, the previous conditions will apply.²⁶²

5.3.2 Foreseeability and Distribution of Risk

The fact that the requirements in the Aliens Act section 6.2 refers to an employment offer that is not legally binding for the employer has been described as an expression for the employer-driven labour migration system.²⁶³ That work conditions offered before arrival can be enforced when the migrant worker arrives in the country of destination for the work has been considered of importance not only in a Swedish context²⁶⁴; both EU law²⁶⁵ and the ILO convention No 189 on Decent Work for Domestic Workers prescribe a requirement that a valid work contract or binding job offer be attached to an application for a work permit.²⁶⁶

The fact that the employment offer is not legally binding has implications for the foreseeability for the migrant worker as the decision to leave the

²⁶⁰ Migrationsverket, "Krav för arbetstillstånd"

<https://www.migrationsverket.se/Privatpersoner/Arbeta-i-Sverige/Anstalld/Krav-for-arbetstillstand.html> checked 2017-08-02.

²⁶¹ (no 175) p. 109f.

²⁶² See cases AD 2007 no 1, AD 2012 no 34 and AD 2015 no 19.

²⁶³ (no 113) p. 11. (no 137) p. 129.

²⁶⁴ As discussed in section 4.5.5, the requirement of a legally binding employment offer in the work permit process has been subject for discussion by the legislator. The Swedish Trade Union Confederation (LO) is of the view that the employment offer shall be made binding. LO: LOs yttrande över Stärkt ställning för arbetskraftsinvandrare på arbetsmarknaden, 2017-03-01, [https://www.lo.se/home/lo/res.nsf/vRes/lo_fakta_1366027472949_remiss_dnr20160473_pdf/\\$File/remiss_Dnr20160473.pdf](https://www.lo.se/home/lo/res.nsf/vRes/lo_fakta_1366027472949_remiss_dnr20160473_pdf/$File/remiss_Dnr20160473.pdf) checked 2017-08-03.

²⁶⁵ See Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers.

²⁶⁶ (no 123) p. 204.

country of origin in order to work in another country is a large investment, both emotionally and financially. In relation to this, it has been argued that it is problematic that the employment offer, as it includes information about wages, insurances and collective agreements, may give the migrant worker the impression that it is legally binding.²⁶⁷

The outcome of the current legal framework on labour migration where the migrant worker has no remedies when she has arrived in Sweden through a work permit based on an employment offer which the employer is not willing or not able to realise, seems unsatisfactory. If the migrant worker and the employer concludes an employment contract with conditions that do not adhere to the requirements in the Aliens Act section 6.2, the outcome is that the migrant worker might risk her residence permit in accordance with the Aliens Act section 7.7 e. In accordance with the Aliens Act section 7.3, however, if she does not accept the changes in the employment contract she might risk that her residence permit is withdrawn due to that the employment has ceased to exist. Herzfeld Olsson argues that neither the labour law framework nor the migratory framework can modify the risk that the migrant worker takes when she decides to leave her home country.²⁶⁸ She points at the fact that the legislator, through the introduction of the employer driven labour migration system, has given the employer the responsibility of the assessment of the need for labour. In the view of Herzfeld Olsson, accordingly, the employer should also stand the risk for when the prerequisites for the migration of the employee cannot be realised.²⁶⁹ This notion relates to the work of Kontouris and Freedland, who have argued for a risk mutualisation between the worker and the employer, and among the collective of workers as well as among the society, in order to achieve efficient protection of the worker.²⁷⁰

In order to counteract the abuse of the labour migration system, it has been proposed that a binding offer of employment shall be introduced as a requirement in order for the migrant worker to obtain a work permit, or that provisions guaranteeing migrant workers the same wages and work conditions as implied by the offer of employment shall be introduced.²⁷¹ Another proposal has been that parties to the employment contract shall not be able to agree to conditions below the level that is communicated to the Swedish Migration Agency when the work permit is applied for. The rationale for this proposal seem to be that the ordinary means in order to compensate for the subordination of the employee in relation to the

²⁶⁷ (no 13) p. 273.

²⁶⁸ P. Herzfeld Olsson: "Bindande eller inte? – Ger anställningserbjudandet arbetskraftsinvandringen tillräcklig förutsägbarhet?", in: C. Calleman, P. Herzfeld Olsson, (ed.): *Arbetskraft från hela världen: Hur blev det med 2008 års reform?*, Stockholm, 2015, p. 441.

