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**Without Papers but not without Rights: The Case of Ana S.
MigrAr: Trade Union Drop-In Center for Undocumented Workers in Hamburg**

Societal Dimension: Migration and Work in Times of Globalization

Germany is one of the biggest recipient countries for migrants. One of the most important factors causing people from poor countries to migrate to industrialized countries is the search for better working and living conditions.

“Migrations from countries with low income who migrate to countries with higher income can often make wages that are 20 to 30 times higher than those in their home countries. Although living expenses in target countries are usually much higher, migrants can make wages that ensure their living expenses and allow for transfers to the members of their household members and communities back home.” (GCIM 2005: 12)

Work is thus a central element of global migration. Migrants without residence permits are therefore highly dependent on informal labor markets. Access to these labor markets is crucially important to them, not only for their own livelihood and well-being but often also for the support of family members in their home countries.

Despite increasing discussions about trafficking of human beings and forced migration – mainly into the sex industry – it is reasonable to believe that work-related migration usually occurs voluntarily, despite the use of escape agents and people smugglers, charging extraordinary high prices and sometimes using dangerous and inhumane modes of transportations. In these cases, the delinquents make use of the fact that their “victims do not expect any help of the police” (Cyrus 2006: 212).

Because of their lack of residence permit status, these migrants need to look for access to informal labor markets –although employers are actually interested in the (regular) employment of migrants. The GCIM-report talks about the dissatisfaction by employers with the current limitations on migration: “In many parts of the private sector, such controls are considered to limit production and the enlargement of the market. Representatives of the private sector complain about the fact that they are unable to offer expected services, because they cannot close the gaps in the labor markets by hiring migrants.” (GCIM 2005: 15) The commission assumes that “some industrialized countries will satisfy their needs for additional workers (especially of cheap and flexible

workers to do the work that the indigenous population does not want to do) by turning a blind eye on the employment of irregular migrants” (ibid 15).

While the GCIM observes tendencies towards greater labor market liberalisation, the EU stresses the restrictive labor market controls for migrants from outside the EU. The guideline of the European Parliament about minimal standards and sanctions against employers employing migrants from outside the EU without residence permit from June 18, 2009, says:

“An important incentive for the illegal immigration into the EU is the possibility to find employment within the EU without having the necessary legal status. The fight against illegal immigration and illegal residency must therefore include measure to reduce this incentive.” (EU 2009:1)

International Labor Law and Social Law

On the international level, the International Labor Organization (ILO), located in Geneva, is the main provider of norms for court decisions involving labor law and social law. The four main principles determining the self-understanding of the ILO are:

1. Freedom of Association and collective bargaining
2. Abolishment of forced labor
3. Abolishment of child labor
4. Prohibition of discrimination in employment and occupations

These main principles have been concretized in eight agreements, the so-called “core working norms”. Germany ratified all core working norms (ILO 1999). Therefore, they are part of German laws, although they have not sufficiently entered court decisions yet. German labor law and social law are usually more extensive than the provisions of the ILO agreements. Germany nonetheless has an interest in the ILO’s norm giving procedures. On the one hand, Germany – along with the other member states – has an ethical interest in the ILO’s attempt to ensure minimal social and economic standards for the working population all over the world. On the other hand, this is also a protection against dumping concurrence. “In addition, it is of crucial importance to Germany, due to its international economic integration, that competition about markets in times of globalization will not lead to a destructive downward spiral of labor and social standards” (ILO 2009).

Worker’s Rights in Case of Irregular Employment

The legal rights of employees without residence permits in Germany differ from those of legal workers. Not having a working permit implies an illegal employment relationship, but does not mean that those without a working permit do not have any rights resulting

from the work they actually do. Today, there is a common agreement among labor lawyers that the lack of a working permit does not lead to a nullification of the employment contract, but only to an absolute employment prohibition for the employer (Schaub 2009:Rn. 33). Even with a legal violation (in this case the lack of a working permit) the unauthorized employee still had some rights. Because parts of the employment contract are fulfilled, then the other parts also need to be fulfilled based on the terms of the contracts or legal standards (de facto employment relationship) (see Müller-Glöße/Preis/Schmidt 2009, Rn:145 ff.).

