

Proposal Summary

This is a proposal to study the growth of posted migrant work in the European Union, and the impact of this on industrial relations. Within the European Union, changes in the application of EU law have resulted in the deterritorialization of sovereign regulatory authority. National industrial relations systems have been subordinated to internal market freedoms in four recent European Court of Justice decisions. These constrain the rights of unions and governments to regulate working conditions of foreign service providers operating in their territory, in effect allowing firms to create “spaces of exception” by exploiting enclaves of alternative, deterritorialized sovereignty. For example, a Polish construction worker on a German construction site working for a Polish subcontractor does not, either in practice or in law, have the same rights as a German or Polish worker working for a German subcontractor because the employment relationship in the first instance is in many respects regulated from Poland. Sovereignty has been reconfigured, through EU law and firm practice, so that it is no longer entirely dependent on territory, but also on other contingencies. It is hypothesized that variegated sovereignty is facilitating the segmentation of labor markets, via transnational subcontracting and agency work.

The project will involve fieldwork in Finland, Germany, the Netherlands, the UK, and at the EU level. The study will be based on ethnographic interviews, to record the experiences of posted migrants and 'native' workers who work with them, and 'expert' interviews of managers, union officials, and policy makers. Two industries have been selected for study: construction and metalworking, because of the prevalence of posted workers in those industries. There will also be a series of policy interviews aimed at understanding the political/legal changes taking place in the European Union which facilitate the growth of variegated sovereignty. These will be used to construct a series of comparative case studies of work sites and industries. The research team will include the Principle Investigator and three other researchers under his supervision.

Section 1d: *Extended Synopsis*

This is a proposal to study the growth of posted migrant work in the European Union, and its impact on industrial relations. Posted work, though an important policy issue in its own right, is an empirical lens through which to study the broader phenomena of variegated sovereignty and deterritorialization of the regulatory authority of the state. The study will be based on ethnographic interviews, to record the experiences of posted migrants and 'native' workers who work with them, and 'expert' interviews of managers, union officials, and policy makers. These will be used to construct comparative case studies of work sites and industries in Finland, Germany, the Netherlands and the UK. There will also be a series of policy interviews aimed at understanding the political/legal changes taking place in the European Union which facilitate the growth of variegated sovereignty.

In a sense, a goal of this study is similar to what the classic studies of Castles and Kosack¹ or Penninx and Roosblad² do: i.e. to map out the labor market positions of migrant workers, and trade union reactions to them. Empirically, part of what I hope to achieve is a partial mapping (for two industries, and in the sample countries) of the current poorly understood situation, which others researchers will be able tap for their own research. Statistics and other systematic information on posted work are poor and unsuited to the sort of policy analysis that needs urgently to be done.³ That said, collecting empirical information is really a means to an end; what I hope to accomplish is theoretical development and empirical testing of the usefulness of Ong's⁴ concept of variegated sovereignty. I wish to test my own assertion that the contradictions contained within variegated sovereignty make it an ultimately unsustainable state form to regulate class relations under capitalism. If this assertion, theoretically based in a Gramscian theory of state, is true, the fragmentation of the territorially based authority of European states should result in increasing worker resistance, and possibly

¹ Castles, S and G. Kosack (1973) *Immigrant Workers and Class Structure in Western Europe*, Oxford: Oxford University Press.

² Penninx, R. and Roosblad, J. (2000) *Trade Unions, Immigration and Immigrants in Europe, 1960-1993*, New York: Berghahn.

³ Lippert, Inge (2006) *Niedriglohnstrategien in Hochlohnsektor: Öffnung des Arbeitsmarktes und Beschäftigung von MOE-arbeitskräften in der Metall- und Elektroindustrie*, InterCase Innovationsforschung.

⁴ Ong, Aihwa (2006) *Neoliberalism as Exception: Mutations in Citizenship and Sovereignty*. Durham: Duke University Press.

in a political push for reformation of class compromise in some new form.

Within the European Union, changes in the application of EU law have resulted in the deterritorialization of sovereign regulatory authority. National industrial relations systems have been subordinated to internal market freedoms in four recent European Court of Justice decisions.⁵ These constrain the rights of unions and governments to regulate working conditions of foreign service providers operating in their territory,⁶ in effect allowing firms to create “spaces of exception” by exploiting enclaves of alternative, deterritorialized sovereignty.⁷ Aihwa Ong labels the phenomena of zones of exception “variegated sovereignty” and “neoliberalism by exception,” by which she means that different physical spaces and work contexts are regulated differently depending on the citizenship or ethnicity of the individuals or firms involved.⁸ For example, a Polish construction worker on a German construction site working for a Polish subcontractor does not, either in practice or in law, have the same rights as a German or Polish worker working for a German subcontractor because the employment relationship in the first instance is in many respects regulated from Poland. Sovereignty has been reconfigured, through EU law and firm practice, so that it is no longer only dependent on territory, but also on other contingencies.