²⁶⁹ Ibid. p. 443.

²⁷⁰ M. Freedland and N. Kountouris, *The Legal Construct of Personal Work Relations*, Oxford, 2011, p. 435.

²⁷¹ TCO: Arbetskraftstinvandring – Bättre kontroll för bibehållen öppenhet. 2013-05-29. <http://www.utredarna.nu/samuelengblom/2013/05/29/arbetskraftsinvandring-battre-kontroll-for-bibehallen-oppnenhet/> checked 2017-08-03. (no 268).

employer, provided for in the Swedish labour law, are not acting properly for the migrant worker.²⁷² In other words, the trade union has admitted that it is not able to strengthen the bargaining power of the migrant worker and that this is reflecting the unequal power between, and the different situations of, the migrant worker and the national worker. It has been argued that in acknowledging the different positions between the migrant worker and the national worker, as a deviation from the Swedish labour law system, the legislature must step in and compensate for the delimitation of the unions.²⁷³

As mentioned in section 4.5.5, the proposal of including a requirement of a binding employment contract in the application for a work permit was left aside in the current proposal for changes of the labour migration framework. One of the arguments was that such requirement would be an infringement of the freedom of contract.²⁷⁴ Another argument put forward by the Government was that a requirement of a binding employment contract would entail a privileged position of the migrant worker, in comparison with other workers on the labour market.²⁷⁵ Two reflections in relation to these arguments are in place. The first one is relating to the fundamental principle of equality, which entails that similar cases shall be treated similarly and different cases shall be treated differently.²⁷⁶ It could be argued that the particular vulnerable position of the migrant worker created by deportability puts her in a different position from the national worker in relation to the possibilities to effectively enjoy labour rights such as the right to fair remuneration and work conditions, as stipulated by international conventions as well as national labour law frameworks. This notion is reflected in the abovementioned statement by trade unions who acknowledge difficulties to assist migrant workers in their enjoyment of labour rights. If the different position of the migrant worker in relation to the national worker is deemed to be of significant importance, as is the standpoint of this thesis, it may be required to consider different treatment of migrant workers in comparison to national workers in as much as it serves the goals of effective enjoyment of their labour rights. Herzfeld Olsson takes a similar stance as she argues that due to the fact that the vulnerability created by the labour migration framework prevents migrant workers from enforcing their rights, exceptional measures are needed in order to balance that vulnerability. She argues that unequal treatment to national workers might be required in order to empower migrant workers so that they face less risk when trying to enforce their rights.²⁷⁷

The second reflection relates to the fundamental purposes of labour law as discussed in Section 2.1. One of the groundbreaking features of the

²⁷² See section 4.4 on the notion that the unionization in sectors where many migrant workers are employed tends to be low.

²⁷³ (no 123) p. 215f.

²⁷⁴ (no 6) p. 115.

²⁷⁵ Ibid. The difference is that the conditions in the employment contracts of national workers are subject to changes.

²⁷⁶ D. Moeckli: "Equality and non-discrimination", in: Moeckli et. al. (ed.) *International Human Rights Law*, Oxford, 2014, p. 159.

²⁷⁷ (no 123) p. 222.

Declaration of Philadelphia was that the until then hegemonic view, that the labour market should be governed by the principle of freedom of contract between the employer and the employee in a fashion not taking into consideration the power imbalance between the two parties, was challenged through the infringement of the freedom of contract through the recognition of the power imbalance between the employer and the employee as expressed by the aim to prevent the commodification of labour. In relation to this and with referral to what has been discussed above regarding the increased subordination of the migrant worker in relation to the employer, it is possible to discuss if a further infringement on the principle of the freedom of contract could serve as a means to the goal of strengthening the position of the migrant worker in order to enable the effective enjoyment of her labour rights.

Both these reflections need to be contextualized to the Swedish model, where the negotiation between employers and employees has been the bread and butter for the operation on the labour market during more than a century. If one holds the position that the Swedish model, where the parties on the labour market rule the conditions on the labour market, is worth protecting, the requirement of a legally binding employment contract must be incorporated in a manner that does not jeopardize the standard operation procedure.²⁷⁸

²⁷⁸ See chapter four regarding the function of trade unions and collective agreements.

