

The Global Labour Market - what Happens when the State Steps Back?

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1 Introduction

Labour law as we know it is closely connected to the nation state and its historical developments.¹ The main goal always has been to ‘compensate for the inequality in bargaining power’.² This field of law emerged in an environment where it was considered ‘necessary to preserve the mechanisms of capitalist accumulation and, at the same time, maintain social order and the bases of democratic legitimization of the state itself’.³ Today society is populated to a larger extent by actors operating more or less outside the control of the nation state. In some very specific situations this development creates a basis for a parallel system of labour law outside the control of the traditional legislator. In this paper it will be illustrated how one nation state, Sweden, contributes to such development.

Certain groups of the labour force, in particular those dominated by women workers, have long been excluded from the reach of labour law.⁴ Lately, some of these groups – such as domestic workers – have at least been recognized as workers,⁵ while other forms of labour have been excluded; the self-employed are a well-explored example of the latter.⁶ Other workers not formally excluded are prevented from enforcing their rights due to their vulnerable position on the labour market.⁷ Atypical or precarious employment contracts and temporary residence-permit arrangements for labour migrants explain some of these effects. Other new forms of employment relations are equally difficult to fit into the national labour law framework – examples are crowd-work, companies operating solely through the internet that buying services from employees located all over the world, like Uber. Technical development and globalisation has paved the way for transnational company structures, increased competitiveness and new forms of employment.⁸

1 Joanne Conaghan, Michael Fischl and Karl Klare, *Introduction* in Joanne Conaghan, Michael Fischl and Karl Klare (eds), *Labour Law in an Era of Globalization, Transformative Practices & Possibilities* (Oxford University Press 2002) xxix.

2 Manfred Weiss, *Re-Inventing Labour Law?* in Guy Davidov and Brian Langille (eds) *The Idea of Labour Law* (Oxford University Press 2011) 44.

3 Massimo D’Antona, *Labour Law at the Century’s End*, in Conaghan, Fischl and Klare (2002) 33.

4 See examples in Judy Fudge, *Labour as a ‘fictive commodity’*: Radically reconceptualising labour law 136 and Adelle Blackett, *Emancipation in the Idea of Labour Law* in Davidov and Langille (2011) 421.

5 ILO Convention no 189 on Decent Work for Domestic Workers (2011).

6 Paul Benjamin, *Who needs Labour Law?* in Conaghan, Fischl and Klare (2002) 85.

7 Lisa Rodgers, *Labour Law, Vulnerability and the Regulation of Precarious Work* (Edward Edgar, 2016).

8 See for example David Weil, *The Fissured Workplace- Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press 2014) 3; Alain Supiot, *Beyond Employment – Changes in Work and the Future of Labour Law in Europe* (Oxford University Press 2001) 13.

This development leads in different ways to increasing pressure on national labour law and calls into question the suitability of labour law as it stands today. From the perspective of Sweden, where trade unions and employers/employers' organisations play such a crucial role for both the development and enforcement of employment conditions, this new scenario holds special challenges. Swedish trade unions and employers' organisations are often deeply rooted in the national context.

It has been argued that '[t]he key to overcoming such collective action problems lies, as is well known, in multilateral agreement and action'.⁹ Some have thus put faith in activities adopted within the umbrella concept 'Corporate Social Responsibility'.¹⁰ Another somewhat related stream involves transnational collective bargaining and agreements. The ambition is to find common standards that shall apply within a whole transnational company, irrespective of where the company's sites are situated.¹¹ Transnational collective bargaining has also enjoyed broader application, not least within an EU context, where transnational collective bargaining is regulated in EU treaties. The collective agreements adopted within this context apply in the Member States but are given different legislative statuses depending on whether or not the agreements are endorsed by the legislator.¹²

In this paper a slightly different but associated aspect of this development will be discussed from a Swedish perspective: a shift that is the consequence of the fact that in our environment, as Langille puts it, capital has become mobile but labour has not.¹³ Deakin's words also apply; globalization is 'occurring on terms which favour the mobility of capital over that of labour'.¹⁴ The right of a person to cross a nation state's border is still strictly regulated.¹⁵

9 Brian A Langille, *Seeking Post-Seattle Clarity* in Conaghan, Fischl and Klare (2002) 145.

10 See for example Fiona McLeay, *Corporate Codes of Conduct and the Human Rights Accountability of Transnational Corporations: A Small Piece of a Larger Puzzle* and Lisa R Price, *International Framework Agreements: A Collaborative Paradigm for Labor Relations* in Olivier De Schutter (ed.) *Transnational Corporations and Human Rights* (Hart Publishing 2006).

