

**The Swedish Labor Market and Irregular Migrant Workers.
Reflections on Interest Representation on a Segmented
Labor Market and on the Future of Neo-Corporativist
Labor Relations in Sweden**

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Paper to the track

Labor and Social Movements Responding to Globalization at the ILERA
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By

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This text is work in progress. It represents the commencement of an attempt to, from a legal perspective, collect and compile labour market processes surrounding undocumented migrant workers in Sweden and to conceptualize and analyze these processes within an adequate theoretical framework. The latter task remains to be carried out.

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Swedish Labor Market Relations and Irregular Migrant Workers: Challenges and Responses

The presence of undocumented migrant workers (UMW), living precariously and performing underpaid labor outside the organizational control and protection of the unions, has severely challenged the representation of Sweden as a generous, tolerant welfare state without inherent tensions and with a stable labor relations model based on mutual understanding and high union density.¹ The ambivalence and conflicts that have arisen between unions, between labor market parties, and between social movements and the labor market parties, reflect some of the challenges that globalization, new patterns of migration, neoliberalism and European Union harmonization have posed in relation to the Swedish social democratic welfare state regime.

Sweden has a history of work-related migration that surpasses its neighboring Nordic countries, specifically during the 1960s and 70s, in an era of unparalleled capitalist expansion. Known as one of the most egalitarian and inclusive nations in the world, Sweden has been described by postcolonial scholars as employing a strategy of “inclusive subordination”, in which “racialized groups have been granted citizenship, but have been forced to subordinated positions in the labor market and the welfare state”. Since the 1990s, the Swedish economy has shifted from an industrial mode of production to a “knowledge economy” with an expanding service sector², and the welfare state has experienced a “circumscribed neoliberalism”, which has reduced its levels of inclusion and weakened its redistributive qualities.³ Researchers within the field of postcolonial studies have critically examined discourses of the cost of an encompassing welfare state in light of new patterns of migration, linking them to changes in migration policies from pluralistic strategies of inclusive subordination to strategies of assimilation.⁴ Sweden has developed a strict policy regarding asylum.⁵

In the wake of such changes in the economy and the labor market, in the welfare state, and in migration policies, the number of persons present and working in Sweden despite the lack of permit has increased. It is estimated that between 31 000 and 75 000 so called undocumented migrants live in Sweden, and apparently there is a large demand for this type of labor.⁶ Almost ten years ago it was noted by labour lawyers that the illegal migration into the EU was a,

¹ The author wants to thank Rebecca Selberg and Markus Gunneflo for helpful suggestions on earlier drafts. All translations from Swedish to English are done by the author.

² Benner, Mats, “The Scandinavian Challenge. The Future of Advanced Welfare States in the Knowledge Economy”, *Acta Sociologica*, vol. 46 no 2, June 2003, p. 132-149.

³ Mulinari, Diana, (2010) “Postcolonial encounters: migrant women and Swedish midwives”. In Fink, J. & Å. Lundqvist (eds.), *Changing relations of Welfare: family, gender and migration in Britain and Scandinavia*, Farnham: Ashgate, Harvey, David, (2007), *A Brief History of Neoliberalism*, Oxford: Oxford University Press.

⁴ Mulinari, Diana, (2010) “Postcolonial encounters: migrant women and Swedish midwives”. In Fink, J. & Å. Lundqvist (eds.), *Changing relations of Welfare: family, gender and migration in Britain and Scandinavia*, Farnham: Ashgate, Schierup, C., Hansen, P, Castles, S., (2006), *Migration, Citizenship and the European Welfare State: a European dilemma*, Oxford: Oxford University Press.

⁵ Cf. Stern, Rebecca (2008), *Ny utlänningslag under lupp*, Svenska Röda Korset, Noll, Gregor & Popovic, Aleksandra, “Flyktingstatus – en marginaliserad resurs i svensk asylrätt?”, *Juridisk tidskrift* 2005-06, p. 834-865.

⁶ OECD (2009), *International Migration Outlook*, SOPEMI. SIEPS Europapolitisk analys, nr 2010:8 Papperslös, laglös, rättslös?

quantitatively speaking, larger phenomenon than “legal” migration between Member States.⁷ Research has illustrated the precarious situations of undocumented migrants in Sweden, severely challenging the notion of Sweden as “women-friendly” and egalitarian.⁸ Swedish legal academia has also begun noticing undocumented migrants.⁹

⁷ Keller, Berndt (2003), “The Employment Chapter of the Amsterdam Treaty. Towards a New European Employment Policy?”. In: Blanpain, Roger & Weiss, Manfred (red.), *Changing Industrial Relations & Modernisation of Labour Law. Liber Amicorum in Honour of Professor Marco Biagi*. The Hague/London/New York: Kluwer Law International, p. 233.

⁸ Frank, Denis (2009), ”De oaktoriserade migranterna i svensk byggnadssektor – en studie i deportationspolitik 1990-2004”, *Sociologisk forskning*, årgång 46 nr 2, s. 26-51, Mattsson, Kristina (2008), *De papperslösa och de aningslösa*, Stockholm: Leopard förlag, Gavanoas, Anna (2010), *Who Cleans the Welfare State? Migration, Informalization, Social Exclusion and Domestic Services in Stockholm*, Institute for Futures Studies Research Report 2010/3, Stockholm: Institute for Futures Studies, Sager, Maja (2011), *Everyday Clandestinity. Experiences on the Margin of Citizenship and Migration Policies*, diss. Lund: Media-Tryck, Abotsi, Britta & Stephens, Andreas (red.) (utan årtal), *Omänskliga rättigheter. En antologi om flyktingar och papperslösas situation i Sverige*, notis, Blomgren, Stina (2008), *Svart notis*, Stockholm: Bokförlaget Atlas, Lodenius, Anna-Lena (red.) (2006), *Global respekt. Grundkurs i globalisering och mänskliga rättigheter*, Stockholm: Premiss förlag, Thörn, Ylva (2008), ”Papperslösa – vår tids statare?”. In: Thoursie, Anna (red.), *Vems ordning och reda? Framtidens kollektivavtal och fackliga samarbete*. Agoras årsbok 2007. Stockholm: Agora, Khosravi, Shahram (2006), ”Territorialiserad mänsklighet: irreguljära migranter och det nakna livet”. In: de los Reyes, Paulina (red.) *SOU 2006:37 Om välfärdens gränser och det villkorade medborgarskapet. Rapport av Utredningen om makt, integration och strukturell diskriminering*, s. 283-310, Socialstyrelsen (2010), *Social rapport 2010*, Stockholm: Socialstyrelsen, Holgersson, Helena (2011), *Icke-medborgarskapets urbana geografi*, diss. Göteborg: Glänta produktion, Sahlström, Olle (2008), *I skuggan av en storhetstid*, Stockholm: Bokförlaget Atlas, Lindberg, Ingemar (2008), *Solidaritetsens landskap. Arbetare utan gränser*, Stockholm: Bokförlaget Atlas, Øien, Cecilie & Sønsterudbråten, Silje (2011), *No Way In, No Way Out? A study of living conditions of irregular migrants in Norway*, FAFO-report 2011:03, Norge: FAFO, Ascher, Henry (2010), ”Rätten till hälsa för papperslösa migranter i Sverige”. In: Lundberg, Anna (red.), *Mänskliga rättigheter – juridiska perspektiv*, Malmö: Liber, bidragen i *Fronesis* nr 27, *Migration*, 2008, de Stoop, Chris (1999), *Utan papper. Människohantering i dagens Europa*, Stockholm: Ordfront förlag, Bohlin, Rebecka (2012), *De osynliga. Om Europas fattiga arbetarklass*, Stockholm: Bokförlaget Atlas.

⁹ Noll, Gregor (2006), ”Asylsystemet, migrantnätverket och den informella arbetsmarknaden”. In: Gustavsson, Sverker, Oxelheim, Lars & Wahl, Nils (red.), *En gränslös europeisk arbetsmarknad? Europaperspektiv 2006*. Stockholm: Santérus Förlag, Noll, Gregor (2008), “The Asylum System, Migrant Networks and the Informal Labour Market”, In: Cramér, Per & Bull, Thomas (red.), *Swedish Studies in European Law*, Vol. 2, 2007, Oxford and Portland, Oregon: Hart Publishing, Noll, Gregor (2010), ”Introduction”, *European Journal of Migration and Law*, Vol. 12, No. 2, s. 143-147, Noll, Gregor (2010a), “Why Human Rights Fail to Protect Undocumented Migrants”, *European Journal of Migration and Law*, Vol. 12, No. 2, s. 241-272, Askola, Heli (2010), ”’Illegal Migrants’, Gender and Vulnerability: The Case of the EU’s Returns Directive”, *Feminist Legal Studies*, Vol. 18, s. 159-178, Inghammar, Andreas (2010), “The Employment Contract Revisited. Undocumented Migrant Workers and the Intersection between International Standards, Immigration Policy and Employment Law”, *European Journal of Migration and Law*, Vol. 12, No. 2, s. 193-214, Inghammar, Andreas (2012), ”Rörlighet på bakgården – EU-gemensam reglering av papperslösa arbetstagare och deras arbetsgivare”. In: Bakardjieva Engelbrekt, Antonina, Oxelheim, Lars, Persson, Tomas (red.), *Arbetslöshet, migrationspolitik och nationalism – hot mot EU:s sammanhållning?*, Årsbok för europaforskning inom ekonomi, juridik och statskunskap. Stockholm: Santérus förlag, Tjernberg, Mats (2009), ”Frågan om kongruens mellan rätten att erhålla vissa sociala förmåner och skyldigheten att betala skatt”, *Skattenytt*, nr 4, Tjernberg, Mats (2010), “The Economy of Undocumented Migration: Taxation and Access to Welfare”, *European Journal of Migration and Law*, Vol. 12, No. 2, s. 149-171, Alexander, Shannon (2010), “Humanitarian Bottom League? Sweden and the Right to Health for Undocumented Migrants”, *European Journal of Migration and Law*, Vol. 12, No. 2, s. 215-240, Gunneflo, Markus med Selberg, Niklas (2010), “Discourse or Merely Noise? Regarding the Disagreement on Undocumented Migrants”, *European Journal of Migration and Law*, Vol. 12, No. 2, s. 173-191.

The presence of undocumented migrants pose severe challenges to Swedish labor market policies, at the core of the representation of Sweden as a country where political conflict and tension has been resolved through a model based on “samförstånd”, a far-reaching mutual understanding of the opposing labor market parties. In this paper, I explore the issue of undocumented migrant workers from a legal perspective and discuss the tensions and conflicts that arise within and between labor market parties against the backdrop of the Swedish/Nordic labor relations model.

In what ways do the presence of and demands from irregular migrant workers challenge the actors of the Swedish labor relations model and its actors? How are these challenges met in terms of discourses and practices of inclusion, exclusion and organizing?

Unions have played a uniquely important role in the labor market and in the political arena in Sweden, and the strategy of inclusive subordination in which migrant workers were granted citizenship never challenged either the position of white, Swedish workers or the labor relations model as such. With new patterns of undocumented work-related migration, unions have been forced to new strategies and reactions. The interaction between unions and undocumented migrant workers is located within an existing legal framework regulating labor and migration respectively. These frameworks represent both restraining and enabling factors in relation to undocumented migrant workers.

There is a need for a deepened understanding of the ways in which labor markets function within welfare states in a globalized world, in terms of relations between workers; between documented and undocumented; between workers and their organizations; between labor and capital; and between the state and organized labor and capital.¹⁰

Undocumented Migrants in Sweden

Little is known of the group of undocumented migrants in Sweden. For example, a government inquiry mentions that in Stockholm most undocumented migrants are from Mongolia and Bolivia, and continues about the rest of this population that is said to stem from “the rest of South America, Africa and Asia”, and also the former Soviet Republics. In the South of Sweden many are said to be from Bosnia and Macedonia. Nothing is known about the origins of the undocumented migrants in Gothenburg. The age span is said to be from 1 to 82 years. Since most asylum seekers reside in Stockholm, Göteborg and Skåne, it is estimated that the undocumented migrants also are present in those areas.¹¹ Some estimates claim that between 2000 and 3000 undocumented migrants are children, while other claim that the number is 10 000.¹² The trade

¹⁰ Policy analysis are often about the EU:s action in the Southern Europe, and does not often discuss how policies are played out in the Northern parts of the union. Cf Demmelhuber, Thomas, ”The European Union and Illegal Migration in the Southern Mediterranean: The Trap of Competing Policy Concepts”, *The International Journal of Human Rights*, vol. 15, No. 6, August 2011, p. 813-826.

¹¹ SOU 2011:48 Vård efter behov och på lika villkor – en mänsklig rättighet. Betänkande av Utredningen om vård för papperslösa m.fl., pp. 87-98.

¹² SOU 2011:48 Vård efter behov och på lika villkor – en mänsklig rättighet. Betänkande av Utredningen om vård för papperslösa m.fl., p. 95, SOU 2010:5 Skolgång för alla barn. Betänkande av Utredningen om rätt till skolgång m.m. för barn som vistas i landet utan tillstånd, p. 57.

union movement experience that undocumented migrants in Sweden work as cleaners, in hotels and in restaurants. They also shovel snow from inner city roofs, pick berries. In the commerce sector undocumented migrants pile products, in construction they demolish and clean. Undocumented migrants also work as taxi drivers.¹³ In 2010 in Sweden 27 460 third-country nationals were apprehended, and 20 205 was ordered to leave, and 27 413 left Sweden.¹⁴ In 2009, the number of irregularly staying third country nationals apprehended in the EU-27 was about 570 000 (7% less than in 2008). Member States returned about 253 000 third country nationals (4.7% more than in 2008).¹⁵

European Union: Legislative Action – But of What Kind? And what are the Implications?

An important legislative development in Europe is the enactment 18 June 2009 of the directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.¹⁶ This piece of legislation represents a novelty from a labor market perspective. The Directive is a complicated legal text that contains provisions from a number of legal sub-divisions. The core of the legislation is the prohibition (art. 3) of buying work from undocumented migrant workers and the sanctioning of non-compliance. It is not clear whether the directive's provisions is applicable only to persons ("employee" and "employer") covered by labor law, or if the directive is applied to every buying and selling of undocumented migrants' work (regardless of legal qualification).¹⁷ Some of the directive's sanctions are the traditional ones stemming from financial, administrative and penal law (art. 5, 7, 9, 10). The other sanction is the back payments that undocumented migrant workers under some conditions are entitled to (art. 6). These payments amount to the salary a corresponding "legal" worker would have been entitled to (art. 2.j), and herein lies the novelty. Taking into account the legal basis for the directive – the treaty provision making EU-rules on migration possible – and the

¹³ Kommunal, Faktaunderlag till Kommunals kongress i Stockholm den 7-11 juni 2010, Kommunals medlemmar och den globala utmaningen [Anna-Lena Lodenius], p. 143.

¹⁴ SEC(2011) 620 final, COMMISSION STAFF WORKING PAPER Accompanying the document Communication from the Commission to the European Parliament and the Council Annual Report on Immigration and Asylum (2010), p. 77.

¹⁵ COM(2011) 291 final, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL Annual Report on Immigration and Asylum (2010), p. 7.

¹⁶ Detailed analysis of the directive is found in Schierle, Florian (2010), "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". In: Hailbronner, Kay (red.), *EU Immigration and Asylum Law. Commentary on EU Regulations and Directives*. München: C.H. Beck/Hart/Nomos, Peers, Steve (2009), "Legislative Update: EC Immigration and Asylum Law Attracting and Deterring Labour Migration: The Blue Card and Employer Sanctions Directives", *European Journal of Migration and Law*, Vol. 11, No. 4, s. 387-426, and Selberg, Niklas (forthcoming 2012), "Åtgärder mot den som tillgodogjort sig papperslösas arbete: Nya principer i arbetsrättens sanktionssystem, eller ett principiellt nytt sanktionssystem?". In: Nyström, Birgitta, Malmberg, Jonas & Edström, Örjan (eds.), *Nedslag i den nya arbetsrätten*, Malmö: Liber.

