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Institutional Cooperation of State Authorities in the Area of Migration Regulation in the Czech Republic: The Issue of Conflict between Control of Immigration Status and Protection of Economic Rights of Labor Migrants

Abstract: There has been a tendency in the Czech Republic for a greater cooperation among institutions controlling different aspects of labor migration, this has had an affect on the access of migrant workers to equal rights as employees. This article argues that migrant workers can enjoy their economic rights only if certain limits have been set on the cooperation between the Foreigner Police and Labor Offices controlling the legality of residence and work of migrants on one hand and Labor Inspectorates controlling the protection of workplace rights and labor relations on the other. The situation is compared with that in the United States.

Economic crisis and the interest in the protection of the 'domestic' labor market have contributed to a greater cooperation of different branches of the government that regulate different aspects of (im)migration in the Czech Republic. At the same time there have been cases when migrant workers were

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not paid their wages, did not receive premiums for overtime or work at night or were threatened in case they planned on complaining against their employer.¹ Even though some state agencies realize that such cases exist, their priority is to 'fight against illegal migration'. This has gained an increased urgency during the current economic crisis with employers releasing their reserve armies of labor from abroad² and the discourse on the failure of some previous state policies regulating labor migration to the Czech Republic.³ According to the representatives of the repressive state agencies most unemployed were

¹ This information is based on mostly informal interviews with employees of non-governmental organizations in Prague, a research report of La Strada Czech Republic. M. Krebs *Analyza procesu agenturního zaměstnávání Vietnanců a Vietnamek v ČR*. (Prague: La Strada ČR, 2009); <http://www.strada.cz/attachments/c/caff8730f68b372ba4540292fe8e6bc5.pdf> and information from media sources see e.g. J. Svoboda, "Otrockou práci v ČR zažilo mnoho Ukrajinců", *novinky.cz* (March 7, 2010); <http://www.novinky.cz/domaci/194014-otrockou-praci-zažilo-v-cr-mnoho-ukrajincu.html>. It is clear that there have been a number of cases of violation of migrant workers' rights even prior to the beginning of the economic crisis see e.g. M. Krebs, E. Pechová *Zpráva z projektu: vietnamské dělnice a dělnice v českých továrnách*. (Prague: La Strada ČR, 2008); <http://www.strada.cz/attachments/a/a299f4c2987af8abd03e03d8c1df8620.pdf>.

² R. Miles, "Labor Migration, Racism and Capital Accumulation in Western Europe since 1945: an Overview", *Capital & Class* Vol. 10, No. 1 (Spring 1986), pp. 49-86.

³ See an interview with the director of the Department of Asylum and Migration Policy of the Ministry of Interior M. Vidlák, "Stát selhal, ale aspoň to teď víme", *Lidové noviny* (May 28, 2009); http://www.lidovky.cz/stat-selhal-ale-aspon-to-ved-vime-doa-/In_noviny.asp?c=A090528_000153_In_noviny_sko&klic=231760&mes=090528_0. The title of the interview "The state has failed but at least we know it" refers to the 'failure of the state', however, the high-level bureaucrat does not mention this directly. The interview is, however, a substantial critique of other parts of the state administration, which regulate some aspects of labor migration. It also announces a need for change in the administration of migration. Non-governmental organizations have also criticized (not only today but on a long-term basis) migration policies of the Czech Republic. This, however, does not mean that the state institutions and non-governmental organizations have the same positions. At the same time it can happen that some non-governmental organizations can in their critique of the exploitation of migrant workers' contribute to the legitimating of state repression especially when their positions have not been articulated in a clear way. For example some parts of a declaration 'The state does not put up barriers to the exploitation of foreigners' may be considered problematic. On one hand this declaration points to the need of the strengthening of the rights of migrants and the danger of 'repressive measures made against common migrant workers', on the other hand though it calls for more effective controls and an increase of inspectors without distinguishing individual state institutions and subjects of their control, e.g. "Vykořisťování cizinců stát neklade překážky. Prohlášení skupiny nevládních a mezivládních organizací zabývajících se cizinci určené premiérovi České republiky Janu Fischerovi, ministru vnitra Martinu Pecinovi, ministru práce a sociálních věcí Petru Šimerkovi, ministru pro lidská práva Michaelu Kocábovi a předsedovi Českomoravské konfederace odborových svazů Milanu Štěchovi" (Prague: Člověk v tísni and other nongovernmental organisations, 2009); <http://clovekvtsi.cz/download/pdf/195.pdf>.