11 Isabelle Schömann (ETUI), Romuald Jagodzinski (ETUI), Guido Boni (University of London), Stefan Clauwaert (ETUI), Vera Glassner (Johannes Kepler Universität in Linz) and Teun Jaspers (Utrecht University), *Transnational collective bargaining at company level. A new component of European industrial relations?* ETUI 2012.

12 See on this phenomenon for example Ruth Nielsen, *EU labour Law* (Djøf Forlag 2013) 149 ff.

13 Langille in Conaghan, Fischl and Klare (2002) 144.

14 S Deakin, *The Many Futures of the Contract of Employment*, in Conaghan, Fischl and Klare (2002) 179.

15 Some exceptions exist. From a Swedish perspective, the EU and the Nordic labour markets are of particular interest.

Two crucial requirements apply if a third-country national wants to enter Sweden for work. First, the worker needs an offer of employment from a Swedish employer, and second, the worker must be offered working conditions at least corresponding to Swedish collective agreements or custom in the relevant industry.¹⁶ The government has emphasized that labour migrants are not to be employed under worse working conditions than those applicable to Swedish workers.¹⁷ However, the law explicitly and implicitly excludes two very different migrant working groups from this starting point: specialists in multinational corporations (MNCs) and irregular workers. The law is constructed in a way that makes it very difficult for these workers to claim any employment rights – or at least any rights based on work carried out in Sweden. As a result, their employment conditions are likely to be set outside the democratically established frameworks under which Swedish labour law is adopted. The law that applies in reality for these groups is ‘law without the state’, or at least in regard to the specialists in MNCs, ‘law without the Swedish state’. The state has chosen in these cases to abstain from any responsibility with regard to upholding a certain standard of labour law and/or employment conditions. The underlying reasons for this differ. For the specialists in MNCs the idea might be that ensuring a certain level of employment conditions might discourage multinationals from establishing companies in Sweden.¹⁸ For the irregular workers, another starting point prevails: guaranteeing this group rights might create incentives to come to and remain in Sweden. Combatting the presence of irregular migrants on Swedish territory has become the aim that overrides other options.

In this paper it will be explained how these situations have been constructed by the law. The paper will be organized in the following way. Section 2 briefly explores the purpose of labour law in order to illustrate the seriousness of the present situation. Section 3 deals with the role of the State in the upcoming situations. Section 4 explains how irregular migrant workers are excluded from the reach of labour law, and Section 5 deals with specialists in multinational companies. The final section discusses possible ways forward, with the relevant question being *is this way with or without the state?*

2 The Purpose of Labour Law

During industrialization, liberal thought affected the relationship between worker and employer. The employment contract replaced former status-oriented relationships and the parties became free to agree on the conditions as they saw fit.¹⁹ The competition between individual workers led to very poor working conditions, however, and intervention was needed to prevent a ‘race to the

16 Ch 6 sec 2. Aliens Act (2005:716).

17 Government Bill 2007/08:147, p 27; Government Bill 2013/2014:227 *Åtgärder mot missbruk av reglerna för arbetskraftsinvandring*.

18 Government Bill 1983/84:144, 62.

19 Mikael Hansson & Mats Glavå, *Arbetsrätt* 3rd edn (Studentlitteratur 2016) 27.

bottom'.²⁰ The individual worker seldom had the bargaining power to safeguard decent working conditions. A two-way strategy was therefore adopted, known as 'collectivization of employees combined with protective legislation'.²¹ As Manfred Weiss explains, 'the interplay between collective self-regulation and legislative intervention from the very beginning characterized labour law. The main goal always has been to compensate for the inequality in bargaining power'.²² The goal of labour law is above all the protection of employees' material needs, their health and safety and their human dignity.²³

The employment contract plays a crucial role here. It limits the employer's legal powers to command, and transforms the 'employment relationship as a vehicle for challenging and redistributing social and economic risks, through the imposition on employers of obligations of revenue collection, and compensation for interruptions to earnings.'²⁴