¹⁷ I argue that the directive's scope in this respect is beyond labour law and covers also self-employment etc. Selberg, Niklas (forthcoming 2012), "Åtgärder mot den som tillgodogjort sig papperslösas arbete: Nya principer i arbetsrättens sanktionssystem, eller ett principiellt nytt sanktionssystem?". In: Nyström, Birgitta, Malmberg, Jonas & Edström, Örjan (eds.), *Nedslag i den nya arbetsrätten*, Malmö: Liber. Cf Peers, Steve (2009), "Legislative Update: EC Immigration and Asylum Law Attracting and Deterring Labour Migration: The Blue Card and Employer Sanctions Directives", *European Journal of Migration and Law*, Vol. 11, No. 4, s. 387-426, p. 412, p. 414.

Directive's stated ratio legis, a new role for labor law (*mutatis mutandis*) and its protective aspirations seems to be emerging. The Directive's aim is to "fight illegal immigration" and therefore it "prohibits the employment of illegally staying third country nationals" (art. 1). The prohibition is enforced with the different sanctions. The preparatory works claim that the proposed legislation "is concerned with immigration policy, not with labour or social policy" and that

"[i]t does not affect third-country nationals' rights as workers, such as the rights to join a trade union, to participate in and benefit from collective bargaining and to enjoy working conditions that come up to health and safety standards".¹⁸

What is being established here, then, is a migration law initiative in the form of labour market regulations and labour law-like provisions. The goal of the directive is to enforce cost neutrality between hiring documented and undocumented workers, thus achieving fewer undocumented migrants on the Union territory. The counteraction towards undocumented migrant workers is protective legislation. The notions of 'protection for' and 'attacks on' analytically collapses. In order to have fewer undocumented migrants, one needs to introduce protection for them, is the prevailing logic. Clearly this is a new conceptualization for labour law (at least labour law like) provisions. It is somewhat surprising that trade unions do not object to the inherent description of labour law protection as a cost and a determining factor in the cost-benefit analysis done by employers. What will come of a legal sub-division that lets itself be labeled in terms of different degrees of burden? Is labour market legislation going to become a future tool for reformers of migration policy? Interconnecting and interlacing two legal fields will presumably lead to both of them changing.

Every application of the directive presupposes the capture of the undocumented migrant, and in this sense the directive cannot be said to propose a labour law for this group, or anything along those lines. The aim of the directive is in each and every instance to deport the migrant. It is therefore conceptually wrong to claim that the directive creates in any way a category of "illegal migrant worker" that holds rights in relation to an employer.¹⁹ The directive addresses these workers in their capacity of migrants and not as ("illegal") workers. Anyone making a claim for back payment on the basis of the directive will, due to deportation, shortly cease to be an undocumented migrant.

The subcontracting regulations (art. 8) of the directive present Swedish law with a new principle. Labor market legislation has not contained rules that make a legal entity responsible for the actions (contracts) of its business partners. The subcontractor liability scheme thus entered Swedish law in the form of a framework for sanctioning unwanted market behavior, not as a part of traditional worker protection.

¹⁸ COM(2007) 249 final, Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals, p. 2-4.

¹⁹ Cf Inghammar, Andreas (2010), "The Employment Contract Revisited. Undocumented Migrant Workers and the Intersection between International Standards, Immigration Policy and Employment Law", *European Journal of Migration and Law*, Vol. 12, No. 2, p. 193-214, Inghammar, Andreas (2012), "Rörlighet på bakgården – EU-gemensam reglering av papperslösa arbetstagare och deras arbetsgivare". In: Bakardjieva Engelbrekt, Antonina, Oxelheim, Lars, Persson, Tomas (red.), *Arbetslöshet, migrationspolitik och nationalism – hot mot EU:s sammanhållning?*, Årsbok för europaforskning inom ekonomi, juridik och statskunskap. Stockholm: Santérus förlag.

The Directive establishes a policy of privatization of the control of foreigners on Swedish soil. Because employers are made responsible for demanding and examining documentation indicating the employment would be legal, the task of controlling foreigners is shifted to the employers, the idea being that no person lacking documents will be hired; a new role for employers in Sweden but an appreciated model among those states with similar policies in place. It is seen as an efficient way of effectuating migration policy and controlling foreigners.²⁰

The Directive grants the state, through the courts, a new role on the market for labour. The undocumented migrant's back payment is to be calculated on the basis of what an equivalent "legally" employed worker would have gotten. Within a Swedish context, this inevitably means comparing to collective agreements.²¹ The Swedish labour law system does not contain any mechanism for extension of, or giving *erga omnes* effect to, collective agreements.²² A court's decision to use a collective agreement to determine the salary for an undocumented migrant will, in effect, be comparable to extending collective agreements to the cohort of undocumented migrant workers.

Within Swedish legal academia, it has been argued that the directive *per se* will strengthen the position that "illegal" contracts should not to be perceived as *pactum turpe*.²³ Inghammar argues that undocumented migrants' "worker's rights under the employment contract ... will be further strengthened under Directive 2009/52/EC", which would amount to a "semi-legalisation", or acceptance of the undocumented migrant workers' employment status could improve the legal situation significantly, but only if appropriately recognized and promoted by the actors of the labour market or the judicial system". The concept of "semi-legalisation" is used by Inghammar to describe "the acceptance of some rights derived from the employment contract without accepting the continuation of the employment should, in my mind, preferably be considered as a semi-legalisation of the employment contract."²⁴ I disagree, and argue that the directive is to be understood as not having any legal implications beyond its actual wordings. The Directive was enacted on the basis of (what is now) article 79 of The Treaty of the Functioning of the European

²⁰ de Lange, Tesseltje, "The Privatization of Control over Labour Migration in the Netherlands: In Whose Interest?", *European Journal of Migration and Law*, vol. 13 (2011), p. 185-200.

²¹ A number of legal techniques can be used to achieve this. Cf Selberg, Niklas (forthcoming 2012), "Åtgärder mot den som tillgodogjort sig papperslösas arbete: Nya principer i arbetsrättens sanktionssystem, eller ett principiellt nytt sanktionssystem?". In: Nyström, Birgitta, Malmberg, Jonas & Edström, Örjan (eds.), *Nedslag i den nya arbetsrätten*, Malmö: Liber, and SOU 2010:63 EU:s direktiv om sanktioner mot arbetsgivare. Betänkande av Sanktionsutredningen.

²² But the same result is obtained in other ways. Se Fahlbeck, Reinhold & Mulder, Bernard Johann (2009) *Labour and Employment Law in Sweden*, Lund: Juristförlaget i Lund, pp. 34-35.

²³ Inghammar, Andreas (2010), "The Employment Contract Revisited. Undocumented Migrant Workers and the Intersection between International Standards, Immigration Policy and Employment Law", *European Journal of Migration and Law*, Vol. 12, No. 2, p. 193-214, p. 203, Inghammar, Andreas (2012), "Rörlighet på bakgården – EU-gemensam reglering av papperslösa arbetstagare och deras arbetsgivare". In: Bakardjieva Engelbrekt, Antonina, Oxelheim, Lars, Persson, Tomas (red.), *Arbetslöshet, migrationspolitik och nationalism – hot mot EU:s sammanhållning?*, Årsbok för europaforskning inom ekonomi, juridik och statskunskap. Stockholm: Santérus förlag, p. 162.

²⁴ Inghammar, Andreas (2010), "The Employment Contract Revisited. Undocumented Migrant Workers and the Intersection between International Standards, Immigration Policy and Employment Law", *European Journal of Migration and Law*, Vol. 12, No. 2, p. 193-214, s. 211, and s. 211, fn 90.

Union on immigration policy.²⁵ This can not be the basis (competence) either for the enactment of provisions on general principles of contract law²⁶ (*pactum turpe* etc), or on human rights related implications²⁷ of an employment contract (i.e. freedom of association, right to collective bargaining et cetera)?

Some commentators argue that the Directive will be of practical importance²⁸, while others consider the key provisions put forward to be too complex, and too narrowly formulated, so that they rarely will be applicable. Since few of the undocumented migrants that are captured will be able to get any back pay on the basis of the directive, the directive will not contribute much to its aim.²⁹

Labour Migration to Sweden

The capitalist and public sector expansion following World War II led to a shortage of labour in Sweden, which was resolved by labour immigration (as well as an increasing number of Swedish women in paid work).³⁰ Work permits were demanded of migrants from outside the Nordic countries. Trade unions commented on applications. At the down turn of production by the end of the 1960's, trade unions started objecting to applications. Instead, unions argued, the domestic labor reserve consisting of married women, the elderly, and disabled should be utilized. The Swedish Trade Union Confederation (LO) pointed out that migrant workers were being exploited and recruited only to sectors of the labour market with the lowest wages.³¹ The need for structural change within the labor market was also put forth as an argument by LO, who linked the availability of cheap labor to the durability of inappropriate and ineffective forms of production.

²⁵ "The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings."

²⁶ Cf e.g. Collins, Hugh (2008), *The European Civil Code. The Way Forward*, Cambridge: Cambridge University Press.

²⁷ LeVoy, Michele & Geddie, Eve, "Irregular Migration: Challenges, Limits and Remedies", *Refugee Survey Quarterly*, vol. 28 no 4, 2010, p. 87-113.

²⁸ Barnard, Catherine (2010), *The Substantive Law of the EU. The Four Freedoms*, 3rd ed.. Oxford: Oxford University Press, p. 547, Inghammar, Andreas (2010), "The Employment Contract Revisited. Undocumented Migrant Workers and the Intersection between International Standards, Immigration Policy and Employment Law", *European Journal of Migration and Law*, Vol. 12, No. 2, p. 193-214.

²⁹ Peers, Steve (2009), "Legislative Update: EC Immigration and Asylum Law Attracting and Deterring Labour Migration: The Blue Card and Employer Sanctions Directives", *European Journal of Migration and Law*, Vol. 11, No. 4, s. 387-426, Selberg, Niklas (forthcoming 2012), "Åtgärder mot den som tillgodogjort sig papperslösas arbete: Nya principer i arbetsrättens sanktionssystem, eller ett principiellt nytt sanktionssystem?". In: Nyström, Birgitta, Malmberg, Jonas & Edström, Örjan (eds.), *Nedslag i den nya arbetsrätten*, Malmö: Liber.

³⁰ This section is based on Calleman, Catharina (2012), "Arbetskraftsmigration, arbetsgivarmakt och mänskliga rättigheter", In: Madell, Tom et al. (eds.), *Utblick och inblick. Vänbok till Claes Sandgren*, Uppsala: Iustus förlag, p. 119-137, and Yalcin, Zeki, (2010), *Facklig gränspolitik. Landsorganisationens invandrings- och invandrarpolitik 1946-2009*, diss., Örebro: Örebro Studies in History 10/Örebro Studies in Conditions of Democracy 4.

³¹ Postcolonial scholars have since pointed to the role of the unions themselves in this condition, Knocke, Wuokko (2011), "Osynliggjorda och 'fragmenterade' – invandrade kvinnor i arbetslivet". In: Mulinari, Paula & Selberg, Rebecca (eds.), *Arbete. Intersektionella perspektiv*, Malmö: Gleerups, Mulinari, Diana & Neergaard, Anders (2004) *Den nya svenska arbetarklassen: Rasifierade arbetares kamp inom facket*, Umeå: Borea bokförlag.

Notions of control, demand, and need in relation to migrant workers have changed considerably over time. In 1967, a general demand on the obtaining of work permit before arrival in Sweden was put forward. Permits were to be granted only if the terms and conditions of the employment amounted to what a Swedish worker would have received under the same circumstances. One ambition was to counter the concentration of migrant workers to a few specific sectors. Trade unions and employers' organizations commented on each application. In the 1980's, labour immigration to Sweden was limited to instances in which workers already in Sweden were not sufficient. In the 1990's, work permits were to be afforded only when the application considered employment in sectors in which there was a shortage of labour in Sweden and within the EU.

In 2008, new regulations on labour migration to Sweden were established.³² Inspired by EU recommendations and policy suggestions, the stated aim was to simplify the recruitment of third-country nationals, thus providing employers with qualified workers. The need for a certain kind of labour was no longer to be a factor in decisions on granting or denying work permits, which were no longer limited to certain sectors or professions. Instead, individual employers' stated need for labour was the focus of the decision process.

Today, a labour migrant looking for work in a sector in which there is great shortage of personnel does not have to wait for a decision on the application before entry into Sweden (ch. 5 sect. 18). Work permit is to be denied only in cases where the wage is considered too low to live on, and/or where the terms and conditions are deemed worse than what Swedish workers would have received in a corresponding situation (ch. 6 sect. 2). A work permit is granted for period of a maximum of four years, and cannot be extended beyond the employment (ch. 6 sect. 2a). If the employment is terminated before the permit has expired, the permit will be revoked, unless the migrant worker has found new and corresponding employment within three months (ch. 7 sect. 3). The labour market parties are to be heard on the issue of what a Swedish worker would have been paid in a similar situation (i.e. collective agreements etc) (utlänningsförordningen [2006:97] ch. 5 sect 7, 7a).

The regulation on labour migration refers only to employment offers, which are not binding to the employers. The actual amounts paid are not investigated, nor will employers be inspected on how they carry out their legal obligations. Within legal academia, these rules have been conceptualised as a liberal regime of labor migration, in which the employers' demand for labour is given the greatest influence on labour migration to Sweden. The rules, according to Calleman, puts the migrant worker in a strongly dependent position in relation to the employer.³³

Sweden: Continuity Regarding Legislation on Undocumented Migrant Workers

It is a criminal offence to work in violation of the Swedish Aliens Act (2005:716), and the construction of the crime basically consists of working, or hiring, in lack of a permit to do this. Both employer (ch. 20 sect. 5) and employee (ch. 20 sect. 3) are covered, and violations are

³² Prop. 2007/08:147 Nya regler för arbetskraftsinvandring.

³³ Calleman, Catharina (2012), "Arbetskraftsmigration, arbetsgivarmakt och mänskliga rättigheter", In: Madell, Tom et al. (eds.), *Utblick och inblick. Vänbok till Claes Sandgren*, Uppsala: Iustus förlag, p. 119-137, p. 120, p. 128.

punished with fines or, in some cases for the employer, with imprisonment; the crime can be committed both by intent and by culpa.³⁴ It has been questioned whether the concept of employment in the aliens act's criminal provisions is the same as in Swedish labour and employment law. The legislator's response to this indicates that the private law concepts of employment, employer and employee are to be used in the application of the aliens act. This implies that if the working party in the agreement does not meet the standard that forms the concept of employee, the "employer" has not committed a criminal offence.³⁵ The concept of employee cannot be found in legislation. Instead it is formulated in the case law of the Swedish labour court, with guidance from the *travaux preparatoire*.³⁶ An interesting aspect of these two rules lies in the fact that they contain the same language. This implies that an employer who is asked if s/he has had an "illegal" migrant employed, in effect is asked to confess to a crime of her own. This fact has not been acknowledged in Swedish legal discourse, nor discussed or tested in relation to Sweden's obligations to human rights regimes.

The trade union movement, generally speaking, opposes this criminalization. They suggest that, sometimes by referencing Swedish legislation on prostitution, only the employer is to be punished for hiring "illegals".³⁷ Two political parties, the Swedish Green Party and the Left Party of Sweden, oppose this criminalization on the same grounds as the trade unionists.³⁸ Some Social Democrats agree on this one-sided de-criminalization.³⁹

The legislator has been passive in this issue, partly in anticipation of the directive 2009/52/EC.⁴⁰ This passive position in relation to proposals to partially de-penalize nevertheless makes the legislator responsible for the *lege lata* of today.

In Europe, discourses on "illegal work" have shifted in their conceptualizations of the central actors, from a focus on "employee" to a focus on the "employer". In Sweden, the popular notion and use of terms such as "illegal work" has never been coupled by a corresponding notion of "illegal employers": the label of "illegal" is continuously referred to the employee. This illustrates the notion of the "problematic" as something alien to the Swedish model and its actors, reproducing the notion of the "innocent" Swedish welfare state, a discourse with historical ties to its colonial roots and which contributes to processes of rendering racism and xenophobia invisible.⁴¹

³⁴ Inghammar 2009, Seth, Torsten (2009), *Svensk Internationell arbetsrätt*, Lund: Studentlitteratur AB, p. 109, Calleman, Catharina (2007), *Ett riktigt arbete? – om regleringen av hushållstjänster*, Säter: Pang, pp. 122.