6 ANALYSIS AND CONCLUSION

6.1 Introductory Remarks

The overall purpose of this work has been to analyse how the enjoyment of labour rights of third country migrant workers in Sweden is impacted by the migration law framework. The aim of this chapter is to discuss the research questions posed in chapter one. Consequently, it begins with a discussion on the bases of labour rights protection of migrant workers. After that, an analysis on the relationship between labour law and migration law as expressed in the Swedish legal frameworks will follow. In the final section a summary of the findings in the thesis and a few reflections on the path forward are offered.

Two overarching observations shall be made before proceeding to the concluding analysis. The first one relates to the alleged crisis of labour law.²⁷⁹ Paradigmatic shifts in the landscape of employment relationships as a result of an increased movement of labour as well as changes in production entail a need to reformulate the legitimacy of the legal field. One of the findings of this thesis is that in accommodating new forms of work relations, the labour law project needs to attend to new forms of vulnerabilities created in the labour market. In other words, the power relationship between the employer and the employee might become increasingly altered due to globalisation, thus the global era might entail a need for a more rigorous labour law. From an optimistic perspective, it can be argued that a crisis is a well-chosen moment for reflection.

The other observation is that the tension between the protection of the Swedish model and the interest of the individual migrant worker to not lose her right to residency is an area that calls for thorough research in the 21st century. Today, the concern of labour rights of the migrant worker within the Swedish context can be described as Janus-headed in that it can motivate both the improvement of her work conditions and her deportation.

²⁷⁹ See Section 1.1.

6.2 The Potential of Labour Law

Whether labour rights are human rights is a debated topic, and the aim of this thesis has not been to settle that debate.²⁸⁰ The bases of labour rights protection have been analysed in order to examine the efficiency of each set of rights in the protection of the rights of third country migrant workers. Leaving a more in depth analysis of whether labour rights accurately can be described as human rights, this thesis assumes that some labour rights are human rights. In providing efficient enforcement mechanisms as it is based on a tri-partite structure not dominated by the state, labour law can be a tool to liberate the implementation of rights from the dependence on the nation-state. Consequently, labour law can be understood as dismantling the obstacles to enjoyment of human rights constituted by the exclusionary features of citizenship. From a theoretical perspective, labour rights of third country migrant workers can be described as enjoying the discursive power of human rights and the power of applicability from labour law. This conclusion will be elaborated upon below.

To consult solely the international human rights law nexus in the search for the efficient protection of labour rights of third country migrant workers is to render the responsibility of their implementation to the discretion of the state, as the international human rights system is state centric in its design. The efficiency of labour rights included in the UDHR, the ICESCR and ILO conventions suffers from the lack of robust sanction mechanisms. As for the ICPRMW, the lack of ratifications from receiving countries makes it a bleak tool in order to strengthen the position of migrant workers.²⁸¹ Political limitations on the international level seem to be a plausible explanation to the shortcomings of these tools to protect the rights of migrant workers. However, the role of human rights as influential in terms of articulating fundamental norms intended to be fleshed out and contextualised within the domestic context shall not be ignored.²⁸²

In positing the role of citizenship in the discourse of labour rights of third country migrant workers, theories of Arendt have been analysed. The fact that the migrant worker is not fully admitted to the political realm and fully emancipated as a citizen in the country where she works has been referred to as an explanation of the subordination of migrant workers in the globalised era.²⁸³ This serves as an illustration of the limitation of the effectiveness of labour rights contingent on a membership in a community in that the citizenship constitutes a threshold to the enjoyment of labour rights protection. The notion that deportability is a factor that impacts both the material and formal enjoyment of labour rights of migrant workers which they are entitled to by virtue of being humans is a further reflection in

²⁸⁰ In section 2.2. an overview of arguments in favour and against labour rights as human rights was provided.

²⁸¹ See section 4.1.1 and 4.1.2.

²⁸² See section 2.2.

²⁸³ See section 2.3.1.

relation to the theories of Arendt. In other words, deportability undoes the victories won in terms of rights afforded migrants in international conventions. The findings of this thesis show, however, that labour law from a normative perspective has potential to eradicate the distinction made between national and migrant workers.