In a Swedish context the aims of labour law are upheld through the interplay of law, collective agreements and employment contracts. The law and the collective agreements (for the parties and their members) set the limits for the content of the employment contract, and in this framework this content is a contract like any other – an agreement that mirror the common will of its parties.²⁵

Another crucial aspect is of course that a worker who tries to enforce denied labour rights shall not be sanctioned for doing so.²⁶

3 The Role of the State

It has been claimed that

The visible weakening of the State in modern day Europe is fraught with injustice, risks, and uncertainties. Injustice, because it is unacceptable for broad sectors of the population in rich societies to be consigned to poverty or social annihilation.²⁷

This weakening of the nation state challenges the applicability of labour law. It should be noted, however, that in the cases that will be discussed later in this paper, the state' has intentionally acted in a way that excludes the groups in question from the protections and obligations of national labour law.

20 Weiss in Davidov and Langille (2011) 44.

21 *ibid* 44.

22 *ibid* 44.

23 *ibid* 44.

24 Deakin in Conaghan, Fischl and Klare (2002) 181.

25 Kent Källström och Jonas Malmberg, *Anställningsförhållandet*, (Iustus 2013) 109.

26 *Ibid* 136.

27 Supiot (2001) 169.

As previously mentioned, despite the increased freedom for capital, services and goods to cross national borders, most states – as is true for Sweden – guard their right to decide which persons shall be allowed to enter the country, and the concept of regulated migration is highly valued. Indeed, irregular labour migrants ignore the nation state's urge to control the inflow of people into its society. In that sense they are threatening the sovereignty of the state. The Swedish state's remedy for this "disregard" is not only expulsion but also criminalization of remaining and working within Swedish borders.²⁸ Still, many irregular migrants stay, and many of them work to support themselves.²⁹ The sanctions imply that the worker loses both the ability to enforce labour law and the strength to conclude an employment contract with reasonable working conditions.

Some intra-corporate transferees, on the other hand, explicitly escapes the control of the law. All other labour migrants (outside the Nordic and EU context) are allowed to operate in the Swedish labour market only if they are afforded the same working conditions as Swedish workers in general. When applying for a work permit, the labour migrant must attach proof of an employment offer including at least a wage level, insurance protection and other working conditions that are equivalent to Swedish collective agreements or custom.³⁰ In addition, the relevant trade union is asked to comment on the conditions offered.³¹ The Migration Agency controls the working conditions offered before arrival and may verify that they are applied after arrival.³² No similar requirements apply for specialists transferred within a multinational company for a period less than a year. The Aliens Ordinance explicitly exempts this group from the work permit requirements. The State obviously sees no role for itself in upholding labour rights for this particular group.

4 Irregular Workers

It is unclear how many irregular migrants are currently in Sweden. Some estimates suggest that 30 000 to 50 000 irregular migrants live in Sweden.³³ The number of instruments adopted on EU level that aim to limit the number of irregular migrants in EU territory is impressive, and the commitment in this regard is strong. Visa requirements, border controls, carrier sanctions and penalties for smugglers and traffickers have been set up to keep irregular migrants out. Other measures focus on removing irregular migrants present in

28 Ch 29 Sec 1 and 3, Aliens Act.

29 Fackligt center för papperslösa, "www.fcfp.se/" (visited 29 May 2016).

30 Ch 6 Sec 2 Alien's Act.

31 Ch 5 Sec 7a Alien's ordinance.

32 Ch 6 Sec 6a and 6b Alien's ordinance.

33 *Fackligt center för papperslösas webbplats* ("www.fcfp.se/"; visited 29 April 2016), *Fler papperslösa i flyktingkrisen*, SVT Swedish Television 29 December 2015 "www.svt.se/nyheter/lokalt/vast/fler-papperslosa-i-flyktingkrisen".

the territory and others – such as the prohibition to employ irregular migrants – are supposed to decrease the incentive to enter and stay.³⁴ These requirements have been implemented in Swedish law; in other words, Sweden is obliged to expulse irregular migrants from its territory. This does not mean, however, that irregular migrants must be denied rights while staying here. Additional measures going beyond what EU law requires with respect to irregular migrants have been part of the Swedish legal system for a very long time. Since 1927 it has been criminalized for irregular migrants to work.³⁵ The criminalization is perhaps not decisive for the ability to realise Swedish labour provisions, but it brings additional clarity to how irregular workers are perceived.³⁶ Expulsion must be the threat the irregular migrant fears the most.³⁷ Still, it is well known that enforcement of expulsion orders is difficult and that there are irregular migrants who manage to remain in Swedish territory. Experts believe that this number is likely to grow.³⁸