³⁵ Prop. 2003/04:35 Människosmuggling och tidsbegränsat uppehållstillstånd för målsägande och vittnen m.m., p. 48-51.

³⁶ Sigeman, Tore (2010) *Arbetsrätten. En översikt*, uppl. 5. Stockholm: Norstedts Juridik AB, p. 27ff, Källström, Kent & Malmberg, Jonas (2009), *Anställningsförhållandet. Inledning till den individuella arbetsrätten*, uppl. 2. Uppsala: Iustus förlag, p. 26ff, Ds 2002:56 Hållfast arbetsrätt – för ett föränderligt arbetsliv [Niklas Bruun & Jonas Malmberg], p. 75ff.

³⁷ See below.

³⁸ E.g. Motion 2010/11:Sf394 av Maria Ferm m.fl. (MP), e.g. Motion 2009/10:Sf319 av Kalle Larsson m.fl. (V).

³⁹ E.g. Motion 2009/10:Sf274 av Luciano Astudillo (S).

⁴⁰ E.g. Socialförsäkringsutskottets betänkande 2009/10:SfU14

⁴¹ Cf Vollmer, Bastian A., "Policy Discourses on Irregular Migration in the EU – 'Number Games' and 'Political Games'", *European Journal of Migration and Law*, vol. 13 (2011), p. 317-339, p. 326. Cf Mulinari (2010).

Industrial Relations Actors' Views on Work Performed Undocumented Migrants

The implementation process regarding the directive 2009/52/EC reveals the positions of the Swedish labour market parties on undocumented migrant workers and the status of this work. LO opposes the criminalization of unauthorized work, arguing that decriminalization is the only way to change the “structure of economic incentives” of employing UMW. The trade unions are free to organize undocumented migrants, but these workers cannot be represented on the same terms as other workers, because of the fact that undocumented migrant workers lack the protection against unfair dismissal. If such a person were to contact his or her union, the employer would sack that person. A UMW, LO asserts, standing up for his or her rights, (legal or in collective agreements) risks deportation, and in order to take this risk possibilities to fair economic compensation must exist. The proposed legal changes are put forward against the notion that “today, both the undocumented migrant worker and the employer are in breach of the law and commit a crime against the state. In a legal process it is very hard to claim that one criminal should pay damages to another criminal; it would make for weak compromises. By strengthening the standing of the undocumented migrant worker, they will be able to face the employer on more equal terms”.⁴² *The Swedish Confederation for Professional Employees* (TCO) also opposes the criminalization of unauthorized work. The confederation claims that a lack of work permit does not impinge on the status as worker and that employment law is applicable to the UMW.⁴³ *The Swedish Association of Graduate Engineers* states that it will not be part of inspections and searches for UMW on the labour market, deeming it a government issue.⁴⁴

The employers, organized through the *Confederation of Swedish Enterprises*, argue that trade unions exaggerate the severity of the situation of UMW.⁴⁵ According to them, the basic problem for UMW is their lack of permit of residence and work. Thus, the trade unions that once created regulations for migration into Sweden are responsible for the sufferings of the UMW. The employers argue that the best course of action for the trade unions in relation to UMW is to expand the possibilities for legal migration.⁴⁶ *The Federation of Swedish Farmers* and the *Confederation of Swedish Enterprise* observe that sanctions against employers of unauthorized workers may lead to increased suspicion against certain groups of people and warn against discriminatory practices in the wake of such regulation.⁴⁷ Against this backdrop, the farmers' organization has suggested, with not much support, de-criminalizing of unauthorized work and

⁴² LO, 2010-12-15, Dnr 20100458, LOs remissvar SOU 2010:63, EUs direktiv om sanktioner mot arbetsgivare.

⁴³ TCO, 2010-12-20, Dnr 10-0081, YTTRANDE EU:s direktiv om sanktioner mot arbetsgivare. Betänkande av Sanktionsutredningen (SOU 2010:63).

⁴⁴ Sveriges Ingenjörer, 2010-12-14, Dnr. Rnr 61.10, YTTRANDE EU:s direktiv om sanktioner mot arbetsgivare (SOU 2010:63)

⁴⁵ Choudhury, Muazzam & Holm, Stefan, ”LO ger en falsk bild”, 2011-11-26, http://www.svensktnaringsliv.se/kommentaren/lo-ger-en-falsk-bild_145523.html Last visited 2012-02-16.

⁴⁶ Ekenger, Karin, ”LO, de papperslösa och dubbelmoralen”, 2008-08-19, http://www.svensktnaringsliv.se/allmanna_nyheter/lo-de-papperslosa-och-dubbelmoralen_57990.html Last visited 2012-02-16.

⁴⁷ Lantbrukarnas Riksförbund, 2011-01-07, Remissyttrande Dnr 2010/5467, EU:s direktiv om sanktioner mot arbetsgivare (SOU 2010:63). Skogs- och Lantarbetsgivareförbundet, 2011-01-14, Remissyttrande SOU 2010:63 EU:s direktiv om sanktioner mot arbetsgivare, betänkande av Sanktionsutredningen. The employer organization for agriculture and lumber agrees. Skogs- och Lantarbetsgivareförbundet, 2011-01-14, Remissyttrande SOU 2010:63 EU:s direktiv om sanktioner mot arbetsgivare, betänkande av Sanktionsutredningen.

extending these workers the same rights, held by other workers.⁴⁸ *The Swedish Federation of Business Owners* notices that tax evasion is a pre-requisite for hiring UMW, and views this criminal behavior as the bigger problem. If tax evasion and illegal competition were countered there could be no hiring of UMW and furthermore, “disloyal competition and crime is really [...] worse than hiring third country nationals”.⁴⁹ *The Federation of Swedish Farmers* and the employer organization for agriculture and lumber state that they are opposed the governments’ attempts to referring the “problem” with “illegals” to the employer party.⁵⁰

Employment Protection for Undocumented Migrant Workers: The Swedish Labour Court’s Case Law on Labour Law and Immigration Law

The work performed by workers lacking permit to work in Sweden has been acknowledged to some extent by Swedish (labour) law. The Labour Court has decided on the employment protection of a worker who is lacking a work permit. Labour law governs workers’ rights while immigration law governs migrants’ rights (to be employed). It is a criminal act to employ a person lacking working permit. The Labour Court has decided in AD 1979 no 90⁵¹ that the Employment Protection Act (1982:80) is not applicable to persons not permitted by immigration law to perform work in Sweden. Since this legislation was deemed not applicable the just cause standard for termination of employment does not stop employers from firing workers lacking work permits. The court claims that holding a working permit is a “primary requisite” for the employment of aliens in Sweden. Thus, the Employment Protection Act does not hinder the employer’s criminal responsibility for employing someone lacking a work permit. The Labour Court puts forward an *obiter dictum* with a highly unusual content; the Court seems to regret the position of the law in this matter and is ambivalent to the decision just made. Penal law regulations are a sufficient argument for a certain application of labour law.

“The Labour Court finally would add the following. [...] the protective provisions of the Employment Protection Act and the criminal law of the Immigration Act are in conflict. The court has emphasized that an employer must not observe regulations that will impose criminal responsibility on him. On the other hand, this deciding implies that the social protection of an alien, in a situation such as the one at hand, is substantially weakened. The court therefore wishes to draw attention to the, from the standpoint of the latter, less than satisfactory situation that the mentioned conflict of laws may lead to.”

⁴⁸ Lantbrukarnas Riksförbund, 2011-01-07, Remissyttrande Dnr 2010/5467, EU:s direktiv om sanktioner mot arbetsgivare (SOU 2010:63). Skogs- och Lantarbetsgivareförbundet, 2011-01-14, Remissyttrande SOU 2010:63 EU:s direktiv om sanktioner mot arbetsgivare, betänkande av Sanktionsutredningen.

⁴⁹ Företagarna, 2011-01-14, Dnr SOU 2010:63, Remissvar – EU:s direktiv om sanktioner mot arbetsgivare (SOU 2010:63).

⁵⁰ Lantbrukarnas Riksförbund, 2011-01-07, Remissyttrande Dnr 2010/5467, EU:s direktiv om sanktioner mot arbetsgivare (SOU 2010:63). Skogs- och Lantarbetsgivareförbundet, 2011-01-14, Remissyttrande SOU 2010:63 EU:s direktiv om sanktioner mot arbetsgivare, betänkande av Sanktionsutredningen.

⁵¹ Cf AD 2000 no 17.

The Swedish Labour Court and “Illegal” Work

One other case concerns “illegal” work. Employers are, in relation to their counterparts in collective agreements, obliged to apply the standards in the collective agreement also upon workers not members of the trade union organization. The trade union is entitled to damages if the employer does not comply in this respect.⁵² In AD 1991 no 49, the Labour Court decided that the trade union was entitled to damages when the employer had not applied to the standards of the collective agreement to workers lacking work permits (and who are also not members of the trade union party to this agreement). The trade union requested that the court would award them a high amount of damages because the employer had exploited a vulnerable group (they did not speak Swedish) of workers, and because the employer had financially benefitted from his breach of contract. The Court awarded the trade union a fifth of the requested sum, because the employer had not specifically intended to exploit vulnerable workers by evading the provisions of the collective agreement, and because the profits made were rather low.⁵³

The Legal Standing of Undocumented Migrant Workers from a Labour Law Perspective

The Swedish Aliens Act criminalizes an employment contract between an undocumented migrant worker and an employer. How should the agreement be viewed from the point of view of private law? Is the “illegal” contract valid? This has been the way to approach the legal standing of undocumented migrants on the labour market. It has been asked whether the contract is a *pactum turpe*, and therefore not deserving the recognition by the legal system. No claim could be made before a court on the basis of a *pactum turpe*. The other perspective on this issue is that “at least a hard core of rights derived from this somewhat peculiar employment contract nevertheless could be subject to recognition by the courts and the legal actors”. Inghammar argues that the latter point *de lege lata* is possible in Sweden: it is not “satisfactory” to let the doctrine of *pactum turpe* preclude these employment contracts from any legal position.⁵⁴ Inghammar continues: “It would, however, not be possible to consider these employment contracts equal to any other, legal, employments and a full ‘legalisation’ or legal recognition of these contracts is therefore not at hand.”⁵⁵ Personally I do not invoke the doctrine of *pactum turpe*, since I do not view work performed by undocumented migrants as morally wrong.⁵⁶

⁵² Schmidt, Folke (1997), *Facklig arbetsrätt*, Reviderad upplaga 1997 ombesörjd av Ronnie Eklund under medverkan av Håkan Göransson, Kent Källström och Tore Sigeman. Stockholm: Norstedts Juridik AB.

⁵³ The Labour Court’s Case no A87/10 is an example on legal demands taken to court on undocumented migrant workers. The case started as a dispute over unpaid wages but ended up being about punitive damages for not entering into a dialogue with the trade union. The case was not tried by the court. The proceedings were ended by the agreement of the parties.

⁵⁴ Inghammar, Andreas (2010), “The Employment Contract Revisited. Undocumented Migrant Workers and the Intersection between International Standards, Immigration Policy and Employment Law”, *European Journal of Migration and Law*, Vol. 12, No. 2, p. 193-214, p. 203.

⁵⁵ Inghammar, Andreas (2010), “The Employment Contract Revisited. Undocumented Migrant Workers and the Intersection between International Standards, Immigration Policy and Employment Law”, *European Journal of Migration and Law*, Vol. 12, No. 2, p. 193-214, p. 204.

⁵⁶ Carens, Joseph H., “The Rights of Irregular Migrants”, *Ethics and International Affairs*, vol. 22.2, summer 2008, p. 163-186, p. 174.

Swedish law contains a similar doctrine of contracts in breach of public policy that can be used in this instance.⁵⁷

Swedish law permitted, already before the directive 2009/52/EC, courts to try cases in which undocumented migrants demanded back pay for work performed.⁵⁸ Swedish general principles of contract law on the effects on contracting in breach of public policy are quite unclear both regarding the conditions for applicability and as regards the legal consequences of application.⁵⁹

It is also assumed that “at least” laws on health and safety at work, vacation and working time are applicable on undocumented migrant workers. The government inquiry argues that the applicability is deducted from the goals and aims of these laws. They are to be applied without a view on the validity or not of an employment contract between an undocumented migrant and an employer. The inquiry also speculates that more of the labor laws are applicable, but claims that this has not been fully investigated. Also collective agreements bind organized undocumented migrants, and are applicable to them.⁶⁰

The legislative development in Sweden on undocumented migrants in Sweden seems to centre to a large extent on the individual employment contract and attempts to make this the basis of legal claims. General doctrines and principles of contract law⁶¹, that play a secluded role in Swedish law, are evoked to create employment law for undocumented migrants.⁶² This indicates a new role for the individual employment contract, which has played a very secluded role in Swedish labor law.⁶³ Will the individual employment contract come to play the role of vessel that enables the development of labor and employment law for undocumented migrants? The future will tell. Lacking from the Swedish legal debate on the protection for undocumented migrants are international legal instruments, doctrine or case law (ILO, UN, ECHR). No reference has been

⁵⁷ Grönfors, Kurt, Dotevall, Rolf (2010) *Avtalslagen. En kommentar*, 4th ed., Stockholm: Norstedts, pp. 196 with further references.

⁵⁸ This state of the law has come about in a quite peculiar way. First this notion of the possibility of back pay was put forward tentatively by a government inquiry (SOU 2010:63, p. 170-188), and then the Labour Court was consulted on the text. The inquiry described the law and concluded that there probably existed a right to back pay. The Court explained that it had no objection to the description of the state of law in these respects (and approved of the suggested legislation). Arbetsdomstolen, Remissyttrande 2011-01-14, Dnr 32/2010, Saknr 124 Betänkandet EU:s direktiv om sanktioner mot arbetsgivare (SOU 2010:63).

⁵⁹ Noll, Gregor & Selberg, Niklas (2011), ”Remiss: Betänkandet EU:s direktiv om sanktioner mot arbetsgivare (SOU 2010:63)”, Juridiska fakultetsstyrelsen, Juridiska fakulteten, Lunds universitet, dnr. J 2010/75.

⁶⁰ SOU 2010: 63, p 180-188. Inghammar, Andreas (2010), “The Employment Contract Revisited. Undocumented Migrant Workers and the Intersection between International Standards, Immigration Policy and Employment Law”, *European Journal of Migration and Law*, Vol. 12, No. 2, p. 193-214.

⁶¹ Also usually quite old. Cf the leading text on contracting in breach of public policy: Nial, Håkan (1936), “Om förvärv i strid med legal förbud”, *Tidsskrift for Rettsvidenskap*, p. 1-77.

⁶² Inghammar, Andreas (2010), “The Employment Contract Revisited. Undocumented Migrant Workers and the Intersection between International Standards, Immigration Policy and Employment Law”, *European Journal of Migration and Law*, Vol. 12, No. 2, p. 193-214. Inghammar, Andreas (2012), ”Rörlighet på bakgården – EU-gemensam reglering av papperslösa arbetstagare och deras arbetsgivare”. I: Bakardjjeva Engelbrekt, Antonina, Oxelheim, Lars, Persson, Tomas (red.), *Arbetslöshet, migrationspolitik och nationalism – hot mot EU:s sammanhållning?*, Årsbok för europaforskning inom ekonomi, juridik och statskunskap. Stockholm: Santérus förlag, SOU 2010:63 EU:s direktiv om sanktioner mot arbetsgivare. Betänkande av Sanktionsutredningen.

⁶³ Cf Fahlbeck, Reinhold (1995), “Past, Present and Future Role of the Employment Contract in Labour Relations in Sweden”. In: Betten, Lammy (ed.), *The Employment Contract in Transforming Labour Relations*, The Hague/London/Boston: Kluwer Law International.

made to Sweden's international obligations to human rights regimes. This is perhaps because of Sweden's history of monism and the demand for transformation into law of international obligations.⁶⁴ This primacy of the employment contract over international law as ground for demand of protection is interesting and counterintuitive.