This is problematic for industrial relations analysis, which has traditionally been based on insular “systems,” and “webs of rules,” serving as a framework for the interactions between industrial relations actors: employers, unions and the state.⁹ Methods have focused on observing and analyzing the labor process, worker mobilization, union and employer strategies, negotiations, workplace conflicts and their resolutions, within a relatively stable context.¹⁰ The deterritorialization of sovereignty means that for industrial relations actors, the regulatory environment is no longer insular nor stable. Regulation has not disappeared, but rather has reconfigured in complex ways.¹¹ New approaches are needed to analyze fundamentally transnational issues such as worker posting. Harrod and O’Brian, for example, suggest a synthesis of industrial relations and international relations theory.¹²

Central questions for this project include: What effect does transnational contracting and posted work have on industrial relations in the construction and metalworking industries? Are unions and works councils seeking to represent posted workers, and if so what barriers do they face? (i.e. are the European Court of Justice decisions in fact inhibiting them?) What kind of firms are transnational subcontractors, are their relations to main contractors the same as those with domestic subcontractors, and what are main contractor strategies for using posted workers? Is the development of transnational subcontracting creating an interest in further regulatory change at the EU level? Is the development of transnational subcontracting motivating organizational change in the labor movement (transnational union cooperation, for example)? Further objectives include establishing a network of researchers from various countries and disciplines working on issues related to labor mobility in the EU and building links to practitioner organizations with an interest in the posted worker issue, i.e. unions, employer organizations, and policy makers, for purposes of dissemination and the development of further research contacts.

Subcontracting and Industrial Relations

⁵ These cases are: Viking Line vs. the Finnish Seamen’s Union and the International Transport Workers’ Federation; Laval un Partneri vs. the Swedish Construction Workers Union and Swedish Electrical Workers Unions; Dirk Ruffert vs. Land Niedersachsen and The Commission of the European Communities vs. Luxembourg

⁶ Hyde, A and [M. Ressaissi](#) (2009) “Unions Without Borders: Recent Developments in the Theory, Practice and Law of Transnational Unionism,” *Canadian Labour and Employment Law Journal* 14: 47

⁷ Lillie, Nathan. 2010. “Bringing the Offshore Ashore: Transnational Production, Industrial Relations and the Reconfiguration of Sovereignty,” accepted at *International Studies Quarterly*.

⁸ Ong (2006)

⁹ Heery, Edmund (2008) “System and Change in Industrial Relations Analysis,” in Blyton, P.; Bacon, N.; Fiorito, J.; and Heery, E. eds. *The Sage Handbook of Industrial Relations*, London: Sage.

¹⁰ Heery, E.; Bacon, N.; Blyton, P.; Fiorito, J. (2008) “Introduction: The Field of Industrial Relations,” in *The Sage Handbook of Industrial Relations*, London: Sage.

¹¹ Martinez Lucio, Miguel and Robert McKenzie. 2004. “Unstable boundaries? Evaluating the ‘new regulation’ within employment relations.” *Economy and Society* 33(1): 77-97.

¹² Harrod, J. and O’Brien, R. (2002) “Organized labour and the global political economy,” in J. Harrod and R. O’Brien (eds), *Global Unions?: Theory and strategies of organized labour in the global political economy*, London: Routledge.

A key factor enabling the employment of posted workers is the prevalence of subcontracting and agency work in certain industries (for example construction and ship building). While in some cases, the development of a two-tier-labor market cushions “core” workers from market uncertainty by transferring risk to contingent workers,¹³ it can also serve to undermine the conditions of both core and peripheral workers by creating competition between the two groups.¹⁴ There is therefore a relationship between intra-firm contracting and labour market segmentation strategies of firms, and between these things and labor migration. Transnational subcontracting has the potential to take coercive use of contingent and agency workers to new levels, undermining conditions for core workers by introducing direct price competition with workers employed under foreign conditions. This is because, in the context of intra-EU worker mobility, high east-west wage differentials, and extraterritorial regulation for transnational service providers, it is easy for managers to set workers and national regulatory regimes into competition with one another, without moving production or goods transnationally.