Until quite recently the question of whether irregular workers are covered by labour law in the same way as other workers operating in the Swedish labour market has not been given much attention. One of the central tools in EU attempts to control irregular migration is the EU sanctions directive (2009/52).³⁹ The aim of this directive is to combat irregular migration by suppressing participation of irregular migrants in undeclared work.⁴⁰ According to the directive, employment of irregular migrants is strictly prohibited; employers in breach of this provision run the risk of financial penalties (and in some severe cases even criminal sanctions).⁴¹ The directive also includes a provision requiring the employer to pay outstanding remuneration to the irregular migrant.⁴² The aim of this latter sanction is to safeguard that employers cannot

34 Steve Peers, *Irregular Migrants: can Human Treatment be balanced against Efficient Removal?* (2015) 17 *European Journal of Migration and Law* 289, 289.

35 Aliens Act chapter 20 sections 3 and 5; Selberg, *Om kriminaliseringen av papperslösas arbete och argumenten för att avskaffa den*, in Catharina Calleman and Petra Herzfeld Olsson (eds), *Arbetskraft från hela världen: Hur blev det med 2008 års reform* (Report 2015:9, Delegationen för migrationsstudier 2015).

36 Selberg, (2015) 365f, 391.

37 Ch 11 Sec 15 Aliens Act.

38 SVT, *Fler papperslösa* 29 December 2015.

39 European Parliament and Council Directive (EC) 2009/52 providing for minimum sanctions and measures against employers of illegally resident third-country nationals.

40 Mark Bell, *Irregular Migrants: Beyond the Limits of Solidarity?* in Malcolm Ross and Yuri Borgmann-Prebil (eds), *Promoting Solidarity in the European Union* (Oxford University Press 2010) 163.

41 Article 9, dir 2009/52/EC.

42 Article 6, dir 2009/52/EC.

make undue profit by engaging irregular migrants instead of hiring regular workers.⁴³

When suggesting how to implement this directive in Swedish law the inquiry was asked to identify and analyse the labour law protection that applied to irregular migrants.⁴⁴ The inquiry, later supported by the legislative bill, started the analysis by discussing the fact that it is not possible to conclude a binding employment contract if it is criminalized to conduct work.⁴⁵ Independently of that argument, the inquiry came to the conclusion that the irregular worker is entitled to remuneration in accordance with the employment contract, void or not, and that a number of labour laws apply with respect to vacation, working time and occupational health and safety.⁴⁶ In the government bill presented to Parliament it was stated that *'substantial parts of the fundamental protective provisions within Swedish labour law and occupational health and safety law can be applied to irregular workers. In addition such a fundamental right as freedom of association applies independently of the foreigners' migratory status.'*⁴⁷ An ambiguity was obviously expressed: some labour law provisions should apply, substantial parts of the fundamental ones, and some should not. This starting point has been debated.⁴⁸ Our focus is however to identify structural shortcomings regarding the enforcement of the applicable labour rights.

It is by now well known that migration law and labour law interact. If there is a risk that a worker will lose the right to stay in a country or, in the case of irregular migrants, being discovered and deported from the territory when trying to enforce labour rights, there is little probability that that the worker will stand up for these rights.⁴⁹ Bell explains how EU law interacts in this field:

'When the Employer Sanctions Directive is combined with the Returns Directive, the likely consequence for an irregular migrant who exposed mistreatment at work is removal from the member state'⁵⁰

It has been argued that labour law and migration law should be disentangled from each other.⁵¹ In order to keep the integrity of labour law it is crucial that no migratory effects will be the consequence of a labour law claim.

The effect of the present situation is that irregular workers are in reality excluded from the protection of labour law. They work in an environment where one political starting point – regulated migration is making other political starting points embedded in labour law obsolete.⁵² The relationship between the worker and the employer is thrown back to the days of early industrialization when workers accepting to work at the lowest price would get the job.⁵³ The conditions will in these situations be set by one party – the employer. To a certain extent some of the sanctions imposed on employers who employ and exploit irregular migrants might balance this effect. That will however not alter the assumption that the irregular worker's main interest is to avoid removal from the territory. As soon as the risk of being removed is inherent in a claim to rights other than those the employer can agree to no other claims are likely to be articulated.