Peculiarities of Trade Unionism in Sweden

Trade unions within the Swedish Trade Union Confederation, LO, are present "in virtually every aspect of public life" in Sweden, and weigh in on debates on social and economic policy. LO is strongly connected to the Social Democratic Workers' Party (SAP), affirming its deeply rooted position in within the Swedish welfare state. LO and SAP are interrelated organizations; SAP is the political branch of the labor movement; LO the outcome of labor organization. SAP implement policy through politics and legislation; LO works the bargaining table. Independent unions without connections to LO (or TCO or SACO), on the other hand, are not common in Sweden, and they have played "a very marginal role on the labour market". The small syndicalist union SAC is one of these rare independent unions, and one of the reasons for its marginal position is that it "has been fought consistently and fiercely by LO, and SAF [the employers' organization] has never wanted anything to do with it".⁶⁵ Apropos the power of the trade union movement it has been noted that the employer side often turn to the political arena rather than to the negotiating table, assuming the political branch will adhere to their demands, and putting more trust in the outcomes of political processes.⁶⁶ Trade unions within the LO function in symbioses with both the state and the employers. The role of public authorities in the everyday world of labour relations is restricted by the Swedish model in that labor market parties govern through collective agreements. The interaction and dealings between employers and trade unions have been to a great extent carried out at the level of the locals, i.e. the plant level trade union organization. The formation of labor law strengthened the unions and their position in bargaining processes, so much so that the trade unions' locals were said to "partake in virtually every aspect of workplace operations".⁶⁷ This fundamental organizational aspect of the Swedish model, that has worked to structure the power relations of workplaces within private and public sector alike, is now beginning to change as union density declines.⁶⁸

The trade unions have been described as integrated parts of the plants, effectively disarming the early adversary role of unions and moving them in the direction of co-operation and "mutual understanding". Research within the legal field has suggested that trade unions have become the equivalence of a lawyer's office in defence of the interest of members, while at the same time

⁶⁴ Cf the discussion in Vogel, Hans-Heinrich (1992) "Om införlivande av internationella överenskommelser och annan folkrätt med svensk rätt", *Förvaltningsrättslig tidskrift*, p. 343-365.

⁶⁵ Fahlbeck, R., *Nothing Succeeds Like Success. Trade Unionism in Sweden*, Juristförlaget i Lund, Lund, 1999, p. 33, p. 14, pp. 18-20.

⁶⁶ Fahlbeck, R., *Nothing Succeeds Like Success. Trade Unionism in Sweden*, Juristförlaget i Lund, Lund, 1999, p. 69.

⁶⁷ Fahlbeck, R., *Nothing Succeeds Like Success. Trade Unionism in Sweden*, Juristförlaget i Lund, Lund, 1999, p. 8, p. 56, p. 46.

⁶⁸ Kjellberg, Anders, (2001) *Fackliga organisationer och medlemmar i dagens Sverige*, 2nd ed., Lund: Arkiv Förlag.

being highly integrated in the state structure in a corporatist fashion..⁶⁹ Research within the field of postcolonial studies have pointed out that in relation to racialized workers, Swedish unions have employed strategies of “inclusive subordination” in which Swedish workers have been prioritized.⁷⁰ Recent research within the field of sociology has indicated that the trust and perceived meaning of unions are in decline chiefly among young workers.⁷¹

The relation between employer and unions have been said to be characterized by “[s]trong elements of trust, co-operation and mutual understanding” and Fahlbeck has even used the term “marriage of reason”, without the possibility of a divorce.⁷² The success of trade unions in shaping the law has generated a positive perception of law as a tool of change and protection within the trade union movement. The trade unions have contributed to the juridification of the labour market, meaning “conflicts of interests on the labour market are transformed into conflicts of legal character and considered legal questions”.⁷³ The aggregated result of this process is a changing role for trade unions with the effect that “[s]hop stewards act as solicitors”:

”In their original form, the main tasks of the trade unions on the labour market can be defined as articulation and furtherance of the employees’ interests. In the Nordic countries, articulation of interests has traditionally taken the form of demand for legal regulation or rules laid down in agreements. After the advent of such regulation, furtherance of these interests has turned into protecting these rights, in other words, supervision of compliance with the regulations at places of work. The trade unions’ role as a lawyer has become increasingly important; from this perspective, negotiations for an agreement and possible legal proceedings become important forms of activity.”⁷⁴

Labour law scholars seem confident the trade unions at the local level will keep their role as supervisors of implementation of both legislation and collective agreements. Legal scholars have noted some important implications of the juridification of working life; conflicts, regarding production results and other political issues, take place within a framework of legal rules, drawing a number of aspects into the parties’ consideration. Bruun et al conclude:⁷⁵

“As regards the adversary role of the local union one can say that today the conflict of interests between labour and capital has been embodied in a system of rules which prescribe that the watching of interests be carried out in an orderly manner with the intention to co-operate and reach a consensus with management. [...] What used to be an exchange of wages and better working conditions for industrial peace has developed into a relationship where work satisfaction and better quality of working life in general is exchanged for higher productivity and increased economic efficiency.”

⁶⁹ Bruun, N., et al., *The Nordic Labour Relations Model. Labour Law and Trade Unions in the Nordic Countries – Today and Tomorrow*, Aldershot, Dartmouth, 1992, p. 90, p. 18.

⁷⁰ Knocke, Wuokko (2011), “Osynliggjorda och ‘fragmenterade’ – invandrade kvinnor i arbetslivet”. In: Mulinari, Paula & Selberg, Rebecca (eds.), *Arbete. Intersektionella perspektiv*, Malmö: Gleerups, Mulinari, Diana & Neergaard, Anders (2004) *Den nya svenska arbetarklassen: Rasifierade arbetares kamp inom facket*, Umeå: Borea bokförlag.

⁷¹ Kjellberg, Anders, (2001) *Fackliga organisationer och medlemmar i dagens Sverige*, 2nd ed., Lund: Arkiv Förlag.

⁷² Fahlbeck, R., *Nothing Succeeds Like Success. Trade Unionism in Sweden*, Juristförlaget i Lund, Lund, 1999, p. 8.

⁷³ Bruun, N., et al., *The Nordic Labour Relations Model. Labour Law and Trade Unions in the Nordic Countries – Today and Tomorrow*, Aldershot, Dartmouth, 1992, pp. 24.

⁷⁴ Bruun, N., et al., *The Nordic Labour Relations Model. Labour Law and Trade Unions in the Nordic Countries – Today and Tomorrow*, Aldershot, Dartmouth, 1992, pp. 24.

⁷⁵ Bruun, N., et al., *The Nordic Labour Relations Model. Labour Law and Trade Unions in the Nordic Countries – Today and Tomorrow*, Aldershot, Dartmouth, 1992, p. 258, pp. 90-91 for the quote.

The Swedish Trade Union Confederation: Evolving Policies on Undocumented Migrant Workers

The Old Trade Union Policy: Patrolling Migrants

Trade unions are key actors in developing migration policy, not only because of the possibility to suggest reform and legislation, but also because of their historical role in decisions on work permits. The relative small number of UMW in Sweden, compared to the rest of Europe, has been explained by the strong and active trade unions. Considering the presence, control and power of the unions, employers knew that if they hired an undocumented migrant, the trade union would take notice.⁷⁶ It has been reported that trade union involvement leads to more “thorough” control of undocumented migrants and a less prominent shadow economy. It has even been suggested that trade union involvement in this respect is part of “the Scandinavian tradition”.⁷⁷ Other European states, in which unions do not play this particular role, have as a matter of (police) policy favored targeting public places, squares, metro stations et cetera, for immigration raids as a means of determent.⁷⁸

However, undocumented migrant workers have been present for a long time in the construction industry. From 1990 and onwards, the construction workers union has been visiting work sites and report to the police suspected violations of the migration law regarding work permits.⁷⁹ The construction workers union has taken part in the internal control of foreigners⁸⁰ at the work sites, and has been able to entice the police in this. Research has traced the dealings between the police and the unions, and unveiled the methods employed to identify UMW at Swedish work sites during the last decades: the police encouraged the trade union to actively take part in the internal control of foreigners, and after being tipped off, the trade union officials visited work sites and communicated with the work force. If the officials still suspected violations of migration law, they contacted the police, which would arrive and stay with the trade unionists at the site. On some occasions the trade union officials assisted the police in their work.⁸¹ The police authorities would also include officials of the construction workers’ union in the planning and execution of raids at work sites.⁸²

An official from an LO-union have described the alerting of authorities upon encountering undocumented migrant workers as a “side effect of the activities of the trade unions” and claimed that the reasons for this action was that the trade union “lacked tools to help the

⁷⁶ Frank, Denis (2009), ”De oaktoriserade migranterna i svensk byggnadssektor – en studie i deportationspolitik 1990-2004”, *Sociologisk forskning*, årgång 46 nr 2, pp. 26-51, p. 32 med hänvisning till Schierup m.fl.

⁷⁷ Caruso, Bruno (2004), ”Immigration Policies in Southern Europe: More State, Less Market?”. In: Conaghan, Joanne, Fischl, Richard Michael, Klare, Karl (eds.) *Labour Law in an Era of Globalization. Transformative Practices and Possibilities*, Oxford: Oxford University Press, p. 303, p. 312

⁷⁸ Triandafyllidou, Anna & Ambrosini, Maurizio, ”Irregular Migration Control in Italy and Greece: Strong Fencing and Weak Gate-Keeping Serving the Labour Market”, *European Journal of Migration and Law*, vol. 13 (2011), p. 251-273.

⁷⁹ Frank, Denis (2009), ”De oaktoriserade migranterna i svensk byggnadssektor – en studie i deportationspolitik 1990-2004”, *Sociologisk forskning*, årgång 46 nr 2, pp. 26-51 p. 37

⁸⁰ Hydén, Sophie & Lundberg, Anna (2004), *Inre utlänningskontroll i polisarbete – mellan rättstatsideal och effektivitet i Schengens Sverige*, diss. IMER/Malmö högskola, Tema Etnicitet/Linköpings universitet.

⁸¹ Frank, Denis (2009), ”De oaktoriserade migranterna i svensk byggnadssektor – en studie i deportationspolitik 1990-2004”, *Sociologisk forskning*, årgång 46 nr 2, pp. 26-51, pp. 43.

⁸² Mattsson s. 125ff. Blomgren, S., *Svart notis*, Bokförlaget Atlas, Stockholm, 2008, pp. 165.

undocumented migrant workers”.⁸³ At the same time, there is within LO an awareness of workers being the ones exploited – and also recognition of abuse of the asylum system. If the undocumented migrants are not organized, the employers will benefit.⁸⁴

While particular unions within LO employed police/authority strategies to control UMW in order to protect unionized workers and their wage levels, the rhetoric of the trade union confederation itself has been different. High ranking LO officials stated back in 2005 that while they are opposed regularization for “moral reasons”, they are in favour of action against the demand side of unauthorized work rather than against the workers themselves. LO officials argue that unions should “never take on the role of the police; it is not our task to hunt criminal employers engaged in serious white collar crime”. The UMW were described as a part of the workforce, and

“workforces being exploited is always a trade union matter. To us it is a matter of solidarity. We support each other knowing that this will make us all stronger. From that perspective, it does not matter whether it is legal or illegal workforces being exploited.”⁸⁵

In 2008, trade union officials stated that they would no more alert the police upon encountering undocumented migrant workers.⁸⁶ However, around the same time another official from an LO-union said that “[w]hen we suspect a white collar crime being committed, we call the police and tax authorities” regardless of the status of the workers at the site: “we still do this”, the union official explained. ⁸⁷ Employers suspected by trade unionists for being involved in illegal matters are still reported to the authorities, but the unionists try to make sure that the filing of charges does not result in the capturing of the undocumented workers.

Representatives from the syndicalist union SAC oppose this line of trade union activity and have suggested that LO-unions instead turn to the UMW themselves and organize them: because the trade unions should not act as a police force, only with the consent of the workers should unions alert authorities to illegalities, SAC asserts.⁸⁸

Whether or not it was the explicit policy of LO-affiliated unions to search for and report UMW is a matter of dispute. Some LO-officials admits this was in fact policy: “it was our directives to call the police. Swedish law was to be followed” as one official put it; others have claimed it was an ad-hoc practice carried out by union officials trying to maneuver complex situations.⁸⁹

It is possible that the representatives of LO-unions continued to call the police upon encountering UMW despite the change in rhetoric from the highest level of the confederation, which tried to conceptualize the presence of UMWs as a migration law “problem” for the police, not for the unions.

The discourse on the presence of UMWs was beginning to change at the end of the decade, as the tough position on behalf of LO unions in relation to UMWs was challenged by blue-collar unions. Union activists called on notions of worker solidarity by pointing out the precarious and

83 Thord Pettersson in Lindquist, K., “Praxis inom LO att ange papperslösa”, *Arbetaren* 08-10-01.

84 Johan Lindholm quoted in Lindquist, K., “Praxis inom LO att ange papperslösa”, *Arbetaren* 08-10-01.

85 Olauson, E., Håkansson, L., ”De som lockas jobba illegalt bör få rätt till skadestånd”, *DN-debatt*, 05-07-30.

86 Blomgren, S., *Svart notis*, Bokförlaget Atlas, Stockholm, 2008, p. 174-175.

87 Thord Pettersson quoted in Lindquist, K., “Praxis inom LO att ange papperslösa”, *Arbetaren* 08-10-01.

88 Lotta Holmberg quoted in Lindquist, K., ”LO-fack fick papperslösa utvisade”, *Arbetaren* 08-03-18.

89 Blomgren, S., *Svart notis*, Bokförlaget Atlas, Stockholm, 2008, p. 174.

extremely tough conditions under which UMWs were working. Proposals from within the LO were being discussed at meetings and congresses: these workers, activists were saying, should be welcomed in to the organizations and unions should act on their behalf.⁹⁰

Steps towards a New Policy: Swedish White-Collar Workers and the ETUC

The trade union movement's approach to UMWs has shifted step by step. In 2007, the white-collar trade union TCO was one of the first labor organizations to decide on policy, and set its goal at "changing the power balance between the undocumented migrant workers and their employers". The focus was on labor market rights, not on migration policy, e.g. regularisation. The board of TCO highlighted the encounter between labor law and migration law and proposed a separation between the two systems, arguing that "migrant status" and "status of employee" needed to be distinguished:

"Labour law status must be determined separately, without reference to whether a person has a work permit or not. The one lacking work permit shall be viewed as an employee and be covered by labour law. [...] There should be a clear distinction made between migration policy and efforts to enhance working conditions for workers without permits."

These statements reflect a principled approach to the task of labor unions, based on a notion of a "division of roles" between agents within the labor market and the welfare state: the task of the trade unions, TCO asserts, "is to protect the interests of workers, not to play the part of immigration authorities". TCO further claimed that trade unions could, "in principle", organise workers lacking permits, but there would be some administrative problems. They attempted to counter the notion, prevalent among unionists, of "free riders" in claiming that because of their "special situation", UMWs should be afforded help even though they are not paying members.⁹¹

In 2007, the European Trade Union Confederation (ETUC) presented its comments on European Union policy, under the headline "All human beings have human rights" regarding UMW, asserting that

"all individuals residing on the European Union territory, regardless of their legal status, are human beings and as such are the subjects of fundamental human rights. [...] The lack of recognition and implementation of these rights contributes to the level of exploitation of undocumented migrant workers."⁹²

ETUC also brought attention to the interplay between migration law and labor law, and requested, in a wording slightly different from that of Swedish TCO, that they be separated:

"Reaffirm the principle of the uniqueness of labor law and uphold rights and forms of protection at the workplace. Labor law exists to protect the worker in an unequal position of power, which is especially the case for undocumented workers."⁹³

⁹⁰ Holmgren, A., "Projekt RITA – rättvis ingång till arbete. Ett projekt i Fastighetsanställdas Förbund med stöd från Näringsdepartementet och Europeiska flyktingfonden".

⁹¹ TCO, "Papperslösa arbetstagare ur ett arbetsrättsligt perspektiv. TCO:s policy angående papperslösa arbetstagare, antagen av TCO:s styrelse 2007".

