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INTERNATIONAL MIGRATION AND LABOUR LAW

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The articles on international migration in this issue highlight the (most often bad) employment conditions of newly-arrived workers. They endure these conditions, rather than accepting them, on account of their precarious situations and the fragility of their entitlement to residence, even when they are not undocumented immigrants. Everywhere, those with power, if they are unscrupulous, can easily exploit the vulnerability of others. We are given some examples here, among others by Risa L. Lieberwitz who reminds us of the situation in the United States. As Lacordaire famously put it: «Between the weak and the strong, between the rich and the poor, it is freedom which oppresses and the law which sets free». «The weak, more than the strong, need to be able to count on the certainty of the law», added Jean-Jacques Dupeyrou¹. This takes us back to the origins of labour law.

The arguments in favour of rigorous social protection for the world's most wretched, through the application of national and international labour law and social security legislation, therefore appear strong, regardless of the legality of their status. They are thus guaranteed, on paper at least, the safeguards necessary to a decent life. Unfortunately, we are all well aware of the difficulties of all kinds, including electoral, that delay or prevent the genuine integration of new arrivals into society in any given nation. The issue is a universal concern, as illustrated by Nanga Silué's contribution on foreign workers in Côte d'Ivoire. So many States fail to practise the virtue they preach! Some even espouse abhorrent policies, which luckily they do not implement to the full.

In spite - and no doubt because - of the growing internationalisation of human exchanges, migrants remain particularly vulnerable to prejudice, to differences in treatment based on race, colour or national descent, in their daily working lives and elsewhere; these negative preconceptions are often combined with others such as gender or religion. Cases of double or even triple discrimination (African, female, elderly) are not rare², not to mention those based on xenophobia, which paradoxically include discrimination by some foreigners against others of different origins, such as the Roma.

Laws impose restrictions on trade union freedom based on nationality, residence or citizenship, whereas workers' associations are one of the most effective instruments of

1 J-J. Dupeyrou, «Et maintenant?», *Droit social*, special issue, July-August 1981, p. 487.

2 I. Daugareilh, «Les discriminations multiples. Une opportunité pour repenser le droit à la non-discrimination», *Revue Hommes et Migrations*, no. 1292, July-August 2011, p. 34; L. Muguérou, T. Eremenko, X. Thierry and R. Prigent, «Les familles monoparentales immigrées: des familles doublement pénalisées?», *Revue de droit comparé du travail et de la sécurité sociale*, 2015-2, p. 68.

protection. Unacceptable practices affect nationals of third countries, even those who are legally resident, ranging from confiscation of passports to non-payment of wages, from physical mistreatment or sexual abuse to restrictions on freedom that turn employment into forced labour (*kafala* system in Qatar, denounced by the ILO)³. The children of immigrants do not always have equal access to schooling, which increases the risk of them being put to work⁴.

Pay levels are often lower than those of nationals, while a Spanish study has shown that workplace accidents are more common among foreign than Spanish workers: they are 34% more likely to suffer a fatal accident and 13% more likely to be injured. The reasons for this stack up one on top of the other: jobs in more dangerous sectors, riskier conditions (long days, shift working), more restricted access to prevention measures, undeclared working which makes it impossible to demand improvements. The Spanish social security system does not require accident declarations for domestic workers and this is one of the branches where the most foreigners are employed⁵.

The contributions in this special issue convey a pressing concern, the need to enhance the protection of these people and supervision of the implementation of the measures that are adopted. Beyond the need to provide adequate working conditions and social security coverage, the worries concern respect for individuals' human rights. One point worth noting is that physically changing country is no longer the only situation that raises such issues: cyber-migrants, as Amalia de la Riva shows, are now faced with virtually the same problems. These analyses also lead to another conclusion, illustrated with force by the articles of Kübra Dogan Yenisey and Ferran Camas Roda: the vanity of the notion of different statuses when it comes to protecting the social rights of people leaving one State for others en masse. In many cases, although not all, distinctions between legal immigrant workers in all the different forms (cross-border workers, seasonal workers, itinerant workers, workers hired for specific projects, self-employed workers) and undeclared workers, refugees who have been forced to flee, economic refugees, asylum seekers, lose all meaning.

