

*The Sectoral Regulatory Regime: When Work Migration Controls and the Sectorally
Differentiated Labour Market Meet*

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I. INTRODUCTION

The literature on migrants at work has pointed to the fundamentality of migration controls for shaping the contract of employment and the terms and conditions of work of migrant workers.¹ It does not, however, explain variations in the regulation of migrants at work.² The Israeli regulatory regime, for example, exhibits sharp differences in the legal situation of migrants, with the core distinction lying, so I claim in this article, in disparities among sectoral settings. I therefore argue that a fuller understanding of the regulation governing migrants at work can be reached through a sectoral focus. In this article I point out this differential regulatory regime and conceptualise it, while offering three factors that explain the regulatory differences among sectors. I also discuss two challenges it poses for labour law. Such a viewpoint makes it possible to shift the discussion on labour law and migration from the state-centred prism to a sectoral one, and to observe the numerous actors operating in the processes of regulating migration and securing (or not) the labour rights of migrant workers, particularly the dominance of private actors in these processes. It is also useful for understanding variations in the regulation of work migrants.

Studies in the past few years have unravelled the interrelations between migration controls and labour rights. Labour law scholars have joined these discussions, engaging in the consequences that migration controls have for labour law and for the rights of migrant workers at work. It has been said that a new basic contract of employment has emerged for

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¹ Hammar has pointed out the distinction between immigration control and migration policy. The former regulates the entry and stay of migrants whereas the latter is concerned with their integration into host societies. T. Hammar, *European Immigration Policy: A Comparative Study* (Cambridge University Press, 1985).

² I take regulation to include regulation promoted by government authority, self-regulation, case law and private regulation.

migrant workers in comparison to the citizen worker,³ and that laws governing the migration of workers institutionalise precariousness at work,⁴ leading to human rights infringements⁵ and 'partial citizenship' of migrant workers,⁶ placing them in a situation of democratic deficit.⁷ Claims have been made that national and international legal tools are ill-equipped to deal with the precariousness resulting from the interaction of migration policy and labour,⁸ and that there are particular concerns with the rights of undocumented migrants.⁹ States' migration controls, it has been shown, are substantial for determining employment rights.

While a rather state-centric prism has been adopted to understand the interaction of migration controls and labour law, more marginal attention has been devoted to the nonunitary aspects of the regulation of work migrants, particularly those resulting from the allocation of workers to certain sectors of activity. In the past few decades a central feature of migration controls has become the allocation of workers to sectors, defined according to acts of production, provision of service or occupation. The common explanation for the referral of migrants to certain sectors is market function, i.e., migrants are allowed to work in sectors where there is a low labour supply of citizens or residents – members of the society. Previous research has shown that such allocation, beyond market function, is also used to control the entry of people into a national state, to keep migrants in specific locations and thus supervise their stay and departure, and to fulfil employers' needs.¹⁰ Additionally, it brings about sectoral divisions and segmentation, with consequences for the general labour

³ G. Mundlak, 'Workers or Foreigners? The "Foundational Contract" and Democratic Deficit' (2003) 27 *Iyunei Mishpat* 423 (Hebrew).

⁴ L. Vosko, *Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment* (Oxford University Press, 2010), Introduction, especially pp. 9-12; J. Fudge, 'Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers' 34(1) *CLLPJ*.

⁵ Fudge (n. 4) and see also V. Mantouvalou, 'Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labour' 34(1) *CLLPJ* 133; M. Dembour and T. Kelly, 'Introduction' in M. Dembour and T. Kelly (eds.) *Are Human Rights for Migrants?* (Routledge, 2011), 1.

⁶ Vosko (n. 4).

⁷ Mundlak (n. 3).

⁸ Fudge (n. 4); N. Kountouris, 'The Legal Determinants of Precariousness in Personal Work Relations – A European Perspective' (2012) *CLLPJ* 101.

⁹ V. Mantouvalou in this volume; Dembour and Kelly (n. 5); B. Ryan, 'The Evolving Legal Regime on Unauthorized Work by Migrants in Britain' (2005) 27(1) *CLLPJ* 27.

¹⁰ B. Anderson, 'Migrations, Immigration Controls and the Fashioning of Precarious Workers' (2010) 24 *Work, Employment and Society* 300; M. Ruhs, 'Temporary Foreign Workers Programmes: Policies, Adverse Consequences and the Need to Make them Work' (2003) 6 *Perspectives on Labor Migration, Social Protection Sector, International Migration Programme* 10 (International Labor Office, 2003).

market, particularly for those within the more disadvantaged sectors.¹¹ Moreover, it restricts the free movement of migrant workers between sectors, locking them in the lower segments.¹² The literature has pointed out that these activities are state-driven, intended to sustain the alienage of migrants, supervise their stay, and fulfil market demands.

What I claim in this article is that such allocation has changed the regulatory regime. Looking deeper into sectoral differentiations, I argue that once migration control policy comes together with the sectoral setting a crucially important regulatory regime is created, which is sectoral in essence. I call this the Sectoral Regulatory Regime. It is important stressing that sectoral regulation is a central feature of labour law.¹³ In this sense it is not unique to sectors of work migrants. However, in an era of migration controls that allocate workers to particular sectors, the sectoral regulatory regime is strengthened due to altering power relations and the growth of sectoral divisions. This brings about reinforced sector-specific regulation in forms that are foreign to labour law and that pose challenges to its theoretical framework. Additionally, it reshapes previous sectors in the market according to those set by migration control policies and it changes the regulation of work migrants making it more sectoral. An analysis of the sectoral regulatory regime is crucial once the referral of migrants to sectors gains dominance.¹⁴

The argument on the sectoral regulatory regime corresponds with another phenomenon discussed in the labour economic literature, i.e., the increased sectoral differentiation that typifies the macroeconomic changes of the past thirty years.¹⁵ Migration controls enter into

¹¹ On segmentation, see: C. Craig, E. Garnsey and J. Rubery, 'Labour Market Segmentation and Women's Employment: A Case Study from the United Kingdom' (1985) 124(3) *International Labour Review* 267; and also J. Peck, *Work-Place: The Social Regulation of Labor Markets* (Guilford Press, 1996), 60-61.

¹² The literature has termed this as 'unfree labour', see: R. Miles, *Capitalism and Unfree Labor: Anomaly or Necessity?* (Tavistock Books, 1989); and also Fudge (n. 4). For an interesting view on unfree labour as a continuum in work relations, see J. Lerche, 'The Unfree Labour Category and Unfree Labour Estimates: A Continuum within Low-End Labour Relations' (Manchester Papers in Political Economy, 2011).

¹³ E. Albin, *Sectoral Disadvantage: The Case of Workers in the British Hospitality Sector* (DPhil dissertation, Oxford 2010) Introduction and Chapter 1.

¹⁴ The allocation of migrants to certain sectors is not unique to Israel but also found in various countries around the world. On Britain, see Anderson (n. 10), and also the sector-based scheme introduced in 2003. On the scheme, see: <http://www.workpermit.com/uk/short_term_work_permits/introduction.htm> accessed 14 January 2014. On Canada, see Fudge (n. 4).

¹⁵ G. Menz and A. Caviedes, 'Introduction: Patterns, Trends, and (Ir)Regularities in the Politics and Economics of Labour Migration in Europe' in G. Menz and A. Caviedes (eds.), *Labour Migration in Europe* (McMillan, 2010), 1.

this process and in the past few decades have been driven by sector-specific considerations.¹⁶ The transformation of the demand for ‘guest workers’ from a general to a sectoral one changes power relations within societies, bowing to employers' preferences and paving the way for particular union involvement at the sectoral level.¹⁷ As the literature points out, even though migration studies have traditionally concentrated on state activities and public policy,¹⁸ in practice, particularly in a sectorally differentiated regime, non-state actors and individuals are very central to shaping migration flows and the regulation of migrants in the host state. Generally, these private actors include organised interest groups, courts, ethnic groups, trade unions, local actors and others.¹⁹

In this article I use the methodology of ‘law in action’, on the claim that through this viewpoint much can be learned about relationships and dynamics in the market. I focus on the Israeli national setting and, more particularly, on a change in migration control policy made in Israel a few years ago as a consequence of a Supreme Court decision, which declared that the binding of migrant workers to their employer is unconstitutional and should therefore be abolished and replaced.²⁰ The judgment required the state to adopt new nonbinding policies, and indeed in the years following the decision new policies were adopted, which were more sector-centric. I discuss the construction sector and the domestic care-work sector. As shown in the article, the change in policy led to a different regulatory regime in each of the two sectors and to new forms of labour regulation that were foreign to Israeli labour laws.

Based on that analysis I conceptualise the sectoral regulatory regime. The challenge of conceptualizing the sectoral regulatory regime is to posit an explanatory process that integrates the various components that take part in shaping the regulatory process, and at the same time enables to assess the role of these various components in the process of regulation. Here I offer three main factors that impact its design. The first is the rules of the sector, meaning its structure and culture. The idea of the rules of the sector draws upon a view

¹⁶ Menz and Caviedes (n. 15), 5.

