Edited by Conny Rijken and Tesseltje de Lange

Towards a Decent Labour Market for Low-Waged Migrant Workers

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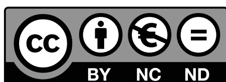

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Towards a Decent Labour Market for Low-Waged Migrant Workers

An Introduction

Tesseltje de Lange and Conny Rijken

Abstract

This editorial chapter sets the stage for the groundbreaking chapters that comprise this volume. We discuss in some detail the fragmented legal framework of intra-EU mobility and labour market access of third-country nationals coming to the EU. In the discussion of the concept of decent labour and decent labour markets, we identify three dichotomies at the intersection of (the regulation of) labour markets and migration that underlie this volume. This is followed by a discussion of the collected chapters, each of which describes and problematises aspects of the road and obstacles towards a decent labour market for low-waged migrant workers. The chapter concludes with a multilayered framework and some unconventional thoughts on how to achieve such a decent labour market.

Keywords: labour migration, low-waged migrants, decent labour market, intra-EU mobility, EU migration law

This book is the final output of a research project – *Protecting labour migrants in the Netherlands: past, present and in the future* that allowed us to collaborate with the selected contributors to this volume.[1] Together, we dive into the position of low-waged migrant workers from within the EU, possibly working under worse labour conditions than nationals, or under the level of their education attainments, as well as third-country

1 The project was financed by Institute Gak, (www.instituutgak.nl) project title: '*Bescherming van arbeidsmigranten in Nederland: toen, nu en in de toekomst'*.

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nationals, especially those in low-paid jobs such as seasonal workers, asylum seekers or those without legal residence. These migrant workers contribute to the labour market, valued for their work but are vulnerable to abuse. The research aim of this project was to contribute to developing theories and strategies to overcome this vulnerability and window for abuse: to work towards a decent labour market for low-waged migrant workers. Understanding the fragmented legal framework and its consequences for migrant workers was a first step to achieve this aim. Together with the contributors to this volume, we looked into opportunities to mitigate the negative consequences.

It cannot be denied that migrant workers are an integral part of EU labour markets. Dynamics of globalisation, individualisation, flexibilisation, and liberalisation are only a few factors that determine the state of labour markets today. After the recent financial crisis, we see a rise in employment rates and shortages in the labour market. Today, we see migration flows of rather diverse groups of migrant workers under a great diversity of legal schemes, ranging from intra-EU mobility of EU nationals, to asylum seekers and international students. Not all migrant workers profit equally from the positive dynamics of economies on the rise. It seems to be a general notion that the divide between the privileged and the unprivileged, the haves and have nots, in the labour market, is widening.[2]

In this editorial chapter, we first discuss terminological ambiguities employed in this field and define the limits of this volume. Next, we discuss in more detail the relevant fragmented legal framework and the concept of a decent labour market as used in our research. We discuss the concept of decent labour and decent labour markets and identify three dichotomies at the intersection of (the regulation of) labour markets and migration that underlie this volume. This is followed by a discussion of the collected chapters, each of which describes and problematises some aspect of a road towards a decent labour market for low-waged migrant workers. In the final section, we draw our conclusions. This edited volume is unique, not only because it studies different legal areas in their interrelatedness but uses

2 On this divide, see, for instance: R. B. Freeman (2007), 'The Challenge of the Growing Globalization of Labour Markets to Economic and Social Policy', in E. Paus (ed.), *Global Capitalism Unbound. Winners and Losers from Offshore Outsourcing*, Palgrave pp. 23-39; also C. Teney, O.P. Lacewell, and P. de Wilde (2014), 'Winners and losers of globalization in Europe: attitudes and ideologies', *European Political Science Review*, 6(4) pp. 575-595; W. Tiemeijer (2017), *Wat is er mis met maatschappelijke scheidslijnen?* WRR.

insights from other disciplines – e.g. economics, anthropology, political sciences – to understand the problem and to look for ways to improve the position of migrant workers.

Terminological ambiguity

A first terminological ambiguity we face, regards the concept of 'migrant workers': migrant workers come under many – legally speaking – different frameworks. We look at overarching legal regimes that are central to this study, which are migration law, the laws on access to the national or EU labour market, and the laws describing the rights of migrant workers. Migration law defines migrant workers according to their status upon arrival, which can be facilitated by laws such as the free movement laws for EU nationals or EU labour migration laws for third country nationals (TCN) or by EU and national laws governing the arrival of TCNs coming to the EU for reasons other than work. Indeed, not all migrant workers arrive as workers: they might arrive and remain legally within the EU as family migrants, as foreign students,[3] or may enter to seek refuge, or have other reasons for entry; if they are working, they too are considered migrant workers. Those migrants that enter legally for reasons of work are labelled as labour migrants. They often receive (restricted) work permits for specific jobs, employers, or geographical areas within a country.

Migrant workers' legal status is not fixed, but may change over time for better or for worse.[4] Migrant workers might arrive without permission to stay and work, labelled as 'undocumented', 'unauthorised', 'irregular' migrant workers.[5] Their irregularity can be caused by loss of a previously held legal

3 T. de Lange (2015), 'Third-Country National Students and Trainees in the EU: Caught between Learning and Work', *IJCLLIR,* 31(4) pp. 453-472.

4 R. Paul (2015), *The political Economy of Border Drawing. Arranging Legality in European Labour Migration Policies*, Berghahn; M. Ruhs and B. Anderson (2010), *Who needs migrant workers? Labour shortages, immigration and public policy*, OUP.

5 Still very relevant is the discussion on undocumented migration by S.H. Legomsky (2009), 'Portraits of the Undocumented Immigrant: A dialogue', *Georgia Law Review*, 44(65). Also see B. Bogusz, R. Cholewinski, A. Cygan, and E. Scyszczak (2004), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Martinus Nijhoff Publishers; A. Triandafyllidou and D. Vogel (2010),'Irregular Migration in the European Union: Evidence, Facts and Myths', in A. Triandafyllidou (ed.), *Irregular Migration in Europe: Myths and Realities*, Farnham: Ashgate pp. 291-299.

residence status,[6] can be uncovered through measures of intensified control,[7] and can be dissolved through regularisations.[8]

All migrant workers, whatever their status as a *migrant* is, and regardless of the protection or lack thereof offered in migration and labour market access laws, are also *workers.* As workers, they may fall under the scope of labour laws and receive legal protection.[9] But how to determine what kind of worker the migrant qualifies as; as employed, or seconded, or provider of a service, or self-employed? This is another terminological – and legally relevant – ambiguity central to this volume. In the next paragraph, we will elaborate on this legal fragmentation.

A Fragmented Legal Framework for EU Labour Mobility

The ambiguity of the concept of the migrant worker is shaped by, and can only be understood within, the legal and regulatory regime of the EU, by current debates and sensitivities on migration in general, and by the opening of the labour market for EU nationals from relatively newer EU Member States.

Intra-EU migration is based on Title IV on free movement of persons, services, and capital of the Treaty of the Functioning of the European Union (TFEU). The chapters in Title IV define the rights of EU nationals moving into another EU Member State as workers, to establish a business or to provide a service. It is a legal framework with blurry boundaries between the legal categories of movers. The Regulation on Free Movement

6 L. Goldring, C. Bernstein, and J.K. Bernhard (2009), 'Institutionalizing precarious migratory status in Canada', *Citizenship Studies,* 13(3) pp. 239-265; F. Düvell (2011), 'Paths into irregularity: The legal and Political construction of irregular migration', *European Journal of Migration and Law,* 13 pp. 275-295.