Despite these legal provisions, it is still difficult for illegal immigrants to exercise their rights, because

1. their dependency on the employer is objectively much higher than vice versa due to the lack of a residence permit;
2. immigration laws and current politics sanction illegal immigration with expulsion and deportation;
3. the subjective feeling of workers without working permit is to have no rights in any respect.

When individuals without residence permit seek to fight for their working permits at court in the framework of a “labor law court proceeding”, it is possible that judge will transfer this information to the immigration office, if he or she learns that the employee does not have a residence permit (Saga 2007: 2). This police could then get involved and immediate deportation would become possible. It is important to notice here that this is only a possibility, but by no means an obligation, according to § 87, which does not imply a noticing duty in current court proceedings according to current judicial conception.

The Right to Be Paid

A brochure for workers, in which the rights of migrant workers “without papers” vis-à-vis their employers, was published in October 2007 within the framework of the EU initiative Equal and with the support of the Ministry of Labor and Social Affairs. The right to be paid ranks first, “even when the employee does not have a residence or working permit” (Sage 2007: 2). The basis for this right is the contractual agreement between the employee and the employer. If there is no written contract, one can resort to statutory regulations. The legal basis is the *Arbeitsvertragsrecht* of the *German Civil Code* (BGB) in §§ 611 and 612: “A wage or salary is considered to be agreed upon, if the service is generally expected to be done only against pay” (Müller-Glöße/Preis/Schmidt 2009:Rn 2). This principle is independent from whether the service is provided in the construction, the hospitality sector, or private households.

If the payment is not explicitly mentioned in the contract, the allowance follows what is usually paid in the given sector. This can be the standard, collective bargaining wage. The obligation to pay the salary is not contingent on the presence of a valid working permit or the employment status. Employers, however, often take advantage of the lack of a valid working permit to negotiate and pay wages far below standard wages. In some cases, employers can even be accused of “immoral wage usury”. According to a recent decision of the Federal Labor Court, wages are considered to be immoral if less than 70% of the usual wages are paid, suggesting “apparent imbalance” (ibid Rn 3).

Although a verbal agreement is sufficient to close a contract, the employer should provide the employee with the written terms of the agreement within one month after the employment relationship has started. This written note, asked by § 2 of the *Nachweisgesetz*, has to include the name and the address of the two contracting parties, the start and the duration of the employment contract, the place of work, the job description, the working hours, and the duration of the annual vacation. (Gesetz über den Nachweis der für ein Arbeitsverhältnis geltenden wesentlichen Bedingungen [Nachweisgesetz – NachweisG] vom 20. Juli 1995)

In the case of illegal employment, the two parties usually agree to not write down the terms of the employment relationship. In such a case, the terms of the verbal agreement are valid. If employees want to file a suit for not having been paid, they need to prove how many hours they worked for the employer by providing written evidence or a testimony. While the employment contract does not to be in written form, the employer need to provide a written document for a lay-off according to § 623 BGB to be valid. Otherwise, the employment relationship will persist, if the employee continues to work after being told about the dismissal.

The case of Ana S.

In 2004, Ana S. came to Hamburg to work as an au-pair with a Hanseatic merchant family. She had a visa for her employment as an au-pair for one year and was meant to work four hours/day in exchange of free board and lodging and a monthly pocket-money of 350 Euro. In fact, she often worked more than 10 hours/day, seven days a week. She looked after three small children (even at night she had the baby monitor lying next to her bed), worked in the household and cleaned the swimming pool. She could not participate in a German language course – which usually is part of au-pair programs – because the mother insisted that she was available 24/7.

After one year, her visa expired. Afterwards, Ana continued to live and work with the family illegally for a total of 39 months. During the entire time, Ana’s employer sent 8.200 Euro to her family in Columbia and provided Ana with a small pocket money. In total this was a sum of around 14,000 Euros.

At the end of 2007, with the assistance of a consulting organization for illegal immigrants, Anna left the family. She also joined ver.di and sued the family, her

employer, for the part of her salary that had not been paid, 47,000 Euro in total. In a mediation process at the labor court, on January 28, 2009, the two parties did not reach an agreement. The employer was not aware of having done anything wrong – they treated Ana like a daughter, had taken her to the most beautiful hotels in Europe for vacation and she had lived comfortably in their house in Blankenese [a luxury part of HH]. The employer suggested to pay 12,500 Euro, since board and lodging was provided by the family for 39 months.