supposed to make use of the so-called voluntary programs in 2009. This article concentrates on the effect of more restrictive and coordinated controls on the exercise of economic rights of migrant workers.

Economic rights include, for example, the right to a just remuneration for work, satisfactory working conditions, freedom of association in unions or the right to strike.⁴ The state controls that focus primarily on the verification of state's approval of the presence in the Czech Republic may infringe on the exercise of economic rights. By creating partial limits to the surveying of migrants' legality by some state agencies, it is possible to assure that these rights do not remain formal only. In this article the author subscribes to the thesis that there should be a separation between the checking of the migrants' legality of residence and work and that of working conditions in order that migrants gain access to equal rights as workers.

The US is an example of a country, which has set limits to the cooperation of immigration officers and labor inspectors. This article will focus on the situation in the USA to explain two normative positions on the relation between (im)migration and labor law. It is possible to identify these two positions on the Czech Ministry of Interior's document on the approach of the state towards 'illegal migration', which was approved by the Government of the Czech Republic in May 2010.⁵ Based on the normative position the author subscribes to here, at the end of the article author criticizes the cooperation between Labor Inspectorates and other state institutions such as the Foreigner Police and Labor Offices.

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⁴ See the Head Four (Economic, social and cultural rights) of the "Charter of Fundamental Rights and Freedoms"; <http://www.psp.cz/docs/laws/listina.html>. Article 26 stipulates that "[d]ifferent statutory rules may apply to aliens", which, however, does not refer to the examples of economic rights listed in this sentence.

⁵ "Postup České republiky v oblasti prevence a potírání nelegální migrace a negativních jevů spojených s migrací", Ministry of Interior. Approved by the Government Resolution No. 344 [May 10, 2010].

Migrant Workers' Rights and Immigration Control in the USA

At the beginning of April 2010 the Secretary of Labor Hilda Solis launched a new campaign 'We can help'⁶ focuses on the protection of workers' rights in low skilled professions where disrespect for legal minimum pay and working standards has been common. A recent representative survey studying the situation of low-paid professions in three US cities confirmed the prevalence of violations of working conditions: 26% of people in these professions were receiving less than legal minimum wage (in the week prior to the research) and 76% did not receive legally entitled over-time pay.⁷ Amongst others Solis said in April: "If you work in this country, you are protected by our laws. And you can count on the US Department of Labor to see to it that those protections work for you."⁸ The aforementioned campaign is directed at all employees regardless of immigration status; work and hour laws cover immigrants, too. As part of the US Department of Labor but also as part of other departments there has been a tradition of a partial separation of immigration and workplace rights controls.

The Immigration Reform and Control Act of 1986 introduced employer sanctions for those who 'knowingly' employ migrant workers not in possession of the required documents to stay on the territory of the United States [further on 'undocumented (im)migrants'].⁹ These sanctions have been criticized by pro-immigrant organizations and also the unions because of their negative effect

⁶ More about the campaign at: <http://www.dol.gov/wecanhelp/>.

⁷ A. Bernhardt et al. *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*. (Center for Urban Economic Development, National Employment Law Project and UCLA Institute for Research on Labor and Employment, 2009); http://nelp.3cdn.net/1797b93dd1ccdf9e7d_sdm6bc50n.pdf.

⁸ "US Labor Secretary Sends Message to America's Under-paid and Under-protected: 'We Can Help!'", Department of Labor Press Release (April 1, 2010); <http://www.dol.gov/opa/media/press/whd/WHD20100411.htm>.