7 See, for instance, A. Desmond (2016), 'The development of a Common EU Migration Policy and the Rights of Irregular Migrants: A Progress narrative?', *Human Rights Law Review*, 16(2) pp. 247-272.

8 See, for instance, S. Chauvin, B. Garcés-Mascerenas, and A. Kraler (2013), 'Working for Legality: Employment and Migrant Regularization in Europe', *International Migration*, 51(6).

9 This is at least the case in the Netherlands today and, to our knowledge, in most EU countries, although the legality of a job contract in case of illegal employment of irregular migrants, and thus the protection offered through labour laws, has been contested; see, for instance, A. Bogg (2013), 'The immoral trap: migrant workers and the doctrine of illegality', in B. Ryan (ed.), *Labour migration in hard times: reforming labour market regulation?*, Institute of Employment Rights; E. Dewhurst (2011), 'The Right of Irregular Immigrants to Outstanding Remuneration under the EU Sanctions Directive: Rethinking Domestic Labour Policy in a Globalised World', *EJML*, 13(4) pp, 389-410.

1612/68/EC explicitly mentions in its preamble the 'social advancement' of the worker as one of the aims of free movement of workers. Whereas Regulation 1612/68 allowed for a protection of the national labour market in the EU context, the social advancement was never used as an aim and subsequently abolished in the Regulation 492/2011, tipping the balance of interests involved towards the interests of employers and their need for work force over the migrants' interest in 'social advancement' through working elsewhere in the EU. A similar process occurred when adopting and negotiating the Posted Workers Directive (PWD).[10] Framing posting of workers under the free movement of services and choosing this as the sole legal basis for the PWD, the position of posted workers was dealt with under the freedom to provide services. Regardless of the (limited) protection clauses adopted in the PWD to guarantee minimum rights to posted workers, the PWD diminished their position.[11] In relation to the free movement of services, the Services Directive was adopted in 2006.[12] Because the risk of social dumping[13] was considered too high when the 'country of origin' principle was applied, this was not included in the directive. Other measures to protect service providers were, however, not included. According to Article 14, Member States are prohibited to make the provision of services conditional to nationality or residency requirements of the providers and other conditions, making it nearly or practically impossible for service providers from other Member States to provide services in that Member State. Article 15 explains which conditions can be imposed that are not discriminatory to service providers from other EU Member States. This volume shows how this directive is creatively applied, e.g. through letter box firms, to increase financial profits to the detriment of the position of the (migrant) service provider.[14]

Current political debates on the free movement of workers and services, on the one hand highlight how intra-EU mobility is strongly supported at the EU level and considered 'one of the unfulfilled promises of the EU'.[15] On

10 Directive 96-71-EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ 21/1/1997, L 18/1.

11 See Chapter 3 by Houwerzijl and Schrauwen in this volume.

12 Directive 2006/123/EC of 12 December 2006 on services in the internal market, OJ 17/12/2006, L376/36.

13 Although social dumping has not been defined it is understood as a set of unfair and uncompetitive practices aimed at gaining (monetary) advantages which could have negative consequences for economic processes and workers' social security.

14 See, for instance, Chapter 4 by Cremers and Dekkers in this volume.

15 J. Donaghey and P. Teague (2006), 'The free movement of workers and social Europe: maintaining the European ideal', *Industrial Relations Journal,* 37(6) pp. 652-666.

the other hand, host states are rather ambivalent and may consider the use of free movement of workers and services by nationals from new Member States as a threat rather than a potential benefit. Although, for a long time, these free movement rights led a dormant life, they became actively applied after the last two enlargements of the EU, and especially after the restrictions towards these freedoms were abolished. High unemployment rates in host Member States and perceived use or abuse of the social benefits have now led to a negative image of EU workers.[16] The differences in wages, labour conditions, and opportunities to work throughout the EU are a constant incentive for people living in the EU where wages and conditions are low, to try to improve these in other EU Member States where wages and labour conditions are high. From an employer's perspective, free movement creates opportunities to lower labour costs either by using service providers from other, low-wage EU countries or by moving the business to such countries. This creates a continuous tension on the one hand between the economic benefits of free movement of workers and services, and, on the other hand, upholding labour rights standards.

In legal and political discourse, there is a strong claim that open labour markets should be accompanied by enhanced labour standards or stronger EU social policy.[17] The lack of full competence at the EU level in the field of social policy makes it more difficult (not to say impossible) to adopt and include social safety nets in regards to the free movement of workers and services. This is called the problem of the 'Social deficit' of the EU construction. The competition between economic freedom and fundamental social rights includes the risk of a race to the bottom in terms of labour rights. Moreover, Achtsioglou and Doherty argue that a lack of correspondence of EU declarations on social values, 'without an expansion of the EU's competences within the social field, any social objective will remain simply declaratory'.[18] Recent developments amending the posting of workers directive to guarantee 'equal pay for equal work'

16 Editorial Comments (2014), 'The free movement of persons in the European Union. Salvaging the dream while explaining the nightmare', *Common Market Law Review*, 51 pp. 729-740.

17 J. Donaghey and P. Teague, p. 662. In November 2017, the so-called 'pillar of social rights' was signed, proposing a decent labour market for EU *citizens*, not mentioning resident non-EU nationals though. Available at: https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/european-pillar-social-rights-20-principles_en.

18 E. Achtsioglou and M. Doherty (2014), 'There must be some way out of here: The Crisis, Labour Rights and Member States in the Eye of the Storm', *European Law Journal*, 20(2) pp. 219-240.

may be perceived as an example of a move in a more social direction.[19] The directive focusses on enforcement of social norms to prevent social dumping. Donaghey and Teague on the other hand conclude that practices of social dumping and wage dumping as a consequence of open labour markets is not widespread nor supported by solid evidence. The threats to national social security as expressed by some ministers in the EU Member States have not been sufficiently supported by quantitative data, they argue.[20] We remark that it cannot be denied that corporations, temporary work agencies, as well as self-employed persons and companies hiring migrant workers have shown great ingenuity in circumventing rules of equal treatment covering migrant workers albeit, often through legitimate legal constructions.

Besides circumventing behaviour and the 'social deficit', a third aspect complicating the application of the free movement of workers and services is the issue of defining work relations. It is not always clear when a person is posted, or working by means of hiring out, or when a person is a worker, (bogus) self-employed person, or service provider. The providing of services, either as (bogus) self-employed person, posted worker, or through transnational temporary work agencies, has been widely used and abused. This has led to a variety of constructions in which minimum wages are not paid, access to social benefits is denied, people are dependent on their employer or agency while they officially work as a self-employed person, and thus do not receive minimum wages nor benefit from collective agreements and protection regimes for workers.[21] For each of these different types of workers a different legal regime exists with different rules on limitations to the freedoms that can, and do, create incentives to frame a labour situation according to the regime with the most opportunities to limit equal treatment and to maximise profits.

19 Available at: http://www.europarl.europa.eu/news/en/press-room/20171016IPR86114/posted-workers-better-protection-and-fair-conditions-for-all. Also see Chapter 3 by Schrauwen and Houwerzijl in this volume.