The judge had difficulties with Ana's unique case. She could not understand why the two parties had previously agreed that Ana S. was employed as an au-pair, receiving the stipulated pocket money, and that now, all of the sudden, she wanted to enforce the law to receive an adequate remuneration. The judge suggested mediation but forwarded her file to the attorney even before the mediation process got started. The attorney prosecuted the employer for moonlighting and Ana for the lack of a valid visa. Protests by ver.di followed. The fear was that labor judges in Hamburg would from now on generally follow such a course of action and that existing labor law was circumvented. Although Ana now faced the risk to be sent back home to Columbia, she continued the lawsuit with the help of her lawyer and ver.di.

On April 1, 2008, the process ended with mediation at the labor court in Hamburg. The judge, managing the mediation procedure, assured Ana in advance that he would not inform the police or the aliens department so that Ana could join the process together with her ver.di representative and could testify in person. The result of the mediation was that Ana received an appropriate financial payment by her employer.

The problem of illegal workers is the uncertainty. While the illegal worker feels they are in a weak position, the risk to the employer is much higher. After the closure of the process, Ana has started working in private household for an hourly payment of 10 Euro for house keeping and 8 Euro for babysitting. She works three times a week for a family with two small children and every two weeks for two elderly ladies in Blankenese, yielding a total of 20 hours/week. She makes her living in Hamburg on her own income and can transfer money to her family in Columbia, paying the living expenses and costs of schooling of her children who live with their grand parents. While the times of extreme dependency and exploitation are over, there is no perspective of legalization.

Background for Trade Unions' Activities for Undocumented Work: Domestic Work – Organizing – International Solidarity

The reason why this case – with the help of ver.di – ended successfully in front of the labor court was the yearlong preparation by a few left-wing and feminist activists in the trade unions as well as anti-racist and migrant organizations.

The discussion about the organization of illegalized migrant workers was initiated by the debate about the increase of migrant work in private household, which started at the end of the 1990s, including in the academic world. Maria Rerrich and colleagues

estimated that around 2.9 million private households in Germany are employers. There is a big variety of employment relationships and employment forms in private households. Only the smallest portion of households regularly employing cleaning personal and household aids offer regular employment with social security contributions and health care. Fewer than 40,000 employees are completely covered by social insurance through their work in private households (Gather/Geissler/Rerrich, 2002:60).

Essentially, there are two reasons why the employment without social insurance is still dominant. On the one hand, income tax for such auxiliary income is high. On the other hand, a great share of these employees cannot be reported to the social insurance administration. These people have lived in Germany illegally – often for many years. A great part of the household work previously done by a professional household worker such as a washer or a cook, is now done by machines. The need for help in the household nonetheless rose over the course of the last years.

Since more than 30 years, women in Germany have sought to abolish the gender-specific and gender-hierarchic division of labor in paid and reproductive work, as this is an important condition for gender equality.

The success of these efforts is modest. Although in some relationships things have changed – the household division of labor is no longer as traditional as it has been 100 years ago – men still do not bear the same share of reproduction work as women. The project of equality in household work has largely failed (Rerrich: 19).

Instead, another development can be observed: many households pragmatically use the workforce of mostly moonlighting women, many of which are migrants. This brings relief to many women suffering from the double burden of job and family duties. The hierarchical gender relationship, however, remains unchanged. The burden of middle-class women is now (often) carried by poorly paid women from poor countries who do not have any security at all. Moreover, their work is treated as a private, not worth being the topic of a political and societal debate.

There is much empirical evidence for well-developed and increasing globalization tendencies in private households. This is not new. For a long time already, the private household has been an important labor market for women in the framework of national and international migration movements.

In the following, I will elaborate more on the globalization aspect and the political strategies. If we believe that – due to worldwide differences in the distribution of wealth – hundreds of thousands marginalized and illegal immigrants will ensure the functioning of private households in Germany, trade unions need to take the initiative so that

- a key date regulation for legalization of migrated laborers will be introduced (e.g., after eight years of work and residence);

- migration law, making the stay in Germany illegal, will be subordinated to labor law;
- the UN convention about the rights for migrant workers and their families will be ratified by the German government.

