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Author(s): Lillie, Nathan; Wagner, Ines

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Practicing European Industrial Citizenship: the Case of Labour Migration to Germany

Nathan Lillie and Ines Wagner

Abstract

Industrial citizenship developed as a way to socially regulate markets in democratic societies. However, EU regulation and one form of labour mobility unique to the European Union, namely posted work, undermines national industrial citizenship through constitutionalizing markets. This chapter examines the contradictions between industrial and market citizenship concepts, and traces their implications in practice. It focuses on how posted work introduces into the German industrial relations system a class of workers with tenuous relations to the system's regulatory jurisdiction. This undermines industrial citizenship in Germany. Use of posting avoids contesting the validity of labour rights and industrial citizenship concepts directly, but instead asserts that specific workers under exceptional circumstances are outside realm of application of those concepts. Based on interviews of posted workers, trade unionists, managers, and policy makers we examine the contradictions between industrial and market citizenship concepts, and trace their implications in practice. Findings show that the dominance of market concepts in the EU regulation of posted work circumvents and undermines Germany's industrial citizenship institutions.

Keywords: Industrial Citizenship, European Citizenship, Labour Migration, Germany

The European Union has its core *raison d'être* in the breaking down of barriers to markets enshrined in its foundational document, the Treaty of Rome. The implementation of this market-constitutional idea brings the EU into conflict with social and democratic principles in

many of the policy arenas the EU touches because it implies treating market dynamics as fundamental organizing principles of society which cannot be overturned through democratic politics. Tensions between society and markets have existed as long as there have been markets (Polanyi 1944), but are brought into sharper relief by the current hegemony of market ideas. This article explores how tensions between the conceptual underpinnings of intra-EU free movement and national industrial citizenship reveal this dynamic, using the example of how free movement affects industrial citizenship in Germany. The practices embedded in the concept of European citizenship challenge the normative and practical structures realizing German industrial citizenship as a nationally specific development of German working class capacities, with the result that balance of class power is undermined. In a sense, our argument that globalization undermines labour is hardly a new and original one, but we wish here to show how transnational processes shift interpretations of specifically nationally bounded concepts. Industrial citizenship exists in all modern welfare states but its formulation is always nationally specific. Thus, we focus attention on one example of a process happening all over Europe, specifically how the European project undermines the normative microfoundations of German industrial citizenship.

This chapter shows how one form of labour mobility, unique to the European Union, namely posted work, undermines industrial citizenship in Germany. Posted workers move abroad as part of a dependent work relationship, rather than moving as individuals to take up a job in the host country. Although originally intended as a way for firms to send employees abroad for short periods, posting has become a way to avoid labour regulation and employ low wage migrants in precarious jobs (Cremers 2013). Whereas industrial citizenship is under pressure in Germany generally (see Brinkmann and Nachtwey, 2014), this chapter focuses on how posted work introducing into the German industrial relations system a class of workers with tenuous relations to the system's regulatory jurisdiction undermines industrial citizenship in Germany.

Use of posting avoids contesting the validity of labour rights and industrial citizenship concepts directly, but instead asserts that specific workers under exceptional circumstances are outside realm of application of those concepts. This works because labour rights, like human rights generally, are exercised via national systems, and posted workers are partially outside of these systems.

Our approach is to examine the contradictions between industrial and market citizenship concepts, and to trace their implications in practice. We first make the case that industrial citizenship developed as a way to socially regulate markets in democratic societies. We then show that EU regulation, and specifically posted work, undermine national industrial citizenship through constitutionalizing markets. Then, the case is made that the key German industrial relations actors are structurally incapable of regulating transnational work relations. Finally, we examine how labour inspectors, who should even in the absence of unions enforce German labour laws, are handicapped by an inability to operate transnationally. We conclude that dominance of market concepts in the EU regulation of posted work circumvents and undermines Germany's industrial citizenship institutions. We rely on interviews of posted workers, trade unionists, managers, and policy makers from 2011-2014 in Germany and in the EU context conducted as part of the Transnational Work and Evolution of Sovereignty project (TWES 263782), on EU and national legal documents.