Worker Rights, Representation and Posting

The temporary and mobile nature of posted migrant work, and partial legal immunity from local labor standards, circumvents nationally focused structures of trade union representation. The nation-state based structure and focus of the labor movement ensures that particular national unions have neither a strong interest nor a clearly protected legal right to represent posted migrants. Posted work is a form of labor migration, and raises similar issues, although the EU framework adds additional complications. As Dolvik and Eldring point out, intra-EU migration of individuals, and migration as posted workers are regulated under EU law via separate channels. Those who migrate as individuals are regulated under EU frameworks for labor mobility, while those who are posted are regulated as dependant employees of service providers (subject to the Posted Workers Directive (PWD), which gives ‘host’ countries the right to set certain standards), even though both kinds of workers compete in the same labor and product markets.¹⁵

Recent rulings from the European Court of Justice make it illegal for governments or unions to seek to enforce any standards for posted workers which are not both explicitly mentioned in the PWD, and set down in national law. In this sense, the PWD, originally conceived as establishing workers’ rights has been turned on its head so that it now limits them instead. The full range of benefits according to native workers cannot be mandated for posted workers – only a more limited set in the directive. Posted workers do not have a right to trade union representation in their host country in terms of free collective bargaining, but only in terms of enforcement of their legally established rights. What a sending country union is permitted to do it not clear, although the Viking decision seems to indicate that unions are not entitled to represent workers outside their own national jurisdictions. Posted workers fall in the cracks between national systems of labor regulation.

The Corrosive Effects of Exception

The regulation of posted work, in denying the sovereign authority of nation states to regulate work and workers’ welfare within their territories, removes from states one of their key functions: the regulation of class compromise. Post-WWII capitalist growth was stabilized by the state functioning as a mediator between the unpredictable international trading system, and national economic systems,¹⁶ but this role has been undermined. Variegated sovereignty involves a fundamentally different role for the state in industrial relations, with implications for national class compromises and state legitimacy. In Gramscian conceptions, the dominant class deploys a combination of carrots and sticks, mixing ideological co-optation with real concessions, to achieve “hegemony,” which allows the capitalist system to function without constant disruption from class conflict.¹⁷ Labor is incorporated through class compromise on the shop floor,¹⁸ but

¹³ Kalleberg, Arne (2003) “Flexible Firms and Labor Market Segmentation: Effects of Workplace Restructuring on Jobs and Workers,” *Work and Occupations*, 30(2): 154-175; Atkinson, J. (1984) Manpower strategies for flexible organisations, *Personnel Management*, 16(8): 28–31.

¹⁴ Doellgast, Virginia and Ian Greer. 2007. “Vertical Disintegration and the Disorganization of German Industrial Relations.” *British Journal of Industrial Relations* 45:(1):55-76.

¹⁵ Dolvik, J. and L. Eldring (2008) “Mobility of labour from new EU states to the Nordic Region: Development Trends and Consequences” TemaNord, Copenhagen, Nordic Council of Ministers , p51-52.

¹⁶ Ruggie, John (1982) “International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order,” *International Organization*, 36(2) pp.379-415.

¹⁷ Gramsci, Antonio. 1971. “The Modern Prince.” in *Selections from the Prison Notebooks*. eds. Quittin Hoare

capital also needs national class compromises, which are made possible through the good offices of “relatively autonomous” states.¹⁹ Democratic institutions make advanced capitalist states autonomous, and the fact that their decisions are seen as neutral because the outcomes sometimes favor labor over capital legitimates these institutions.²⁰ Sovereignty is a reflection of state autonomy, serving as a constraint on capital by allowing states potentially unlimited regulatory authority.

Spaces of exception are the ultimate neo-liberal zones, providing freedom from sovereign regulatory authority within confined contexts. But states, as the sovereign authorities granting the exceptions, cannot avoid implication in what happens as a consequence. As Palan notes, exception in the form of ‘off-shore’ undermines and threatens state legitimacy and democracy by ‘commercializing’ sovereignty.²¹ This undermines democratic legitimacy and strips the state of autonomy by making it directly and visibly accountable to capital. Although in many ways a constraint on capital, sovereignty also serves as an anchoring point for the system of property rights on which capitalism is based;²² capital therefore depends on state sovereignty even as it tries to undermine or escape from it. Palan shows how offshore promised a way out of the dilemma, if only for limited firms in limited contexts – as Palan puts it, capital and states can ‘have their cakes and eat them too’.²³ This ‘unbundling’ and deterritorialization of sovereignty is a way for capital to escape working class associational power, while still reaping the benefits of national class compromises. As exception looses the binary quality of off-shore – i.e. under variegated sovereignty, things are no longer either ‘off-shore’ or ‘on-shore,’ but rather under varied and contingent forms of regulation – the danger becomes that there is no longer any space where a ‘normal’ state of affairs applies any more.