⁹² European Trade Union Confederation, Platform for International Cooperation on Undocumented Migrants, Solidar, "Joint Comments of ETUC, PICUM and SOLIDAR on Expected Commission Proposals to Fight 'Illegal' Employment and Exploitative Working Conditions", Brussels, 26 April 2007.

⁹³ European Trade Union Confederation, Platform for International Cooperation on Undocumented Migrants, Solidar, "Joint Comments of ETUC, PICUM and SOLIDAR on Expected Commission Proposals to Fight 'Illegal' Employment and Exploitative Working Conditions", Brussels, 26 April 2007.

On the critical issue of allowing UMW union membership or not, ETUC stated:

“Granting of specific dedicated services based on membership of trade unions, associations and civil society organisations is a relevant step on the path to combat exploitation and to ensure recognition of the fundamental rights of undocumented migrants not only as workers but also as individuals on EU territory”.⁹⁴

In her address to the ETUC-congress in 2007, Wanja Lundby-Wedin, chairperson of the Swedish LO, stated that “[w]e want to find forms for supporting and maybe organizing these people [undocumented migrants].”⁹⁵ The decision of ETUC was finally to organize UMWs, and in a variety of ways promote the freedom of association for them:

“The ETUC and its affiliates are committed to developing policies and strategies to organise migrant workers, defend and promote their trade union rights and other human rights (whatever their legal status), develop strategies to incorporate the situation and demands of migrant workers into trade union work and integrate them in the structures of trade union organisations, prevent and combat exploitation, and improve their living and working conditions.”⁹⁶

The Decisions of the Swedish Trade Union Confederation Congress 2008 and its Aftermath

During the 2008 LO congress, the issue of UMWs was at the center of attention. In her opening address, Wanja Lundby-Wedin demanded decriminalization of the work of UMWs as well as harsher punishments for those employing UMWs. The LO chairperson stated that the UMWs should be afforded the “same” human rights as other workers, and blamed “laws” for not being able to effectuate this. In this address, Lundby-Wedin introduced the formation of a center for UMWs:

“The core mission of trade unions is to be on the workers’ side. That is why it is natural for us to fight for better conditions for the undocumented migrants. They do not have the formal right to stay in our country, and they often work in the informal economy. It should be a matter of course that they have the same human rights in the working life as everybody else. [...] If the political will is there, the government and parliament can change the laws pretty quickly. While waiting for them to take on their responsibility we will take on ours. Shortly we will, together with local LO-unions, together with TCO and together with the organization of the undocumented migrants, open a trade union centre in Stockholm. We are doing this to be able to give the undocumented migrants all the support that is possible given the situation as it is today.”⁹⁷

High ranking LO-representatives described the issue of undocumented migrants as “perhaps the most difficult issue the congress has to decide upon”.⁹⁸ Two motions to the congress addressed undocumented migrants, and the congress decided, following the board's suggestion, to dismiss the one proposing that LO should “actively pursue [...] amnesty for hidden aliens and ‘irregulars’

⁹⁴ European Trade Union Confederation, Platform for International Cooperation on Undocumented Migrants, Solidar, “Joint Comments of ETUC, PICUM and SOLIDAR on Expected Commission Proposals to Fight ‘Illegal’ Employment and Exploitative Working Conditions”, Brussels, 26 April 2007.

⁹⁵ Wanja Lundby-Wedin quoted in Holmgren, A., “Projekt RITA – rättvis ingång till arbete. Ett projekt i Fastighetsanställdas Förbund med stöd från Näringsdepartementet och Europeiska flyktingfonden”, p. 12.

⁹⁶ European Trade Union Confederation (ETUC), “Strategy and Action Plan 2007-2011”, Sevilla Congress 21/5-24/05/07, pp. 40-41.

⁹⁷ Opening address to the congress by chairman Wanja Lundby-Wedin. See Landsorganisationen i Sverige. LOs 26:e kongress 2008. Kongressprotokoll Del 1, p. 11.

⁹⁸ Erland Olason quoted in Larsson, E., ”Papperslösa får plats i Fastighets”, LO-tidningen 08-12-17.

who have not committed serious crimes”.⁹⁹ The board of LO opposed regularization as a matter of principle, since this would lead to more “irregular” migration and the institutionalization of this “problem”.¹⁰⁰ The petitioners also suggested that LO should actively support an organization founded by undocumented migrant workers in Stockholm, and this was affirmed by the congress.¹⁰¹

The second motion suggested that the core issue was profit-seeking employers, and argued that profiting from work of undocumented migrants was “unworthy a civilised society”. The petitioners were in favour of organizing UMW, asserting that no one but the trade union movement itself, together with undocumented migrants, can decide if and how to organize and represent these groups. The petitioners suggested that LO develop “forms for organising undocumented migrant workers and claim their labor market rights”.¹⁰² In the debate following the proposal, advocates claimed it was “absurd to have to fight for the basic idea of organizing people”; besides, delegates asserted, “it is a human right to become a member of a trade union regardless of citizenship”.¹⁰³ The congress responded to the motion by declaring LO already in the process of finding ways to organize undocumented migrant workers and to protect their rights. The petitions to work for harder punishment of employers and the decriminalization of the work performed by undocumented migrants were affirmed by the congress.¹⁰⁴

The congressional debate offered a glimpse of the tensions and conflicts that have arisen within the LO, one of the strongest and most successful unions in the world, since the presence of UMWs was being recognized. The board of LO was and still is opposed to welcoming undocumented migrants into the trade union movement, since the membership would be of little value to these workers; the trade union cannot aid these workers at this point in time. The workers would risk losing their jobs and being deported were they ever to take advantage of the union resources. Furthermore, the trade union does not accept wages below amounts laid down in collective agreements, and one core feature of “illegal work” is the low wage levels.

Scholars within the field of postcolonial studies have pointed out that equal opportunity and equal treatment discourse, linked to anti-discrimination policies, are rather new in Sweden and the effect of EU harmonization. The discourse on discrimination has entered into the rhetoric of LO officials arguing against granting UMWs membership. Every attempt at non-discrimination is futile, Lundby-Wedin has argued, explaining that undocumented workers could not receive the same support and benefits granted other members because the minute those benefits, such as insurance, are claimed the UMW would in all likelihood be known to the authorities and risk deportation.¹⁰⁵

The law as it is, *de lege lata*, is the obstacle for LO, but no suggestions *de lege ferenda* have been put forward. The proposal to decriminalize working without a permit is supported by the

⁹⁹ Landsorganisationen i Sverige. LOs 26:e kongress 2008. Kongressprotokoll Del 2, the motion no 17.60 at p. 535. The board's suggested decision at p. 542 and the decision of the congress at p. 543.

¹⁰⁰ Landsorganisationen i Sverige. LOs 26:e kongress 2008. Kongressprotokoll Del 2, p. 539.

¹⁰¹ Landsorganisationen i Sverige. LOs 26:e kongress 2008. Kongressprotokoll Del 2, p. 536 for the motion and p. 543 for the decision of the congress.

¹⁰² Landsorganisationen i Sverige. LOs 26:e kongress 2008. Kongressprotokoll Del 2, p. 537.

¹⁰³ Sten-Erik Johansson quoted in Lindquist, K., ”LO-nej till papperslösa”, Arbetaren 08-06-04.

¹⁰⁴ Landsorganisationen i Sverige. LOs 26:e kongress 2008. Kongressprotokoll Del 2, p. 537, p. 543.

¹⁰⁵ Lundby-Wedin, W., ”Problemet är inte de papperslösa!”, www.lo.se Last visited 08-12-18.

LO-board using the analogy to Swedish regulation on prostitution. It is the "client, not the one being exploited" that should be (criminally) punished. The LO-board has proposed to afford undocumented migrant workers damages amounting to the difference between the salary the worker actually received and the salary laid down in the applicable collective agreement.¹⁰⁶ LO is aware of the fact that their proposal to award the worker damages would still lead to deportation, and has stated that it is "naturally" so.¹⁰⁷ Delegates at the congress in 2008 in favor of organizing UMW argued that unions should not take on the role of the police,¹⁰⁸ and they expressed sharp criticism of the LO board, one delegate stating that "this is fucked up, I don't understand [the board's] position that 'the current state of the law' makes it difficult to organize undocumented migrant workers". The union activists behind the motion to organize UMWs went on to congratulate the competing syndicalist union SAC, pointing to the fact that LO sent a strong signal that UMWs should instead approach SAC to be able to enjoy union protection and membership.¹⁰⁹

In her final address to the congress, Wanja Lundby-Wedin noted a divide on the issue of trade union membership for undocumented migrant workers. She called the decisions made "important", and reiterated that it was open for each of the unions forming LO to decide whether or not to organize undocumented migrants.¹¹⁰

The Ambivalence of LO

LO is without doubt one of the world's most successful union organizations, but its role in the corporatist Social democratic welfare state regime has complicated its position on the labor market and expanded its responsibilities beyond that of representing workers. In a model based on "mutual understandings" and corporatist agreements, the union can no longer rely on a simple conception of its responsibilities, aims, means and projective. The ambivalence towards the presence of UMW is an outcome of this complex role reconfiguration: if the responsibility is not only to members and workers, but also to the Swedish model – and to the Social Democratic Party and its welfare state project – then legal frameworks and policies on other arenas must also be protected. Blurring between different legal fields, institutions and functions, occurs at all levels. Co-operation between the union and the police is an effect of choices on behalf of unionists to practice in the everyday their sense of extended responsibility.

A 2008 report from trade unions within LO illustrated further the ambivalence of the major strands of Swedish labor movement in relation to new patterns of migration and working life. On the one hand, trade unions criticized in the report the political body for not moving adequate legislation that would enable unions to assist undocumented migrant workers, describing unions' room for maneuvering as severely restricted, adding that they "cannot be expected to handle all the problems of the labor market" and that

"The outer prerequisites for the conditions of migrants consist of the state, and e.g. the conditions for permits and legal rights towards employers. The role of the trade union is

¹⁰⁶ Landsorganisationen i Sverige. LOs 26:e kongress 2008. Kongressprotokoll Del 2, p. 540.

¹⁰⁷ Olauson, E., Håkansson, L., "De som lockas jobba illegalt bör få rätt till skadestånd", DN-debatt, 05-07-30, Lundby-Wedin, W., "Problemet är inte de papperslösa!", www.lo.se Last visited 08-12-18.

¹⁰⁸ Sten-Erik Johansson quoted in Lindquist, K., "LO-nej till papperslösa", Arbetaren 08-06-04.

¹⁰⁹ Sten-Erik Johansson quoted in Lindquist, K., "Strid om papperslösa på LO-kongressen", Arbetaren 08-05-28.

¹¹⁰ Closing address to the congress by chairman Wanja Lundby-Wedin. Landsorganisationen i Sverige. LOs 26:e kongress 2008. Kongressprotokoll Del 2, p. 646.

to supply collective agreements and to make sure that workers are treated fairly.”¹¹¹

But the report was not consistent in this representation of the limited role and responsibility of the unions. If the state refused to act, the unions anticipated an intensification of their work and an increased number of union officials to carry out controls of work sites and companies:

“Reality shows that the union needs to have a greater presence “out in the field” in order to control work sites and detect possible illegal employments. The fact that the state, maybe for economic reasons, does not monitor [enough] puts a de facto increased pressure on the unions to, not least for moral reasons, improve the abilities of effectuating supervisions of companies with lax policies. That kind of operation demands large crews.”¹¹²

LO has a history of viewing irregular migrant workers as an issue for police and migration authorities, and not as a group of workers in need of protection by or membership in the unions. This position was challenged internally by LO activists, but also by some member unions of the trade confederation. At the core of the conflict was the question of how to characterize irregular migrant workers: should they be given status as workers or as irregular – “illegal” – migrants? The conflict was partly dissolved by the creation of the *Trade Union Centre for Irregular Migrant Workers*, which was introduced at the 2007 congress. The center offers irregular migrant workers advice, without formally organizing them within the union.

I would argue that despite its current ambivalent and conflicted position, LO will be forced into total inclusion (organizing and legal and interest representation) of irregular migrant workers into its ranks. The role of the union within the Swedish welfare state regime and their ties to the Social democratic party will change because of this, I predict. The dominant trade union movement has operated in close proximity to the state apparatus and government agencies, including immigration authorities, but the political processes at play pressuring LO to including UMWs has created a distance between the trade union and the state.

A New Labour Market Institution: Fackligt Center för Papperslösa

The Trade Union Center for Undocumented Migrant Workers (the Center) represents a new form of trade union activism within the Swedish labor market, constituting a new entity within the organizational field of the labor market and the welfare state. The establishment of the Center represents a new form of trade union activism, and a strategy bordering on interest representation but practicing a kind of legal service. The Center nevertheless represents one of the biggest shifts in labor market behavior in Sweden during the last 30 years. It is at the crossroad of exclusion and inclusion: it exists because some workers are excluded from protection of labor law, but the aim is to perpetuate the principle of total inclusion in the trade union pattern of organizing all workers. The center does not meet the legal definition of a workers’ organization in the Co-determination Act (1976:580) 6 §. Nevertheless the centre represents a North American

¹¹¹ Landsorganisationen i Sverige, ”Fackliga verktyg för migranter. En förbundsgemensam rapport från LO, maj 2008”, p. 5.

¹¹² Landsorganisationen i Sverige, ”Fackliga verktyg för migranter. En förbundsgemensam rapport från LO, maj 2008”, p. 8, p. 20.

influence on Swedish labor law. The centre is in many ways similar to different kinds of worker centers in the United States.¹¹³

The Center was founded by LO along with the two white collar confederations TCO and SACO (which organizes academics), representing the entire Swedish trade union movement. The working principles of the organization are stated as "undocumented migrants are also entitled to rights at work", and "rules on the labor market applies to everybody, including those lacking permits to reside and to work". The Center engages in the struggle of undocumented migrants by helping them to "enforce their rights on the labor market" and by giving them "information regarding their rights and advice on wage levels, working conditions and health and safety regulations at work"; the Center asserts that migrants whose rights have been violated can come to them for help.¹¹⁴ However, not all undocumented migrant workers agree on the strategy to work for labor rights only, some have demanded permits to reside and regularization, stating that "we fight for papers, we don't fight to remain illegal".¹¹⁵

There is a call center connected to the Center that receives about 70 calls per year. these calls often concern general questions from journalists, researchers and students. the calls from UMWs mostly concern questions regarding employers refusing to pay wages. UMWs also call and ask what they should do when the employer does not pay taxes and how much they should demand in salary. The call center usually refers them to the Center.¹¹⁶

According to their representative, The Center is successful in that in about 50 - 60 percent of the cases the worker will get some or all of what is owed him or her. The Center demands wages based on collective agreements. While no case has gone to court, the Center representative interviewed for this paper asserted they would take cases to court it was deemed necessary and a successful outcome plausible. Employers of UMWs, the representative stated in the interview, are often criminals engaged in different kinds of businesses they'd rather not discuss publically, and because of this the employers are likely to adhere to threats of alerting authorities. "These companies are so afraid of attention they would not, wouldn't dare to put forward demands based on justice and finesse, since that is the exact opposite of what they've been up to!", the representative said.¹¹⁷

The interviewed representative described the difference in working for the Center not in terms of the tasks performed, but rather in terms of the status of these tasks - i.e. what others thought of the function of the Center. "In many parts of the trade union movement, this is still very controversial: many still argue that these are illegal aliens without a right to be here, and so these people should not be helped", he explained, revealing some of the deep-rooted conflicts linked to

¹¹³ Cf Fine, Janice (2007), "A Marriage Made in Heaven? Mismatches and Misunderstandings between Worker Centres and Unions", *British Journal of Industrial Relations* vol. 45 no2, p. 335-360, Fine, Janice (2006), *Worker Centres. Organizing Communities at the Edge of the Dream*, Ithaca and London: ILR Press an imprint of Cornell University Press, Gordon, Jennifer, (2005), *Suburban Sweatshops. The Fight for Immigrant Rights*, Cambridge, Massachusetts, and London, England: The Belknap Press of Harvard University Press.

¹¹⁴ www.fcfp.se Last visited 08-12-18.