Conceptualising Industrial Citizenship

Industrial citizenship arose as a Polanyian challenge to capitalism's marketization of the social world as a way of delivering on the promise of national citizenship by recognizing the collective power of the working class in the economic realm. In general, citizenship is both a formal legal status, giving access to rights and protections, as well as a practice of

participation in a polity (Zhang 2014). Likewise, industrial citizenship is both a status, granting rights within a defined territorially based (political) community, and a process and relationship between workers and employers. Like other forms of national citizenship, industrial citizenship reflects the societies and communities it is based on, within and bounded by the territories of capitalist states. National industrial relations systems are based on national class identities and capacities, and secure industrial citizenship via mutually interlocking and reinforcing sets of institutions. Industrial citizenship is embedded in the (power) relationship of worker to employer, relying on the creation of structural political power through class-based collectivism and using this power to advance workers' interests. Our chapter therefore examines practices of inclusion and representation via worker organizations such as trade unions and works councils, as well practices and structures of posted worker protection. The first aspect is arguably more important, because it forms the power basis via which the second aspect is achieved (Zhang and Lillie 2015). For posted work, only the second occurs in actual practice, and that only weakly. The concepts underlying industrial citizenship have long been grounded in nationally specific ideas about class, territory, and national identity, and as these have changed as has the expression of industrial citizenship in practice.

In the Marshallian tradition, citizenship is conceived in expansionary terms, with social and economic progress leading to increasing inclusiveness and equality, and ever more substantial and realizable rights (Marshall 1992). Yet contradictions emerge, as modern citizenship is also inextricably embedded in market capitalism. Citizenship's egalitarian and decommodifying implications do not sit well with expanding markets, which produce inequalities and power disparities. Citizenship in capitalist society is undermined by the inability of the impoverished to act as free and autonomous agents (Somers 2008), so that democracy and citizenship depend on structures protecting industrial democracy in the

workplace. Furthermore, modern citizenship is spatially grounded and territorially limited, tying individuals to specific nation states. From this came Marshall's notion that industrial citizenship, alongside the closely related social citizenship, served to integrate the working class into the welfare state, supporting the realization of civic and political citizenship (Marshall 1992).

The notion of industrial citizenship serves to explain practices which resolved the tension between class and national identity. Trade unions developed by generating and harnessing class conflict to use collective working class economic power to establish economic democracy for workers. Industrial citizenship is embedded in the (power) relationship of worker to employer, relying on the creation of structural political power through class based collectivism and using this power to advance workers' interests. In connecting, integrating, and empowering workers in the management of the polity, industrial citizenship is a vehicle for, and an outcome of, class compromise—i.e. its corollary is acceptance of the legitimacy of the polity, and a rejection (or at least deferral) of revolutionary visions of social transformation. This is what C. Wright Mills (1948) meant when he called trade unions “managers of discontent”; unions generate and focus discontent among workers to bargain with capitalists and politicians for the things those workers want (Mills 1948). Unions criticize capitalism and its inequalities to gain power which can only be used under conditions of capitalist inequality. In Gramscian terms, industrial citizenship is an acceptance of the ideological dominance of the ruling class.

Industrial citizenship at once advances the struggle for equality while also embedding it in logics which make achieving complete equality impossible. Within sovereign territories, rights of industrial citizenship are variegated depending on bargaining units and collective agreement; employers also strategize around those cleavages to create groups of workers with

less access to rights. Even at its height, access to industrial citizenship was conditioned by ethnic hierarchies, firm boundaries, gender, age and so on, with adult white male workers in stable, union jobs in core industries as the archetype (Zetlin and Whitehouse 2003). Although the precise forms of inequality vary, inequality in industrial citizenship is inevitable, because industrial citizenship is expressed through collective power at work and therefore expresses and reflects inequalities inherent in capitalist societies, even as it (ideally) seeks to lessen them. As a subaltern concept, it finds power in weakness of the working class and the injustices they are subject to; even in its ideal form, therefore, its logic inherently excludes the possibility of fully achieving its nominal goals.

Industrial citizenship is realized within nation states via national systems of industrial relations made up of employer associations, trade unions and government regulatory agencies. Underlying this superstructure are unions and their structural relations to the national working class; the capacity for mobilization of the working class shapes the resulting class compromise (Wright 2000). There is a functional similarity between systems, and many labour rights are regarded as universal. However, the practical realization and implementation of industrial citizenship is mediated by national institutions and varies from country to country in terms of process and outcomes. Industrial relations practice is based on a strong spatial ontology, reflected in the jurisdictional boundaries of nation states, production sites, worker communities, and labour market organizations. Unions articulate the demands of their worker-members from shop floors to bargaining tables and national political settlements, via institutionalized systems of national industrial relations. J.R. Commons (1913), e.g., takes the formation of the national union as the logical endpoint of labour movement development, and the 'systems theory' on which Industrial Relations is based assumes this implicitly (Heery 2008). Rarely using the terms citizenship, the Industrial Relations discipline has an implicit

notion of industrial citizenship, with worker voice, access to interest representation, fair pay, due process, and right to strike as key concepts (see Freeman and Medoff 1984, e.g.).