¹⁷ Menz and Caviedes (n. 15), 6.

¹⁸ Menz and Caviedes (n. 15).

¹⁹ G. Lahav and V. Guiraudon, 'Actors and Venues in Immigration Control: Closing the Gap between Political Demands and Policy Outcomes' (2006) 29(2) West European Politics 201.

²⁰ *Kav LaOved v The Government of Israel* H CJ 4542/02 (unpublished). It is important to mention that the case was litigated by the author.

of sectors as fields,²¹ each of which has its own structure and culture that change over time, impacting the sector as well as those located within it.²² The second factor is agents operating in the sector – employers, trade unions, employers' associations, NGOs, private agencies, etc. The third and final factor is sector-sensitive system effects designed by the state and hence are outside the control of the agents noted above.²³ These include, for example, the provision of public services at low cost, such as care work for the disabled and the elderly, and processes of flexibility that lower incentives to invest in training and technology.

The state is not absent from this regulatory regime. It determines the system effects, and it is a player in shaping migration regulation and labour legislation. However, the two latter have been intertwined with the three factors noted above, and accordingly altered, intensifying their sectoral form. The sectoral regulatory regime that has been created from the meeting of migration controls and the sectorally differentiated labour market poses challenges to labour law, two of which are discussed in the article. The first concerns the unitary approach to labour law, particularly labour-protection legislation, and the second the assignment to these private actors of legal responsibility towards the migratory workforce.

The article is structured as follows: Part I discusses the interconnections between work migration policies and the sectoral setting, and introduces the theoretical view of the sector as it is used in this study for methodological purposes. Part II turns to Israeli migration controls policy and to the judgment of the Supreme Court regarding the binding policy. Part III conducts an analysis of the symbiotic relationship between the new policy and arrangements at the sectoral level by looking at the way the court decision has impacted processes targeted at migrant workers in the construction and domestic care-work sectors, respectively. Part IV puts forward the idea of the sectoral regulatory regime that has been created from the meeting of migration controls and the sectorally differentiated labour

²¹ My thinking of the sector as a field has been much inspired by the writings of Bourdieu, including P. Bourdieu, *Outline of a Theory of Practice* (Cambridge Studies in Social Anthropology, Cambridge University Press, 1977); P. Bourdieu, *Distinction: A Social Critique of the Judgment of Taste* (Harvard University Press, 1984).

²² The notion 'the rules of the sector' is from Peck (n. 11) and see also Albin (n.13), Introduction and Chapter 1.

²³ On system effects, see M. Ruhs and B. Anderson 'Introduction' in M. Ruhs and B. Anderson (eds.), *Who Needs Migrant Workers? Labour Shortages, Immigration, and Public Policy* (Oxford University Press, 2010), 1.

market through a discussion on the three factors that explain it. Part V points out two main concerns that this regime raises for labour law; and Part VI concludes.

II. WORK MIGRATION CONTROLS AND THE SECTORALLY DIFFERENTIATED LABOUR MARKET

Allocating migrant workers to particular sectors within the labour market is an element of many work migration control policies around the world. Countries adopting this policy often set and apply different pieces of regulation to each sector. The argument promoted in this article is that this brings together migration control policy and the sector, with its rules and the agents operating in it, leading to an interactive symbiotic and dynamic process. This process provides substantive power to private actors in the sector, and furthers sector-specific regulatory arrangements, having profound consequences for migrants, the labour market, migration law and labour law. In order to develop this argument, this Part of the article first outlines the literature on migration controls and labour law, and that on the sectoral labour market. It also presents the theory underlying my analysis of the sectoral setting.

While migration controls are designed in response to economic claims of labour shortages and needs, studies have shown that their implications go beyond those aims. Bosniak's path-breaking work on citizenship offers the first step towards such analysis. Her work reveals that migration policy and migration controls make it possible to preserve the distinction between citizenship and alienage. Even though citizenship is understood to embody a commitment to equality as against subordination, it also represents an axis of subordination itself – targeted against the alien.²⁴ The construction of alienage is accomplished through mechanisms aimed at preserving the idea of citizenship. Part of this is refraining from providing migrants with citizenship status, an act that not only differentiates migrants from members of a society, but also serves as an additional 'axis of inequality' and exploitation in the market.²⁵

²⁴ L. Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton University Press, 2006), Introduction.

²⁵ Bosniak (n. 24), 112.

Vosko similarly has discussed the implications of migration policy and controls for the citizenship conception of work migrants, defining it as 'partial citizenship', meaning the gradual and selective extension of civil, political and social rights to migrants.²⁶ Both Bosniak and Vosko address the labour market in their arguments, showing how the 'axis of inequality' or 'partial citizenship' impacts work relationships and the labour rights of work migrants, preserving their alienage while constructing and institutionalising precariousness at work.²⁷ This has also been illustrated by Anderson who discussed how migration controls produce particular work relationships and the precariousness of migrants through categories of entrance, the imposition of employment relations, and institutionalisation of uncertainty.²⁸ Categories of entrance not only determine who is eligible to enter (based on requirements of age, skill, country of origin, marital situation, etc.), but also shape length of stay and employment. In this way they directly impact the employment relationship and the rights of workers. Employment relations are structured through particular patterns of work, such as false self-employment and subcontracting, statuses that result in the absence of labour rights or in limited rights. Additionally, fixed-term contracts are very common in the employment of migrants, as is the binding of workers to their employers, a practice that provides immense power to the latter. Lastly, immigration policies are key to the creation of legality, but at the same time they may produce illegality by setting exceptions, determining situations of rule breaking, and leaving grey areas. A state of insecurity is thereby produced and institutionalised for migrant workers, placing them in a more precarious position.

Labour lawyers have joined these discussions. Mundlak, for example, has claimed that policies towards migrants influence the contract of employment of migrants, stating that they have a 'foundational contract', which constitutes three layers of difference between the migrant worker and the citizen worker.²⁹ First, while citizen workers' status is established upon a set of minimal rights, the status of migrant workers consists of partial rights, duties and restrictions. Second, as opposed to citizen workers who, at least theoretically, can be involved in the negotiation of the terms and conditions of their employment, migrant workers have almost no say in determining their working circumstances. These are set beforehand by the government. Third, the legal construction of citizen workers' status is

²⁶ Vosko (n. 4).

²⁷ Vosko (n. 4); Bosniak (n. 24), Chapter 5.

²⁸ Anderson (n. 10).

²⁹ Mundlak (n. 3), 431-432, 437.

intended to interfere in the market. This is not the case in respect of migrants, whose situation is constructed through a view of their rights and obligations towards the state.³⁰ As a consequence, while the citizen worker enjoys a protected status, the status of the migrant worker is binding and restrictive.

The immense contribution of this line of studies is that it reveals the interconnection between the regulation of workers' rights and migration controls and policy, and the various ways in which they impact one another, significantly pointing to their implications for work migrants. It captures migration as a process that alters previous arrangements in the market, while differentiating citizens and residents from migrants. In doing so it poses an assumption that migration is a unitary experience, when, in fact, the regulation regarding migrants is diverse both in migration law and in labour law. Differentiations exist in the regulation of migration and in migrants' rights at work. I believe that these differentiations are correlated with the sectorally differentiated labour market and with another process discussed in labour economic literature, the one regarding the growth of sectoral divisions.

Studies have shown that in the past few decades the demand for labour has become more sectoral. Ruhs has noted that one change is the emergence of 'immigrant sectors', meaning sectors that employ work migrants primarily or exclusively.³¹ Restrictions of the employment of migrants to certain sectors and occupations has led, or at least contributed, to the desertion of these sectors by native workers, creating segmentation in the market. Menz and Caviedes have pointed out that the politics of migration in Europe are driven by sector-specific considerations.³² They say that the system of political economy in a given polity strongly shapes the type of labour migrants employers will be interested in, and that this has become sectoral. Countries began to incorporate large-scale labour recruitment policies in sectors such as construction, agriculture, hospitality, healthcare and information technology. This change in the political economy not only affects policies but also reconfigures power relationships within societies, with a considerable shift toward bowing to employers' preferences.³³

³⁰ Mundlak (n. 3), 431-432.

³¹ Ruhs (n. 10).

³² Menz and Caviedes (n. 15).

³³ Menz and Caviedes (n. 15).

I claim in the article that while the allocation of migrants to certain sectors has been used to further promote the state's migration controls – limiting their movement; shaping the foundational contract and depriving migrants of rights enjoyed by citizen workers, like the rights to resign, choose employment, and negotiate terms and conditions of work;³⁴ locating migrants in the lower labour market, and intensifying labour market segmentation³⁵ – after a period of time this policy has not only created migrant sectors, but also altered power relations among the state and actors in the sectoral setting. Once migration controls allocate migrants to particular sectors and continue to do so, it reinforces a sectoral regulatory regime. It can be said that today this regime defines migration law and the labour laws applying to migrant workers. It also leads to the creation of new forms of sector-specific regulation that preserve the alienage of migrants, while sustaining an axis of inequality. This unequal, non-unitary, private-actor-governed regulation, poses challenges to labour law theory.