The strength of labour law in relation to labour rights of migrant workers is twofold. The first strength is that its protective ambit is inclusive. This follows from the basic notion that what qualifies an individual to be encompassed by labour law is that she performs work. This is deduced from the attention paid to the inseparability of the work performed from the person performing it, the acknowledging of the humanity of the worker, the counteraction against the commodification of work and the aim to alter the subordinate position of the worker, present in the development of labour law. The second strength is that it is not contingent solely on the state for its realisation. The tri-partite structure, where associations of workers and employers, together with the state, are responsible for the conditions on the employment market provides efficient tools for the applicability of rights.

In sum, what follows from fundamental theories of labour law is that there shall be made no difference between workers. Therefore, the labour law protection shall apply to national workers and migrant workers alike. As such, labour law from a normative perspective is a powerful tool in order to strengthen the position of workers, even when they perform work in states where they do not have citizenship. The fact that one of the core features of labour law is the recognition of the subordination of the worker in relation to the employer makes it particularly useful in the protection of migrant workers as their subordination is increased due to the vulnerability created by deportability.

In concluding that labour law from a normative perspective is a powerful base of rights for the migrant worker as its protection theoretically is inclusive and indiscriminate, the thesis has found that the application of migration law leads to the outcome that the migrant worker enjoys labour rights protection to a lesser extent than the national worker.²⁸⁴ This will be the focus for the next section of the analysis.

6.3 The Swedish Labour Migration System – Migration Law Hegemony on Labour Law Matters?

Within the jurisdiction of a nation state, different areas of legislation need to coexist. As different areas of law serve to protect different interests, it is important to identify and pay attention to conflicts of those interests. Of interest for this thesis has been the relationship between labour law and

²⁸⁴ See chapter five.

migration law. The premise of this thesis is that labour rights protection is of intrinsic value if the labour law framework and the migratory framework shall be able to coexist without undermining each other. It has however been shown that the Swedish legislative framework seems to enable the undercutting of labour law principles through the application of migration law.²⁸⁵

Initially it should be mentioned that an intertwinement between labour migration and asylum migration seems to be prevalent. This is illustrated by the fact that individuals who experience a need for protection enter the labour market under substandard conditions as it is their only available possibility to obtain a legal residence in the country. As much as the change of track offers asylum seekers a new way to obtain a residence permit in Sweden, the fact that many migrants with an experienced need of protection apply for work permits can be interpreted as a symptom of an asylum system which needs to be more attentive to the need of protection of individuals. In accordance with the preparatory works that forewent the introduction of the change of track, it seems that the main purpose was an aim to not interfere with personal establishment on the labour market. The preparatory works have to a lesser extent elaborated on the potential of the change of track to enable abuse of individual migrants.

The main impact of the migration law framework on the labour rights of third country migrant workers identified in this thesis have been their weakening on the protection of employment and on the enjoyment of fair work conditions. The circumstance that different requirements in order to prove identification in different stages of the migration process governs the right of the migrant to keep her employment is an example of the precedence given to migration law. An alignment of the requirements in order to prove identity throughout the migration process would increase the foreseeability for the migrant worker. Another example of when migration law governs the protection of employment is the, in accordance with the current labour migration framework, existing order that failures contingent on the employer to adhere to conditions required by the Aliens Act lead to that the migrant worker loses her employment.

Article 8 of the ILO convention no 143 which has been ratified by Sweden entails that under the condition that the migrant has resided legally within the state, the loss of employment shall not render the migrant “illegal” or “irregular” status. The Article further stipulates that the migrant worker shall enjoy equal levels of protection with national workers in relation to dismissal. In light of the findings in the thesis, it is questionable whether Sweden fulfils its obligation in accordance with the convention.

As has been discussed in chapter five, the current labour migration framework which is undergoing revision has not safeguarded the migrant worker from vulnerability created by deportability. The situation when the

²⁸⁵ Ibid.