20 Letter sent in April 2013 by the UK Home Secretary and her Austrian, German, and Dutch counterparts to the President of the Justice and Home Affairs Council regarding the strain on services and national welfare systems posed by the free movement of Union citizens and the response of Czech, Hungarian, Polish, and Slovak ministers, in December 2013, highlighting the beneficial nature of such movement for host Member State economies.

21 J. Cremers, J. Dølvik, and G. Bosch (2007), 'Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU', *Industrial Relations Journal,* vol. 38(6) pp. 524-541.

Labour Migration to the EU

Apart from intra-EU mobility, people move from third countries to the EU as well. The legal regime on migrant workers from outside the EU – non-EU nationals also called third-country nationals (TCN) – coming to live and work in the European Union Member States, is laid down in title V of the Treaty on the Functioning of the EU (TFEU), on the areas of freedom, security, and justice. This title of the TFEU includes a chapter on border check, asylum, and immigration policies. As far as relevant for this volume, Title V states that the EU shall develop a common policy on visas and other short-stay residence permits. Furthermore, it shall develop a common policy on asylum, subsidiary protection, and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. It shall set the standards concerning the conditions for the reception of applicants for asylum or subsidiary protection. Finally, it shall develop a common immigration policy aimed to ensure, 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 of human beings. In this respect, measures shall be adopted regarding the conditions of entry and residence and combating both illegal immigration and unauthorised residence and trafficking of persons. Furthermore, the Member States remain free to set conditions and admission quotas of third-country nationals coming from outside the EU to seek work, if not covered by the specific EU directives.

Based on these TFEU provisions, the EU has concluded several Directives with specific relevance for labour migration. These are the Single Permit Directive 2011/98/EU aiming at efficient entry procedures but not setting any criteria for admission.[22] Both migrants admitted for reasons of work, and working though admitted for other reasons, fall within the scope of this Directive and are entitled to equal treatment with nationals.[23] Only one EU Directive sets standards for migration into lower skilled jobs, this is the

22 Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 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, *official Journal* L 343.

23 See: A. Beduschi (2015), 'An empty shell? The Protection of Social Rights of Third Country Workers in the EU after the Single Permit Directive', in P. Minderhoud and T. Strik (eds.), *The Single Permit Directive: Central Themes and Problem Issues,* Oisterwijk: WLP.

Seasonal Workers Directive.[24] This Directive sets entry conditions, sanctions for employers who do not abide by the rules, and an equal treatment right for the workers, but grants no right to family reunification, for instance. In contrast, however, there are numerous directives covering sectors with highly skilled labour migration, an area of migration where political agreement is easier to reach.[25] The first was a directive for the admission of scientists, the Scientific Researcher Directive, which was subsequently assimilated into a directive for the admission of foreign students and scientists.[26] Researchers may teach in addition to conducting research as long as research remains the primary task. Next came a directive for highly qualified and highly remunerated migrants, the European Blue Card Directive.[27] This directive, which is currently under review, is only widely used in Germany. Relatively new is the Intra Corporate Transfer (ICT) directive.[28] The ICT directive regulates admission in the event of intra-group transfers of managers, specialists, or interns for a period of more than 90 days. The legal status of migrant workers and their family members transferred under this Directive is very similar to that of seconded workers under the Posting of Workers Directive and is not equal to the position of nationals. Like the Seasonal Workers Directive, it only allows for temporary labour migration.[29] Finally, there is the Employers' Sanctions Directive, which stipulates that EU Member States are obligated to punish employers who hire third-country nationals who have not been granted a lawful right of residence and/or work permit.[30] In addition, and important for our discussion, the Employ-

24 Discussed in this volume by Zoeteweij and Herzfeld Olsson (Chapters 5-6).

25 A.A. Caviedes (2010), *Prying open Fortress Europe. The turn to Sectoral Labour Migration*, Lexington Books.

26 Directive 2016/801/EU of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes, or educational projects and au pairing (recast), *Official Journal* L 132/21.

27 Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, *Official Journal* L 155/17.

28 Directive 2014/66/EU of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, *Official Journal* L 157/1.

29 C. Costello and M. Freedland (2016), 'Seasonal Workers and Intra-corporate Transferees in EU Law: Capital's Handmaidens?' in J. Howe and R. Owens (eds.), *Temporary Labour Migration in the Global Era. The Regulatory Challenges*, Hart Publishing; T. de Lange and S. van Walsum (2014), 'Institutionalizing temporary labour migration in Europe; creating an "in-between" Migration Status', in L.F. Vosko, V. Preston, and R. Latham (eds.), *Liberating Temporariness? Migration, Work, and Citizenship in an Age of Insecurity Liberating Temporariness? Migration, Work, and Citizenship in an Age of Insecurity*, McGill-Queens University Press.

30 Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, *Official Journal* L 168/24.

ers' Sanctions Directive also provides that Member States must provide a certain degree of protection for illegally employed foreign nationals. The European Commission concluded in its review of the Employers' Sanctions Directive that the level of protection offered to illegally employed TCN by the Netherlands, as well as by a number of other Member States, is not yet adequate.[31] Other EU Directives deal with different kinds of migration rather than labour migration, such as family reunification, long-term residence[32] or asylum-seeking, and set standards for labour market access for non-EU nationals as well. But for the right to work of asylum seekers, as discussed by De Lange in this volume (Chapter 7), these other directives remain untouched here. Although Directives include the obligation to provide for a certain level of equality, not all migrant workers are to be treated equal to nationals of the receiving EU Member States.[33]

This legal framework – together with the labour, tax, or social security laws of the country where a job is performed – creates the legal regime applicable, and defines the position of the migrants, both EU nationals and TCN, on the labour market in the receiving Member States.

The Concept of Decent Labour in a Decent Labour market

Given this fragmented legal framework and using the position of the migrant worker to look at it, what challenges can be identified? Labour lawyers, migration scholars, and political theorists have delved into these themes, compartmentalising the topics and/or groups, looking at intra-EU mobility, (temporary) labour migration, labour exploitation, integration, undocumented migrants, or seasonal workers. A sound 'solution' doing justice to all categories of migrant workers and their specifics may not exist, but we depart from the normative stance that, if a better balance can be struck between interests of all labour market actors, a more *decent* labour market can be created.

So how do we define decent work and does decent work imply a decent labour market? Decent work takes place on the individual level and, as such, fits the perspective chosen in this volume, namely the perspective

31 See Chapter 9 by Berntsen and de Lange in this volume.

32 On labour mobility within the EU of long-term residents, see L. Della Torre and T. de Lange (2017), 'The ¨importance of staying put¨: third country nationals' limited intra-EU mobility rights', *Journal of Ethnic and Migration Studies*, DOI: 10.1080/1369183X.2017.1401920.

33 B. Friðriksdóttir (2016), *What happened to Equality. The Construction of the Right to Equal Treatment of TCN in EU Law on Labour Migration*, (PhD Thesis) Radboud University Nijmegen.

of the migrant worker. A decent labour market refers to the way in which the labour market is organised, namely in such a way that it stimulates decent work and diminishes elements that facilitate or allow practices that are detrimental to workers, including migrant workers. We look at the International Labour Organisation (ILO), EU Social Charter, and EU Directives for further guidance. The ILO description of decent work reads:

> Decent work sums up the aspirations of people in their working lives. It involves opportunities for work that are productive and deliver a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organise and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men.[34]

Overall, we see neither specific policy aims nor practices that actually implement this broad definition of decent labour, especially not for migrant workers. For instance, long-term perspectives or vocational training for migrant workers are rarely established. Although the Seasonal Workers Directive requires equal treatment with respect to vocational training, few, if any, EU countries facilitate a future career for their seasonal workers other than, maybe, a fast-track visa procedure, once again, for seasonal work.[35] A decent labour market protects migrant workers against exploitation and offers them opportunities according to their abilities.[36] As such, labour market policies must facilitate equal and fair participation of all migrant workers, including those in low-waged jobs. Throughout this volume, situations, regulations, and abuses are identified that undermine a decent labour market.

