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Conferences

- In 2009

“Migration and decent work: influence of European and International rules on the rights of migrant workers”

- In 2012

“Is it a crime to be a foreigner”

INTERNATIONAL and EUROPEAN labour law for migrants and refugees

Why important?

- In 2010 **214** million people living outside of their country of origin (in 2050 estimated 405 million, International Organization for Migration, *World Migration Report 2010 - The Future of Migration: Building Capacities for Change*, p. 21)
- Need for international cooperation and protection on migration to avoid and punish abuse and exploitation of migrants

- Humanitarian migration is more and more ‘criminalised’ and work migration encouraged. Do we only attract migrants when they are of (economic) use?
- Migrant workers are often in a vulnerable position because:
 - their residence rights are linked to work
 - they often do not have a residence permit

Same rights

- Migrant workers have the same rights and rights to access to social protection as any other worker (article 39 Treaty of Rome 1957, directive 2004/38)
- Documented workers and undocumented workers need to have the same rights

How to protect: International and European level

INTERNATIONAL LEVEL

- Two ILO Conventions on labour migration ensuring non-discrimination in the equality of treatment = basic framework

1. ILO Convention 97 = the Migration for Employment Convention 1949: equal treatment between national and regular migrants in recruitment procedures, living and working conditions, access to justice, tax and social security regulations

2. ILO Convention 143 = The Migrant Workers Convention 1975: specific minimum norms of protection applicable to migrants in an irregular situation or who are employed illegally

= legal framework for national policy and legislation

Other standards

- Universal Declaration of Human Rights
- The Geneva Convention 1951: asylum seekers. Asylum seekers receive less protection and become undocumented migrants
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families = the Migrant Workers Convention

(MWC, 18 Dec 1990): no European country has ratified. Human rights for all migrants. (chapter for all workers and chapter for legal workers)

- ILO Convention 181 (Private Employment Agencies Convention)
- ILO Convention on Decent Work for Domestic Workers – 189: offers specific protection to domestic workers.

EUROPEAN LEVEL

- EU migration policy direct the member states

2stages

- **1957-2000**: construction of Europe
- **> 2000**: economic migration from third world countries + need for European reglementation

European Union: 4 fundamental freedoms

1. Free movement of persons
2. Free movement of services
3. Free movement of good
4. Free movement of capital

1. Migration within European Union

- Migrant workers in the European Union:
free movement of persons

- For workers, this freedom has existed since the foundation of the European Community in 1957. It is laid down in Article 45 TFEU and it entails:

- the right to look for a job in another Member State;
- the right to work in another Member State;
- the right to reside there for that purpose;
- the right to remain there;
- the right to equal treatment in respect of access to employment, working conditions and all other advantages which could help to facilitate the worker's integration in the host Member State.

- Migration for European citizens and their family who want to work in other states (residence > 3 months): work permit
- Equal rights in labour law and social security
(regulation 1612/68, directive 2004/38, different stages for the EU of 15 to 25 to 27)
- Self-employed are free

- Free movement of services
 - self-employed of countries of EU who work in an other EU countries and European companies who subcontract their workers within the EU
- Directive of posting (Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services/ Draft directive on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services 12.03.2013)

Labour law: host country

Social security: country, in which the employee habitually carries out his

work

- Risk of social fraude:
 - Posting of workers (eg. Polish worker in Belgium, social security in Poland for work in Belgium. Control? Setting up complicated constructions of subcontracting to get round labour law or collective agreements)
 - Misclassifying a worker as self-employed: no protection for the worker

2. Migration from outside European Union

2.1. Lisbon strategy

- economic migration.

During the European council in Lisbon in March 2000, European Union leaders launched a **Lisbon Strategy** aimed at making the EU the world's most dynamic and competitive economy by 2010.

- This strategy rests on three pillars of which the first: An economic pillar laying the groundwork for the transition to a competitive, dynamic, knowledge-based economy: strengthen employment.

- Directives:

- Directive 2011/98/EC: is a directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State

The goal is to simplify the procedure to encourage economic migration and give equal rights to workers

But: in reality inequality because

-member states are competent to decide on the conditions and criteria for the single permit, so they can decide who can come to work and stay in their country.

-Permit is given after examination of the market to decide if no national worker can do the job

-Permit is given for a specific job and employer = migrant worker is dependent of his employer and in a vulnerable position (<-> national worker). If worker loses his job he loses his residence permit

⇒ Directive encourages economic migration without putting to an end the vulnerability of migrant workers

- Entry and residence of highly qualified workers (EU Blue Card/ 2009/50/EC of 25 May 2009): common criteria, easier access, free circulation within EU, after two years freedom of employer.