migrant worker risks deportation due to failures of the employer to meet the conditions stipulated in the Aliens Act is of relevance for the material enjoyment of the right to fair work conditions of the migrant worker. The situation can be described as quite paradoxical, as the vulnerability of the worker is a result of the aim to provide protection of the same worker. As the right to residence is tied to the employment, the incentives of the migrant workers to report abuse of her labour rights are few as reporting entails a risk of deportation. Accordingly, it can be argued that vulnerability is a factor creating a self-regulating regime where the migrant worker is less likely to claim her rights. The likelihood that the migrant would report abuse is further decreased by the fact that the work permit during the first period is tied to a particular employer. In other words, the migratory framework is dictating the limits for the material enjoyment of the labour law protection which the migrant worker is by law entitled to, and the current order which the proposed changes in the legislation is intending to solve, where the individual migrant worker bears the cost of failures contingent on the employer is unsatisfactory. However, the relevant regulation in the Aliens Acts also serves to protect the labour migration system and the conditions on the Swedish labour market. Consequently, being an illustration of vulnerability created by deportability, the situation when lack of adherence to conditions in collective agreements begets deportation is also an example of a problem that has been a headache for the legislator; how can the interests of the individual migrant worker of not being deported be reconciled with the Swedish model based on ideas of high labour standards in all sectors? This is a pressing issue and it is positive that the legislator has shed light on the conflict of interests, however it seems as if the balancing between the protection of the individual migrant worker and of the labour migration system is not easily reconciled.

The circumstance that the work permit is based on an offer of employment which is not legally enforceable has implication for the foreseeability of the migrant worker. One of the main arguments against including such a requirement has been that such requirement would entail too much of a risk for the employer. Without taking a stance in the matter of whether such requirement should be required or not, it should be noted that the risk taken by the migrant worker who chooses to migrate shall not be ignored. The fact that it is the interest of the employer that has been given the greatest weight in the preparatory works reflects the inherent power imbalance in the relationship between the migrant worker and the employer. The discussion relates to theories presented by Ruhs, who argues that the rational choice made by the migrant worker who has chosen to leave her home country in order to work abroad also includes the awareness of the limited labour rights protection she can realistically expect to enjoy as a migrant worker, and that she always has the possibility to return to her home country.²⁸⁶ It could be objected that the autonomy of the migrant worker in the choice to stay or leave is constrained by the investments made in order to migrate. Further, the abovementioned intertwinement between labour migration and asylum

²⁸⁶ See section 2.3.2.

migration suggests that for many third country migrant workers the alternative to go back to the country of origin is not an alternative.

The implications of the conflation between labour law and migration law seem to be that the migration law framework invalidates residence permits in conflicts that are labour law matters in nature; labour law matters become migratory matters and the labour rights protection is conditioned on the adherence to migration law.²⁸⁷ The responsibility distribution in the administration of labour migration in Sweden entails that the tasks of safeguarding that the standards are met in order to grant work permits mainly is incumbent on the trade unions. As such, the ground work for the migration administration is handed over to the bastions of labour law, but the decision regarding who is to be granted protection is decided by the migratory framework. Consequently, labour law becomes a way to regulate migration. It is the interests protected by migration law, and not the equivalents of the labour law framework, that are prevailing in the final assessment. This order can possibly be explained by the fact that these two areas of law need to be in a conversation with each other and that this system gives the actors of labour law incentives to make sure that the standards provided for in the labour market are looked after, but it is important to highlight the operation in order to bring to the fore the implications it has for the individual migrant worker, the labour market and for the legitimacy of the labour law framework in general.

In sum, it can be argued that the conflation between migration law and labour law implies the risk that the normativity of labour law will be rendered obsolete in relation to migrant workers. With a referral to the aim to alter the inherent power imbalance within the employment relation, labour law has served to hold the employer responsible for abuse of the employee. In contrast, the Swedish labour migration system can be described as holding the migrant worker responsible for being abused.

One of the most central interests that labour law serves to protect is the strengthening of the position of the worker. Consequently, the idea of labour law is to prevent, limit and contain the operation of dishonest employers. When a new level of vulnerability is added, as is the case with the risk of deportability the migrant worker experiences through the condition that her residence permit is contingent on the continuity of the employment, the prospect for labour law to operate undisturbed in order to serve its purpose is heavily diminished. If attention is not paid to the augmented power relationship, the achievements of labour law are undermined when the migration law framework is implemented.

²⁸⁷ See chapter five.

6.4 Make Labour Law Great Again – Reflections for the Future

The aim of this thesis has been twofold; to analyse the protection of labour rights that third country migrant workers enjoy in Sweden today, and to discuss how the protection of this group of workers can be improved.