⁹ The focus of this article on the legal category of 'undocumented migrants' stems from the fact that it is especially with this 'category' that the conflict between migration control and the control of the protection working standards becomes most apparent (Bosniak, op.cit.). The term 'migrant' or 'foreigner' is understood here as one which is not neutral. See e.g. N. De Genova *Working the Boundaries. Race, Space, and "Illegality" in Mexican Chicago*. (Durham a London: Duke University Press, 2007); A. Sayad *The Suffering of the Immigrant*. (Cambridge Malden, MA: Polity Press, 2004), preface by P. Bourdieu. It also is varied (based on gender, race, ethnicity, age, etc.) as well as it may not necessarily be the most important for the explanation of the rate of non/observance of economic rights. For example there are great differences among economic sectors and professions (cf. Bernhardt et al., op. cit.).

on the protection of workplace rights and collective bargaining. According to a groundbreaking decision of the AFL-CIO confederation from 2000, 'unscrupulous employers' have actively used them against labor migrants who have tried to uphold their economic rights.¹⁰ In spite of the existence of these sanctions there have been mechanisms to ensure that undocumented migrants are not afraid to raise complaints about their employers that violate the labor legislation. The Memorandum of Understanding between the Immigration and Naturalization Service Department of Justice¹¹ and the Employment Standards Administration Department of Labor describes forms and limits of cooperation between these two government agencies. According to the memorandum labor inspectors from the Work and Hour Division of DOL are not supposed to ask for the immigration status of workers who complain about violations of working standards.¹²

The noninterference of US Immigration and Customs Enforcement (ICE) in labor conflicts has not always been respected in recent years. The joint report of AFL-CIO, American Rights at Work and National Employment Law Project from last year documents a number of cases when the ICE agents controlled some migrant workers based on the incitement of the employer or raided a workplace where there had been labor conflicts under way.¹³ In the context of the publishing of this report Hilda Solis declared that the Department of Labor had hired 244 new labor inspectors. She also said, "The violation of any one worker's rights is cause for concern to all American workers. When unscrupulous employers abuse vulnerable workers, honest employers and their workers suffer."¹⁴ This statement is amongst others a critique of the kind of workplace raids targeted at undocumented workers carried out during the Bush administration. In general her arguments correspond to those in the memorandum: apart from keeping and raising the labor standards the aim was to prevent unfair

¹⁰ "Immigration, Executive Council Action" (New Orleans, LA: AFL-CIO, February 16, 2000); <http://www.aflcio.org/aboutus/thisistheafclcio/ecouncil/ec0216200b.cfm>.

¹¹ The US Immigration and Customs Enforcement replaced this agency. It is part of the Department of Homeland Security.

¹² "Memorandum of Understanding Between the Immigration and Naturalization Service Department of Justice and the Employment Standards Administration Department of Labor", Department of Labor (November 23, 1998); <http://www.dol.gov/whd/whatsnew/mou/nov98mou.htm>.

¹³ R. Smith, A. Avendaño, J.M. Ortega, "Iced Out. How Immigration Enforcement Has Interfered with Workers' Rights" (National Employment Law Project, AFL-CIO, American Rights at Work Education Fund, 2009); http://www.nelp.org/page/-/Justice/ICED_OUT.pdf?nocdn=1.

¹⁴ "Statement of US Secretary of Labor Hilda L. Solis on this Week's Immigration Enforcement and Workers' Rights Report", Department of Labor Press Release (October 30, 2009); <http://www.dol.gov/opa/media/press/opa/opa20091342.htm>.

competition by employers who would employ and abuse the insecure position of the undocumented migrant workers.¹⁵

Two Normative Positions on the Relation between Immigration and Labor Law

On a more general level conflicts about the interference of immigration control to the protection of economic rights correspond to conflicts arising from two different regimes on which the concept of citizenship is based. On one hand there is the regime of equal and universal inclusion of all people in a society. On the other hand there is the regime of exclusion, which sets the boundaries of a given society.¹⁶ Apart from some exceptions migrant workers should have