I aim in the article to conceptualise the sectoral regulatory regime while positing an explanatory process that integrates the various components that take part in shaping it. Such conceptualization also enables to assess the role of these various components in the process of regulation. I show that the rules of the sector, the actors operating in it and system effects play a major role in constructing the situation with regard to migration, migrants, labour relations and labour law. 'Sectoral disadvantage' is a helpful notion for analysing the part of the sector's rules.³⁶ Under this notion, the sector is viewed as a segment of the labour market, with its rules constituting its structure and culture. By rules I mean norms in the broader sense, including informal norms. These have been created by actors within the sector, by state policy, by global processes, etc., throughout history, and the activities of these agents continue to be embedded in these rules.

The notion of sectoral disadvantage centres on two axes. The first axis is the ways in which sectoral rules impact workers in a specific direction of disadvantage. As noted, these rules are embedded in the history of the sector, but they also transform over time. They entail a culture that has developed in the past, but continues to change. Most importantly, their existence shapes work relationships and thus serves as another factor in the interaction of

³⁴ Fudge (n. 4).

³⁵ Ruhs (n. 10).

³⁶ On 'Sectoral Disadvantage', see Albin (n. 13), Chapter 1.

migration control policy with the sectoral labour market. Here, the various actors operating at the sectoral level, including the workers themselves, employers, trade unions, employers' associations, and NGOs, play a key role in determining the sectors' rules, while also being bound by them. This shapes the dynamic relationship between the abovementioned actors and the state, including the claims raised by these actors and their power. It can eventually explain the regulatory outcome.

The second axis of sectoral disadvantage is the multi-layering of disadvantage, which can be traced and better understood through a sectoral focus, with the sector being viewed as a location through which a more holistic concern regarding disadvantage may be exercised. By accepting that disadvantage varies by sector, the sectoral viewpoint reveals the variations among workers within a national setting, cutting across the traditional categories of disadvantage discussed in the literature. It sheds light on divisions within the categories of men and women, low-wage workers and migrants, pointing out dissimilarities within these groups. In today's rather diverse and unequal work domain, the unravelling of these variations and their causes is extremely important. This is the axis through which a better understanding of variations among the groups of migrants can be achieved. It offers an opportunity to assess how, despite the shared experience of migration, some migrants may be in a different position than others and, more importantly for this article, how the dynamic relationship with the state is continuously being shaped, creating differences among the groups of migrants.

In the following Parts I look at a change in migration control policy that took place in Israel after a Supreme Court decision from 2006 declared that the binding policy of migrants to their employers breached the rights of workers and should therefore be abolished and replaced. The discussion focuses on two sectors that were affected by the ruling and the change in policy – construction and domestic care-work. Part III below describes the policy and the court judgment, while Part IV features the analysis of the two abovementioned sectors.

III. ISRAELI WORK MIGRATION CONTROL POLICY

Migrant workers began entering the Israeli labour market in 1993 when the access of Palestinians from the occupied territories was restricted. Since then the number of documented and undocumented migrants has grown dramatically, with data showing that at the beginning of the twenty-first century they accounted for ten per cent of the labour market.³⁷ Migrant workers entered into four main sectors in Israel: construction, domestic care-work, hospitality, and agriculture. In recent years a migration control policy change was adopted limiting the number of visas awarded to workers in hospitality.

The entry of migrant workers into Israel was regulated by a specific work visa that stated their length of stay and the name of the employer for whom the visa was granted. Accordingly, work visas for migrants were given on condition that the work would be performed only for the employer named on the work permit and for the period of time stated in the visa. The employer was also responsible for the migrant's departure from Israel at the end of his or her working period. Working for an employer not named on the permit meant a breach of it, as a result of which the worker would be considered 'undocumented', exposed to detention and deportation. This was called 'the binding policy', due to its construction of unfree labour movement from one employer to another.

Binding the migrant to her or his employer was stated by the government to be the most effective way of controlling the migrant workers' entrance into Israel, their stay in and departure from the country. But at the same time, the binding policy denied the freedom of migrant workers and scuttled their market power, setting the platform for abuse by their employers. Employers used to hold the workers' passports, restrict their movements, lock them within the household, not pay salaries, or pay wages below the level set in the Minimum Wage Law. Denial of the option of leaving their employers due to the binding policy also led to long working hours without extra pay and disgraceful living conditions. In addition, with migrant workers' high dependence on their employers came sexual, physical and emotional harassment, and also abuse. Employers used violence towards their workers or treated them in other inhumane ways, such as denying them food or water. Migrants who were found staying or working in Israel not under their registered employer were

³⁷ D. Gottlieb, 'The Impact of Non-Israeli Workers on Employment, Wages and Inequality: 1995-2000' (2002) 49 *Quarterly Journal of Economics* 694.

automatically viewed as undocumented and sanctioned to deportation. There were also instances in which workers became undocumented without their knowledge. Employers tended to transfer their workers from one location to another, providing their labour force to others for pay. Eventually the work would be conducted for another employer, leaving the workers in a situation of illegality. The workers' having to pay remittances to the agencies that brought them to Israel only made the situation worse. They needed earnings from their work in order to repay the debts they had incurred in their countries of origin and were afraid of being subjected to removal.

By deciding to adopt this migration control policy, the government not only controlled migrant workers but also structured their precarious work situation. Binding workers to their employers was one layer within the foundational contract of migrant workers, which also included the provision of lower social benefits, restrictions on their ability to de-facto form trade unions, and denial of the possibility of becoming members of the main Israeli trade union – the Histadrut – until the year 2010.³⁸ Additionally, the terms and conditions of employment they were entitled to were hardly enforced.³⁹ Most academic writings in Israel, NGO reports and research conducted by the Bank of Israel and by the state's comptroller, pointed to the binding policy as the main reason for the mass infringement of human rights.⁴⁰ It is important to note that in comparison to other binding policies in various national contexts that enabled movement in some circumstances, the Israeli policy was very strict, allowing a transfer to another employer in very rare circumstances and only in the domestic care-work sector.

Against this background, a petition was submitted to the Israeli Supreme Court by six human rights organizations. The case is called: *Kav-Laoved v the Government of Israel*.⁴¹ The petition raised the following claims: the binding policy is illegal since it breaches the workers' right to dignity set in the Basic Law of Human Dignity and Liberty,⁴² and it is a violation of labour rights, such as the right to resign. The main argument was that the policy slashes the migrant workers' market power, because at any stage, at any time of day, the employer can dismiss the worker, leaving him or her undocumented. At the same time, it gives the

³⁸ See Mundlak (n. 3), 447-457, 472-476.

³⁹ Mundlak (n. 3), 457-463.

⁴⁰ For a summary of these, see Supreme Court Judgment (n. 20).

⁴¹ HCJ 4542/02 (n. 20).

⁴² The Basic Law of Human Dignity and Liberty was adopted in 1994.

employer extensive power over the worker due to the worker's high reliance on the employer for his or her earnings and legality of stay. In a situation where there is already increased inequality in market power between migrants and their employers, this policy made things worse, equivalent to a situation of modern slavery.

The Supreme Court accepted the petition, ruling that the binding policy is an infringement of the natural right to freedom, of a person's freedom of action and freewill.⁴³ The Court stated that the policy deprives the workers of their bargaining power at its most basic level. Additionally, it stated that the policy attaches a severe sanction to the basic right of every worker to resign, and that this cannot be justified. The Court stressed that the binding created a new legal regime, foreign to labour law principles and to the basic purpose of the contract of employment, which is to sustain the worker's economic existence and his or her dignity and liberty. Because dignity is a basic principle in Israeli constitutional law, especially since the Basic Law of Human Dignity and Liberty was adopted, and the right to dignity includes freedom of contract, freedom of movement and a person's freewill, the court reached the conclusion that the binding policy breaches the rights set in that Basic Law of Human Dignity. Judge Cheshin even said that the binding policy is a modern form of slavery, noting that 'the country pierced the ears of migrants to the doors of their employers'.⁴⁴ The court declared the policy to be illegal and one that should be replaced, giving the ministry six months to offer an alternative.

It took the state some time before it issued its revised migration controls for migrants in Israel, and the policy that was adopted was set according to the different sectors where migrants are employed. In 2007 what is termed the corporate policy was issued for migrants working in the construction sector, and in 2008 the agencies policy was issued for migrants working in the domestic care-work sector. The following Part describes the two policies that were applied in the construction sector and the domestic care-work sector, respectively, and analyses the resulting dynamic and symbiotic relationship in both sectors and among actors in each sector and the state following the court's decision.

⁴³ Supreme Court Judgment (n. 20), p. 26.