¹¹⁵ Yacine Asmani quoted in Frank, B., Lindquist, K., "Arbetsrätt eller papper först? Papperslösa oeniga om hur kampen skall föras", *Arbetaren* 07-11-28.

¹¹⁶ E-mail from Ida Löwgren, 2012-02-14, to author. On file with author.

¹¹⁷ Interview 2012-02-14 with Sten-Erik Johansson. On file with author.

notions of belonging to the nation. Even in cases in which the UMW is a member of the union (which they can be in some cases; a few LO union branches organize UMWs), the representative claimed it was difficult for other members to see them as peer unionists. The Center representative saw a parallel between working for and helping UMWs and situations in which union activists feel forced to help a ("regular") member that has misbehaved at work: in those situations, union activists may not always do their best to help the misbehaving member. In the interview, the Center representative stated that many trade unionists feel this way.¹¹⁸

The centre acknowledges the space in which it can act, and also what would happen if it overstepped certain boundaries. One of these boundaries regards the "sacred" collective agreement:

"Our task is to see to it that no one, neither companies nor anyone else, dumps the price of the workers, the wages, and that some kind of order of things prevails. And most important – we won't budge an inch on this – is that it is the collective agreements' terms and levels that should come into effect. We don't argue that it is better that they make 80 SEK instead of 60 SEK. We follow and demand the lowest salaries in the collective agreement. This is real important and we have talked about this for years. This is really the issue where we don't follow the wishes of the undocumented migrant worker. It's a balance act... if we would accept what some of the UMWs [would accept working for], we would break our own necks.

Everything will go to hell if we don't follow the collective agreement, since that is what we agreed on [the hand shake we made] once upon a time. [Q: LO would leave you then?] Yes, they would and they would be right to do so, and the unions would drop us too. This part is sacred."¹¹⁹

The Center sees itself as an instrument in the fight against social dumping, and this is how it must represent itself in order to not be attacked from within the trade union movement. The other aspect of boundary work the Center identifies as crucial to its survival is related to the status of certain policies. Migration policy is beyond questioning:

"The trade unions are independent both vis-à-vis capital and state; the members pay their dues to the unions, which are independent organizations. The police and the migration authorities are to see to it that these people, if they lack the right to be here... it is their thing to do. We have nothing to do with it – and we have gotten all the unions to understand this. We are neither the tool of the police; nor the tool of the capitalists. The terrible thing may happen, that after meeting us, the police are standing in the alley; they [the migrants] are captured and deported. And this is not what we want or what we find pleasant, but we cannot criticize this, because in that case, I think, we would blow LO into pieces. It would be a huge controversy... [Q: This regards the question of managed migration...] Yes, exactly, it does. [...] If we were to think about this in another way, it in any case wouldn't be anything we could act upon."¹²⁰

Being independent from state and capital is the factor that leaves the law as it stands today without critique. Independence allows for a space that can be occupied by the Center.

¹¹⁸ Interview 2012-02-14 with Sten-Erik Johansson. On file with author.

¹¹⁹ Interview 2012-02-14 with Sten-Erik Johansson. On file with author.

¹²⁰ Interview 2012-02-14 with Sten-Erik Johansson. On file with author.

Demanding another migration policy would erode the already weak legitimacy of the Center, and would be considered as provocative challenging the norms of the collective agreement.

In the interview, the representative related a highly critical view of the employers. The general perception seems to be that employers are secretly happy about the development of increasing presence of UMWs undermining the collective agreement's position as a regulatory instrument on the labor market. Employer organizations have argued that disloyal competition poses a threat to their side too, but the Center representative was not impressed:

"They have not shown any interest in our operation here. Not even the ones who keep talking and crying about some employers dumping prices and all this. The hypocrisy! Not a shred of interest! We have invited them to all kinds of things but they don't care about ... the order and the discipline on the labor market, and they probably think it is good to undermine collective agreements. Their behavior is pitiful. [Q: You mean they are not being honest when they talk about the dangers of disloyal competition?] I can't say for sure. They sit there in their Armani suits crying about it in meetings, but they have never shown any real interest. It's bullshit on their part!"

There is class rhetoric in this quote, indicating the fragility in the "mutual understanding" that is at the core of the Swedish model. The real interest of employers are not in the Swedish model with its discipline in the labor market; if there is a chance to undermine collective agreements and the unions, employers will see that as a positive development, according to the Center representative.

Activists at the Center link the suggested concept of interest representation of UMWs (class - in their capacity as workers) to political agendas of restricted migration. Making a stand for the class interest of UMWs is about "general humanitarianism" as well as acknowledging that the phenomenon of "lacking papers" ultimately is created by some countries exploitation of other countries. The Center views UMWs as workers, but ideological debates and notions of class struggles are no longer present in the trade union movement; the concept of class interest is rarely uttered. The activists at the Center hope, without really believing this will happen, that the issue of UMWs on the Swedish labor movement could vitalize the trade union movement.¹²¹

Recital 16 of the directive 2009/52/EC require of the member states that they "should, in the context of establishing effective mechanisms to facilitate complaints and if not already provided for by national legislation, consider the possibility and added value of enabling a competent authority to bring proceedings against an employer for the purpose of recovering outstanding remuneration". The Swedish inquiry failed to do this.¹²² Policy suggestions have been made by trade union lawyers and academics about a new ombudsman that could put forward legal claims on back payments on behalf of undocumented migrants.¹²³

¹²¹ Interview 2012-02-14 with Sten-Erik Johansson. On file with author.

¹²² SOU 2010:63 EU:s direktiv om sanktioner mot arbetsgivare. Betänkande av Sanktionsutredningen.

¹²³ TCO and Andreas Inghammar. Larsson, Erik, "Ombudsman för papperslösa", *LO-tidningen*, 2010-10-08. Inghammar, Andreas (2010), "The Employment Contract Revisited. Undocumented Migrant Workers and the Intersection between International Standards, Immigration Policy and Employment Law", *European Journal of Migration and Law*, Vol. 12, No. 2, p. 193-214, p. 212.

The Swedish Syndicalist Movement

The smaller, 5 000 – 6 000 members, and politically ostracized competing trade union, the syndicalist organization SAC, which is oriented more to the political left,¹²⁴ has always organized undocumented migrant workers. The labor market actions and political interventions of SAC have been in favor of total inclusion of irregular migrant workers in trade unions. But encounters with increasing numbers of undocumented migrant workers have induced a change of strategy for SAC as well. SAC has partly returned to its tactical roots in reviving the strategy deployed circa 1910 of using a register as a means to making rules on the labor market and at the same time achieving higher salaries for its members. Representatives of SAC explicitly disregard demands for documents as a prerequisite for organizing workers. Swedish workers and undocumented migrant workers share the same interests, SAC argues.¹²⁵ This position is perceived as an internationalist stance and is directed against migration laws and borders as such. Organizing workers and attacking employers is understood as going for the root cause of trouble, instead of chasing the symptoms (i.e. UMW).¹²⁶ The LO-affiliated trade union movement has always strongly disliked SAC, describing them as troublemakers, and as an organization that has never won any dispute on the labor market.¹²⁷

SAC claims that their work with organizing undocumented migrant workers “has turned out to be not only possible, but also successful”, but representatives of SAC also feel that the organization has been rendered invisible in the history of undocumented migrant workers in Sweden.¹²⁸ One aspect of SAC’s trade union strategy for better working conditions seems to be to threat those employing UMWs with publicity and public humiliation.¹²⁹

An Old Labour Market Institution: Registret and Job Control through Trade Unions

The Syndicalist movement’s action on the labour market in relation to undocumented migrant workers is to a large extent a return to a methodology from the days of the birth of trade unions in Sweden. As part of the struggle for co-determination in decisions about hiring and firing of workers (i.e. the struggle to limit employer power), the early trade union movement deployed different versions of so called job control. The job control concept should be understood as part of the motif for forming unions, namely the unions’ overarching struggle to control labour exchange. In this way the job control concept is related to phenomena such as trade union job-placement services. Job control provisions existed in most unions’ statutes. Trade unions provided employment services from 1890, and became more important in the 1920’s. As part of the strategy to prevent internal member competition for jobs, trade unions sought to control who was employed, and what remuneration was offered. Job control aimed at limiting the employers’ powers and to influence wages and working conditions as well as to achieve industrial

¹²⁴ Fahlbeck, R., *Nothing Succeeds Like Success. Trade Unionism in Sweden*, Juristförlaget i Lund, Lund, 1999, Pettersson, Lars-Olof & Silberstein, Willy (2011), *Syndikalisternas nya ansikte*, Stockholm: Bilda förlag.

¹²⁵ Holmberg, Lotta (2002), ”Organisera de papperslösa!”, *Arbetaren* no 5, p. 18.

¹²⁶ Barrow, Lena (2002), ”Alla arbetare är välkomna”, *Arbetaren* no 7, p. 18.

¹²⁷ Pettersson, Lars-Olof & Silberstein, Willy (2011), *Syndikalisternas nya ansikte*, Stockholm: Bilda förlag.

¹²⁸ Holmberg, L., ”Papperslösas kamp försvagas”, *Arbetaren* 08-09-30.

¹²⁹ Blomgren, S., *Svart notis*, Bokförlaget Atlas, Stockholm, 2008, p. 18.

democracy without the intervention of the legislator. The methodology was to achieve a fair distribution of the available jobs, increase wages and safeguard terms agreed upon. Wages could be increased by locking out employers that paid the least of from the supply of labour. A high degree of loyalty to the organization and other members is a prerequisite for the method. Trade unions relied on wage statistics and information on working conditions, and trade union bodies assigned jobs to members based on that information. Not following the rules, accepting work at lower wages, etc. led to sanctions.¹³⁰

It has been presumed that the syndicalists invented the trade union strategy of job control. Today it is known that this method existed before the formation of the syndicalist organization (1910). The syndicalist version of the Register method was formed in 1913 and consisted of a combination of wages statistics and employment services. The ultimate aim of this line of work was for the syndicalists to take control over the means of production. However, the historical roots of the job control method were found in trade unions' travel assistance funds. LO and the social democrat-affiliated unions used the register method and job control and viewed it as a complement to the collective agreement before SAC was established. According to LO, the method was to be handled by union branches, the trade confederation construed model statutes that set up job control schemes. The Saltsjöbaden agreement of 1938 entailed rules that limited the use of job control.¹³¹

According to SAC 250 workers gathered October 12, 2006 and formed a new register.¹³² The register system implies that the trade union sets a price for labor, which the employer then considers. All of the workers forming the register were from Spanish speaking countries. Also today a majority of the undocumented migrant workers in the register speak Spanish. The workers were mostly employed at hotels and restaurants, in construction work and service franchises. According to a spokes person they decided to "fight for better salaries, and get some of the rights of ordinary workers; some, not all of them, because of the illegality".¹³³

The trade union functions as a form of employment service or job center. There are no re-negotiations and if the employer does not want to hire at the proposed price, strikes and picketing could be organized.¹³⁴ This blurs the line between industrial action and peace on the labor market.¹³⁵ The trade union also comes to deal with a number of tasks that are not today perceived as union matters. The union office is used as postal address, as a centre for translation of documents etc, as a channel for information on housing and available apartments and information on which employers that are (sexually) violent and should be avoided.¹³⁶

¹³⁰ Bengtsson, Berit (2006), *Kampen mot § 23. Facklig makt vid anställning och avsked i Sverige före 1940*, (diss.). Uppsala: Acta Universitatis Upsaliensis, p. 67, p. 177-204, p. 214-227, p. 255-258.

¹³¹ Bengtsson, Berit (2006), *Kampen mot § 23. Facklig makt vid anställning och avsked i Sverige före 1940*, (diss.). Uppsala: Acta Universitatis Upsaliensis, p. 67, p. 177-204, p. 214-227, p. 255-258.

¹³² <https://www.sac.se/Aktuellt/Fokus/Registret> Last visited 2012-02-26. Interview with Amalia Alvarez 2012-03-21. On file with author.

¹³³ Interview with Amalia Alvarez 2012-03-21. On file with author.

¹³⁴ <https://www.sac.se/Aktuellt/Fokus/Registret/Kort-förklaring-av-Registermetoden> Last visited 2012-02-26.

¹³⁵ Cf Iskander, Natasha (2007), "Informal Work and Protest: Undocumented Migrant Activism in France, 1996-2000", *British Journal of Industrial Relations* vol. 45, Issue 2, p. 309-334, on the industrial actions of undocumented migrant workers in France.

¹³⁶ Interview with Amalia Alvarez 2012-03-21. On file with author.

The number of industrial actions on behalf of the register shifts according to season. Since many undocumented migrant workers are employed in restaurants more conflicts arise in the summer. The four months of summer of 2011 are said by a spokes person for the register to have kept 30 instances where the employers refused to pay the agreed salary. In about half of these cases the register method and blacking was deployed.¹³⁷

The union is said to be not perceived by the undocumented migrant workers as an organization that can choose to ‘organize’ people, instead the union concept is understood as a tool for workers to deploy when needed. “The union is a tool for workers, and not the other way around.”¹³⁸ The salaries demanded are generally speaking said to be similar to the levels laid down in collective agreements. It is said that UMW that are members of SAC/register are not guilty to social dumping. That is why no employer is willing to hire a member of SAC, the spokes person claims. According to the register spokes person undocumented migrant workers oftentimes get paid what they are owed, and that this is the main reason for the popularity of the register. Oftentimes no direct action is needed, and the threat of bringing the syndicalists to the work site renders immediate payment.¹³⁹

A majority of the undocumented migrant workers organized in SAC/the register is men. SAC is said to have about 1000 undocumented members. Of these about 150 are very active, and 50 of these are women. The register have most of their members in and around the capital, Stockholm; Skärholmens LS, Västerorts LS and Stockholms LS. The number of members shifts according to season. And sometimes a bunch of members are caught by the police and thrown out of the country.¹⁴⁰ An effect of the organizing of undocumented migrant workers the trade union seems to have to engage in more and more tasks. According to the register spokes person, female undocumented migrant workers commonly experience black mailing and sexual assault. Dealing with this employer behavior becomes part of the trade union agenda:

“We have a Women’s Committee. They deal with how to demand from the attackers that they admit to their actions and acknowledge their excuses to the victim, and also pay damages. Most importantly admit what they did! This hardly ever works; they never confess and they never pay. Other women, who themselves have been in this situation, get involved and ask for confessions. The women trust each other, and support each other in order to be able to move on. There are so many problems beside the usual union matters and salaries... [...] The women have their methods ... they themselves do ... they spray paint on the assailant’s car, for example. They write ‘you are so fucking ...’ The organization do not do this, individual women do this; spray paint on cars and houses... scratch cars with keys ... that woman, she felt that she had been remunerated, despite her not getting any money, she thinks he’ll never pay...”¹⁴¹

The register activists perceive the trade union center for undocumented migrants (LO) as a propaganda tool and “an aspirin to the people”. It is called “propaganda”, “since it does not

¹³⁷ Interview with Amalia Alvarez 2012-03-21. On file with author.

¹³⁸ Interview with Amalia Alvarez 2012-03-21. On file with author.

¹³⁹ Interview with Amalia Alvarez 2012-03-21. On file with author.

¹⁴⁰ Interview with Amalia Alvarez 2012-03-21. On file with author.

¹⁴¹ Interview with Amalia Alvarez 2012-03-21. On file with author.

work, because the workers who go there get only legal aid, and after that they are encouraged to leave the country, because they are illegals”.¹⁴² The syndicalists claim that the LO center for UMW only will give workers “the information that is available in that society”. The spokes person exemplifies with the theft by an employer of an undocumented worker’s passport and the threat to report the migrant to the police. In that instance the spokes person claim that the LO center will say that stealing is against the law, but that the theft cannot be proven in a court of law and that the police would catch the migrant in the process. But if the migrant contacts SAC “there are people that could talk to the employer, more to the parallel, not totally parallel, but kind of”.¹⁴³ This difference in relation to the law and legal structures is also visible in relation to gender specific problems encountered by undocumented migrant women:

”... of course they are sexually attacked. If a person then contacts the LO... they are not used to handling this kind of ... they haven’t met these people... It is a difference regarding culture. LO will send them to some sort of counsellor... In SAC this person would meet a woman that has herself been in a similar situation, and she will say that ‘you don’t need to claim your dignity back, because you have never lost it!’ and then she will say that we must fight for your salary and everything else...”¹⁴⁴

The revival of the method of using a register in trade union activism represents a significant change in the forms of dialogue within the Swedish labor market. The self-understanding, politics and actions of the union SAC correspond to the life and work of the “illegal” undocumented migrants. The broadened trade union agenda visible in registret also correlate to the experiences of UMW of being outside the law and “illegal”. The dilemmas of the “extra legal” upholding of some kind of law and order are also visible in the union’s work, especially on sexually assaulted women. Also the undocumented migrant work force is segmented with the young women workers with family members “at home”, at the bottom of the cohort, demanded by employers as extremely cheap and vulnerable labor.