If we look at the EU legal framework, this directs us to the European Charter of Fundamental Rights. Article 14, for instance, states that *Everyone has the right to education and to have access to vocational and continuing training.* Vocational and continuing training are typically investments employers make in their workers to encourage commitment. State-run or financially backed training provided to temporary low-waged labour

34 Available at: http://www.ilo.org/global/topics/decent-work/lang--en/index.htm.

35 Chapter 8 by Rijken in this volume.

36 A. Sayer (2009), *Contributive Justice and Meaningful Work*, Department of Sociology, Lancaster University, Lancaster; S. Bolton, K. Laaser, and D. Mcguire (2016), 'Quality Work and the Moral Economy of European Employment Policy', *JCMS,* 54(3) pp. 583, 598 DOI: 10.1111/jcms.12304.

migrants (and to citizens performing these jobs as well) could add to building a sustainably decent labour market with workers' career perspectives in both the receiving and sending countries.[37] Article 15 of the Charter on the Freedom to choose an occupation and the right to engage in work starts by saying that '*Everyone* has the right to engage in work and to pursue a freely chosen or accepted occupation' (emphasis added). But this freedom is, in practice, restricted for labour migrants, low-waged or not, in case their admission for reasons of employment is tied to a specific employer. If they chose to work somewhere else, without the required permission, they fall into irregularity. So far, this has not been interpreted to mean that tying a migrant to an employer through a work permit, common in almost all labour migration regimes, is in conflict with the Charter or must be considered as illegal. However, it has been argued by scholars that it increases vulnerabilities to abuse and exploitation.[38] In the final paragraph, article 15 reads 'Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union'. But how decent is the labour market if TCN seasonal workers must be treated equal to citizens, while EU nationals sent across internal borders, through posting, to perform a service, are not? Here, we support the view that a decent labour market in low-waged sectors can only be achieved in a sustainable manner if the 'mission statement' of the ILO that labour is not (merely) a commodity, is taken seriously for all (local, migrant, and posted) workers alike.

Finally, during the 2015 UN General Assembly, four pillars of Decent Work were defined – employment creation, social protection, rights at work, and social dialogue. This is a narrower definition than presented by the ILO. We feel that, at the EU level and at EU Member State and local levels, there is a need to work towards this kind of inclusive decent labour market, where there is dialogue with the (undocumented) migrant workers, countries of origin, as well as employers and local workforce representatives. In this volume, we will show how legal structures, obligations, and practice do or do not contribute to the creation of such a decent labour market.

37 Indeed, we can conclude from Siebers: if this is not actively pursued, the risk is eminent that children of low-waged migrant workers grow up without the (soft) skills to perform on a changing and socially demanding labour market, in this volume, chapter 11.

38 D. Demetriou (2015), '¨Tied Visas¨ and Inadequate Labour Protections: A formula for abuse and exploitation of migrant domestic workers in the United Kingdom', *Anti-Trafficking Review*, 5, pp. 69-88; S. Mullally and C. Murphy (2014), 'Migrant Domestic Workers in the UK: Enacting Exclusions, Exemptions, and Rights', *Human Rights Quarterly,* 36(2) pp. 397-427.

Literature delineates specific pitfalls that stand in our way of working towards a decent labour market for low-waged migrant workers and are discussed in this volume. 'Disconnections' between the economy – the economic need for the migrant workers' labour – and the social substance of society has shaped migrants' inclusion and mainly exclusion.[39] The disconnections have huge political impacts, with Brexit as an obvious example. We see at least two disconnections that add to the creation of a failed decent labour market.

First, we see a disconnection between labour migration mechanisms for third country nationals providing workers to fill labour market shortages, and, on the other hand, the lack of social protection and equal treatment for third country migrant workers. Options to migrate legally with the aim to perform low-wage work are limited. However, Directives such as the Single Permit Directive 2011/98/EC and the Seasonal Workers Directive 2014/36/EU try to strike a balance and, thus, do contribute to a decent labour market to some extent. The margins for discretion in the national implementation however, are wide and leave plenty of room for deviations to a lower standard of 'decency'.[40]

Second, and as explained above, we see the disconnection between EU social rights and the laws of the internal market. In the European internal market with the free movement of workers and services, economic interests prevail. Creatively manipulating boundaries of these freedoms by employers and companies has led to maximised profits from mobility at the cost of labour migrants.[41] Attempts are made to combat practices that undermine a decent labour market and to facilitate practices that add to a decent labour market. The recently proposed changes to the posting of workers directive is an example thereof. Creating a more central position of the migrant worker in which the rights of the migrant worker serve as a corrective

39 S. Bolton, K. Laaser, and D. Mcguire, (2016), 'Quality Work and the Moral Economy of European Employment Policy', *JCMS,* 54(3) pp. 583, 598 DOI: 10.1111/jcms.12304.

40 C. Rijken (2015), 'Legal Approaches to Combating the Exploitation of Third-Country National Seasonal Workers', *The International Journal of Comparative Labour Law and Industrial Relations,* 31(4) pp. 431-452; J. Fudge (2015), 'Migration and Sustainable Development in the EU: A Case Study of the Seasonal Workers Directive', *International Journal of Comparative Labour Law and Industrial Relations*, 31(3) pp. 331-349.

41 R. Muffels and A. Wilthagen (2013),'Flexicurity: A new paradigm for the analysis of Labour markets and policies challenging the trade-off between flexibility and security', *Sociology Compass,* 7(2) pp. 111-122; C. Rijken and E. de Volder (2010), 'The European Union's struggle to realize a human rights-based approach to trafficking in human beings', *Connecticut Journal of International Law*, 25(49) pp. 49-80.

mechanism to the erosion of these rights contributes to a sustainable and decent labour market.

Three Observations on Labour Markets and Migration

Let us conclude this section with three observations on the connection between labour markets and migration that underlie the chapters in this volume.

Our first observation on the theme of labour markets and migration is that the theme is often framed in the context of exploitation, precariousness, and vulnerabilities, and the use or presumed abuse of the law through 'constructions' to engage in less protective or less regulated mechanisms.[42] Practices in which migrant workers do not receive the salary that was promised or are paid below minimum wage, or, even worse, are forced to work, should be strongly rejected, qualified as labour exploitation, and treated as the criminal act of human trafficking.[43] However, there are practices that are less severe and in which migrant workers have entered voluntarily. Then the question must be raised whether the qualification of exploitation, precariousness, and vulnerability does justice to the labour market needs for flexible (and affordable or even cheap) labour on the employers' side, as well as the needs and willingness of labour migrants to work, and even the needs of their country of origin for economic remittances.[44] On the other hand, we see a disregard and denial of labour standards towards labour migrants, especially at the low end of the labour market. These seemingly discordant but interrelated mechanisms of migrant workers aiming to raise their income by accepting lower labour standards abroad and the combating of exploitative practices, against a background of employers trying to increase financial benefits, raise the question if we could maybe find a better mechanism in labour and migration law to balance the interests involved.