43 Selberg, *Åtgärder mot dem som tillgodogjort sig papperslösas arbete: nya principer i arbetsrättens sanktionssystem, eller ett principiellt nytt sanktionssystem?* in B Nyström, Ö Edström and J Malmberg (eds), *Nedslag i den nya arbetsrätten* (Liber 2012) 77, 86, 92.

In a time where the number of irregular workers is likely to grow – it cannot be rational to uphold a situation where work is conducted at the Swedish territory and the normal standards are not applied. The employer will act as both the legislator and the enforcing entity. As the legal standards that apply for other groups of the labour force are out of reach for the irregular workers - the labour law that applies is decided and enforced unilaterally by the employer – law without the state.

5 Specialists in Multinational Corporations

Multinational companies have expanded their role ‘in the era of globalization’.⁵⁴ Their possibility to forum shop and thereby choose the most convenient jurisdiction for their choice, has been identified as a problem and the recipe prescribed, transnational legislation, transnational collective structures, and codes of conducts etc.⁵⁵ Transnational companies also have a desire to allocate parts of their workforce to different sites at different times.⁵⁶ The question is what employment conditions that should apply for the workers when working in other countries.

44 Kommittédirektiv 2009:49 Genomförande av EG-direktiv om sanktioner mot arbetsgivare 7.

45 SOU 2010:63, *EU:s direktiv om sanktioner mot arbetsgivare* 180; Government Bill 2012/13:125 80.

46 SOU 2010:23 181ff.

47 Government Bill 2012/13:125 24.

48 Selberg (2012) 79; A Inghammar, *The European Contract Revisited. Undocumented Migrant Workers and the Intersection between International Standards, Immigration Policy and Employment Law*, European Journal of Migration and Law 12(2010) 193, 203ff.

49 Bridget Anderson, *Migration, Immigration Controls and the fashioning of precarious workers*, (2010) 24 (2) Work, Employment and Society 300.; Judy Fudge, *Precarious Migrant Status and Precarious Employment: The paradox of International Rights for Migrant Workers* (2012)34 (95) Comparative Labour Law&Policy Journal 122.

50 Bell in Ross and Borgmann-Prebil 164.

51 *ibid* 164; Bell is also referring to PICUM’s comments on the communication on policy priorities in the fight against illegal immigration by third-country nationals. See also Selberg in Calleman and Herzfeld Olsson (2015) 391f.

52 Bell (2010) 165.

53 Inghammar (2010) 211.

54 Weiss in Davidov and Langille (2011) 52.

55 *ibid* 52–53.

56 See for example Government Bill 1983/84:144 p 62.

International private law norms usually come into play in such situations. The main question here is which country's labour law that should apply. In a European context, the relevant instruments with regard to applicable law and jurisdiction are the Brussels I Regulation on jurisdiction in civil and commercial matters⁵⁷, the Rome I Regulation on the law applicable to contractual obligations⁵⁸ and Rome II on the law applicable to non-contractual obligations⁵⁹. However, some of these workers are also covered by the Swedish Posting of Workers Act.⁶⁰ A posted worker means a worker who normally works in another country but for a limited period carries out work in in another country.⁶¹ The employer must be established outside Sweden and the posting must be done in the framework of a transnational provision of services.⁶² The act applies when an employer sends workers to an establishment or an undertaking in Sweden owned by the group.⁶³ Workers covered by that act are guaranteed only Swedish minimum provisions on wage and some other labour law provisions.⁶⁴ We will not analyse how these different provisions would play out for the specialists coming to Sweden through a transfer within a multinational company. Instead, we will take a look at how these transfers are regulated in Swedish migration law and the consequences this can have for upholding the labour rights to which these workers are entitled.