Some Trade Unions within the Trade Union Confederation Organize Undocumented Migrant Workers

The 2008 LO congress revealed some of the conflicts within the organization brought about by the presence of UMWs. The decision not to organize UMWs did not mean that the member organizations could not decide otherwise. After the congress, the board of one member organization, *The Swedish Building Maintenance Worker’s Union* (Fastighetsanställdas förbund, *Fastighets*)¹⁴⁵, decided to start organizing undocumented migrants and to grant them the right to be represented in negotiations regarding salaries and working conditions.¹⁴⁶ The board’s decision was made after an overview of the legal standing of undocumented migrant workers on the

¹⁴² Interview with Amalia Alvarez 2012-03-21. On file with author.

¹⁴³ Interview with Amalia Alvarez 2012-03-21. On file with author.

¹⁴⁴ Interview with Amalia Alvarez 2012-03-21. On file with author.

¹⁴⁵ This trade union has worked extensively with the issue of undocumented migrant workers. The project is reflected in the report Holmgren, A., “Projekt RITA – rättvis ingång till arbete. Ett projekt i Fastighetsanställdas Förbund med stöd från Näringsdepartementet och Europeiska flyktingfonden”.

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<http://www.fastighets.se/home/fast2/home.nsf/d8d07c37d9beb6ac412569d9004bff04/34af0779e9296afdc125752300327893?OpenDocument&Highlight=0,pappersl%C3%B6sa>. Last visited 2012-02-20.

labour market. The decision was made public during the union congress of 2010 by the chairpersons of both *Fastighets* and LO.¹⁴⁷ A representative from *Fastighets* stated that the organization wants to "work for fair salaries and working conditions for all those working within the area of our collective agreements".¹⁴⁸ Already before the LO-congress, *Fastighets* took trade union action on behalf of undocumented migrant workers, and expressed optimism about the possibilities of organizing and representing them: "if we come into contact with undocumented migrant workers we will act as if they were members and help them get salaries and so forth", and "[w]ith a membership we can represent them in the same manner as other members".¹⁴⁹

A motion to the congress of the *Swedish Food Workers' Union* suggested that undocumented migrants should become members of the union, because they labor under exploitative circumstances, and because supporting them is the same thing as working to support and protect the collective agreements. The union board opposed the motion based on the same arguments used by the board of LO: the law was seen as the main obstacle. But the board also stated that "The union cannot accept illegal work, and work being performed for less than the salary laid down in collective agreements". Nonetheless the congress decided to affirm the motion and to offer membership to UMWs.¹⁵⁰

The Swedish Municipal Workers' Union (Kommunal) decided in 2009 to accept all persons, including undocumented migrants, seeking membership in the union. A permit to reside or work was not a prerequisite for membership in *Kommunal*. The decision to grant membership was delegated to the regional organizational level. In 2010, no undocumented migrant was known to be a member.¹⁵¹

In a motion to the congress of the *Hotel & Restaurant Workers' Union (HRF)* in 2011, members argued that all workers, including undocumented migrants, working in hotels and restaurants should be able to become members of the union. The board of the union opposed this, but agreed it was an important issue. The union already worked with the Center and the board argued that the fraudulent employers were to blame for situation of UMWs. Stated the board: "Membership presupposes employment [...] Even though the undocumented migrants work, they are not, legally speaking, employees". The congress voted against the board, deciding that undocumented migrants could become members of the union.¹⁵² The chairperson of *HRF* said they lost to a "good thing".¹⁵³ One of the union members behind the motion to support organizing undocumented migrant workers later claimed that it was important to her that the labour movement returned to its core values. The unionist also stated that it was not for the union to regulate who are present on the Swedish labour market. Instead the union's task is to protect the

¹⁴⁷ Fastighetsanställdas förbund, Kongressprotokoll 2010, s. 10, s. 24.

¹⁴⁸ Hans Öhlund quoted in Larsson, E., "Papperslösa får plats i Fastighets", LO-tidningen 08-12-17.

¹⁴⁹ Anders Bergsten quoted in Karlsson, J., "LO-förbund ger hjälp åt papperslösa", Arbetaren 08-02-20.

¹⁵⁰ Livsmedelsarbetareförbundets kongress 30/5-3/6 2009, Protokoll, p. 245-248.

¹⁵¹ Berglund, Sofia, "Facket och de papperslösa", *Kommunalnytt* no 11, 2008, p. 7. Hjärtberg, Erik, "Fritt fram för papperslösa medlemmar i avdelningarna", *Kommunalarbetaren*, 2009-02-02, Kommunal, Faktaunderlag till Kommunals kongress i Stockholm den 7-11 juni 2010, Kommunals medlemmar och den globala utmaningen [Anna-Lena Lodenius], p. 146.

¹⁵² Hotell och restaurangfackets kongress 18-21 november 2011, Kongressprotokoll 2011.

¹⁵³ <http://www.hrf.net/kongress2011/kongressnyheter?tid=2793>. Last visited 2012-02-20.

collective agreements.¹⁵⁴ The shift in perspective is clear. Not so long ago the same line of argument ended in the conclusion that the issue of undocumented migrant workers constituted a police question of enforcing migration policy. Today, the same argument ends in favor of organizing undocumented migrant workers.

The Swedish Construction Workers' Union 2010 decided against organizing undocumented migrant workers. The motion that was voted down stated that no person is “illegal”, that everyone working should benefit from the protection of the collective agreement, and if the law could not provide this, the law, and not the individual, is at fault.¹⁵⁵

Summing Up: Undocumented Migrant Workers Challenge the Swedish Labor Relations Model and its Main Agents

In this paper, I have illustrated some of the tensions, conflicts and changes brought about by the presence of undocumented migrant workers on the Swedish labor market. The overview provides some indications as to future developments and conditions of the neo-corporatist tripartite co-operation and “mutual understanding” of the Swedish model and its main agents. It also points to processes of reformulations of the ways in which the dominant trade union understands and represents its position, its responsibilities, and its means. The paper has illustrated the development of new forms for trade union activism bringing change to the organizational landscape of the Swedish model. Globalization and new patterns of migration challenge traditional roles of unions and union activists, who find themselves maneuvering complex spaces of interest representation, notions of belonging, inclusion, exclusion, and responsibilities. The presence of undocumented migrant workers have forced unions to take on new positions, to vary the range of union strategies, and to renegotiate some of the relationships within the labor movement, but also with the state and other national institutions.

Neither the concept of¹⁵⁶ nor the hardships endured by undocumented migrant workers are new to unions and activists.¹⁵⁷ So how come the Swedish trade unions at the turn of the century were not prepared to legally conceptualize this group of workers? Why was the issue of membership for the “clandestine” not settled until the issue became acute? During the period of great capitalist expansion in the 60s and 70s – a time marked by regulated labor migration – the class interests of the unions were articulated in terms of ambitions towards “equality between Swedish and legal migrant workers”. An Immigration Board official during this time described “efforts to secure for the newcomers the same wages and other benefits enjoyed by Swedish workers” as “an expression of both traditional trade union solidarity and self-protection”.¹⁵⁸

¹⁵⁴ Hellquist, A., ”En minut med Katja Ojanne, styrelseledamot i Hotell- och restaurangfacket, som lade den antagna motionen om papperslösas medlemskap på HRF:s kongress”, *Arbetaren* nr 74/2011, p. 4.

¹⁵⁵ Byggnadsarbetareförbundet Kongress 2010, Motioner och utlåtanden, pp. 122-123.

¹⁵⁶ Böhning, W. R. (1983), “International Migration: A Suggested Typology”, *International Labour Review*, vol. 122, p. 641.

¹⁵⁷ de Grazia, Raffaele (1980), “Clandestine Employment: A Problem of Our Times”, *International Labour Review*, vol. 119, p. 549.

¹⁵⁸ Öberg, Kjell. (1974), “Treatment of Immigrant Workers in Sweden”, *International Labour Review*, vol. 110, p. 1, p. 8. The official continued: “Swedish workers are unanimous in trying to prevent any competition on the part of immigrants that could lower wages or impair working conditions. It is only reluctantly that they are coming to

The fact that LO and its unions for such a long time took the state's migration law view on undocumented migrant workers – illegal aliens – and did not consider them workers, can be understood as an exponent of the strong links between the union and the state apparatus. The shift in the union's views on UMWs can accordingly be understood as a process of re-defining the links between state and unions. In organizing UMWs, unions have in effect also moved closer to the position of the politically stigmatized SAC. The new union formation of the Center, initiated by LO, represents a small but principally significant shift on the labor market. The strategy embodied by the Center, the “almost-organizing” of undocumented workers, also constitutes a new phenomenon on the Swedish labor market. The experiences, legally speaking, of this will be highly interesting for labor lawyers to follow: what are the strengths and weaknesses of this line of work? How will the forms for trade unions' actions develop in the future? What are the future implications for traditional interest representation?

SAC, that never has been (nor will be!) linked to the state in the corporatist manner that has been true of LO, continues to organize undocumented migrants. The return to a method that has not been in use for 70 years is also a small, but principally significant shift on the labor market.

Government policy in relation to undocumented migrants is still an issue of hunting down and deporting.¹⁵⁹ Unauthorized work is still a crime in Sweden. A shift in focus has come about in the new sanctions against employers of undocumented migrants, however. The legislated possibility of back pay is a new thing in Sweden (but was perhaps possible already before the directive 2009/52/EC).

It is not clear whether an undocumented migrant worker that has encountered trouble in relation to his or her employer would dare to contact a trade union. Will the representative call the police, do nothing, call the Trade Union Centre for UMW, or personally try to help? The standings of UMWs in relation to state and employer are also changing: employer sanctions may lead to collusion between worker and employer, but on the other hand, the introduction of possibilities of back pay could lead to shared interests between the worker and the state/authorities.

Employers of UMW should still avoid both state and unions. Because of sanctions, a shared interest with UMW may be said to exist, while back pay rules counteract this. The continuity of criminalization of unauthorized work still provides employers with an economic incentive to hire undocumented migrants before anyone that can make use of labor law.

It was recently reported that origin countries of undocumented migrants have started developing policies and procedures aimed at reducing the number of migrants leaving the country and becoming “irregular”.¹⁶⁰

accept that the availability of foreign workers may tend sometimes to prolong the lifetime of certain branches of industry that are able to remain in business only because of low wages—for Swedes and foreigners alike.”

¹⁵⁹ E.g. the daily *Skånska Dagbladet*, June 16, 2011, TT reporting a 40 % increase in police capturing of undocumented migrants. The government has created special police patrols that search (also at work places) for undocumented migrants.

¹⁶⁰ International Organization for Migration, *World Migration Report 2010. The Future of Migration: Building Capacities for Change*, Geneva: IOM.

In the Nordic countries, trade unionism has centered on the nation states. Because the members of trade unions have belonged to the nation, “the defense and articulation of interests has taken place within the framework of the national state” with the effect that the perspective for strategies of trade unions in the Nordic countries “has been almost exclusively a national one”.¹⁶¹ The strong interrelation between union and state that has prevailed may soften in the wake of undocumented migrant workers’ entry into the labour market. Unions will have to adapt. This process will probably consist of a changing notion and conceptualization of the trade union ‘we’, the ones the union fights for. This process will consist of two aspects. Firstly; a ‘less is more’ approach to the notion of the worker, a status that more and more seems to be decided without regard to status in the eyes of migration law and policy. This disregarding of the legal context surrounding the human work performing body is essentially a return to the thinking of earlier times in trade union history. Secondly; notions of the membership in trade unions are changing, along with the conceptually connected concept of “free riding”. I predict there will be changes in relation to the conceptually speaking work performing person, from “illegal” to “worker. The concept of employee develops inasmuch as discursive changes are given legal expressions. Notions of who is a work performer worthy of protection (instead of policing and expulsion) from law and trade unions will change. The “illegal” “migrant” will be, at least to some extent, be understood also as a “worker”/“employee”. In this capacity the person should have his or her interests represented by a union, and other (than the one of performing work) aspects (i.e. status as irregular migrant) of a person is disregarded. The chasm between labor law, with its qualifications and concepts, and other areas of the law, criminal and migration law, becomes widened as a result of this process.

Perhaps what we are witnessing, also in Sweden, is a process of notions of work developing both beyond employment¹⁶² and beyond formal right of belonging and citizenship? Instead of employer sanctions and criminalization of unauthorized work the possibility of implementing standards that strongly resemble employment protection and access to collective bargaining ought to be developed. The possibility of developing means to implement standard employment protection and access to collective bargaining should be explored, instead of the policy of employer sanctions and criminalization of unauthorized work.¹⁶³

Tentative Reflections on the Laws on Migrants and the Laws on Workers

The above described labor market processes provoked by the presence and work of “illegal aliens” express attempts at managing some contradicting legal facts. Also in Sweden there exists a debate about what rights and entitlements undocumented migrants ought to have.¹⁶⁴ The

¹⁶¹ Bruun, N., et al., *The Nordic Labour Relations Model. Labour Law and Trade Unions in the Nordic Countries – Today and Tomorrow*, Aldershot, Dartmouth, 1992, p. 255.

¹⁶² I link here to the discourses described in Supiot, Alain (2001), *Beyond Employment. Changes in Work and the Future of Labour Law in Europe*, Oxford: Oxford University Press.

¹⁶³ Anderson, Bridget, “Migrants and Work Related Rights”, *Ethics and International Affairs*, vol. 22.2, p. 199-203, p. 202.

¹⁶⁴ Cf SOU 2011:48 Vård efter behov och på lika villkor – en mänsklig rättighet. Betänkande av Utredningen om vård för papperslösa m.fl. on health and medical services for undocumented migrants, and SOU 2007:34 Skolgång för barn som skall avvisas eller utvisas. Betänkande av Utredningen om rätt till utbildning m.m. för barn som håller sig undan verkställighet av beslut om avvisning eller utvisning and SOU 2010:5 Skolgång för alla barn. Betänkande

question about what rights an undocumented migrant ought to have on the labor market is about the legal-technical meet¹⁶⁵ between labor law and migration law. Should undocumented migrant workers be afforded the protection of labor law, despite the breach of migration law? ¹⁶⁶ Is the application of labor law dependent on the migration law status of the person performing work? The performance of work resembling employment *prima facie* raises the question whether labor law is applicable. But, will the exclusion defined by migration law also imply exclusion from labor law?

The normative question of labor law protection for undocumented migrants is acute to legislators and courts in dealing with cases about the interaction between labor and migration law. In order to be legally relevant, the discussion must take place in the light of some postulates¹⁶⁷: the world is assumed to be divided into nations; both (and this is important) migration law and labor law are to be parts of the legal order; complete effectuation of migration law is not possible (or the price is too high).¹⁶⁸

Legal scholars report tensions when interconnections occur between migration law and labor law, because the two areas of the law are partly based on contradicting legislative impulses. An interstice between labor and migration law has been mentioned. The debate about the meet between labor and migration law has been understood as important, not at least because of assumptions on the internal coherence of the law and its goal rationality.¹⁶⁹

Migration policy is a regulator of the composition of the work force, but also the force that creates different positions on the labor market. Anderson describes how "[i]mmigration controls work with and against migratory processes to produce workers with particular types of relations to employers and to labour markets." Instead of theorizing illegality "as absence of status and therefore of access to state protection" it should be acknowledged that immigration control

av Utredningen om rätt till skolgång m.m. för barn som vistas i landet utan tillstånd on the right to schooling and access to pre-school and school-age childcare. SOU 2010:63 EU:s direktiv om sanktioner mot arbetsgivare. Betänkande av Sanktionsutredningen on the labor market. Carens, Joseph H., "The Rights of Irregular Migrants", *Ethics and International Affairs*, vol. 22.2, summer 2008, p. 163-186. See above.