⁴⁴ Supreme Court Judgment (n. 20), p. 51.

IV. MIGRATION CONTROLS CHANGE: TWO SECTORAL PERSPECTIVES

The binding case led to sectoral migration controls in Israel, with the adoption of distinct programmes for the construction and domestic care-work sectors.⁴⁵ In addition, once these programmes were introduced into each sectoral setting, an interesting symbiotic process occurred, with different consequences for the workers, labour relations, migration policy and labour law. In the following paragraphs I will discuss these transformative processes, an understanding of which can be achieved only from a viewpoint that considers the history of the sector and its rules before the transformations occurred. Thus, each subsection begins with that history, lays out the sector's rules, and continues with the analysis of the transformation and its implications.

1. The Construction Sector

In the early days of the twentieth century, when Jews began settling in then-Palestine, the Zionist ethos of establishing a nation-state for the Jews was fundamentally reliant upon the construction sector. During those years, to engage in construction work was a source of pride, dignity and considerable respect to workers, and Jewish community members, skilled, educated, and motivated, worked in this sector.⁴⁶ They were Jewish immigrants coming mainly from Europe. In those early days workers in the sector were members of the Histadrut, which gave them political power. There was a unique connection between the socialist ideology, the building of the nation-state, and the political power of those engaged in construction.⁴⁷ This connection not only placed leaders of the construction sector in key positions in politics, but was also the reason why the sector was one of the first where collective agreements were made.

⁴⁵ Even before this judgment migration policy had also sectoral elements, but very minor ones. As noted above, migrant workers in the domestic care-work sector had the possibility of transferring to another employer in limited circumstances, something that was denied to migrants in the other three sectors of construction, agriculture and hospitality.

⁴⁶ Establishing the nation-state through engagement in hard labour was the underlying ideology of the Zionist movement, specifically of B. Katznelson and A. Gordon. See Z. Sternhell, *Nation Building of a New Society? The Zionist Labor Movement (1904-1940) and the Origins of Israel* (Am Oved Publishers Ltd, 1995), 83-88.

⁴⁷ H. Dan, *Unpaved Road* (Tel Aviv, 1963), Chapters 1-5.

Workers were not the only organized group in the construction sector. Construction craftsmen and corporations were also united in a few organizations. In 1949 these came together under the Association of Contractors and Builders in Israel.⁴⁸ This has been the main employers' association in the Israeli construction sector ever since. From the day it was established, the Association, which has more than 2500 members (including a small number of very large corporations and many small companies and craftsmen), signed a number of collective agreements with the Histadrut regarding the terms and conditions of employment of the sector's workforce. The main collective agreement in the sector was drafted and signed in 1968. It was voided in January 2010 and replaced by a new collective agreement that will be discussed further below. However, the fact that the construction sector was, and continues to be, a unionized sector is important. Many of those working in companies and for private employers in construction are covered by collective agreements or by extension orders.⁴⁹ Still, despite its being a unionized sector, since the establishment of Israel as a state there has been a constant decrease in the prestige, stability and terms of the construction workforce.

A few causes may be mentioned for the transformation of the sector's workforce from being proud and privileged to being located in precarious employment. The first is the growth in the extent of work patterns differing from the traditional employment model of fulltime, long-term work. This has happened with the increase in construction companies and independent craftsmen, and the growth in subcontracting and self-employment. The second cause is the loss of the workforce's political power. This loss can be associated with several interconnected changes that occurred over the years, including the dominancy that other sectors have gained in the Israeli labour market; legal, political, economic and social changes

⁴⁸ The association's name today is: Israel Builders Association Boney Ha'aretz. On the organization, see: <<http://www.acb.org.il>> accessed 17 December 2013 (Hebrew).

⁴⁹ Over the years, several extension orders have been issued by the Ministry of Labor, extending general collective agreements to the entire sector. On administrative extension orders, see: G. Mundlak, *Fading Corporatism: Israel's Labor Law and Industrial Relations in Transition* (Cornell University Press, 2007), Chapter 1. The extension orders in the early years of the agreement did not necessarily cover all those working in the sector. In the 1968 agreement it is stated that workers subject to the agreement are those treated by the Histadrut of Construction Builders. The meaning of the term 'treated' is unclear. From the discussion below on the situation of Palestinian workers from the occupied territories, it is evident that this group was not covered by the 1968 agreement until 1970, and that migrants also were not included in the agreement until it was amended to include migrant workers in 2000. See the definition in section 1 of the general collective agreement number 681255 between the Association of Contractors and Builders in Israel and the General Histadrut, concluded on April 9, 1968.

that impacted the political power of the Histadrut and its members;⁵⁰ the growing segmentation of the labour market, which negatively affected construction; and the entry of other groups of workers into the sector. First were Jews from North African and Middle Eastern countries, then Arabs residing in Israeli territory after 1948,⁵¹ and afterwards Palestinians from the occupied territories. This is the third cause I wish to note. The story of the construction sector is also a story of the migration processes happening in Israel. Throughout history the sector's workforce was drawn from groups located in the lower segments of the market. This affected the pay levels of construction workers, entitlements to social benefits, bogus employment on a daily and casual basis, and the enforcement of rights.⁵² Additionally, some of these groups – citizen Arab workers and then Palestinians from the occupied territories – were not entitled to become members of the Histadrut.⁵³ Moreover, and this is a crucial point, their employment enhanced ethnic segregation in the labour market, promoted the disadvantage of workers in the sector, and delayed technological advancement, entrenching the dependency of the sector on cheap labour.⁵⁴ Segregation and cheap labour were institutionalised.

Migrant workers entered into this setting, where the rules of the construction sector were already established. These rules were reinforced after their entry, mainly in connection with the binding policy. The Histadrut, the employers and their association developed tight working connections over the years, determining the terms and conditions of employment while relying on cheap labour. Those cheap labourers, at least from a certain point in time, were not members of the Histadrut, and it does not seem to have seen itself as representing their interests. Additionally, the construction sector had a few dominant and strong construction companies, alongside of which worked many small companies and self-employed individuals, whose work depended on the subcontracting of particular assignments

⁵⁰ A good summary of these changes can be found in Y. Cohen and others, 'Unpacking Union Density: Membership and Coverage in the Transformation of the Israeli IR System' (2003) 22(4) *Industrial Relations* 692.

⁵¹ In 1969 10.7 per cent of those working in construction were Jews from North African and Middle-Eastern countries, 20.2 per cent were Israeli Arabs, and forty five per cent were Palestinians from the occupied territories. M. Simyonov and N. Lewin-Epstein, *Hewers of Wood and Drawers of Water: Non-Citizen Arabs in the Israeli Labor Market* (ILR Press, 1987), 49.

⁵² See Kav LaOved, 'Information Pamphlet' (March 1993) (Hebrew).

⁵³ R. Ben-Israel, *Labour Law Vol 1* (2nd ed., Open University Press, 2002, Tel-Aviv) 95-97.

⁵⁴ D. Bartram, 'Foreign Workers in Israel: History and Theory' (1998) 32 *Int. Migration Rev.* 303, 304, 308.

by the larger corporations. This culture was dominant in shaping work relationships within the sector. The entry of migrant workers into the sector and the application of the binding policy until 2007 made it possible to preserve those rules of cheap labour, lack of technological advancement, segmentation of work, etc. It was against this background that the corporate policy was set within the construction sector after the Supreme Court judgment.

According to the corporate policy, workers are employed by employment corporations that receive a license from the government. Only a limited number of corporations are entitled to work in a sector, and they allocate workers to specific establishments within it. Most of these corporations are tied to the large companies that have worked in the Israeli construction sector for years. Workers wishing to move from one establishment to another are allowed to do so, and once in three months workers are permitted to request to move from one corporation to another.

As a result of this policy, the situation of workers in the construction sector has improved on some levels. Mainly, there was a rise in the pay given to workers.⁵⁵ Corporations receiving a license to employ migrants are obliged to pay a level of wages higher than the national minimum. The level of pay as determined takes into consideration the extra working hours required from these workers. Furthermore, workers can move legally from one employer to another and from one corporation to another. In parallel, however, remittances paid to the agencies that bring these workers to Israel have increased.⁵⁶ It is questionable whether the wage of workers indeed reaches the minimum when these are taken into consideration. Workers are still mistreated when they suffer accidents in the workplace.⁵⁷ There are numerous complaints about the corporations themselves and their breaches of labour rights,⁵⁸ the terms set for migrants under collective agreements are lower than those of Israeli

⁵⁵ Y. Berman, *Liberty Ltd* (Tel Aviv: Hotline for Migrant Workers and Kav LaOved, 2007) (Hebrew), 28-9.

⁵⁶ Berman (n. 55).

⁵⁷ In a report written by Kav LaOved there are a few stories about workers injured at work that were not returned to their work and lacked satisfactory provision of healthcare rights. See Kav LaOved, *Activity Report on Chinese Workers* (Tel Aviv: Kav LaOved, 2008) (Hebrew).