Our second observation on the theme of labour markets and migration concerns the flexibilisation of the labour market in general. A wide variation of flexible contracts and labour relations has seen light since the turn of the

42 B. Anderson (2015), 'Precarious Work, Immigration, and Governance', in C.U. Schierup, R. Munck, B. Likic-Brboricand, and A. Neergaard (eds.), *Migration, Precarity, and Global Governance. Challenges and Opportunities for Labour,*, Oxford, Oxford University Press, pp. 68-82.

43 M.S. Houwerzijl and C. Rijken (2013), *Responses to Forced Labour in the EU*, in country report for JRF.

44 M. Ruhs (2013), *The Price of Rights. Regulating International Labour Migration,* Woodstock: Princeton University Press; C. Costello and M. Freedman (eds.) (2014), *Migrants at Work: Immigration and Vulnerability in Labour Law,* Oxford University Press.

century, such as subcontracting, work via recruitment agencies, pay-rolling, 0-hour contracts, 'traineeships', and increased solo-self-employment. As a steady job is becoming an anomaly, especially for migrants arriving newly on a labour market, we see labour migrants in these low-waged 'flexible' positions or postings (not necessarily coined as jobs) with fewer rights then national workers might have had before in the same position.[45] As indicated above, these flexibilisations were and still are often facilitated by (EU) law and are especially at play in the intra-EU mobility as well as the labour market integration of refugees. At the intra-EU level we have seen the development of a more worker-protective framework build up during the past five years,[46] with a strong voice for less flexibility within the EU internal labour market. This, for instance, has contributed to the proposed amendment of the PWD towards 'equal pay for equal work'. Other countries, such as the UK, gear towards the protection of their labour market against intra-EU mobility, denying the dependence of some sectors on workers from other EU countries.[47] The question is raised if we could allow for the flexibility that businesses require of a labour market, in order to compete internationally, while still providing a decent labour market for both migrant *and* domestic workforces (often with a migrant background) alike.

Our third and final observation concerns the existence of a 'shadow economy' created by those living on the margins of the formal labour market or falling outside of the formal labour market. An example of the latter are undocumented migrants. They are not authorised to stay or to work within host societies, nevertheless it is common knowledge that they live and work in our midst. Undocumented migrants perform valuable tasks on our behalf, without receiving societies' acknowledgement.[48] In global cities, the

45 College voor de Rechten van de Mens (2013), *Poolse arbeidsmigranten in mensenrechtenperspectief*, report; C. Costello and M. Freedman (Eds.) (2014), *Migrants at Work: Immigration and Vulnerability in Labour Law,* Oxford University Press; K. Strauss and J. Fudge (2014), *Temporary Work, Agencies and Unfree Labour: Insecurity in the New World of Work,* New York: Routledge; L. Berntsen (2015), *Agency of labour in a flexible pan-European labour market: A qualitative analysis of migrant practices and trade union strategies in the Netherlands,* Groningen University Press.

46 A.A.H. van Hoek (2016), *Re-embedding the transnational employment relationship – can the commission proposal deliver?* in Amsterdam Law School Legal Studies Research Paper No. 2016-69, Centre for the Study of European Contract Law Working Paper No. 2016-16; M. Seeliger and I. Wagner (2016), *Workers United? How Trade Union Organizations at the European Level Form Political Positions on the Freedom of Services*, MPIFG Discussion Paper 16/16.

47 Houwerzijl and Schrauwen actually shed some more than interesting light on how a different legislative and policy turn in the 1990s might actually have prevented the need for a Brexit, in this volume, chapter 3.

48 J. van der Leun (2003), *Looking for Loopholes*, Amsterdam University Press.

undocumented (domestic) workers facilitate the highly skilled workers by allowing them to work outside the home, by providing the necessary home care in their absence.[49] They work in the 'shadow economy', and, as such, they run a higher risk of exploitation, precariousness, and vulnerability, due to the lack of legal authorisation to stay and work. How can we allow for migrants to perform these jobs without running these risks? And how can we provide a decent labour market for those undocumented migrants? Regularisation mechanisms are employed in some EU countries, but a call for legal entry into the EU and the EU labour market for low-wage jobs, is heard over and over again, but without success.[50] Such a (temporary) migrant worker programme would grant access to formal labour markets and rights, even if not (necessarily) fully equal treatment.

So how can we find a proper balance between the benefits of the EU's internal market, business and private household labour market needs, and build on the concept of a free market *as well as* a decent labour market for (undocumented) migrant workers in low-wage jobs? This volume tries to find answers to this question by understanding the dynamics between different actors and the impact of different legal regimes looked at from the perspective of the position of the labour migrant. Furthermore, it presents some directions for solutions.

Content of this Volume

The book constitutes 12 chapters and is divided into three sections. We start with a conceptual introduction of the relation between labour and migration and the rule of law. The two chapters in this section explain how (legal) boundaries are drawn and the function of these boundaries. Section two is about migrant worker access to the labour market from both within the EU, and from outside the EU. As this volume takes the perspective of the migrant as the lens through which we look at labour migration, the third section addresses the imbalances and vulnerabilities in the labour market for migrant workers at the low end of the labour market, even after migrant workers have participated in the labour market for quite some time.

49 S. Sassen (1991), *The Global City*, Princeton University Press.

50 G. Battistella (2017), 'Temporary Labour Migration: A flawed system in need of reform', in S. Carrera, A. Geddes, E. Guild, and M. Stefan (eds.), *Pathways towards legal migration into the EU,* Center for European Policy Studies, Brussels.

As mentioned, an important element in the study of migrant workers' rights in the EU context is defining the relevant legal framework applicable to the migrants' situation. The variety of migration law frameworks can be linked to factors such as the migrant workers' nationality, the job to be performed, or salary to be earned, which may again depend on the legal structure of the work relationship; it can be about race and, even more so, about class structures. Our goal is an in-depth analysis of the conflict areas of migration where law has a role to play. Other arrangements of ordering, such as the economy, politics, and education, are not discussed.

Section 1: Setting the Scene and Drawing the Boundaries

Bert van Roermund immediately twists our mind with defining labour as human beings reproducing themselves, including the process of determining the 'plural self', the 'we', and, as such, drawing a border between those who are included and those who are excluded. In this way, labour and migration are intertwined. This understanding of labour is far more complex than the reproduction of goods and is represented in the ILO definition of decent labour as discussed above. Based on different characteristics of law, he determines the role of law in this conflict between labour and migration. Only when this conflict is disruptive for society, does law address it. By trying to get a fuller understanding of the conflict, he implicitly provides some guidance for lawmaking. In his 'diagnosing exercise', he identifies inequality and unequal treatment of equal cases as a general parameter. Secondly, he stresses the dire need to involve major stakeholders such as international businesses and banks, labour unions and consumer organisations, and nongovernmental organisations dealing with migration and poverty in labour. Thirdly, he reviews structures of authority in order to enhance legal certainty for migrant workers. With the fourth parameter, Roermund gives further guidance to perform the tasks with a strong emphasis on the relationship between morality and lawmaking and the importance of fundamental rights, which prevent reducing humans to workers.