Since ‘exception’ can only exist in relation to the rule, there is a paradox: if everything becomes exceptional, nothing can be exceptional any more – the exception has become the norm. This follows from what Agamben, drawing on Schmitt, calls “the paradox of sovereignty,” which “consists in the fact the sovereign is, at the same time inside and outside the judicial order.” This dual status of the sovereign exists because sovereignty is defined as the power to decide the exception to the rule of law.²⁴ But the right to make exceptions depends on there being a place where the rule of law is the norm, making variegated sovereignty an inherently unsustainable way of ordering global capitalism. Variegated sovereignty negates the norm to which it is the exception. If, in the words of Benedict Anderson, passports are “less and less attestations of citizenship, let alone of loyalty to a protective nation-state, than of claims to participation in labor markets,” it is clear that the nation-state has lost its legitimating function, and citizenship is nothing more than an increasingly thin justification for “differential tariffs on human labor.”²⁵ It is this contradiction which I hypothesize should undermine the organization of capitalist hegemony, by undermining the legitimating potential of democracy and national class compromise.

Methods

It is hypothesized that variegated sovereignty is facilitating the segmentation of labor markets, via transnational subcontracting and agency work. Evidence suggesting this is the case has been found in preliminary research.²⁶ This project will take a wider look at the issue in a variety of contexts, using

and Geoffrey Smith. London: Lawrence & Wishart, p.161.

¹⁸ Burawoy, Michael. 1985. *The politics of production: factory regimes under capitalism and socialism*. London: Verso.

¹⁹ Poulantzas, Nicos. 1972. “The Problem of the Capitalist State,” in *Ideology and the Social Sciences*, ed. Robin Blackburn, London: Fontana.

²⁰ Przeworski, Adam. 1985. *Capitalism and Social Democracy*. Cambridge: Cambridge University Press, p141.

²¹ Palan (2003), *The Offshore World: Sovereign Markets, Virtual Places and Nomad Millionaires*. Ithaca, NY: Cornell University Press. p154-161

²² Palan (2003), p87

²³ Palan, Ronen. 1998. “Trying to Have Your Cake and Eating It: How and Why the State System Has Created Offshore.” *International Studies Quarterly* 42(4): 625-644, p625

²⁴ Agamben (1998), *Homo Sacer: Sovereign Power and Bare Life*. Tra. Daniel Heller-Roazen. Stanford: Stanford University Press. p15, citing Schmitt, Carl (1922) *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität* Munich-Leipzig: Duncker & Humboldt.

²⁵ Anderson, B. (1994) “Exodus,” *Critical Inquiry*, Vol. 20, No. 2, pp. 314-327

²⁶ Lillie, N. and M. Sippola (forthcoming) “Olkiluoto 3 -ydinvoimalaitostyömaa: suomalaisen työmarkkinamallin koetinkivi?,” *Sosiologia*.

qualitative semi-structured interviews as the main data source, supplemented by media research and surveys of workers. This research will map the effect of variegated sovereignty on labor markets and industrial relations systems, and vice-versa. It will do this through comparative case studies of industrial relations at production sites in construction and metalworking, around Europe, placing these in the context of a changing European regulatory framework. This project takes a multi-level approach, with cases defined by industry, or production site, for a particular analysis. Focusing on production sites is useful because one can record the interactions workers and managers from main contractors, native subcontractors, and transnational subcontractors. Industry level analysis gives a better sense of the interactions between economic actors and political institutions – i.e. how industrial actors are influencing the regulatory framework. These are methods I have used before.

This project will involve multiple types of interviewing and data gathering, in order to facilitate triangulation, and because the different aspects of this fundamentally interdisciplinary project require it. The types of data gathering are: (1) Politically oriented interviews with policy makers, employer association representatives, legal experts, political (migrant) activists, national and European elected officials and civil servants and trade union officials, for describing legislative and legal struggles taking place around the reconfiguration of sovereignty. (2) Industrially oriented interviews of union officials, managers, works councillors, and shop stewards to establish the background facts of particular cases, describe firm strategies, and gather narratives about worker posting and the employment of migrants. (3) Interviews of posted and native workers on jobs sites where posted workers are will probe issues having to do with labor market segmentation – i.e. perceptions of divergent interest, unequal treatment, stereotyping etc. (4) Surveys of posted and native workers will be used similarly to the manner of Byoung-hoon and Frenkel's²⁷ use of them, combined with semi-structured interviewing to show how the discursive practices of workers can reinforce differences, and segment the labor market. (5) Media surveys of selected cases, using the Lexis-Nexis database available through the RUG to compile media reports on selected firms, job sites, and issues. The team will include the Principle Investigator, Dr. Nathan Lillie, a post-doctoral research associate, Markku Sippola, and two doctoral students, who will conduct their doctoral work under Dr. Lillie's supervision.

²⁷ Byoung-Hoon, Lee and Stephen Frenkel (2004) "Divided Workers: Social relations between contract and regular workers in a Korean auto company," *Work, Employment and Society*, 18(3), pp. 501-530