⇒ Risk of brain drain to Europe

• Proposal directive for seasonal workers

-According to estimates, well over 100 000 non-EU seasonal workers come to the EU each year (this includes irregular migrants). EU economies face a structural need for seasonal work for which labour from within the EU is expected to become increasingly difficult to find. Furthermore, there is significant evidence that certain non-EU seasonal workers face exploitation and sub-standard working conditions which may threaten their health and safety. And finally, sectors of the economy that are characterised by a strong presence of seasonal workers — most notably agriculture, horticulture and tourism — are repeatedly identified as the sectors most likely to have non-EU nationals staying in the EU without permission carrying out the work.

- currently under discussion

- Precarious work (temporary residence permit is linked to the job without perspective on permanent residence permit)

Other

- Legal Residence > 5 years: European status (Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents)
- European Pact on Immigration and asylum 2008

2.2. Undocumented Migrants

- No EU legislation on regularisation
- Member states decide about regularisation
- A part of the economy in the EU is based on undocumented workers and unregistered workers. Semi tolerance of the EU because of economy?

- DIRECTIVE 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals

- It prohibits the employment of irregular migrants from outside the EU, by punishing employers through fines or even criminal sanctions in the most serious cases.

- All Member States, except Denmark, Ireland and the UK, are bound by the Directive.

Background:

- Many irregularly-staying third country nationals are working across the EU, in sectors such as construction, agriculture, cleaning and hotel/catering. Knowing that such work is available in the EU is a major pull factor for people who come or stay in the EU under irregular conditions. Employers take advantage of irregular migrants' precarious position, and employ them for what are usually low-skilled and low-paid jobs. Due to their status, these employees are very unlikely to complain about working conditions or pay. This puts them in an extremely vulnerable position.
- The Directive helps put an end to this situation. It establishes minimum standards across the EU on sanctions and measures against employers of irregularly-staying third-country nationals.
- Under the Directive, before recruiting a third-country national, employers are required to check that they are authorised to stay, and to notify the relevant national authority if they are not.

- Employers who can show that they have complied with these obligations and have acted in good faith are not liable to sanctions. As many irregularly-staying migrants work in private households, the Directive also applies to private individuals as employers.
- Employers who have not carried out such checks, and are found to be employing irregular migrants will be liable for financial penalties, including the costs of returning irregularly staying third-country nationals to their home countries. They have to repay outstanding wages, taxes as well as social security contributions. And in the most serious cases, such as repeated infringements, the illegal employment of children, or the employment of significant numbers of irregularly-staying migrants, employers are liable to criminal penalties.
- The Directive protects migrants, by ensuring that they get any outstanding remuneration from the employer, and by providing access to support from third parties, for example trade unions or NGOs.

- Member States must also ensure that where an employer is a **subcontractor**, the contractor of which the employer is the direct subcontractor will be held liable in addition to or in place of the employer. However, contractors that have undertaken due diligence obligations defined by national law will not be liable. Member States may also provide for more stringent liability rules in relation to subcontracting.

Good evolution: protective provisions: automatic payment of any outstanding remuneration, possibility for complaints, liability of the chain of employers,..

Risks of the directive:

- Risk for the worker of being expelled? Need for protection of the worker eg. temporary residence permit
- Goal of directive is against illegal migration and not against exploitation of the workers

Conclusion

- Political climate in Europe: Lisbon strategy based on competitiveness of European companies and flexibility of workers
- 2 priorities:
 - economic growth
 - employment
- Influence on the immigration policy of the EU: more “employable” workers: more part time jobs, temporary contract, precarious jobs, flexible jobs,..

- Consequences of this policy:
 - putting workers in competition with one another
 - dependency of workers on their employers
 - opening borders for economic migrants and at same time refusing to regularise many illegal migrant workers:
need for EU regulation
 - brain drain to EU

Possible changes:

1. Ratification of the Migrant Workers Convention
2. Refuse the politic of “selected migration”. Disconnect after a certain time the link between work and residence permit
3. Need for EU legislation on regularisation
4. Sectors in need. Necessary to use a correct definition of shortage of workers in a certain sector.

5. Strengthen the social legislation for all workers of the EU, undocumented and documented workers.

6. To have a right is one thing, to realise this right is another: need for protection of undocumented workers who file a complaint against their employer eg. Belgium oral agreement

=> Important role for trade unions, workers, NGO's, lawyers, labour inspectors,.....

Thank you!

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