Never walk alone: Organizing – a model for the future

A new approach of trade union policies towards illegalized migrants comes out of the implementation of the organizing approach. Organizing follows democratic and emancipatory principals.

In cooperation with the SEIU, a model organizing project took place in Hamburg (2006/07), shedding light on precarious work in different sectors, relevant to ver.di, such as cleaning, household help, care work, work in the haven, sexual work, etc. A particular focus was on winning these migrants for joining the union as active members (Bremme 2007: 194ff). In addition, trade unions in the UK, Sweden, Switzerland, which have already accepted and represented illegalized workers, were contacted through the EGB.

Trade Union Policies for Undocumented Migrants

Essentially, there are no obstacles for trade unions belonging to the German Trade Union Federation (DGB) to accept illegal workers as members and represent them. There is, however, still little interest in organizing these groups. The main focus of union policies is still on firms, particularly big firms. Private households are not considered to be as important for the acquisition of new members. In addition, the actual trade union policy is still on fighting illegal employment (e.g., IG BAU) and the avoidance of collective bargaining agreements, so that the political – as well as the practical – dimension of female migrants as organizing targets is largely ignored.

For migrants who live in Germany illegally and work in private household, joining the trade union is still advantageous.

- They can document the time they lived in Germany through the payment of their membership dues (right of residence)
- They can ask for the solidarity of the legal employees and emancipate themselves from being (considered) a victim through their own activities
- They can publicize their often undignifying work- and living conditions.
- They are provided with legal support if they want to fight the exploitation through their employers, for example, when it comes to the issue of unpaid wages, unpaid wages in case of illness or vacation, sexual harassment etc.

Solidarity instead of Competition: Trade Union Initiatives in Support of Irregular Employees

The question of how basic rights can be ensured to workers even if their residence in Germany is illegal has been discussed by human rights organizations for quite some time. Although trade unions are the biggest organizations for employees, this subject has only started to be discussed recently and entered union policies and offers to a minor degree. The issue still raises contradictions within the unions.

Nonetheless, trade union initiatives for irregular employees are still the subject of this chapter – on the one hand, because the representation of illegal workers is at the heart of unions' duties and, on the other, because the initiatives presented in this chapter – especially the example MigAr in Hamburg – are exemplary.

Construction has been one of the biggest and earliest sectors in which illegal immigrants have been employed. The first attempt of the concerned union, the IG BAU (representing workers from construction, agriculture, and environment) therefore was to fight dumping wages and protect the collective agreements of the legal employees. Later – after the ZAPO, an association for the solidary support of Polish construction workers, became active – the European Migrant Worker Association to support illegalized workers was established in the construction sector.

The unions had problems with the subject for many years. Illegal workers were considered to be competitors rather than colleagues. It is only a recent development that unions, especially ver.di, seeks to support illegal workers, helping them to get their rights, representing them at labor courts, and making them members of the union.

The European Migrant Worker Association

The European Migrant Worker Association (Europäischer Wanderarbeiterverband, EVW) was established on September 4, 2004 on a special union day of the IGBAU with the hope that within four years, 10,000 of migrant workers would organize in the association, thus making it possible to strike. This, however, has been turned out to be an illusion. The IGBAU, funding the project with 1.5 Mio Euro, declared in October 2008 that the EVW would no longer work as an independent professional association. The association represents East European migrant workers in the construction, agriculture and horticulture sectors. Its operations would be taken over by the IGBAU (LabourNEt2008). Many grieved this step: "Although some this initiative was considered to be an image campaign for the IGBAU, for others it was an important step towards new policies and treatment of illegal migrants." (Berger/Meyer 2008).

The IGBAU's re-organizing attempt was a consequence of the EVW's modest membership development. In contrast to the initial expectation, it was not possible to organize a big share of the East European migrant construction workers in an independent organization. To use the existing resources more efficiently, the IGBAU

itself will represent the East European trade union members, who work here for some time. Nonetheless, the work of the EVW in general is considered to be positive: “The European Migrant Worker Association helped start the public debate about the precarious working conditions faced by migrant workers in Germany. The association will continue to work” (IGBAU 2009).