Regine Paul, in her contribution, challenges the notion of borders as territorial demarcation lines. By 'critically unpacking the normative underbelly of regulatory distinctions of migrant workers in European migration governance', she shows that border drawing is a multilayered process that reaches beyond merely physical border drawing. The outcome of this process is a dubious categorisation of different groups of migrant workers, which she coins as a 'selective meaning-making processes' in which the state plays a crucial role by using its power to create 'legal' and 'illegal' categories of

migrants. For her analysis, she builds on Bourdieu's reflections on classification and symbolic power. This border-drawing framework is illustrated with a comparative study conducted in Britain, France, and Germany, which demonstrates the reasoning and institutional logic behind the distinction between high-skilled and low-skilled labour migration.

Section 2: Access to the Labour Market for EU Citizens and Third-country Nationals

The chapter by *Mijke Houwerzijl and Annette Schrauwen*, by focusing on the position of mobile workers in particular in low-wage sectors, sketches and juxtaposes the respective historical evolution of the narratives on posted and 'migrant' EU workers, while displaying their differing legal impacts on workers' rights. They assess the extent to which the pending proposal for 'targeted revision' (a possible new chapter in the 'saga' on posting of workers of the Posted Workers Directive) improves the position of the posted worker. Their overall conclusion of this assessment is a cautiously positive one, especially when combined with the already adopted posted workers enforcement directive. They furthermore acknowledge that the problem of enforcement is not restricted to posted workers alone, but also contributes to illegal practices for workers and service providers (e.g. as bogus self-employed service providers). According to the authors, the limited legal basis of the PWD is one of the reasons that social rights are excluded, which further hampers the position of posted workers.

Jan Cremers and Ronald Dekker rightly point out how the use of the blurred boundaries between legal categories might bring short-term profits to employers, but may not necessarily contribute to the concept of a decent labour market; even worse, these blurred boundaries create opportunities for abuse of migrant workers. This so-called 'arbitraging' jeopardises the intra-EU mobility framework altogether. Based on the work of a long-term cooperation project of labour inspectors and research in the EU and the Netherlands, they identify the role of HR advisors and intermediaries stimulating corporations to abuse the loopholes created by the fragmented legal framework.

Margarite Zoeterweij centralises the legal framework for third-country national seasonal workers, which should have been implemented by all Member States of the EU by 30 September 2016, in her chapter. She critically assesses the extent to which this directive makes equal seasonal workers' positions with national workers'. The chapter concludes with the thesis that the seasonal workers' directive reinforces the inferiority of the position of the unskilled workers on the labour market. This conclusion is based on

the absence of family reunification rights, social rights, and the fact that seasonal workers are bound to their employer for residence rights according to the directive. Her findings are underpinned with the examples of Spain and Italy, which show a lack of implementation in practice.

Petra Herzfeld Olsson addresses the situation and the regulatory regime for migrant berry pickers in Sweden. They mainly come from Thailand to pick wild blueberries and lingonberries in the remote forests in the north of Sweden. Most of them are employed by Thai temporary-work agencies and posted to Sweden. She shows the interaction between legal regulatory regimes and practice, by focusing on the 2008 reform of the Swedish labour migration regime. Initially, this reform left the abusive practices of Thai berry pickers untouched and, some say, even enhanced these practices. Only after introducing pre-arrival reliability checks of employers and recruitment agencies, combined with targeted interventions by trade unions and municipalities, were these practices addressed. Step by step, the trade union movement and the Migration Agency have strengthened their engagement in this sector with very positive results. However, practices then anticipated these interventions by recruiting EU nationals, mainly as posted workers or (bogus) self-employed persons, to have the berries picked. Olsson puts the finger on the sore spot by raising the issue of long working hours consented to by the berry pickers as a survival strategy for this sector.

Tesseltje de Lange discusses asylum seekers' access to the labour market: What are their rights? And what hurdles do they face in order to enter the labour market? Based on recent research conducted in the Netherlands, De Lange considers how EU law sets the stage for the rights of asylum seekers who are awaiting the outcome of the evaluation of their asylum claim and, more specifically, how this EU law is implemented in the Netherlands. By focussing on (temporary) participation in the labour market and creating opportunities for unpaid employment to facilitate integration, the Dutch approach possibly adds to increased vulnerability instead of financial independence, for which EU law aims.

Section 3: Imbalances and Vulnerabilities

Conny Rijken, in her chapter, argues that the term 'exploitation' is easily used in those cases in which labour rights are infringed. Labour exploitation has not been defined nor is it clear when bad labour conditions turn into situations of labour exploitation, both nationally and internationally. The discussion in this chapter takes into account the international and European context as well as recent discussions on modern slavery and human

trafficking. She analyses the European Court for Human Rights (ECtHR) case Chowdury v. Greece ruled in March 2017 to unpack the concepts of exploitation, forced labour, and human trafficking.

Lisa Berntsen and Tesseltje de Lange base their chapter on a file study conducted in the Netherlands of cases in which the employer was fined for illegal employment. In their chapter, they show how the Dutch Labour Inspection, although assigned with the task to perform the obligations laid down in the Employer Sanctions Directive, did not perceive itself as involved in migration policy. Yet, employer sanctions under EU law fall under migration policy and not labour policy. These blurred, fragmented, or even opposing legal frameworks and on-the-ground practices, do not contribute to creating a decent labour market. As such, the Employer sanctions directive not only aims at labour market regulation and migration control but also aims to improve the protection of labour migrants as well.

Lucia Della Torre also focusses on undocumented migrant workers, but in the context of Switzerland. In her chapter, she discusses the regularisation (or partial regularisation) of these workers in the canton of Geneva. The Swiss stand towards undocumented migrants has, for quite some time, mirrored the European one of – at best – isolation and indifference. Yet, it is precisely from Switzerland that a new attempt to promote the regularisation of Sans-Papiers has very recently arisen. Coming from a Cantonal government, this operation resembles the creative practices of social inclusion already experimented with in some communities. Unlike the latter, however, this Swiss operation received the endorsement of the Federal Government, thus presenting itself as an example of 'Swiss pragmatism', which could become an interesting model for other European countries.

Hans Siebers's chapter demonstrates how even nationals with a migrant background face migration-related challenges as they lack the soft skills needed to perform on an equal footage as locals in the labour market. Ethno-migrant inequality in the labour market is a persistent problem in many countries. In the Netherlands especially, people with a first- or second-generation 'non-Western' migration background find themselves in subordinated positions in the labour market. The aim of this chapter is to outline a framework of explanation. Inspired by Bourdieu, Siebers distinguishes various forms of capital – human, social, cultural – that may give access to economic capital, like getting a well-paid or satisfying job. However, based on empirical studies, he identifies and discusses indirect discrimination when non-job-related capitals such as social and cultural capital play a role in harming the chances for people with a 'non-Western' migration background to access economic capital.

Johan Graafland has researched the impact of collective agreements on female management and job opportunities of employees from disadvantaged groups (including migrants or their descendants) in 4053 enterprises in Europe. He finds that collective agreements stimulate the female presence in board and executive positions and the inflow of employees from disadvantaged groups (e.g. migrant workers, people with disabilities, long-term unemployed). Moreover, female management further enforces job opportunities for disadvantaged workers. Countries with high coverage of collective agreements, therefore, directly as well as indirectly, through female management, foster integration of employees from disadvantaged groups into the labour market. The results imply that dismantling extensions of collective agreements on the labour market increases gender inequality and inequality between advantaged and disadvantaged groups of employees.