⁵⁸ Kav LaOved (n. 57). The most significant complaint is of corporations holding back the wages they have to pay workers. See also Berman (n. 55), 29-30.

ID-holders, and until 1 March 2010 migrant workers were not entitled to become members of the Histadrut or form their own trade union.⁵⁹

While the strong actors within the sector, in this case the employers and major construction companies, have found ways to preserve the rules of the sector, namely cheap labour, ethnic segregation, and patterns of subcontracting, the Histadrut was also a party to a collective agreement that located migrant workers in the lowest pay rank among several. This collective agreement was declared by the Israeli National Labour Court in November 2009 to be discriminatory and therefore void.⁶⁰ In the amended collective agreement, signed in January 2010, there were no practical beneficial outcomes for migrant workers in construction. The rank under which migrant workers are employed set the level of pay at 4,350 NIS, which is the sum that employment corporations had to pay their workers in any case at that time, according to the corporate policy. Hence, the collective agreement did not benefit the workers in improving their terms and conditions of work, but does provide them, at least theoretically, with the protection of the Histadrut.

From a law in practice perspective, then, it is evident how the rules of the sector impacted the shaping of sector-specific regulation, and the ways in which private actors within the sector took part in forming state-led regulation as well as their own private regulation in order to preserve the economic order of the sector. The corporate policy adopted the structure of the sector, which includes a few dominant contract companies and large numbers of independent contractors that are reliant on these companies for work. Now they are reliant on these companies for hiring migrant workers as well. The large corporations were involved in the design of the corporate policy and their interests governed the arrangement. Practices created over the years by these corporations as well as by the employers' association and the Histadrut were maintained, reflected in the collective agreement from 2010. Here, the long-lasting relationship of the Histadrut with the employers' association was active in sustaining the precarious position of migrants. Labour supply conditions have also had an impact due to the possibility of hiring undocumented Palestinians from the occupied territories in the sector, as well as attracting the young Israeli workforce to the sectoral setting. These features of the sector have had a substantial impact

⁵⁹ See <http://www.histadrut.org.il/index.php?page_id=1318> accessed 15 January 2014.

⁶⁰ *The Association of Contractors and Builders in Israel Ltd v The New Histadrut NLC 18/08* (unpublished).

on the way work relationships were designed in the sector after the Supreme Court gave its decision. To these we should add state policy - no incentives were given by the state to promote technological advancements or to raise the pay for other workers to be employed in construction. Additionally, the policy of subcontracting and privatization strengthened the adoption of a policy based on the sector's structure consisting of companies and independent contractors as described above.

2. The Domestic Care-Work Sector

The story of care-work in Israel is as old as that of construction. During Israel's early years as a nation-state, the Ashkenazi Jewish migrants from Europe employed Jewish women who had arrived from North African and Middle Eastern countries in household activities, creating segmentation within the labour market among both groups. In the 1950s, citizen Arab women were employed in cleaning, cooking and caring for children, and with the occupation of the Palestinian territories in 1967, Palestinians from the occupied territories began entering the sector as well.⁶¹ Most of these workers were not live-ins. People who are recognised today as being in need of domestic care-work, such as the elderly and the disabled, were either cared for by their family members and domestic help, or placed in institutions. The number of people entitled to state support was low, and it was provided according to restrictive principles of selectivity.⁶² This all changed in the 1980s and 1990s, due to the recognition that large numbers of elderly people live in the community alone, changing social conceptions regarding institutions and the inclusion of the elderly and the disabled in the community, including community living, as well as the entry of migrant workers into the sector from 1993 onwards.⁶³

As Mundlak and Shamir have shown, in the early days of the state and continuing today, care-work in Israel performs a dual function of including those who would otherwise find themselves outside the labour market, while at the same time excluding them. It

⁶¹ On this history, see G. Mundlak and H. Shamir, 'Between Intimacy and Alienage: The Legal Construction of Domestic and Carework in the Welfare State' in H. Lutz (ed.), *Migration and Domestic Work: A European Perspective on a Global Theme* (Studies in Migration and Diaspora, Ashgate, 2008), 161.

⁶² M. Ajzenstadt and Z. Rozenhek, 'Privatization and New Modes of State Intervention: The Long-Term Care Program in Israel' (2000) 29 *Journal of Social Policy* 247, 252-253.

⁶³ Ajzenstadt and Rozenhek (n. 62), 253-254; see also Mundlak and Shamir (n. 61).

accomplishes that by two main mechanisms: stratification among Ashkenazi Jews, due to the fact that care-work remains a woman's chore, thereby maintaining gendered labour divisions; and segmentation between Ashkenazi women and others, such as Mizrahi Jewish women, Arab women, Palestinian women from the occupied territories and, later, migrant women.⁶⁴

Like other care-work sectors in the world, the Israeli domestic care-work sector was, and continues to be, characterised by personal work relationships between employers and workers.⁶⁵ The employers are individuals; the chores are conducted within the household and often include intimate activities of caregiving and no definitive working time; the workers are women from ethnic minority groups or migrants, earning low wages, isolated from other workers and scattered in private households across the country. Since its emergence, domestic care-work has been a non-unionised and largely informal sector, in the sense that almost no written work contracts are found in it. Therefore, employment relationships are based on oral agreements and trust. These rules of the sector continued to apply with the entry of migrants into care-work during the 1990s.

As noted above, from 1993 onwards the Israeli government approved the issuance of work permits for migrants. After their inclusion within the construction sector and later in agriculture, too, the government admitted migrant workers from the Philippines, Romania and Poland into the domestic care-work sector. Permits were given for work with the elderly and the disabled, but undocumented work was performed in other situations, such as care for children and the household alone. A high percentage of migrants in the sector are live-ins, bearing the associated difficulties of working time, intimacy, isolation, low pay, etc. With the entry of migrants into the sector, its rules were further entrenched due to the relationship's being construed as intensively including care-workers within the household while at the same time excluding them as aliens.⁶⁶ The binding policy made the situation extremely difficult for the workers, since even in cases of abuse, neglect, sexual or physical harassment, exploitation by other family members or other instances, the workers could not

⁶⁴ Mundlak and Shamir (n. 61), 163.

⁶⁵ On the notion of 'personal work relationships', see E. Albin, 'From "Domestic Servant" to "Domestic Worker"' in J. Fudge, S. McCrystal & K. Sankaran (eds.), *Challenging the Legal Boundaries of Work Regulation* (Onati series, Hart, 2012), 231. Additionally, see the description of these relationships in various countries in A. Blackett, 'Introduction: Regulating Decent Work for Domestic Workers' (2011) 23 *Canadian Journal of Women and the Law* 1.

⁶⁶ Mundlak and Shamir (n. 61).

legally move to another employer. There was an administrative procedure that enabled some movement, but it was usually applied only when the employer died or when the worker was released by him/her. This was a fruitful platform for the violation of basic human rights. In those days, numerous stories of abuse, neglect and discrimination of migrant domestic care-workers by their employers and/or their family members reached NGOs in Israel, and these were brought before the court in the binding case.

In September 2006, after the Supreme Court handed down its decision, the Israeli government recommended the adoption of a new migration control policy towards migrant domestic care-workers – the agencies policy – which was implemented in August 2008. According to the agencies policy, authorised private agencies with expertise in the field of domestic work are responsible for transporting domestic migrant workers to Israel on behalf of those for whom the state has approved the hiring of a migrant domestic worker, and for allocating them to their future employers. In contrast to the corporate policy in construction, here the employer remains the care recipient. The government noted that the responsibility assigned to the agencies is intended to improve enforcement against middlemen that extort remittances from migrants, and at the same time to enable the movement of migrants from one employer to another through these agencies.⁶⁷

This policy can also be seen as being informed by the type of relationship considered appropriate between the care-provider and care-recipient – an intimate and close relationship that should not include a third employing party. But what this sector-specific policy resulted in was greater freedom of movement for migrant domestic care-workers, due not only to the changes in migration control policy and accordingly in the foundational contract, but also to the activities of NGOs that raised awareness among workers regarding their rights. Data shows that after the judgment these better-informed workers tended to leave their workplace more easily than in the past.⁶⁸ The claim has also been made that workers are now freer to move from employers that demand extensive care, such as children, the chronically ill and people with severe disability, to places where work is easier.⁶⁹ Furthermore, employers have

⁶⁷ Administrative Procedure for Private Agencies: Bringing, Transferring and Caring for Migrant Care-Workers (updated August 2011) (Hebrew).

⁶⁸ Report, The Knesset Special Committee on Migrant Workers: Recommendations for a Policy Change in Regard to People in need of Domestic Nursing (August 2011), 38-39.