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the same rights as other workers, however, as migrants they are not regarded as equal to the citizens of a state. Therefore it is possible to talk about migrants' position as the 'citizenship of non-citizens'. They are not formally citizens of a certain state but have their rights recognized based on their personhood and presence on the territory of the state.¹⁷ The ideal of the citizenship to which migrants have access is, however, limited. For

example according to the US Constitution they are bearers of universal rights but are at the same time excluded from the 'ethic of national solidarity'¹⁸. This is the origin of the conflicts about the particular instances in which the state can or cannot legitimately treat migrants in a different way than the (formal) citizens of the state. In other words: when can the state refer to the interest in immigration control and the keeping of the boundary of the society? When on

¹⁵ "Memorandum of Understanding Between the Immigration and Naturalization Service Department of Justice and the Employment Standards Administration Department of Labor", Department of Labor (November 23, 1998).

¹⁶ L. Bosniak *The Citizen and the Alien: Dilemmas of Contemporary Membership*. (Princeton: Princeton University Press, 2008).

¹⁷ Cf. Article 42 (2) of the "Charter of Fundamental Rights and Freedoms": "Citizens of other countries shall enjoy in the Czech and Slovak Federal Republic the human rights and fundamental rights and freedoms the Charter extends to everybody irrespective of his or her citizenship".

¹⁸ Bosniak, op. cit., p. 15.

the other hand do other state interests prevail – ‘not those shaped by interests in sovereignty but in equality, and one subject to far greater constraints’?¹⁹

These questions correspond to two different paradigms.²⁰ The first paradigm is against the interference of the sphere of membership²¹ into the status of the non-citizens in economic and social spheres²². This means that the rights of those living in a state should not be based on their formal membership. Distinguishing between citizens and non-citizens should be irrelevant in such spheres as that of work or education according to this paradigm.²³ In case there is no boundary kept between determining membership in the society and the spheres of work or education, the equality principle cannot be fulfilled. Fiss refers to the US constitutional tradition according to which there is a ban on the subordination of certain groups of inhabitants by other groups: “The constitutional guarantee of equality bars not just discrimination, but also laws that create or perpetuate caste-like social structures”²⁴. The second paradigm is against the separation of the sphere of membership and other spheres and aspects of migrants’ lives. According to the supporters of this paradigm the control of migrant’s legality of residence in the country of immigration can happen in almost every instance. Migration control has priority over the ideal of equality. Based on this perspective this means, for example, that undocumented immigrants in the USA should not have access to public education, welfare or a driver’s license. Also immigration control should thus take priority over the protection of migrant workers’ rights who, partly as a result of their legal status, become vulnerable.

When the Interest in Migration Control Prevails

The second normative position is prevalent in the recent Ministry of Interior’s document “The approach of the Czech Republic in the area of prevention and fight against illegal migration and negative phenomena related to migration.”²⁵ It

¹⁹ Ibid. 14.

²⁰ Concrete positions of authors and institutions cannot be so easily delineated based on the two divergent paradigms. From the perspective of the nation-state it is not possible to get rid of the conflict and negotiations between migration control and equality (Bosniak, op.cit.).

²¹ Bosniak bases her analysis on Michael Walzer’s *Spheres of Justice*. By the sphere of membership is meant the primary determination of who is or is not a member of the society.

²² Bosniak, op.cit. p. 39.

²³ E.g. O. Fiss, “The Immigrant as Pariah”, *Boston Review* (October/November 1998); www.law.yale.edu/documents/pdf/immigrantpariah.pdf.

²⁴ Fiss, op.cit. p. 4.

²⁵ “Postup České republiky v oblasti prevence a potírání nelegální migrace a negativních jevů spojených s migrací”, Ministry of Interior (2010).

illustrates the currently more common perspective of migration issues by state institutions in this country. It gives evidence of the perception of migrants as special objects of state control, which can take place in a multitude of spheres of the state administration. The reinforcement of (im)migration control and their coordination among various branches of the state administration is seen as a solution to the previous 'failure' of state policies. The monitoring of migrants' legality of residence in the country is seen as superior to the protection of migrant workers' rights.