Some Conclusions, a Policy Agenda, and Ideas for Future Research

With this broad pallet of topics, concerns, imbalances, and a great variety of actors at regional, national, and European levels, it is quite a challenge to draw conclusions. But it would be a missed opportunity not to pull some strings together, based on the significant observations made in the contributions to this volume. The improvement of the position of the migrant worker, the central focus of this volume, can take place at supranational, national, and sectoral levels. Each of these levels has its own legal and regulatory frames, specific actors and opportunities to achieve such improvement.

At the supranational level, the level beyond state level, it must be acknowledged that flexibilisation of labour, labour mobility (within the EU), and labour migration (to the EU) is a reality and so is circumventing behaviour. This circumventing behaviour is facilitated by the fragmented legal framework, lack of enforcement, and the corporate focus to maximise profits, often to the detriment of the position of (migrant) workers, coined by Marx as the commodification of labour. In the EU, these dynamics are further enhanced by the free movement of workers and services, as well as the blurred boundaries between the two. Increased mobility of workers and service providers from middle- and Eastern European countries have multiple effects; it leads to abusive practices by intermediaries and companies of workers and service providers, to a diminishing of wages of migrant workers (profitable for businesses, but disadvantageous for workers and service providers from the host country), to labour displacement and social dumping,

but also to an improvement of the competitive position of companies and industries in the host countries. Ideally, the combination of labour-market openness and labour standards should be in harmony, and if labour standards are not guaranteed there should be a corrective mechanism that fits within the acquis communautaire. Future EU policies on labour mobility and on labour migration from TCN should build on this. The future will tell whether the Posted Workers Enforcement Directive (PWED) and the adaptation of the PWD are examples thereof. So far, restrictions to the free movement, e.g. for protecting minimum wages for migrant workers and service providers, have not been accepted by the CJEU. However, and in line with the concept of the rule of reason in relation to the free movement of goods, in future research, it is worth exploring the application of this concept in the area of free movement of workers and service providers to protect migrant workers.

At the national level, states are the main actors. First, and if not regulated by EU law, they are to determine under what conditions third-country nationals are allowed to work on their territory. Especially in the area of low-waged migrant workers, EU law only addresses the legal position of seasonal workers in the SWD and, albeit hardly effective, the employment of illegally employed migrants without legal residence under the Employer Sanction Directive. This brings us to the second role of states, namely as the addressees of EU law who are responsible for the correct implementation of EU law. As will be shown in this volume, the more sensitive the topic, the more difficult it is to achieve agreement amongst the EU Member States, and the more there is left to the discretion of individual Member States to implement in practice EU legal provisions. Consequently, protection and guarantees of migrant workers need to be realised at the state level rather than the EU level, creating considerable differences between EU Member States. A third role of the state is the enforcement of the regulatory regime, regardless of whether it originates from the EU or the state level. Looked at from the position of the migrant worker, this requires profound knowledge of social security, tax laws, labour law, as well as migration law, indicating that this is a complex task. Furthermore, it requires cooperation with other EU countries, which is not an easy task either. Fourth, and linked to the first task, states have a role to play when the outcome of their migration policies hamper the position of migrants, including illegally employed and possibly undocumented migrant workers, but who perform an important role for the economy and perform work that nationals are often not willing to do. By looking at the Swiss example on regularisation, discussed by Della Torre in this volume, we find inspiration for renewed regularisation schemes that could

be applied in other countries as well. Such regularisation based on both economic performance and humanitarian reasons could fill a policy gap in western EU countries like the Netherlands.

At the sectoral level, directly related to the position of the migrant worker, the legal regulatory framework is only of limited value. Of course, what is unacceptable from a normative perspective should be prohibited or, in Van Roermunds' words, 'what is socially disruptive, should be determined by the law' and consequently excluded, forbidden and prosecuted. However, before the law 'steps in', it is other actors such as trade unions, intermediaries, corporations, and HR officers that can improve the position of the migrant worker. Their role should not be underestimated. They are crucial for migrant workers to realise their rights, and, at the same time, they are the ones who deny migrant workers their rights.

To conclude and in order to improve the position of migrant workers, actions need to be taken at all three levels. Actions should be equally creative and provocative as some of the circumventing strategies employed by corporations, intermediaries, and others. But we also have to think ahead. In a globalised world, we should have the courage to explore global opportunities. If a sector (e.g. agriculture) can only survive in an EU Member State by jeopardising our legal framework and its underlying value of equality, the question if such an industry should not be moved to other places, may be legitimised. Another controversial avenue would be to address the root causes of EU mobility, namely large differences in wages and labour conditions between EU Member States. The effect of large numbers of Middle and Eastern European workers leaving their country to work in Western Europe is also a detriment to increasing wages and labour conditions in these countries of origin. Levelling wages and labour conditions at EU level could mean considering lowering wages for some sectors in high-income countries in parallel with increasing incomes in those countries in which incomes are low. If we take decent work seriously, we should not be afraid to consider unconventional measures to support it.

Bibliography

Achtsioglou, E. and M. Doherty (2014), 'There must be some way out of here: The Crisis, Labour Rights and Member States in the Eye of the Storm', *European Law Journal,* 20(2) pp. 219-240.

Anderson, B. (2015), 'Precarious Work, Immigration, and Governance', in C.U. Schierup, R. Munck, B. Likic-Brboricand, and A. Neergaard (eds.), *Migration,*

Precarity, and Global Governance. Challenges and Opportunities for Labour, Oxford: Oxford University Press, pp. 68-82.

Anderson, B., et al. (2006), *Fair Enough? Central and east European low wage migrants in low wage employment in the UK*, report for Joseph Rowntree Foundation.

Battistella, G. (2017), 'Temporary Labour Migration: A flawed system in need of reform', in S. Carrera, A. Geddes, E. Guild, and M. Stefan (eds.), *Pathways towards legal migration into the EU*, Center for European Policy Studies, Brussels.

Beduschi, A. (2015), 'An empty shell? The Protection of Social Rights of Third Country Workers in the EU after the Single Permit Directive', in P. Minderhoud and T. Strik (eds.), *The Single Permit Directive: Central Themes and Problem Issues*, Oisterwijk: Wolf Legal Publisher.

Berntsen, L. (2015), *Agency of labour in a flexible pan-European labour market: A qualitative analysis of migrant practices and trade union strategies in the Netherlands,* Groningen University Press.

Bogg, A. (2013), 'The immoral trap: migrant workers and the doctrine of illegality', in B. Ryan (ed.), *Labour migration in hard times: reforming labour market regulation*?, Institute of Employment Rights.

Bogusz, B.; R. Cholewinski; A. Cygan; and E. Scyszczak (2004), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives,* Martinus Nijhoff Publishers.

Bolton, S.; K. Laaser; and D. Mcguire (2016), 'Quality Work and the Moral Economy of European Employment Policy', *JCMS,* 54(3). pp. 583, 598 DOI: 10.1111/jcms.12304.

Caviedes, A.A. (2010), *Prying open Fortress Europe. The turn to Sectoral Labour Migration,* Lexington Books.