In recent decades, the ideas underpinning industrial citizenship have come under pressure. Market ideology and notions of market citizenship have eroded worker collective organization and support for industrial democracy (Fudge 2005). The decline of industrial citizenship is related to the declining influence of class-based understandings of workplace relations. Communitarian frames support an organizational logic that grants workers industrial power, allowing them to limit and shape the market outcomes produced by capitalist systems. Industrial citizenship depends on organization, processes and participation, which arise out of class capacities. Class capacities (i.e. the working classes' ability to act as a political, economic, or social actor) depend ultimately on bonds of solidarity and class consciousness developed from experiences in workplaces and communities. Workers in the same workplace and same geographic space rely on one another at work, share social networks in community and leisure activities, and find common cultural reference points (Thompson 1963). The realization of a right of industrial citizenship is highly dependent on both workers' understanding of class-conflict, as well as practising that in specific ways which maximize leverage over employers. Unions engage in identity work (Greer and Hauptmeier 2012), 'building solidarity' to maximize leverage given existing political and economic opportunities; unions have often fulfilled the role of 'schools of class conflict', as part of this process of creating mind-sets which generates their power.

Posted Work and the Variegation of EU Citizenship

Free movement has been a foundation stone of the European integration since the signing of the Treaty of Rome in 1957. Although contested by ideas such as 'Social Europe', Europe has

evolved as a marketization process through the removal of 'barriers to free movement'. Many aspects of national social regulation have been challenged as impediments to free movement, including those relating to industrial and social rights. Intra-EU free movement is central to the construction of a post-national EU citizenship, but its justificatory basis in market norms turns the growth of the pan-EU labour market into a lever to deregulate national industrial relations. This deregulation occurs through differential access to industrial citizenship rights, exploiting the regulatory gaps which emerge as a result of clashes and contradictions between nationally specific concepts of industrial citizenship, and globalizing/Europeanizing ideas of market governance (Zhang and Lillie 2015).

The politics of posted work regulation in the EU has been one of policy-makers trying to prevent undercutting of wages in host countries, versus policy-makers seeking to enable the undercutting of wages in host countries. Much of the contestation had been around the implementation of the EU's Posted Workers Directive (PW). This Directive made explicit that national labour regulations applied to posted construction workers (and to workers in other sectors, if a national government so chose), but did not provide a harmonized EU level policy. The PWD also limited aspects of national labour regulation that could be applied, as the 2007-2008 *Laval Quartet* of CJEU decisions clarified, in terms of the way standards could be decided on and enforced. Specifically, strike action and minimum wages clauses in public contracts could not be used on behalf posted workers to compel employers to pay higher wages, because this violates the free movement rights of employers. This is an application of the European Union concept of market making through free movement. The EU expressly seeks to open national territory by constitutionalizing economic mobility rights, and accomplishing this required suppression of industrial citizenship rights.

The association of market citizenship with EU citizenship is not inevitable; other regulatory paths exist alongside the posted worker path, and indeed have a longer history. The issue of employment and social rights for mobile EU citizens emerged already in the early days of the EU, as the EU sought to promote free movement of labour. Intra-EU mobile workers required rights to social security, mobility of family members and similar, so that over time an individual rights-based approach developed. An EU labour rights framework asserts that mobile workers should be treated equally in their employment and social rights. E.g., the principle of non-discrimination on grounds of nationality is associated with the freedom of movement. Although these began as extensions of the right to work (relying on free movement of labour) they have decommodifying implications (Marzo 2011). However, posted work takes place under the free movement of services rather than labour. The regular free movement rules here do not apply and therefore lack this element of decommodification.

Posted work is a form of temporary labour migration, in which an employer sends a worker abroad to provide 'services' (although often the services they provide involve manufacturing). Regulating post work effectively is, as is shown later, beyond the capacity of host country regulatory institutions, effectively deregulating employment to the extent that in some situations posted work becomes a fig leaf concealing illegal employment arrangements (Cremers 2013). Workers can (and often do) also move as individuals rather than as dependent employees. The difference in legal and organizational position of posted workers vis-à-vis individual migrants is that the laws and organizational practices through which rights are accessed are not native to the territory the worker is in—and therefore in practice are difficult to access. It is thus a further and additional disconnection with territory, relative to individual migrants, and one with a legal basis legitimated by market norms. The promotion of this type of mobility reflects the conceptual shift in the EU, towards promoting markets through deliberate undermining of national labour protections. In this framework of thought,

industrial citizenship becomes a barrier to free movement, which can be legitimately circumvented by EU policies making national rules difficult or impossible to enforce.