Globalisation has weakened States and opened their borders, largely facilitating labour mobility. A comparison of African and European demography suggests, as Stephen Smith observes, that migratory pressures will not ease unless brutal measures are taken⁶. That said, normally it is not the poorest who migrate to industrialised countries, because it takes money to make the trip⁷. Climate change⁸ and violent political upheaval only add to the

3 International Labour Conference (104th session, 2015), *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A), Geneva, ILO, 2015, p. 190.

4 International Labour Conference (104th session, 2012), *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1B), Geneva, ILO, 2012, para. 967.

5 See J.-M. Servais, «Le droit international social des migrations ou les infortunes de la vertu», *Revue de droit comparé du travail et de la sécurité sociale*, 2017-1, p. 111.

6 S. Smith, *La ruée vers l'Europe - La jeune Afrique en route pour le Vieux Continent*, Paris, Grasset, 2018.

7 François Héran questioned by Laure Cailloce on 10.12.2018, «Les migrations à rebours des idées reçues», *Journal du CNRS*, December 2018: <https://lejournel.cnrs.fr/articles>; S. Smith, *op. cit.*, p. 142.

8 C. Zickgraf, E. Hut, Fr. Gemenne (dir.), *The state of environmental migration 2018: a review of 2017*, Liège, Presses universitaires de Liège, DL, 2018.

determination to flee of those who want to escape poverty or an environment that is too restrictive. The traditional system of receiving migrants and political refugees established by law in many nations and by ostensibly binding (although in practice rarely ratified) international conventions, was designed in another era to channel the flows of foreign workers and deal with the specific difficulties of people coming from the East after the Second World War. It has proven its inability to cope with contemporary problems.

First point: everyone will agree that an industrialised country is unable to take on all the misery in the world, but it must take its share, to paraphrase former French Prime Minister, Michel Rocard. Several contributions point out that the United Nations Covenants on Human Rights, as well as the other international and regional instruments relating to the same issue, apply to all humans with very few exceptions⁹.

The countries of transit for migrants, of immigration and of emigration, are also faced with considerable difficulties. Zina Yacoub illustrates this with the case of Algeria, emphasising in particular the effect the flows of foreigners coming through the country have had on the growth in the informal economy. Similar concerns could be expressed about Lebanon or Turkey for example, which have had to cope with the arrival of huge numbers of Syrian refugees.

It is particularly complex, as the recent history of Italy has shown, to reconcile strict respect for these rights with the just as essential right of the citizens of a host country to express their fears democratically and to expect them to be dispelled¹⁰. In this light, measures to stem the migratory flows appear inevitable. One basic objective of migration policies remains: to find a balance between measures facilitating access to employment for new arrivals, prioritising sectors where labour is in short supply, and the apprehensions linked to the unemployment rate in the host country¹¹. It is not easy for an elected government to assert a moral responsibility to the poor and downtrodden with no right to vote at a time when populist movements are stirring up irrational fears of foreigners in the population. Other factors make integration efforts complicated for migrants, as well as for citizens of the host country. Religion, on both sides, can become a way of retreating into one's community and rejecting those who do not share the same beliefs. Accommodating a policy of integration and respect for the immigrant's personality and differences¹² is a difficult exercise.

Rich countries like Israel or the Gulf monarchies have drastically restricted the possibilities of immigration, protecting their own culture and in practice prohibiting the integration of people from elsewhere. Joanna Howe highlights how temporary migration has now become the norm for workers in Australia. Japan, on the other hand, is tending to relax policies that have been highly restrictive hitherto; Chizuko Hayakawa explains the reasons. Western countries have long adopted an ambiguous strategy, closing their eyes to the entry of large

9 See, however, Article 2 para. 3 of the International Covenant on Economic, Social and Cultural Rights, which allows developing countries, «with due regard to human rights and their national economy» to determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals.

10 J. Hado, *Immigrants and Refugees. Social and Economic Impacts in Europe after 2015*, End-of-study document, Venice, Ca'Foscari University, GESAM, 2018.

11 For Germany see M. Fuchs, «The Integration of Refugees into the Labour Market: The German Experience», in J. Pichrt, K. Kodinska (eds.), *Labour Law and Social Protection in a Globalized World*, Bulletin of Comparative Labour Relations, vol. 103, La Haye, Kluwer, 2018, p. 281.