The Drop-in Center for Undocumented Workers in Hamburg: MigrAr at ver.di

In ver.di’s working group “Undocumented Work” different initiatives and consulting organizations support individuals without residence permits who are confronted with legal issues with respect to labor law. Housekeeping, maintenance, child and elderly care, hospitality, and construction are among the sectors with a high proportion of illegal immigrants; moreover, prostitutes, seasonal and port workers are also often undocumented.

The fact that workers without residence and work permit are particularly vulnerable to exploitation at work yielded the idea of a trade union-run drop-in center for illegal immigrants. The goal of this project was to tell illegal immigrants what their rights were and helping them to bring these rights to bear. Existing rights in the employment relationship can be asserted through the representation of the union. The trade union run drop-in center closely cooperates with many other initiatives and organizations and only consults on labor law and social law (assertion of existing rights, social insurance, and preparation of law suits).

Since May 1, 2008, MigAr has office been offering walk-in hours every Tuesday, 10am-2pm; additional appointments can be scheduled. The small office is located in the ver.di-center and until 2010 it was financed as a pilot project by the ver.di Hamburg. In case of problems related to labor or social law, a first consultation with the concerned individual takes place at drop-in center. With the individual’s approval, the case is initiated and a first labor law examination will be done. In close cooperation with specialized lawyers, this first examination involves a survey of the relevant facts and a check of potential entitlements. Potential language problems are overcome through the cooperating partners agreeing to provide a translator. To ensure the professional handling of the undocumented workers’ questions outside labor and social law, they are sent to one of the cooperating partners.

This way, the concerned migrant workers can get a direct assessment about the type and the amount of existing entitlements, while also getting informed which documents they will need to present. To ensure the payment of the claim, three steps are usually followed. If the employer does not react or comply with the demands, a next step follows.

1. The claim, including a date by which the payment is due, will be sent to the employer in written form.

2. Potentially a reminder/admonition in front of the labor court.
3. Law suit to ensure the payment of the claim.

If the concerned individual wants to go this route to ensure the payment of her or his claim, the case will be forwarded by the drop-in center to the DGB law department. The drop-in center accepts the illegalized colleagues as trade union members. The initial consulting and the first legal examination are possible without union membership. If the worker wanted to be represented by the union, they needed to become members, so that the legal protection could apply and the legal department of the DGB could take over the claim (compare Wollborn/Wolze 2009: 2).

Selected Examples for the labor law related inquiries at MigrAr

The following section covers some of the cases confronted by the drop-in center. The provided date refers to the initial contact. One common result was that claims from the past could only be realized to a very limited degree using legal means. However, the case studies still indicate how the later payment of an unpaid wage, for example, can be documented in the future.

5/20/2008

A women from Chile did not get the entire sum of her promised wage. The employer, however, returned to Chile. It is almost impossible to get her the unpaid money. The women is not interested in making a big fuss, especially given the fact that the amount of money is rather small. She is brought into contact with an information center, providing her with advice the legalization of her migration status

6/12/2008

A 41-year old women from Togo found a job as a housekeeper (30h/week) in a hotel on the Reeperbahn (Hamburg's amusement mile) through an agency. She was told to earn 8,15Euro/hour, which is the minimum tariff wage for maintenance workers. After three weeks, she received her employment contract, saying that the wage was 1.70 Euro per room after the departure of the guest(s) and 0.5 Euro per room during the guests' stay (before taxes), yielding a wage of 98 Euro/week in June and 535.60 Euro for July (before taxes). She was brought into contact with lawyers who calculated that she was entitled to 342.30 Euro before taxes for June and 1059.50 Euro before taxes for July – taken together, this more than twice what she actually had gotten. At first, the maintenance firm did react to the letter. After the street paper "Hinz und Kunz(t)" started interrogating the issue, the employer's lawyer explained that it was a "misunderstanding", since " the final invoice was not yet completed". In a written statement, the organization ensured that no one was employed below the applicable minimum wage". Shortly afterwards 1,254.49 Euro was transferred.