¹⁶⁵ Cf the claim made by Bell that the "Directive [on Employer Sanctions, 2009/52/EC] continues to intertwine labour law issues with immigration law issues, with the result that the latter overwhelms the further". Bell, Mark (2010), "Irregular Migrants: Beyond the Limits of Solidarity?". In Ross, Malcolm & Borgmann-Prebil, Yuri (eds.), *Promoting Solidarity in the European Union*, Oxford: Oxford University Press, p. 150-165, p. 164.

¹⁶⁶ The emblematic example is the Hoffman case from the USA. Fisk, Catherine L. & Wishnie, Michael J., "The Story of *Hoffman Plastic Compounds, Inc. v. NLRB*: Labor Rights Without Remedies for Undocumented Migrants", In: Cooper, Laura J. & Fisk, Catherine L., (eds.) (2005), *Labor Law Stories*, New York: Foundation Press, p. 399-438.

¹⁶⁷ Cf the framing of the debate in Carens, Joseph H., "The Rights of Irregular Migrants", *Ethics and International Affairs*, vol. 22.2, summer 2008, p. 163-186.

¹⁶⁸ Democratic states' reluctance towards sudden raids, heavier arming, stronger repression, intensified surveillance, and mass deportations are based on practical, economic and human rights related arguments. This has been labelled "embedded liberalism" or the "liberal constraint". Cf Ambrosini, Maurizio, "Irregular Immigration: Economic Convenience and Other Factors", *Transfer* vol. 14, no 4, winter 2008, p. 557-572. (To this I want to add that already without being fully realized migration law is brutal.)

¹⁶⁹ Griffith, Kati L., "U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law", *Comparative Labor Law & Policy Journal*, vol. 31, p. 125-162, 2009-2010, p. 128, with references, p. 159.

produces illegality and status and types of legality, with effects on labor market positions of migrants.¹⁷⁰ Anderson argues for

”the importance of paying close attention to the relation between labour markets and immigration controls which not only illegalise some groups, but legalise others in very particular ways. In practice, as well as a tap regulating the flows of workers to a state, immigration controls might be more usefully conceived as a mould *constructing* certain types of workers through selection of legal entrants, the requiring and enforcing of certain types of employment relations, and the creation of institutionalised uncertainty.”¹⁷¹

Institutionalized uncertainty is the conditions for undocumented migrant workers on the labor market amounting to vulnerability and exploitation.

Migration law regulates the composition of the work force, and labor law is today understood as a regulator of migration. The strategy of differentiating labor law in order to achieve migration policy goals has not only been deployed by states and the EU, but also been suggested as a trade union strategy.¹⁷² In some respects there exist corresponding views on the driving forces behind “illegal” migration: work.¹⁷³ Despite otherwise differing views and policies corresponding views prevail on work as the root cause behind “illegal” migration. Some claim that it is the bad, dangerous, poor work – i.e. the lack of radicalism and efficiency of labor and employment law – that creates opportunities for undocumented migrants’ work. Others claim that it is the good, over-protected and expensive work that creates these opportunities for undocumented migrants’ work. If it wasn’t for the tough labor and employment law regulations, and the following costs for labor, etc, then there wouldn’t be any demand for cheaper labor performed by undocumented migrants.¹⁷⁴

How to reconcile the migration law approach and the labor and employment law context? And vice versa: how to merge labor and employment law elements into a migration law context? Is it possible to extrapolate from the innate rationalities of the two sub-disciplines a foundation for managing undocumented migrant work?

Labor and employment law is, and must be, founded on equality and collectivity.¹⁷⁵ One expression of this is the concept that functions as a threshold for the application of labor and

¹⁷⁰ Anderson, Bridget, “Migration, Immigration Controls and the Fashioning of Precarious Workers”, *Work, employment and society*, vol. 24, issue 2, 2010, p. 300-317, p. 306.

¹⁷¹ Anderson, Bridget, “Migration, Immigration Controls and the Fashioning of Precarious Workers”, *Work, employment and society*, vol. 24, issue 2, 2010, p. 300-317, p. 312.

¹⁷² Caruso, Bruno (2004), “Immigration Policies in Southern Europe: More State, Less Market?”. In: Conaghan, Joanne, Fischl, Richard Michael, Klare, Karl (eds.) *Labour Law in an Era of Globalization. Transformative Practices and Possibilities*, Oxford: Oxford University Press, p. 298-319, p. 307, p. 314, and the directive 2009/52/EC.

¹⁷³ This driving force has been neutrally labeled “economic convenience”. The point is that employment is beneficial for both parties. Ambrosini, Maurizio, “Irregular Immigration: Economic Convenience and Other Factors”, *Transfer* vol. 14, no 4, winter 2008, p. 557-572.

¹⁷⁴ de Grazia, Raffaele (1980), *Clandestine Employment: A Problem of Our Times*”, *International Labour Review*, vol. 119, p. 549.

¹⁷⁵ My inspiration regarding this point are Fahlbeck, Reinhold (2007), *Stridsåtgärder, särskilt sympatiåtgärder, på arbetsmarknaden och kollektiv reglering av anställningsvillkor. En internationell jämförelse*, Lund: Juristförlaget i Lund, p. 59-61 and Malmberg, Jonas (2001), “Collective Agreements and Competition Law in Sweden”. In: Bruun,

employment law: the concept of employee. The objectives of labor law cannot be achieved without equality, collectivity and the limiting of competition¹⁷⁶, and this is therefore what defines the relevant subject in terms of employee (the human body performing work) without distinctions. The employee is at the centre of attention and his or her interests are safeguarded through collective actions furthering policies founded upon unity, thus creating limits to competition. No worker has an interest to be excluded from the group of workers, and no worker has an interest to see that any other worker is excluded from the group of workers; this would threaten the effectuation of labor law's objectives.¹⁷⁷ The basic contradiction in relation to undocumented migrant workers, Carens writes, is that "the rationale for denying normal workplace protections to irregular migrants is that this will reduce the incentive for them to come in the first place. Ironically, this sort of policy tends to create a comparative advantage for employers who hire irregular migrants, thereby making it even more attractive for employers to hire them".¹⁷⁸ Some years ago Swedish trade unions demanded and achieved legislation that gave certain immigrant workers the right to study the Swedish language during working time (and with pay). This policy was accused of making it harder for immigrants to get jobs, because their labor all of a sudden had become more expensive for employers than Swedes' labor.¹⁷⁹ If migration law was to provide employers with too much power over migrant workers with permits, then these workers would be favored before Swedes.¹⁸⁰

Migration law is based on the drawing of borders and on inequality. Noll writes on the state's powers over migration:

"all nation states have the right to regulate immigration. This right comprises a state's personal sovereignty and has ancient origins in international law. States are free to allow immigration of foreign labour one day, and prohibit it the next. States can also recruit well-educated labour from abroad, while refusing entry to those with little or no education."¹⁸¹

Niklas & Hellsten, Jari (eds.), *Collective Agreement and Competition in the EU. The Report of the Colcom-Project*. Copenhagen: DJØF, p. 187-208.

¹⁷⁶ Cf the apocryphic maxims "to take labour out of competition", "the labor of a human being is not a commodity or article of commerce" and "the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries".

¹⁷⁷ Cf the point "The growth of the informal, shadow economy, copiously fed by immigration, is a challenge not only to equality in labour law but to the very effectiveness of labour law and its regulatory apparatus, effectiveness being one of its main aims." Caruso, Bruno (2004), "Immigration Policies in Southern Europe: More State, Less Market?". In: Conaghan, Joanne, Fischl, Richard Michael, Klare, Karl (eds.) *Labour Law in an Era of Globalization. Transformative Practices and Possibilities*, Oxford: Oxford University Press, p. 298-319, p. 315.

¹⁷⁸ Carens, Joseph H., "The Rights of Irregular Migrants", *Ethics and International Affairs*, vol. 22.2, summer 2008, p. 163-186, p. 176.

¹⁷⁹ Yalcin, Zeki, (2010), *Facklig gränspolitik. Landsorganisationens invandrings- och invandrarpolitik 1946-2009*, diss., Örebro: Örebro Studies in History 10/Örebro Studies in Conditions of Democracy 4, p. 243-299 with further references.

¹⁸⁰ Anderson, Bridget, "Migrants and Work Related Rights", *Ethics and International Affairs*, vol. 22.2, p. 199-203, p. 202.

¹⁸¹ Noll, Gregor (2008), "The Asylum System, Migrant Networks and the Informal Labour Market", I: Cramér, Per & Bull, Thomas (red.), *Swedish Studies in European Law*, Vol. 2, 2007, Oxford and Portland, Oregon: Hart Publishing, p. 3. References omitted here.

What is needed is the dismantling of the paradoxes that Anderson mentions:

”Precarious work for those working illegally is not simply at the whim of individual employers, but structurally produced by the interaction of employment and immigration legislation.”

Or, put in a slightly different way, by Hanau;

”Illegal work is cheap and it’s cheap because it’s illegal.”¹⁸²

Consider also the public and also governmental indignation over the exploitation that is the result of the strong dependence of the UMW to his or her employer: if the worker turns to the state, then the state will effectuate exactly what the employer threatened to do; deportation.¹⁸³ When an employer denies an UMW his or her rights, this is legally explained by the doctrine of illegality, which holds that a person should not benefit from their wrongdoing.¹⁸⁴ The introduction of sanctions against both employer and “illegal” employee is said to bring the interests of these groups closer together, hindering detection, and “becoming, perhaps counter-intuitively, an important factor in inducing the submersion of immigrant labour”.¹⁸⁵

How can migration law and labor law be reconciled? Working human bodies’ equality in relation to status as worker must be at hand, if labor law is not to be threatened, while at the same time this does not do away with migration law. The effectuation of labor law does not threaten migration law, while the opposite is true. The effectuation of migration law threatens labor law. Inclusion in labor law is not in opposition to exclusion by migration law, and vice versa. The systems are autonomous, if they are put in this hierarchy; otherwise one (in principle) threatens the other. Labor law should be given primacy over migration law. Everybody that is excluded by migration law should be included by labor law.¹⁸⁶ Work performing bodies are not identified by the study of documents. The labor law notion of worker should therefore not be partially defined by the study of documents. Carens discusses labor law in terms of rules governing a market within the state’s jurisdiction.¹⁸⁷ The limits for market behavior “reflect a particular democracy’s conception of the minimum standards under which economic activity should be conducted within its borders”. The implication for Carens is that labor law should apply to all workers.¹⁸⁸

¹⁸² Hanau, Peter (2007), “Immigration to the Workplace: The German Experience”, *Comparative Labor Law & Policy Journal*, Vol. 28, s. 213-218, s. 216.

¹⁸³ Anderson, Bridget, “Migration, Immigration Controls and the Fashioning of Precarious Workers”, *Work, employment and society*, vol. 24, issue 2, 2010, p. 300-317, p. 311.

¹⁸⁴ Anderson, Bridget, “Migration, Immigration Controls and the Fashioning of Precarious Workers”, *Work, employment and society*, vol. 24, issue 2, 2010, p. 300-317, p. 311.

¹⁸⁵ Caruso, Bruno (2004), “Immigration Policies in Southern Europe: More State, Less Market?”. In: Conaghan, Joanne, Fischl, Richard Michael, Klare, Karl (eds.) *Labour Law in an Era of Globalization. Transformative Practices and Possibilities*, Oxford: Oxford University Press, p. 303, p. 313.

¹⁸⁶ Since inclusion in labor law leads to less demand for hiring persons that are excluded from migration law, labor law can be said to effectuate a migration policy, without compromise about labor law’s own objectives. Labor law does not have to be described in these terms.

¹⁸⁷ This conceptualization is also common in Nordic labor law discourse. Cf Malmberg, Jonas (2010), *Vad handlar arbetsrättslig reglering om? En essä om arbetsrättens uppgifter*, Uppsala Faculty of Law Working Paper 2010:9.

¹⁸⁸ Carens, Joseph H., “The Rights of Irregular Migrants”, *Ethics and International Affairs*, vol. 22.2, summer 2008, p. 163-186, p. 175.

The creation¹⁸⁹ of a labor force membership without regard to documents and only with regard to whether a person works or not would be beneficial. Attempts to "displace citizenship from its privileged place in our political imaginations" has been put forward in a labor law context. This could amount to a 'decoupling' of the idea of citizenship from rights and recognition, which instead "should be based on an individual's personhood or her social participation, rather than on citizenship".¹⁹⁰ Scholarship, as well as policy, should look beyond the traditional notion of 'undocumentedness' as a derived category defined by what it is lacking, since this view is based on the primacy of migration law. The question ought to be how to construct inclusion in labor law for undocumented migrants.¹⁹¹ No intervention is still intervening.¹⁹² Undocumented migrant workers should be covered by labor law, and have the practical means of also using it.¹⁹³ Labor law should be autonomous in relation to migration law, but not the other way around. Many legal-technical issues arise here.¹⁹⁴ There is a need to re-develop and re-define an industrial citizenship¹⁹⁵, without regard to citizenship in the migration law sense. This is an agenda for labor law scholarship suitable for the challenges posed by today's working life.

¹⁸⁹ Cf the reflections on regulating working life as if it was to be regulated today from a legal void in Fahlbeck, Reinhold, "Towards a Revolutionised Working Life. The Information Society and the Transformation of the Workplace", *The International Journal of Comparative Labour Law and Industrial Relations*, vol. 14, no 3, 1998, p. 247-265.

¹⁹⁰ Bosniak, Linda (2004), "Critical Reflections on 'Citizenship' as a Progressive Aspiration". In: Conaghan, Joanne, Fischl, Richard Michael, Klare, Karl (eds.) *Labour Law in an Era of Globalization. Transformative Practices and Possibilities*, Oxford: Oxford University Press, p. 339-349, p. 343. The discussion moves on to notions of 'alien citizenship'. Political theorist and philosopher Judith Butler is invoked.

¹⁹¹ Cf the point made by Bruun that "labour law today, including the Nordic countries, is a complicated system built on multiple sources and layers of rules. We can actually describe the situation in terms of several labour law systems existing side by side within one national jurisdiction". Bruun, Niklas (2002), "The Future of Nordic Labour Law". In: Wahlgren, Peter (ed.) *Stability and Change in Nordic Labour Law*, Scandinavian Studies in Law, vol. 43, p. 375-385, p. 378.

¹⁹² Cf the discussion in the labour and employment law context: Fahlbeck, Reinhold, "Employment Protection Legislation and Labour Union Interests: A Union Battle For Survival?", *Stanford Journal of International Law*, vol. XX, Issue 2, Fall 1984, p. 295-327.

¹⁹³ Carens claims that it is a serious normative problem for states if only "purely formal legal rights" exist, without the possibility to exercise them. Carens, Joseph H., "The Rights of Irregular Migrants", *Ethics and International Affairs*, vol. 22.2, summer 2008, p. 163-186, p. 167. Cf. Selberg, Niklas & Noll, Gregor (2011), "Det måste vara lika för alla", *Lag & avtal*, no 3, p. 38-39.

¹⁹⁴ Cf what Carens calls the "Firewall Argument": "States can and should build a firewall between immigration law enforcement on the one hand and the protection of basic human rights on the other. We ought to establish as a firm legal principle that no information gathered by those responsible for protecting and realizing basic human rights can be used for immigration enforcement purposes". This way rights will be enforceable. Carens, Joseph H., "The Rights of Irregular Migrants", *Ethics and International Affairs*, vol. 22.2, summer 2008, p. 163-186, p. 167.

¹⁹⁵ Cf Fudge, Judy, "After Industrial Citizenship: Market Citizenship or Citizenship at Work", *Relations Industrielles/Industrial Relations*, vol. 60, no 4, 2005, p. 631-656 with further references.