Sweden has not formally started along the road of selective labour migration policies focusing on highly skilled migrants. Any labour migrant can obtain a work permit and enter the Swedish labour market if he or she is offered a job by a Swedish employer, and as long as this offer includes working conditions that at least correspond to the level in the relevant collective agreement (or, if no such agreement exists, custom in the sector).⁶⁵ It is the individual employer that identifies the need to recruit from abroad; the only condition is that the post has been advertised in Europe for ten days before the 'offer is made'. When these new rules were adopted in 2008, previous authority-based labour market tests were decisive for entry, the government emphasized the importance of ensuring that the labour migrant would be provided with the same set of wage levels and other working conditions as their Swedish counterparts.⁶⁶ In 2014 this emphasis was strengthened by clarifying in the law that the labour migrant would lose the residence permit if the Migration Agency found out that the prescribed level was not being applied.⁶⁷

The work permit application plays an important role. It clarifies that the working conditions applied must correspond to Swedish standards. A trade union representative also gets a chance to review the application, and this procedure ensures that the trade union is informed about the arrival of the worker.⁶⁸ The Migration Agency has also been given the task to monitor and verify that prescribed provisions are applied when the migrant worker is here.⁶⁹ One crucial starting point for enhancing the application of Swedish labour law norms through migration law procedures is that the Swedish model like most other models, must compensate for the vulnerability created by temporary residence permits and its inherent negative impact on labour migrants' ability to enforce the national labour law norms.⁷⁰ Once again the risks related to removal come into play. This risk evidently depends on the bargaining strength the labour migrant has through other means, such as highly sought-after skills.

There are some groups, however, that are exempted from the requirement to apply for a work permit before entering Sweden.⁷¹ Most of those exceptions apply in very specific cases and for periods from two weeks to three months. In these cases, practical reasons motivate the exception.⁷² One category, however, stands out: the ‘*Specialists within an international group who work in Sweden for the group in less than one year altogether*’.⁷³ Normally, such a worker who intends to stay for a period longer than three months must apply for a residence permit. The working conditions are not scrutinized in that process.⁷⁴

Other groups of workers staying for shorter periods than one year, irrespective of whether or not they are employed by a foreign employer, must apply for a work permit.⁷⁵ It is clear, however, that persons corresponding to this ‘specialist group’ have been treated differently than other labour migrants for a long time. Earlier, specialists and persons working in leading positions in multinational

57 REGULATION (EU) No 1215/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

58 REGULATION (EC) No 593/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 June 2008 on the law applicable to contractual obligations (Rome I).

59 REGULATION (EC) No 864/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

60 Posting of Workers Act (1999:678).

61 Section 4, Posting of Workers Act (PWA).

62 Section 1.

63 Section 3.2.

64 Section 5.

65 Ch 6 sec 2 Aliens Act.

66 Government Bill 2007/08:147 34; Catharina Calleman and Petra Herzfeld Olsson, *Moves towards Increased Workforce Fragmentation among Labour Immigrants* in Carlson, Edström, and Nyström (eds), *Globalisation, Fragmentation, Labour and Employment Law* (Iustus 2016) 164.

67 Ch 7 Sec 7e Aliens Act.

68 Ch 5 Sec 7a Aliens Ordinance.

69 Ch 6 Secs 6a and 6b Aliens Ordinance.

70 Herzfeld Olsson, *Bindande eller inte? Ger Anställningserbjudandet arbetskraftsinvandringen tillräcklig förutsebarhet*, in Calleman & Herzfeld Olsson, *Arbetskraft från hela världen*, 2015.

71 Chapter 5 Aliens Ordinance.

72 SOU 2005:50 203.

73 Ch 5 Sec 2 p 10 Aliens Ordinance.

74 Ch 2 Sec 5 Aliens Act.

75 Berry pickers in Thailand are often employed by temporary work agencies, for example, as well as IT consultants in India; see Hedberg, *Thailändska bärplockare: Hushållsstrategier på en global arbetsmarknad* in Calleman and Herzfeld Olsson (2015) 124.

companies were not considered as competing with Swedish workers; therefore, their entry into Sweden was not based on an established shortage in the Swedish labour market.⁷⁶ They were not considered as operating in the open Swedish labour market.⁷⁷