12 J. Andriantsimbazovina (dir.), *Intégration et droits de l'homme*, Paris, Mare et Martin, 2018.

numbers of illegal immigrants, whilst keeping them in a situation of illegality that leads to legitimate frustrations. This may mean providing free medical care and education to the families of illegal immigrants, for obvious humanitarian reasons, thereby acknowledging their presence in the country, while refusing them residence permits, and even expelling them or their children later on. Through separate development and imposed assimilation, they have ignored the cultural and religious factors that act as barriers to integration.

Second point: populist parties have been quick to denounce this position, with familiar success. Recent flows of refugees have exacerbated fears and increased attacks on migration policies that are deemed to be too open, in particular those of Germany and the United Kingdom. Confronted with wave after wave of migrants, countries like Italy have not received the assistance they hoped for. It is also a fact that terrorist attacks have given arguments to those who defend hard-line policies. In these circumstances, to advocate universal freedom of movement of persons is delusional, in my opinion. Between natural indignation in the face of the distress of the exiled and opting for a policy of welcoming migrants, there is all the difference that separates a moral concept of value from that, more legal and political, of principle. The normative horizon of the concept of hospitality is cosmopolitanism¹³, which no-one can reasonably expect to achieve in the foreseeable future.

As well as the excesses to which we all know separate development (apartheid) can lead, most of the countries tempted by this regime and having applied it in a balanced way have returned to more integrationist policies¹⁴.

Third point: voices are being raised demanding that a rational, practical middle way be found. Those that attempt to put this into practice find themselves with the sad privilege of uniting against them the votes of the risk-averse right and the idealistic left, not to mention those of political strategists who, by their leniency, hope to attract the political support of citizens of foreign origin who very naturally still wish to maintain their traditions.

This all amounts to asking how it is possible to reconcile loyalty to a particular culture (with its linguistic and religious dimensions and memory of the past) and adhesion to citizenship, to a collective national identity, how to transcend traits specific to tradition and a particular background by civic spirit and a grasp of common values. Immigrants have formed minority groups within national societies, singularly so in the industrialised nations. Their public authorities have responded with the legal instruments available to them, but have been unable to prevent the rise in tensions and the inability to understand the (many) reasons that drive people to migrate and people in the host countries to view their arrival with suspicion and even to reject them. The history of the integration of Jews in the European nations reveals both the virtues and shortcomings of attempts at regulation¹⁵. Certainly what is needed is not the destruction of the social and legal edifices built over the centuries, but their adaptation and the seeking of a new synthesis, a rethinking of the migratory phenomenon as a whole.

The UN endorsed a Global Compact for Migration in 2018. This instrument promotes cooperation to reduce the chaos of illegal migration and contains a guide to good practice, as Ferran Camas Roda and Rachid Filali Meknassi explain. It is to be hoped that it can prove to be

13 Y. Cusset, «Hospitalité», *Esprit*, June 2018, p. 96. See also A. Frachon, *Le Monde*, 29 June 2018, p. 24.

14 D. Schnapper, *La citoyenneté à l'épreuve. La démocratie et les Juifs*, Paris, Gallimard (NRF essais), 2018.

15 *Ibid.*

more than good intentions and have a real effect, as it has already had in Morocco. However, the fact that it is non-binding renders it inherently fragile. More generally, the reliance on soft law manifests the hesitations States have when it comes to making commitments to others; the efficacy of the measures proposed remains entirely inadequate in the face of the scale of the situations. At the very most, these declarations and other non-binding instruments, allow well-intentioned governments to make a political commitment to «do something» without resorting to double-speak.

The authors whose articles appear in this issue express their concerns on the fate of migrants. They argue for real equality in the workplace, for adequate social protection and for decent handling of what are deplorably inhumane situations. Nonetheless, stricter control of migratory flows seems inevitable if we want to avoid the authoritarian and xenophobic excesses that certain countries are already seeing. The European Union has begun to tackle the issue and is seeking to achieve an acceptable balance between showing solidarity to the poorest and the measures being demanded by European citizens to protect their jobs, their personal safety and security, whilst aiming to make the actions of public services more effective in dealing with the new problems created by the mass arrivals of migrants¹⁶. The three main strands of its policy concern actions with partners in third countries (the European resettlement programme), actions on its outer borders (the total restoration of the so-called Schengen system, but with the reinforcement of the European Border and Coast Guard standing corps¹⁷ and the revision of the Return Directive) and actions within the EU (reform of the Common European Asylum System and the Dublin Regulation).