7/1/2008

A woman asked for her sister from South America, who works in a private household and barely speaks any German, whether an employer can withhold the wage for a housekeeper's mistake. In the first two months, she received 500 Euro for her work, but nothing in the third. She had burnt some clothes, when ironing the laundry. She wants to claim her money. However, after this initial consultation, the woman did not show up for the appointment at the drop-in center.

11/18/2008

Together with his nephew, a man from Ecuador did some renovation work in a private household. The employer also is Ecuadorian and has the reputation of already having betrayed other compatriots. R. could have proved how much he worked. His nephew, however, the potential witness, did not have a residence permit. At the end, he is too afraid to claim his wage, because he suspects that the employer would, in turn, press charges against him and his family. R. planned to tip off the LKA (state police) regarding white collar crime but eventually did not do it.

2/24/2009

Murat, a Kurd from Turkey, asked for asylum in 1996 but was declined and deported in 2002. Using a fake visa, he came back in 2004. Ever since then, he lives in Hamburg without papers. He has worked with a subcontractor in construction. Murat does not have any problems at work but he needs help for his legalization. He is transferred to a parochial information center and brought into contact with lawyers focusing on Turkey.

4/21/2009

Jacqueline from Kenia comes to the drop-in center in company of a social worker. She arrived in Germany in late 2008 with an Au-pair visa and started working in a private household. On December 8, 2008, she was fired with a two-week notice. Orally, she was told that this was due to her pregnancy. In December she was 6 months pregnant. Since December 22, 2008, she has lived in Hamburg illegally. A check of the contract indicated that the dismissal was legal. In the framework of Au-Pair-contracts, dismissal protections for pregnant women do not apply.

Networks and Cooperation Partners

Conceptually, MigAr is part of an existing network supporting illegalized migrants in Hamburg and works in cooperation with other organizations. In case of questions outside social and labor law, the aggrieved party is relegated to an adequate cooperation partner. Potential language problems are solved by those cooperation who have volunteered to provide translators.

The drop-in center cooperates with the following organizations: Amnesty for women, Attac Menschenrechts AG (Attach Human Rights Chapter), Café Exil, DGB Migration, Diakonisches Werk Hamburg Abteilung Migration, Eine Welt Netzwerk Hamburg e.V., Flüchtlingsbeauftragte der Nordelbischen Kirche (Appointee for Refugees of the Nordelbuc Church), Fluchtpunkt, Flüchtlingsrat Hamburg, Flüchtlingszentrum, Initiative für ausländische ArbeitnehmerInnen (Wilhelmsburg), Interkulturelle Begegnungsstätte e.V., Kein Mensch ist illegal, Koofra e.V. (Coordination Center against Human Trafficking, Malteser Migrants Medizin, Medizinische Beratungsstelle für Flüchtlinge und MigrantInnen (Medical Information Center for Refugees and Migrants), Mujeres sin fronteras, ver.di AK Migration, ver.di Fachbereich 13 (Besondere Dienstleistungen), ver.di Frauen, ver.di Jugend, Verikom e.V.

One step ahead: The DGB takes on the organizing responsibility for the drop-in center MigrAr

On January 21, 2010, the following DGB proposal was approved, explicitly acknowledging that the improvement of the situation of persons without regular residence permit status was a task of German trade unions and the DGB.

“The work of the trade union drop-in center for migrants without regular residence permit status – MigAr (Migration and Work) – is approved as a union task by the DGB Hamburg. This work is part of the trade union representation of interest und part of the political work regarding migration.

Employees without regular residence permit status are often deprived from getting their wages and rights. There are a couple of thousands of them in Hamburg – with rising tendency. Undocumented employees work in many sectors. They work as maintenance workers, housekeepers, carer givers, on construction sites, at the harbor, in the restaurants and hotels, as seasonal workers and sex workers.

The representation of interests of employees without working permits vis-à-vis employers yields particular demands that emerge, for example, out of the combination of work-related and residence-related problems. The trade union drop-in center MigAr (Migration and Work) at ver.di Hamburg has successfully dealt with these problems. A part from ver.di, most other DGB unions are also directly concerned with the subject matter.”

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