Chauvin, S.; B. Garcés-Mascerenas; and A. Kraler (2013), 'Working for Legality: Employment and Migrant Regularization in Europe', *International Migration* 51(6), pp. 118-131. DOI: 10.1111/imig.12109.

College voor de Rechten van de Mens (2013), *Poolse arbeidsmigranten in mensenrechtenperspectief*, report.

Costello, C. and M. Freedland (Eds.) (2014), *Migrants at Work: Immigration and Vulnerability in Labour Law,* Oxford University Press.

Costello, C. and M. Freedland (2016), 'Seasonal Workers and Intra-corporate Transferees in EU Law: Capital's Handmaidens?' in J. Howe and R. Owens (eds.), *Temporary Labour Migration in the Global Era. The Regulatory Challenges*, Hart Publishing.

Cremers, J.; J. Dølvik; and G. Bosch (2007), 'Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU', *Industrial Relations Journal,* 38(6) pp. 524-541.

Della Torre, L. and T. de Lange (2017), 'The 'importance of staying put': third country nationals' limited intra-EU mobility rights', *Journal of Ethnic and Migration Studies*, pp. 1-17. DOI: 10.1080/1369183X.2017.1401920.

Demetriou, D. (2015), '"Tied Visas" and Inadequate Labour Protections: A formula for abuse and exploitation of migrant domestic workers in the United Kingdom', *Anti-Trafficking Review*, 5 pp. 69-88.

Desmond, A. (2016), 'The development of a Common EU Migration Policy and the Rights of Irregular Migrants: A Progress narrative?' *Human Rights Law Review*, 16(2) pp. 247-272.

Dewhurst, E. (2011), 'The Right of Irregular Immigrants to Outstanding Remuneration under the EU Sanctions Directive: Rethinking Domestic Labour Policy in a Globalised World', *European Journal of Migration and Law*, 13(4) pp. 389-410.

Donaghey, J. and P. Teague (2006), 'The free movement of workers and social Europe: maintaining the European ideal', *Industrial Relations Journal*, 37(6) pp. 652-666.

Düvell, F. (2011), 'Paths into irregularity: The legal and Political construction of irregular migration, *European Journal of Migration and Law,* 13 pp. 275-295.

Editorial Comments (2014), 'The free movement of persons in the European Union. Salvaging the dream while explaining the nightmare', *Common Market Law Review*, 51 pp. 729-740.

Freeman, R.B. (2007), 'The Challenge of the Growing Globalization of Labour Markets to Economic and Social Policy', in E. Paus (ed.), *Global Capitalism Unbound. Winners and Losers from Offshore Outsourcing*, Palgrave pp. 23-39. Available at: https://link.springer.com/book/10.1057/9780230608849.

Friðriksdóttir, B. (2016), *What happened to Equality. The Construction of the Right to Equal Treatment of TCN in EU Law on Labour Migration*, (PhD Thesis) Radboud University Nijmegen.

Fudge, J. (2015), 'Migration and Sustainable Development in the EU: A Case Study of the Seasonal Workers Directive', *International Journal of Comparative Labour Law and Industrial Relations*, 31(3) pp. 331-349.

Goldring, L.; C. Berinstein; and J.K. Bernhard (2009), 'Institutionalizing precarious migratory status in Canada', *Citizenship Studies,* 13(3) pp. 239-265.

Hoek, A.A.H. van (2016), 'Re-embedding the transnational employment relationship – can the commission proposal deliver?', *Amsterdam Law School Legal Studies Research Paper* No. 2016-69, Centre for the Study of European Contract Law Working Paper No. 2016-16.

Houwerzijl, M.S. and C. Rijken (2013), *Responses to Forced Labour in the EU,* country report for Joseph Rowntree Foundation.

Kremer, M.; M. Bovens; E. Schrijvers & R. Went (red.) (2014), *Hoe ongelijk is Nederland? Een verkenning van de ontwikkeling en gevolgen van economische ongelijkheid,* WRR-Verkenning 28.

Lange, T. de and S. van Walsum (2014), 'Institutionalizing temporary labour migration in Europe; creating an "in-between" Migration Status' in L.F. Vosko, V. Preston, and R. Latham (eds.), *Liberating Temporariness? Migration, Work, and*

Citizenship in an Age of Insecurity Liberating Temporariness? Migration, Work, and Citizenship in an Age of Insecurity, McGill-Queens University Press.

Lange, T, de (2015), 'Third-Country National Students and Trainees in the EU: Caught between Learning and Work', *International Journal of Comparative Labour Law and Industrial Relations,* 31(4) pp. 453-472.

Leun, J. van der (2003), *Looking for Loopholes*, Amsterdam University Press.

Muffels, R.J.A., and A.C.J.M. Wilthagen (2013), 'Flexicurity: A new paradigm for the analysis of labour markets and policies challenging the trade-off between flexibility and security', *Sociology Compass*, 7(2) pp. 111-122.

Mullally, S. and C. Murphy (2014), 'Migrant Domestic Workers in the UK: Enacting Exclusions, Exemptions, and Rights', *Human Rights Quarterly,* 36(2) pp. 397-427.

Paul, R. (2015), *The political Economy of Border Drawing. Arranging Legality in European Labour Migration Policies*, Berghahn.

Rijken, C. (ed.) (2011), *Combating Trafficking in Human Beings for Labour Exploitation*, Wolf Legal Publisher.

Rijken, C. (2015), 'Legal Approaches to Combating the Exploitation of Third-Country National Seasonal Workers', *The International Journal of Comparative Labour Law and Industrial Relations,* 31(4) pp. 431-452.

Rijken, C. and E.J.A. de Volder (2010), 'The European Union's struggle to realize a human rights-based approach to trafficking in human beings', *Connecticut Journal of International Law*, 25(49) pp. 49-80.

Ruhs, M. and B. Anderson (2010), *Who needs migrant workers? Labour shortages, immigration and public policy*, Oxford University Press.

Ruhs, M. (2013), *The Price of Rights. Regulating International Labour Migration,* Woodstock: Princeton University Press.

Sassen, S. (1991), *The Global City*. Princeton University Press.

Seeliger, M. and I. Wagner (2016), *Workers United? How Trade Union Organizations at the European Level Form Political Positions on the Freedom of Services*, MPIFG Discussion Paper 16/16.

Strauss, K. and J. Fudge (2014), *Temporary Work, Agencies and Unfree Labour: Insecurity in the New World of Work*. New York: Routledge.

Sayer, A. (2009), 'Contributive Justice and Meaningful Work' *Res Publica*, 15(1) pp.1-16.

Teney, C.; O.P. Lacewell; and P. de Wilde (2014), 'Winners and losers of globalization in Europe: attitudes and ideologies', *European Political Science Review,* 6(4) pp. 575-595.

Tiemeijer, W. (2017), *Wat is er mis met maatschappelijke scheidslijnen?* Wetenschappelijke Raad voor het Regeringsbeleid.

Triandafyllidou, A. and D. Vogel (2010), 'Irregular Migration in the European Union: Evidence, Facts and Myths' in A. Triandafyllidou (ed.), *Irregular Migration in Europe: Myths and Realities*, Farnham: Ashgate, pp. 291-299.

About the authors

Conny Rijken is professor of Human Trafficking and Globalization – INTERVICT – Tilburg University.

Tesseltje de Lange is senior researcher Mobility, Migration and Integration Law and assistant professor Administrative and Migration Law at the University of Amsterdam.