How Industrial Citizenship is Realized in Germany

We explore the problem of posted work through an examination of the German institutions of industrial citizenship, and their application to posted workers, and find that the insularity and lack of transnational reach of the German industrial relations systems ensures that posted workers fall essentially outside its boundaries. This study explores the German system as an example case. Although treatment of posted workers varies across Europe, this is only a question of degree. Regardless of the details, national specificity and insularity are characteristic of all industrial relations systems.

German industrial relations is characterized by a 'constitutional' approach to firm governance which gives space to industrial democracy, under the idea of a 'social contract' within the firm (Frege 2005). Under principles of 'co-determination', power is exercised not only by management, but also union and works council representatives. Firms are perceived as quasi-public entities. Rather than being the absolute property of their owners, they are social communities, states within the states, or constitutional monarchies, where workers hold democratic rights and the monarch/owner shares power. 'The employment relationship is not seen as one of free subordination [as in the US] but of democratization,' declared Weimar labour law scholar, Hugo Sinzheimer (Finkin 2002, 621).

The German industrial relations system has long been considered a best practice example, with industrial citizenship realized through a 'dual system' of trade unions outside the immediate workplace, and works councils inside. Lowell Turner argues this produced

‘democracy at work’, closing out the ‘low-road’ of cheap, low quality production, and encouraging German employers to participate in apprenticeship programmes producing workers with high-level job skills (Turner 1991). This ideal picture has been changing since the 1990s, so although the institutional infrastructure still exists and functions for core workers in core firms, there is a large and increasing segment of the workforce excluded from it by labour market dualization (Bosch and Weinkopf 2008). In 2013, only 28 per cent of private-sector workers in western Germany and 15 per cent in eastern Germany were covered both by a collective agreement and a works council.

Both unions and works councils exercise industrial democracy rights in the firm. Within firms, unions in Germany have rights to information and consultation, and in some firms also co-decision (*Mitbestimmung*). There is a traditional division of tasks: unions negotiate with employers’ associations on a branch level, whereas works councils negotiate with individual employers. Works councillors are elected by all employees of a firm, including the non-union ones, but are often dominated by active trade union members, becoming vehicles for union influence within firms. Works councillors have authority to negotiate on issues such as working hours, working rules, hirings and dismissals, and are in a structurally similar position to shop stewards in other systems.

At the workplace level Works Councils are the institutional base for worker representation. Employees in companies with 5 or more permanent employees can elect a Works Council; the employer must not interfere with or forbid these elections. Migrant workers who fulfil these requirements may participate in these elections, but few are employed in companies with works councils; posted workers are by definition excluded because their employers are not incorporated in Germany; the German co-determination act doesn’t apply to subcontracting firms that are based outside Germany. Posted workers are employed via foreign

subcontractors or agencies; main contractors or agency firms' client may well have a works council, but these have almost no rights to represent workers in subcontracting arrangements and these workers are not permitted to interact with the works council directly. Whether foreign based subcontractors can elect a works council depends on the regulation of the country where the firm is based. In many countries there is no legal basis to form a works council. More importantly, the reality of employer oversight and pressure is that there is little chance workers of international work agencies would try to form a works council, even if legally entitled to do so. This is not only a problem for posted workers, but German workers' traditional institutional arrangements have been under enormous pressure as firms outsource to smaller firms as a way to avoid works council and trade union power (Doellgast 2009). The difference for posted workers is that they do not even have the *right* to form a works council under German law. Because for German trade unions, works council formation is often the entry into the firm, the possibility to have a works council is an essential expression of German industrial citizenship.

A common regulatory problem under globalization is that the authority of national institutions ends at the border; this is also the case with the authority of German's comprehensive dual system. The free mobility of services and labour, however, enables private actors to extend across territorial borders, reconfiguring relations between actors in ways that inhibit worker access to industrial citizenship (Wagner 2015). These shifting boundaries of regulation facilitate firm strategies to segment the labour market. Whereas immigration generally tends to reduce trade union leverage in the labour market, in the past trade unions have coped by organizing and representing immigrant workers. This has not been without its tensions, but there has nonetheless been a trend toward integration of immigrants into the trade union movement (Marino et al. 2015).

Interaction between posted workers and unions, however, is difficult because both actors are embedded in different normative frameworks. Posted workers even though physically in the host country, continue to frame their understanding of their employment rights with reference to their home country. One posted worker explains her embeddedness in the home country and her excluded status in the host country:

“I have been to a union meeting once. There are certain rights, but in vain, because they are not applicable to us □ posted workers □ because we are not employed by a German company but by a Romanian company. Our rights are connected to the country and firm where we are employed and pay taxes and social security contributions to, i.e. Romania” (Bulgarian posted worker interview 2012).