⁶⁹ Protocols of Discussions in the Knesset, 19.12.2007, p. 2; 15.11.2010, p. 28

reported that due to the inadequate numbers of workers, those who were already working in Israel moved to households that offered higher pay.⁷⁰

These stories show that when a change of policy meets the rules of the sector, workers may not only achieve freedom of movement, but also enjoy extensive freedom of contract, while increasing their ability to determine their place of work and conditions of employment (not necessarily pay, but the identity and physical condition of the care-recipient). Technological advancement has also been of benefit, enabling migrant domestic care-workers to set up a website that gathers together stories of care-workers in Israel, and which served as a basis for information on efforts to form a domestic workers' trade union, established under the auspices of a rather new Israeli trade union – Koach LaOvdim.⁷¹

At first, it seemed that freedom of association had become more feasible in the context of the sector's rules. The fact that there was no prior history of unionisation in the sector – especially featuring neglect of the treatment of migrant workers – offered a setting for the entry of a new trade union. The new union offered a form of industrial citizenship aligned with ideas of membership, political agency, and direct participation.⁷² However, other obstacles resulting from the way work is arranged in the sector continued to be a hurdle to effective unionisation – the workers' isolation, their migratory situation, and further limitations that were eventually placed on them, as described below.

Indicative of the transformation of the workers' situation in the domestic care-work sector is the response to the reality described above of the employers, who began taking steps to reverse it, asking for a return to the binding policy. Efforts made by employers in this respect included filing a petition with the Supreme Court, in which they claimed that even though every person is entitled to her/his freedom, the case of domestic care-work is an exception due to the vulnerability of the care recipients.⁷³ Additionally, employers turned to the Knesset – the Israeli Parliament – requesting it to change the non-binding policy. This step was rewarded with success, leading to a law reform that limits workers' movement among

⁷⁰ Protocols of Discussions in the Knesset, 10.1.2011, pp. 19-20; 2.3.2011, pp. 19-20; 26.12.2011, p. 6.

⁷¹ See: <<http://siod.workers.org.il>> accessed 15 January 2014.

⁷² On the organising process in the Israeli domestic care-work sector, see G. Mundlak and H. Shamir, 'Organizing Migrant Care-Workers: Industrial Citizenship and the Trade Union Option' (2014) *International Labor Review* (forthcoming).

⁷³ Doron v The Ministry of Interior Affairs HCJ 1834/09 (pending).

different regions of the country.⁷⁴ In all activities taken by employers, they wanted to adjust the regulation to suit their interest in a personal and intimate work relationship, and to satisfy their dependency on migrant workers for care.

Their interest in such regulation should also be attributed to the state's welfare policy, which leans on twenty four hour care by low-waged workers. Only migrants can meet this structuring of care provision. This has become very evident in a recent judgment delivered by the Supreme Court in the case of *Glutan*.⁷⁵ There the court stated that domestic care-workers are not covered by the Hours of Work and Rest Law, which requires payment for extra hours of work and strikes a balance between work and leisure. The decision was based on the claim that the purpose of striking a balance between work and leisure does not apply to this work arrangement of twenty four hour care.⁷⁶ Additionally, the judges referenced the vulnerable situation of the care-recipients and the costs that a judgment accepting payment for extra working hours would lead to, leaving the employers in a worse situation. The court's decision regarding this protective piece of legislation applies, as the judges themselves declared, to the domestic care-work sector alone.

When the regulatory regime in the construction sector after the Supreme Court decision is compared with that of the domestic care-work sector, the differences between the two become very evident. Regulation in both leaned on the rules of the sector, and was also shaped by state policies regarding care, training, privatization and subcontracting – what has been termed 'system effects', as discussed in the next Part. Private actors within each sector were dominant in constructing this regulatory regime in both sectoral settings. The forms of regulation in the two sectoral settings can be explained by the three factors, namely the rules of the sector, agents operating in the sector and sector-sensitive system effects, which I now turn to presenting.

⁷⁴ Articles 2(c) and 3A of the Entry into Israel Law (1952) (Amendment 2011).

⁷⁵ *Yulanda Glutan v The National Labour Court* HCJ 10007/09 (unpublished).

⁷⁶ See the main judgment by the President of the Supreme Court, Asher Grunis.

V. A SECTORAL REGULATORY REGIME

Building on the insights from the previous discussion, in this Part of the article I want to conceptualise the idea of the sectoral regulatory regime, while pointing to three main factors that impact its design: the rules of the sector, agents operating in the sector, and sector-sensitive system effects. I believe that even though the analysis centres on migration control policies and labour regulation in Israel, it is very much relevant to additional national contexts.

1. The Rules of the Sector

The notion of the rules of the sector was introduced in Part I of this article. It means the structure and culture of a sector, which have been established in a long historical process and transform over time. The sector is hereby viewed as a field whose rules – norms in the broader sense, including informal norms – have been shaped by agents operating in the sectoral setting, as well as by state policy and institutions. But the sector as a field with its own rules has a recognised standing of its own, distinctive from those who have taken part and of those who continue to take part in its creation. There are a few fundamental aspects of the sector rules, three of which I particularly want to point out – the type of work performed, work patterns and payment methods, and unionisation.

2. Type of Work Performed

While a sector is defined according to an act of production, occupation or service, within each sector there is usually a dominant type of work that is performed. In other words, there is a dominant ‘nature of the work’ and general tasks that are viewed as necessary for fulfilling the job. In domestic care-work that would be care and in construction it is physical work. The type of work performed is associated with what is demanded from workers in regard to skills, patterns of work that seem most adequate, and work relationships with the employer as well as with other actors, such as clients, which in some instances are seen as required alongside that type of work. All entail conceptions of the work and are not necessarily built on rational perceptions of the job. These conceptions eventually shape regulation. In the domestic care-work sector, for example, it is assumed that care demands personal relations

with employers. Thus, when migration controls met this sector, this feature determined the adoption of the agencies policy and the designation of the care-recipient as the employer. The embracement of the corporate policy in construction is based on a different conception of the relationship needed for the type of work performed, leading to the establishment of corporations recognised as the employing entity, while it is accepted that they will be sending their employees to work elsewhere. In respect of labour regulation, the type of work presumed for work migrants led the Histadrut and the employers' association to place them in the lowest rank of the collective agreement, and in domestic care-work it shaped the court decision regarding the application of the Hours of Work Act. Hence, the rule regarding the type of work that is performed has affected the shaping of migration and labour regulation.

3. Work Patterns and Payment Methods

Various causes explain the emergence of particular work patterns and payment methods within a sectoral setting. Some are related to employers' view to profitability, managerial interests and internal sectoral competition, local as well as global (like subcontracting or hiring through employment agencies); some are subject to workers' requests in their own interest (like part-time work of mothers); and some result from the type of work performed in the sector (round-the-clock 24-hour care requires someone to do a night shift) and the culture of the sector (tip payment to waiters; stock remuneration in the high-tech sector; performance-related pay in strip clubs, etc.). Like the type of work, work patterns and payment methods are historically embedded in the sector and change over time, and regulation is shaped by that history. In construction, the extensive use of subcontracting and the dominance of a few primary construction companies were essential in shaping the corporate policy. That policy's problematic implications for workers and the precariousness that this pattern entails were not questioned by the policymakers. The court in *Glutan* discussing the domestic care-work sector, where a 24-hour pattern of work has been common since migrants entered the sector, eventually promoted the adoption of a sector-specific decision stating that the existing regulation of work time is not applicable to this work pattern. The work pattern itself and its necessity were accepted as is by the court.

4. Unionisation

Unionisation or the lack thereof within a sector can have varied implications for regulation applying to migrant workers. On the one hand, once a sector is unionised it may lead to stronger protections for migrants. On the other hand, studies and reality have shown that unions have a conflicting attitude toward migrants, due to their moral obligation to their members and their interest in protecting the terms and conditions of work of the citizen or resident worker. Here, there are two main circles of solidarity affecting each other: one with the citizen or resident members, and the other with all those engaged in the activity of work – people captured by the term ‘industrial citizenship’. Desiring to protect their members and at the same time sustain ongoing and stable relationships with employers’ associations, unions might sign collective agreements that place migrant workers in a disadvantaged position, preserving their alienage and precariousness, as happened in the Israeli construction sector. When there is a lack of historical unionisation, migrants can benefit from possibilities for new organising attempts, as seen in the domestic care-work sector. Theoretically, they can be more involved in constructing the terms and conditions of their work. Here, the history of unionisation is crucial, as are the unions’ size, power, public legitimacy, global connections, etc., which impact their activities in the sector. In the Israeli domestic care-work sector the characteristics of the new union, together with other features, such as the type of work and work patterns, left the workers in practice without effective union protection.

i. Agents operating in the Sector

The literature on growth in sectoral differentiations reveals the number of agents operating in the sectoral setting, beyond the state – employers, employers’ associations, trade unions, NGOs, courts, and others. The discussion in Part III above highlighted their role in regulating migration policy and labour rights. This role is substantive, and I wish to point here to a few important findings of the above analysis.