A 'specialist' is quite a vague concept. No available definition of the concept has been found.⁷⁸ It turned out to be very difficult to acquire more detailed definitions of the types of workers covered by this exception. No checking or verification of this group seems to take place at the Migration Agency.⁷⁹ However, the Migration Agency anticipates that this exception is applicable in quite a few cases.⁸⁰ The Agency states that the exception should be applied generously, as it has been adopted in order to facilitate and promote transnational exchange.⁸¹ Hence, it seems to be up to the applicant, in consultation with the sponsoring company, to decide whether or not to use this exception.⁸² Previously corresponding uses for the exception seem to have been scrutinized in order to prevent allowing incorrect categories of workers to benefit from the exceptions applicable at that time.⁸³

The only thing we know is that the exclusion of this workforce from ordinary procedures is based on the assumption that they are not competing with the Swedish workforce. This is also done so that transnational companies will not encounter barriers to allocating the necessary workforce to sites in Sweden.⁸⁴ These arguments were developed when the entry of labour migrants was based on labour market tests. Since 2008 this system has changed, and individual employers decide whether they need to recruit third-country nationals. The main function of the work permit since 2008 is to ensure that labour migrants are offered work by a Swedish employer and that prescribed working conditions are fulfilled.

The effect in the present system is that the legislator does not take on the responsibility – as in other cases through the work permit system – of verifying the working conditions these persons have while working in Sweden. This can be contrasted with berry pickers, who do neither compete with Swedish workers and in most cases are employed by companies abroad.⁸⁵ As no definition of a

76 Government Bill 1983/84:144 56, 58.

77 SOU 2005:50 210, Government Bill 2004/2005:170 211.

78 There is a definition in article 3 in the EU directive 2014/66/EU on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer. It could be argued that the definition in the Aliens Ordinance should correspond to that one. The time-factor however make such a statement quite weak.

79 The answers from the Migration Agency are part of an e-mail correspondence kept by the author.

80 Migrationsverkets handboken s 5, från 2015.02.16.

81 Migrationsverkets handboken, s 6 från 2015.02.16.

82 Migrationsverkets handboken, s 5-6.

83 Government Bill 1983/84:144 s 56, *see* also Government Bill 2007/2008:147 18.

84 *See* Government Bill 1983/84:144 62.

85 Hedberg in Calleman and Herzfeld Olsson (2015).

specialist in this context can be found, it seems likely that specialists can be involved in all kind of industries and possess very different qualification characteristics.

It is rare to see media reports about exploitation of migrant workers who are considered specialists; at any rate this factor is not mentioned. That does not mean that their employment conditions correspond to Swedish standards. But the truth is that we don't know. These workers, in contrast to most other labour migrants from third countries, operate in the Swedish labour market without any state-based control of their working conditions. The arguments for excluding this particular group from the standards applicable to all other labour migrants are no longer valid, at least in part.

From a labour law perspective, the decision to exempt specialists from the work permit requirement could result in their exclusion from the coverage of Swedish labour law. Even if Swedish labour law was applicable for this group, the mechanisms that normally must be put in place to ensure that labour migrants are provided with the rights to which they are entitled are absent for this group. That does not mean that they are not covered by Indian or Canadian labour law, or are not perfectly satisfied with their working conditions. The point here is that the basis for treating them differently from other labour migrants is not convincing. The result is that from a labour law perspective, they operate on conditions outside the control of the Swedish state.

6 Some Concluding Remarks

The function of labour law is to address the inherent power imbalance between the worker and the employer.⁸⁶ What happens on the global labour market is that some actors escape the protection of national labour law – in this paper this development has been illustrated by the situation of two very different groups operating in the Swedish labour market: irregular migrant workers and specialists transferred within a multinational company.

When the nation state fails to promote the application of Swedish labour law norms on labour migrants, the situation starts to resemble the one before the birth of labour law in the 19th century when the level of employment conditions depended on the worker's bargaining power. This could play out very differently, for different groups – the weak worker could be exploited and the strong ones would probably take care of themselves.

Perhaps one can convincingly defend the present legal situation with regard to the strong ones. If so, the government should at least clarify that position. But how should we determine that a particular labour migrant is so 'strong' that no support is needed from the state? For the weak ones, typically the irregular migrant, the situation is very different. Here it must be considered urgent to establish a system where a labour law claim can be made without risking the enforcement of an expulsion order. In the situations discussed here, it seems that

86 Otto Kahn-Freund, *Kahn Freund's Labour and the Law*, (3rd edn. Stevens 1983).

the law that applies in more or less obvious ways needs additional support from the state legislator in order to safeguard the position of the weaker party.