This document presents a 'holistic' approach to the regulation of migration. Point 1 (The approach of the Czech Republic in the area of prevention and eradication of illegal migration and negative phenomena connected with migration) supports a more coordinated approach to migration: "the problem of migration

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is so cross-sectional in that questions related to alien elements fall under the authority of a number of state institutions.'²⁶ Insisting on the cross-sectionality should, according to this argument, preclude any doubts regarding the supposed obviousness of cooperation of state institutions. However, when one realizes the existence of the two different paradigms it becomes clear that the forms and the extent of cooperation among institutions can vary.

The authors of this document hint at a potential conflict between the migration and labor law. In point 3 that deals with 'the fight against middlemen and organizers of migration who abuse the vulnerable position of the foreigner' different instances of migrants' rights violations are mentioned (such as late payment of wages, non-payment of premiums). However, as the authors of the document note, due to various kinds of limitations (e.g. 'limitation that follows from the legal status') migrants cannot exert their rights effectively. The measures of the state should, according to them, focus on the increasing awareness of migrants and the punishment of wrongdoers.²⁷ The vulnerability of the migrants on the labor market cannot, however, be solved in a satisfactory way within a model which puts migration control at the fore. Protection can be given to the trafficked individuals by awarding them long-term residence based on paragraph 42e of the Foreigner Act or a 'visa for the purpose of toleration' based on paragraph

²⁶ Ibid.

²⁷ Ibid.

33 (1b) of the Foreigner Act. This way residence of these individuals can be legalized in the Czech Republic. However, the number of persons who could make use of this kind of status is minimal. Sixteen people were included in 2009 into the Program for the Support of and Protection of Victims of Human Trafficking of the Ministry of Interior.²⁸ In its definition of trafficking in human beings the penal code contains 'forced labor and other forms of exploitation' (paragraph 168), however, this does not include general conflicts in labor relations or violation of working conditions. The interpretation of 'forced labor and other forms of exploitation' is considered unclear due to the fact of missing legal cases. Because of that the non-governmental organization La Strada, the Ministry of Interior and Justiční akademie (Law Academy) have prepared a common project²⁹. Even if this definition becomes clearer in the future, one cannot subsume labor relations and the protection of labor standards under paragraph 168 of the penal code.

Controls by the Labor Inspectorates

As mentioned already, in this article the autor subscribes to the normative position that refuses the interference of interests in the control of the legality of residence of migrants with their rights in the workplace. All employees should have equal access to economic and social rights. This position is based on a general refusal of the 'caste system'³⁰ in the Czech Republic and a legal subordination of a certain group of inhabitants based on their citizenship. If the employer does not pay the wages to the employee or pays lower than the required legal minimum wage, a migrant worker should have the same rights as any other employee to defend himself or herself effectively regardless of his/her legal status in the Czech Republic. According to Bosniak, the question 'who is a citizen?' (in the sense of equality in rights) should be raised in the context of concrete institutions. In this part the autor will focus on the Labor Inspectorates, which are meant to control the observation of labor standards and labor relations. The question posed here is the following: where do the Labor Inspectorates stand in terms of the equality of all workers?

The Labor Inspectorates function rather according to the normative paradigm that enables the interference of the sphere of membership into the

²⁸ "Zpráva o stavu obchodování s lidmi za rok 2010", Ministry of Interior (2010); <http://www.mvcr.cz/soubor/zprava-obchod-s-lidmi-2009-pdf.aspx>.

²⁹ Ibid.