5. Employers

Employers exert pressure on governments, demanding work migrants and claiming they have no other alternatives. This claim by employers has been dismantled lately in the work of Ruhs and Anderson.⁷⁷ These writers have shown that employers do not necessarily need migrant workers when they request them and, in cases where migrants are not viewed as the best option, employers have an alternative. Their alternatives include increasing wages or improving working conditions, changing the production process, relocating to countries where labour costs are lower, or switching to production processes that are less labour-intensive.⁷⁸ Therefore, Ruhs and Anderson conclude that employers are central to determining that there is a need for migrant workers, for they continue to phrase their claims as if they have no other alternative. This is very much evident in the Israeli case study. Once it became highly difficult to obtain permits to hire Palestinians from the occupied territories in the construction sector, employers claimed they were in desperate need of migrants. In construction the demand for migrants as cheap labour had an impact on the collective agreement, which in the past had regulated the terms and conditions of work for Palestinians and was altered once migrants were hired in the sector. However, the arrangement for migrants is based on similar provisions to those set previously for Palestinians from the occupied territories. Moreover, the claim of employers in the domestic care-work sector in their lobbying to the Knesset to amend the law and limit the movement of migrants despite the Supreme Court judgement, and before the Courts, is that they have no alternative.

An interesting finding of the study relates to the social location of employers. There was a difference in application of the respective policies in the construction and domestic care-work sectors.⁷⁹ When the employer was a member of a marginalised group, such as the elderly and disabled in the domestic care-work sector, the power relations following the new agencies policy tilted in favour of migrants, enabling them to take action and claim their

⁷⁷ Ruhs and Anderson (n. 23).

⁷⁸ Ruhs and Anderson (n. 23), 34.

⁷⁹ L. Lamphere and others, *Sun Belt Working Mothers: Reconciling Family and Factory* (Cornell University Press, 1993). The notion of 'social location' has made important contributions to studies on disadvantage, including labour law studies. It has been especially useful in discussing precarious work and the situation of women workers. See, for example, J. Fudge and R. Owens, 'Precarious Work, Women and the New Economy: The Challenge to Legal Norms' in J. Fudge and R. Owens (eds.), *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (Hart, 2006), 3; L. Vosko 'Precarious Employment: Towards an Improved Understanding of Labour Market Insecurity' in L. Vosko (ed.), *Precarious Employment: Understanding Labour Insecurity in Canada* (McGill-Queens Press, 2006), 3.

freedom more easily. In the Israeli domestic care-work sector, that explains their more frequent movements and their attempts to unionise after the Supreme Court decision. This prompted action by employers that led to further sector-specific regulation in migration controls – the new regulation that limits movement among regions – as well as shaping labour laws. The marginal social location of employers has been noted by the Supreme Court in Glutan as legitimizing its decision to exclude domestic care-workers from the Hours of Work Act.

6. Workers

The literature has highlighted the implications of social location for work relationships, something that has also been noted regarding work migrants.⁸⁰ Groups dubbed as more marginal in the economy are weaker in negotiating the terms and conditions of their work, in unionising, and in their ability to impact political and legal processes. This promotes understandings of how work experience may be different for citizens and migrants. Social location is evident in the regulation of the situation of migrants, and of distinct groups of migrants, at the sectoral level, in court decisions, and in activities targeted at the state. The social location of construction workers – their masculinity and migratory status – serves as an explanation of the practice of shared accommodations, their exposure to health and safety risks, and their location in the lowest rank of the collective agreement. In the domestic care-work sector, the migratory feature of the workers impacts regulatory decisions on their exclusion from labour-protective laws, including the recent Supreme Court decision in Glutan. There the court favoured the interests of the citizen care-recipient over the labour rights of domestic care-workers, consistently stating the non-application of the judgment to work arrangements where similar dilemmas exist (in sectors where the workforce is composed of citizen workers).⁸¹

The discussion on the construction and domestic care-work sectors has revealed that private actors are very dominant in regulating the situation of migrant workers, and that such regulation varies according to the particular characteristics of these actors. In respect of employers I have shown that there may be considerable variation: from private individuals to

⁸⁰ Vosko (n. 4); Fudge (n. 4).

⁸¹ Glutan (n. 75).

large firms, or even chains or franchises, as well as employers from disadvantaged groups, like the disabled and elderly, etc. The existence of employers' associations has also been noted to be crucial, especially when these are active in the process of regulation, as in collective agreements or before regulators. Trade unions, as the discussion above has shown, are also key to regulatory processes, and it is important to see whether or not unions exist in the sector, and whether or not they are powerful. What the discussion has shown is that where migrants are concerned a lack of unionisation may at times provide a better platform for action than when a powerful union operates in the sectoral setting. NGOs are key actors too. In some sectors they are much more involved than in others, and their involvement impacts the shaping of the terms and conditions of work for migrants and the strategies adopted by migrants to further their claims. It is they who initiated and followed through on the binding case. NGOs might also be key actors in shaping regulation for private actors by representing workers in labour courts, providing them with legal advice and awareness of their rights, pushing towards political activity and organisation, and by criticising or aiding trade unions.⁸²

i. Sector-Sensitive System Effects

In their discussion on labour shortages, immigration and public policy, Ruhs and Anderson point out that labour demand and supply are not generated independently of each other, but rather there is a 'dynamic and mutually conditioning relation' between them.⁸³ I have already noted one of their central findings, namely that employers have alternatives to employing migrants. At the same time they note that there are 'system effects', which are produced not necessarily by employers but mainly by other actors, such as the state. State policy in spheres beyond migration can impact employers' alternatives to hiring work migrants. System effects also, as shown in the discussion, shape regulation. Moreover, I claim here that many such effects are sector-sensitive in the sense that they are either relevant to particular sectors or have more considerable implications for some sectors than others. Take, for example, state policy regarding welfare. In Israel that policy is based on the provision of 24-hour care by live-ins at home, with limited welfare payments being allocated to those in need of care. This welfare policy is thus sector-sensitive for it is relevant to the domestic care-work sector

⁸² On differences between NGOs' activities and those of unions, see G. Mundlak, 'Human Rights and Labor Rights: Why Don't the Two Tracks Meet?' 34(1) CLLPJ.

⁸³ Ruhs and Anderson (n. 23), 16.

alone, and it is a system effect that was central to shaping the agencies policy, and also to the Glutan decision. Another example is the training possibilities offered to particular sectors, and incentives to technological development (or lack thereof). These too are sector sensitive, and can alter production processes so as to become less labour-intensive and dependent on cheap migratory labour. The analysis performed above has shown how these examples of system effects impact regulation, particularly the design of the sector-specific migration policy based on low-waged workers, and the labour laws in both sectoral settings.

When the findings from the previous part and the three factors discussed above are brought together, a conclusion emerges regarding the creation of a sectoral regulatory regime that impacts migrants, work relationships, migration law and labour law. Work regulation of migrants as well as migration control policy can be understood in light of these three factors. Additionally, and perhaps more crucially, due to the implications of a sector's rules, the agents operating in it and sector-sensitive system effects a process ensues that alters power relations and changes the regulatory regime. When migration controls and the labour law of migrants become more sectoral, unified pieces of legislation become more obscure and begin to shift towards sector-specific regulation. This sector-specific regulation is foreign to current labour law theory because it entails an axis of inequality towards migrants, which is produced not only by the state, but also by various private actors. In this sense it challenges the theory and idea of labour law. It contests labour-protective legislation, which is perceived to be unitary,⁸⁴ and places the state in a more marginal position in determining policies, gives more power to private actors, and brings about differences among migrant workers. These outcomes should be further studied, assessed and analysed with the growth of the emerging sectoral regulatory regime.

VI. THE SECTORAL REGULATORY REGIME AND LABOUR LAW

The sectoral regulatory regime deserves serious thought for it poses a few challenges to labour law that should be carefully addressed, two of which will be discussed here. The first concerns the unitary conception of labour law, the second the assignment to private actors

⁸⁴ Despite this perception, studies have revealed that the unity might be false. See M. Freedland, *The Personal Employment Contract* (Oxford Monographs on Labour Law, Oxford University Press, 2003), 15-22.

of responsibility towards work migrants' rights at work. The discussion held hereunder only points out these challenges and does not aim in any way to tackle them rigorously.