The main findings thus far have been:

- A. That, in making claims for labour rights for third country migrant workers, human rights provide discursive power. Labour law enables efficient application as it is not depending solely on the state for its implementation. Furthermore, it dismantles the obstacles to rights enjoyment constituted by citizenship.²⁸⁸
- B. That the outcome of the conflation of labour law and migration law in Sweden is that the labour rights protection of migrant workers is undermined, both formally and materially.
- C. That the intertwinement between labour migration and asylum migration, while offering the migrant an additional path to protection, makes the migrant exposed to abuse in the labour market.

This final section of this thesis will be devoted to reflections on how the labour rights protection of migrant workers in Sweden can be strengthened. In relation to the notion that migrant workers suffer from a higher degree of vulnerability than national workers, special protection of migrant workers might be called for as a means to attend to their increased subordination. This could be a way to compensate for the difference between the positions of the two groups of workers, and could possibly be justified by the formula of equality entailing that different cases shall be treated differently.²⁸⁹ Leaving aside a hypothetical design of the special protection legislation, this notion is compelling from a justice perspective and could possibly be a short-term solution to urgent problems occurring in the labour market. However, it is questionable whether special legislation of different groups of workers is compatible with solidarity between workers and a strong sense of collectivity, being fundamental ideas of labour law.

As concluded above, the labour law complex has the capacity to efficiently protect migrant workers. However, the tri-partite structure with the inherent strength in not being state centric has a weakness related to the operation of the trade unions in that many migrant workers are not unionized.²⁹⁰ Thus, a

²⁸⁸ See, however, section 4.2 on the notion that gender may have an indirect impact on the enjoyment of protection of labour law as women tend to perform domestic work to a larger extent than men.

²⁸⁹ See section 5.3.

²⁹⁰ See section 4.4.

challenge for the future will be for the unions to find strategies to reach out to migrant workers to ascertain their labour rights protection. This entails that trade unions must make efforts in order to increase levels of unionization in fields where migrant workers are employed, an action that will also serve the goal of further strengthening the Swedish model, as deficient adherence to labour rights of migrant workers is undermining the legitimacy of the model at large.

What seems to be the core question for the efficient enjoyment of the labour rights the migrant workers are entitled to in accordance with Swedish labour law is how third country migrant workers shall be able to claim their rights without risking deportation. In other words, the question is how the labour law framework shall be able to operate without being undercut by the migratory legal framework. Carens discusses the situation of irregular migrant workers in his “Firewall Argument”.²⁹¹ However, the concept can possibly be applied on documented third country migrant workers as well. The details of how the implementation of such “Firewall” should be designed is a matter that will be left aside, but it could perhaps entail a possibility to report abuse of labour rights to an institution isolated from the Migration Agency and entirely from the migration process. It could be argued that trade unions already play this role. However, the conclusions drawn in this thesis is that the trade unions are not to a sufficient degree protecting the labour rights of third country migrant workers, partly because of low levels of unionization in sectors where this group of workers are employed, partly because the role of the trade union is not sufficiently separated from the migration process. The current order, where the trade unions are involved in the migration process, is presumably that the migrant worker hesitates to make such reports due to fear of deportation as it is not clear that the report of abuse of labour rights does not jeopardize the residence permit. It should be made clear, however, that the flaws in this structure are not attributable to the trade unions, but to the legal framework for labour migration.

Generally, the role of the trade unions in relation to third country migrant workers is delicate as it is in the interest of the unions to influence labour migration as this form of migration has implications on the conditions on the Swedish labour market. At the same time, they are responsible for the protection of labour rights of all workers performing work in Sweden, where third country migrant workers are within its protective ambit. For labour law to be able to deliver on its promises in relation to third country migrant workers, the role of the trade unions in relation to this group of workers need to be clarified.

The suggestions for changes in the proposal for a revision of the labour migration system contains notions of an aim to separate the reporting of abuse from the risk of deportation.²⁹² However, as mentioned above, the change in the Aliens Act suggested to be enacted in December 2017,

²⁹¹ See section 3.4.

²⁹² See section 4.5.5.

entailing that minor flaws in the adherence to the conditions stipulated in the Aliens Act shall not lead to withdrawal of the work permit only in situations where the employer has initiated self-correction, does not to a sufficient degree remedy the situation that the migrant worker risks deportation due to factors beyond her control. If the revision of the labour migration framework shall live up to its title “A Strengthened Protection for Migrant Workers in the Labour Market”, it needs to incorporate a more refined power analysis.

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