There is a need, however, to go further and develop a social cohabitation pact that goes beyond the notion of hospitality - for if he is eternally seen as a guest, the migrant will never feel at home - and is shaped around the notion of belonging¹⁸. This implies acceptance of integration, seeking mutual trust¹⁹, adhesion to a common vision of society, respect not only for the rule of law, but also for the habits and customs of the host country. It also presupposes recognition of the economic benefits gained from the arrival of newcomers in an aging population, since they boost domestic consumption and pay social contributions.

The sensitive questions that divide opinion need to be addressed head on, but serenely: cultural difference, acquired behaviours in the societies²⁰ of country of origin and the receiving country, the role of religion and its external manifestations, that of the clerics of different faiths, but also effective protection against rampant discrimination, the need to provide appropriate schooling for immigrant children without holding back those born in the country, interpersonal relationships, including between the sexes. We must not underestimate the subjective factors that come into play on both sides, or the ill-intentioned skill of those who exploit them. We must find the will to rationalise them in laws that are supported by a majority on all sides.

16 Communication of European Commission, *Managing migration in all its aspects: progress under the European Agenda on Migration*, COM (2018), 798 final, Brussels, 4 December 2018.

17 C. Chevalier-Govers and R. Tinière, *De Frontex à Frontex: vers l'émergence d'un service européen des garde-côtes et garde-frontières*, Brussels, Bruylant, DL, 2019.

18 F. Brugère and G. Le Blanc, «Le conflit des hospitalités», *Esprit*, July-August 2018, p. 63.

19 E. M. Uslaner (dir.), *The Oxford handbook of social and political trust*, Oxford University Press, 2018.

20 That is to say the cultural issue as culture is defined in the *Nouveau Petit Robert* dictionary. See also P. Ory, *L'histoire culturelle*, Paris, PUF, «Que sais-je?», 2004.

The measures that are adopted can be based on common sense, as the German experience has shown²¹: promotion of the language of the country or region, a dynamic employment and vocational training policy, temporary work opportunities until legal residency is granted. Sweden has established a fast-track system for integrating new arrivals on the labour market²². Their inclusion in the social security and welfare systems may be complex²³ given the financial dimension, but remains an issue that has to be addressed. International or regional institutions, such as the Council of Europe Development Bank, also have a role to play²⁴.

In the process of integrating all these migrants, including refugees, trade unions have an important mission²⁵, although they have to tread carefully because they must overcome resistance from their members who see the foreigner as a competitor or even an intruder²⁶. In Germany and Denmark, a bi- or tripartite dialogue has nevertheless been established, but these are countries with long traditions of social dialogue²⁷. Other than that, the potential of collective negotiation and the function of the public authorities, who need to be the guardians rather than the controllers of this integration, remain to be developed.

Finally there is one other question that cannot be ignored. African, Latin American and Asian nationals who leave their countries of birth are not all unskilled. Many of them are academics and holders of other qualifications who come to Europe or North America to complete their education and end up staying or emigrate later wishing to make a better life. They are better received in countries keen to take advantage of their qualifications. However, this means depriving the regions of the world that most need them of citizens that could usefully contribute to their development. We often maintain an embarrassed silence concerning the harmful impact of this brain drain on the economic progress of the countries concerned. It also affects European countries. But how are we to take sides in the conflict between individuals' freedom to choose the life they want for themselves and the concern of governments to serve the common interest?

21 M. Fuchs, *op.cit.*

22 EurWORK 5 February 2016.

23 P. Melin, *The external dimension of the EU social security coordination: towards a common EU approach*, Oisterwijk, Wolf Legal Publishers (WLP), 2018.

24 Council of Europe Development Bank, *The integration of Migrants in Europe*, Paris, CEB, 2015.

25 C. Charcartegui, «Trade Unions' Action for Refugees and Asylum Seekers: Mapping the Process to Agency», in J. López López (dir.), *Collective Bargaining and Collective Action. Labour Agency and Governance in the 21st Century*, Oxford, Hart Publishing, 2019, p. 148.

26 S. Marino, J. Roosblad, R. Penninx (eds.), *Trade unions and migrant workers: New contexts and challenges in Europe*, Cheltenham, E. Elgar, Geneva, BIT, 2017.

27 Eurofound, 1 February 2016 and 17 December 2015.