1. The Unitary Conception of Labour Law

Generally speaking, many countries have adopted a unitary rather than selective approach to labour law, particularly labour protective-legislation.⁸⁵ Such is the case in Israel. Unitary labour law is based on two main justifications. One is equality – equal citizenship and equal worth – and the second is universality like that of human rights.⁸⁶ In Israel, the unitary approach to labour-protective-legislation follows that of the British system, which was based on the rise of universality in the welfare state.⁸⁷

The idea of universality in welfare regulation is entrenched in Marshall's ideal of 'equal citizenship'⁸⁸ and on the principles of 'self-respect and dignity'.⁸⁹ According to Marshall, equal citizenship is a fundamental aspect of the modern liberal state. The basic assumption is that no person is inherently superior, simply as a person, to any other and thus entitled to specific rights and privileges. In order to achieve equal citizenship, three sets of rights should be acknowledged: civil rights, political rights, and the social rights of citizenship, the latter including minimum labour standards.⁹⁰ On the one hand, acknowledging social rights of citizenship is important for making civil rights and political rights effective. On the other hand, it entails recognising the 'equal social worth' of all members of society.⁹¹ Equal worth, as Moon notes, 'goes beyond the idea of making civil rights effective by providing the resources necessary to their existence'.⁹² It also includes 'a concern with social integration, or social solidarity, with promoting enough communality in the social experiences and ways of

⁸⁵ On the pros and cons of unitary as opposed to selective labour-protective legislation see G. Davidov, 'Setting Labour Law's Coverage: Between Universalism and Selectivity' forthcoming in *The Oxford Journal of Legal Studies* (2014).

⁸⁶ For an elaborated discussion see Albin (n. 13), Chapter 1.

⁸⁷ S. Deakin and F. Wilkinson, *The Law of the Labour Market* (Oxford University Press, 2005), Introduction.

⁸⁸ T. Marshall, 'Citizenship and Social Class' in T. Marshall, *Class, Citizenship & Social Development* (University of Chicago Press, 1974), 71.

⁸⁹ J. Moon, 'The Moral Basis of the Democratic Welfare State' in A. Gutman (ed.), *Democracy and the Welfare State* (Princeton University Press, 1988), 27.

⁹⁰ Marshall (n. 88), 103. Marshall distinguished between minimum standard rights and other labour rights, situating the latter within a particular category of industrial citizenship, see p. 104, and pp. 122-123.

⁹¹ Marshall (n. 88), 101.

⁹² Moon (n. 89), 43.

life of different sections of the society so that genuine equality of respect will be possible'.⁹³ Citizenship based on equal worth is correlated with the ideas of dignity and self-respect, another theme central to universal welfare regulations. The moral argument is that the basis of the democratic welfare state cannot be one of charity or altruism on the part of the more fortunate individuals. In a democratic society, as opposed to a hierarchical one, the self-respect of beneficiaries cannot be reconciled with the receipt of charity.⁹⁴

While the unitary approach rests, in theory at least, on a very similar basis to that of welfare legislation, there is one major difference between the two fields. The idea of universalism in welfare is rooted in a specific national context, its boundaries usually set by the status of citizenship. However, the conflict between labour and capital – which in legal language is transformed into inequality of bargaining power or subordination – crosses countries and nations. In that respect, the unity of labour law is in some ways similar to the universality of human rights. This is the basic understanding that underlies the adoption of international labour regulations such as those promoted by the ILO and those set in the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families,⁹⁵ but it is also part of the national concession of the unity that covers all workers irrespective of their citizenship status. For that reason, at least theoretically and, of course, with differences among national contexts, labour legislations are not conditional upon citizenship and apply to other participants experiencing subordination in the work force, like work migrants. This is the legal situation in Israel, or at least that was the legal situation before the decision in Glutan.

The sectoral regulatory regime hinders those rationales. It furthers inequalities among workers, particularly between migrants and citizens. As opposed to some forms of selective legislation that are aimed at promoting equality by setting terms and conditions that will enable historically discriminated-against groups to enjoy levels of protection equal to other workers,⁹⁶ in the two cases discussed above, as in most cases regarding work migrants, the sectoral regulatory regime works in the opposite direction. Going back to Bosniak's

⁹³ Moon (n. 89).

⁹⁴ Moon (n. 89), 35-36.

⁹⁵ Articles 7 and 25 of the Convention.

⁹⁶ On the justification for a selective approach in these circumstances, see: Davidov (n. 85), 20; E. Albin and V. Mantouvalou, 'The ILO Convention on Domestic Workers: From the Shadows to the Light' (2012) 41(1) ILJ 67.

terminology, it creates an 'axis of inequality' towards migrants, breaking down the very idea of unitary labour law, which is not based on citizenship. While it can be said that labour laws, including labour-protective legislation, have never been hermetically unitary, in the past few decades the Israeli legislature and courts seem to have been intent on achieving that goal.⁹⁷ More importantly, they did not differentiate among one sectoral setting where migrants are employed and other sectors. Then came Glutan, which is a step in the opposite direction. For the first time it was stated that a group of workers is not covered by labour-protective legislation, not in an act of the legislature, but as an interpretation of the Hours of Work Act. This is a landmark shift in the theory of Israeli labour law, which reflects the problems of the sectoral regulatory regime.

2. The Responsibility of Private Actors

Traditionally, labour laws have shaped responsibilities within a triangle of relations that includes states, employers and workers.⁹⁸ This traditional approach has been questioned with the transformation of the nation-state and corporations in the process of globalisation, giving rise to literature that discusses the responsibilities of global actors and institutions towards workers.⁹⁹ Such literature is based on the premise that the moral commitment towards workers has not weakened, so the challenge that remains is how the protection and promotion of workers' rights should be developed and shaped in this transformed regime. These contemporary debates, however, have focused narrowly on the national context and local private actors acting within it. The assumption is that the sovereign state will honour its commitments to workers, including migrants, by placing requirements on these local actors. However, once local private actors start to become very dominant, changing the role of the state internally, as seen from the discussion on the sectoral regulatory regime, a challenge emerges with regard to placing responsibility on these actors too.

⁹⁷ 1987 signalled a change in the legal approach to workers in Israel, with the move away from a corporate unionized regime to a regime based on labour-protective-legislation which adopted unitary terms, particularly a unitary minimum wage, with respect to all workers. See Mundlak (n. 49), Introduction. Additionally, while most labour-protective acts in Israel exempt some groups of workers, the labour courts tend to interpret such exemptions in a very restrictive way, limiting the ability to exclude workers from the protection of these pieces of legislation.

⁹⁸ Declaration of Philadelphia.

⁹⁹ Through existing or proposed institutional arrangements, like corporate codes, provisions through international trade institutions, and the International Labour Organization.

For example, the collective agreement in the Israeli construction sector was drafted by the employers' association and the trade union in a way that did not further the wages or other rights of migrants in the sector. There is no justification for this collective agreement when it is analysed from the viewpoint of the work migrants. What it did was enhance the disadvantage of work migrants in comparison to other workers. This agreement seems to have mainly benefited the trade unions' citizen members, who were upgraded in the process to ranks higher than the one established for migrants. Despite this, the responsibility of the union in contributing to the creation of an axis of inequality for migrants was neither noted, nor analysed, nor came before the courts.

As noted above, trade unions might have conflicting attitudes towards work migrants, and in many instances their actions, which are intended to protect their citizen members, bring about disadvantage to the migratory workforce. Thought should be devoted to the placing of responsibility on unions in these circumstances, and what that responsibility involves. I am not saying that these other private actors should have the same responsibilities as employers or states. But just as contemporary thinking about the global order looks at the aims and functions of global institutions and corporations in theorising responsibility,¹⁰⁰ discussions in the national context, too, should extend to functions and roles in thinking about whether to apply responsibilities to private actors and what they should entail. In the case of trade unions, then, it may mean an obligation to adopt non-discriminatory practices towards migrants, and/or to provide them with effective representation.¹⁰¹

Trade unions are only one example among several. In an era of nation-state decline, amongst other things in its functioning with regard to migration controls and the terms and conditions of migrants' rights within its borders, and when in parallel private actors gain dominancy, addressing their legal responsibilities alongside the responsibility of states becomes a more pressing issue.

¹⁰⁰ This is part of global justice theories that look at political or social connections between institutions and the outcomes of their activities to the placing of responsibilities. See in this respect especially the writings of T. Pogge, 'Eradicating Systematic Poverty: Brief for a Global Resources Dividend' in T. Brooks (ed.), *The Global Justice Reader* (Blackwell, 2008), 439; T. Pogge, 'Cosmopolitanism and Sovereignty' (1992) 103(1) *Ethics* 48.

¹⁰¹ I began thinking of these issues in E. Albin, 'Union Responsibility to Migrant Workers: A Global Justice Approach' (2014) forthcoming *Oxford Journal of Legal Studies*.

VII. CONCLUSION

With the allocation of workers to certain sectors having become part of many work migration controls around the world, the need to understand the regulatory regime that it creates has become acute. What this article has shown is that the link created between migration controls and the sectoral level reinforces a regulatory regime that is shaped by the rules of the sector, the agents operating in it, and sector-sensitive system effects. This regime is created through a symbiotic and dynamic process happening within the sector, and among actors operating in the sector and the state. In this process private actors play a central role within and beyond the sectoral setting, reproducing sectoral-specific regulation. The three factors presented in the article shed light on the diverse directions of regulation in a sector, and on the centrality of these private actors to determining the situation of migrants. Further research and thought should be devoted to the implications of the sectoral regulatory regime on the unitary idea of labour law, the role of private actors and the state, and the ways in which these can be addressed.