³⁰ See Fiss, op.cit.

rights of migrants as employees.³¹ Although Labor Inspectorates start from the assumption that in principle all workers are equal in their rights, in most cases they distinguish them based on formal citizenship. Workers are distinguished to a lesser degree in cases involving work safety. Inspectors working at the Labor Inspectorates check employees' identity cards or passports and try to identify if migrants have work permits or work based on other kind of contracts. Based on the Act on State Control no. 552/1992, Coll., information about 'illegal employment' or residence is passed onto the Labor Offices and/or to the Foreigner Police. This means that Labor Inspectorates participate in migration control, that is control of legitimacy of residence and work in the Czech Republic itself. The Labor Inspectorates also participate in joint controls with other

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institutions such as the Foreigner Police and Labor Offices. To justify these joint controls it has been pointed out that the positions of labor inspectors are badly remunerated, which means that mostly women work in what is considered a risky working environment.³² Therefore according to this logic a man (an armed policeman) should be present at the controls of workplaces. Bad material conditions of the labor inspectors legitimate the need for the presence of better-paid policemen.

Why should a migrant who did not receive pay for his or her work be interested in complaining against the employer at the Labor Inspectorate? Such interest is minimal among migrants who have non-EU citizenship, do not have proper 'papers' or are afraid of

losing them if they expressed discontent about their working conditions.³³ These migrants are potentially in possession of a number of civil and economic rights but are at the same time aware of consequences of their presence and work in the Czech Republic if they complained against their employer. The reality of their rights is the following: "[a]s a practical matter, the rights they technically

³¹ The analysis in this part is based on the "Labor Inspection Act" (No 251/2005, Coll.), "State Control Act" (No. 552/1991, Coll.) and an interview with M. Ronin, the head inspector of the Local Labor Inspectorate for Prague (carried out on March 9, 2010).

³² Interview with M. Ronin (carried out on March 9, 2010).

³³ The employer may discipline its employees by for example threatening to cancel the work permit or denunciation at the Foreigner Police.

enjoy are rendered ineffective or meaningless”³⁴. Labor Inspectorates realize the need to protect employees who make a complaint against their employer. Therefore they have devised bureaucratic procedures, which shield the identity of the person who complained. On the other hand the conflict between migration and labor law has not been articulated to the same extent.

Conclusion

Will the Czech Republic continue to bring migrants from as far away as half the planet without being able to guarantee equal access to economic and other rights? According to the aforementioned document of the Ministry of Interior on ‘illegal’ migration from April 2010 this seems to be the case. The original motto of the project of the Czech ‘Green Cards’³⁵ should continue to hold true for the future: “We do not want the situation where businessmen leave, rather we want the labor force to come to them.” There should, however, be some changes. The state wishes to delineate more clearly *temporary* labor migrants and enforce their temporariness; this is to be ensured for example by return programs. They will be ‘guest workers’ who will not have better access to their rights than has been the case thus far.

Apart from this there should be an increased coordination and cooperation among individual institutions regulating different aspects of migration. Such cooperation has had negative consequences for the factual equality of workers on the labor market because there is little space left for it when the ‘fight against illegal migration’ is the priority. From the point of view of enforcement of migrant workers’ rights one needs to look into the conditions underlying cooperation of the individual state agencies. With the Labor Inspectorates one notes a clear conflict between (im)migration control and protection of labor standards.

This article has not tried to offer a solution to this conflict in the context of the Czech Republic but rather to point out the existence of this conflict. It is difficult to find a legal solution. It is substantial to set limits to the cooperation between the Labor Inspectorates and other institutions such as the Foreigner Police and Labor Offices in a similar way as is done with labor inspectors observing wage-and-hour violations in the USA One possibility in the Czech Republic would be to set conditions on the passing of information from the Labor Inspectorates to

³⁴ Bosniak, op.cit. p. 70.

³⁵ For more information about this measure meant to liberalize labor migration to the Czech Republic see here: http://portal.mpsv.cz/sz/zahr_zam/zelka/ciz.

the Foreigner Police in the Labor Inspection Act. There could be an obligation of secrecy, which could be inspired from for example the secrecy regarding tax issues. Another possibility would be to set limits in the Foreigner Act for the Foreigner Police so that the police would make use of some information only under certain conditions. This would for example mean that the police would not automatically react to the 'anonymous' denunciation of migrant workers in cases when the control of Foreigner Police could interfere in conflicts between the employer and the employees.³⁶

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³⁶ I am thankful to the attorney Pavel Čížinský for these two points.

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