The impression of the worker is that there is a dividing line based on the national context of where the employer is based inhibiting the enactment of certain rights, and preventing her seeking representation from the trade union in the host country. Moreover, many distrust unions due to negative experiences with home country unions or misunderstanding of the union structure in Germany. The worker leaves the sending country geographically, but in a regulatory and normative sense carries its rules into German territory. The predicament is that whereas unions are understaffed and lack the resources to mobilize posted workers, the workers themselves mostly refrain from seeking help from the union due to fear of employer intimidation and retaliation. This results in a 'catch 22' situation and creates a border between the union and workers (Wagner 2015). Although workers are aware of their agency in this, they also know that changing their situation is difficult and risky because of the multiple mutually reinforcing barriers, and the relative helplessness of the unions to protect them.

Actors play a major role in defining these spaces through their on-going interactions. There is a mutually constitutive relationship between the material facts of the EU legal framework, the ideas held by actors about organizing these spaces, and actors' practices manifesting those

ideas. Searching for ways out of the dilemma, the DGB and its sectoral unions have undertaken various initiatives aimed at integrating migrants into structures of worker representation. E.g., IG Bau has responded by attempting to organize and represent posted workers. One well-known effort was the establishment of the European Migrant Workers Union (EMWU), which attempted to create a transnational union, separate from the IG Bau, from which workers could receive representation in both home and host countries. The EMWU did not establish the independent role initially envisioned due to insufficient union support from unions in Germany and other countries, as well as organizational flaws in EMWU itself, and was eventually reintegrated into the IG BAU (Greer, Ciupijus, and Lillie 2013). Nonetheless, the IG BAU continues to represent the rights of posted workers at the political level and provide information to workers on construction work sites or at worker housing sites and help with legal services in certain dire cases. The same is true for the 'fair mobility' service centres which now exist in large cities across Germany. In these service centres project workers with relevant language skills inform migrant workers (including posted workers) about labour law and social legislations in their native languages, in an attempt to preserve the norms of the German labour market. The creation of fair mobility service centres interacts with the recognition that migrant workers need also help with housing and other social issues.

The Posting of Workers Law and Collective Bargaining in Germany

Posting is pervasive in the German meat and construction industry. In both industries high levels of subcontracting and international mobility make for a fluid labour market. Subcontracting is used in construction to access specialized knowledge, increase flexibility, manage risk and reduce labour costs, whereas in meat processing it is mainly a cost reduction strategy. Construction consists of large main contractors or building service providers, and

numerous small and medium sized subcontractors, who provide the majority of the workers (Bosch and Zühlke-Robinet 2003). Transnational work agencies and subcontractors compete on cost against domestic subcontractors by bringing low-cost migrant workers to high labour cost countries, and preventing them from claiming the wages and benefits demanded by domestically hired workers.

The PWD was translated into German law via the German Posting Act (*Arbeitnehmerentsendegesetz*) in 1996. The German posting law only covers certain sectors. Initially it included construction, building cleaning and mail services, but was amended in 2008 to include slaughtering and meat processing, and in 2009 to include care work (elderly care and ambulant treatment), security services, waste management, training and educational services, laundry services, and special mining work in coal mines. Posted workers in those sectors are covered by German labour law in crucial areas such as wages and job safety, but social security contributions (i.e. sick and pension pay) are paid in the sending country and not in the country where the work is performed. Sending country social security contributions are often much lower than Germany's leading to an overall reduction in labour costs (Fellini et al. 2007). Firms sometimes establish letterbox companies in low cost countries to lower tax and social contributions. For posted workers, this often means they have no effective access to legal remedy if their contracts are violated by the employer, and they can be left with social insurance rights vested in a jurisdiction they will never visit.

The EU's Posted Worker Directive enables national regulation of labour markets, but only in certain ways. Specifically, in the *Laval* decision of the Court of Justice of the European Union (CJEU) clarified that host countries can only regulate the working conditions of posted workers through legislative instruments (i.e. not through free collective bargaining), and only in those areas specifically mentioned in the PWD (Kilpatrick 2009, 845–849). In a further

CJEU decision, *Rueffert vs. Land Niedersachsen*, the CJEU prevented public bodies from using their purchasing procedures from mandating collective agreement wage levels of transnational contractors employing posted workers. In this way, the CJEU explicitly defines posted workers as outside the industrial citizenship framework of host countries, not entitled to the full set of worker rights based on their territory in which they work, but rather to a different, usually lesser, and often inaccessible, set of rights based on the nationality of their employer. In *Viking* (C-438/05) and *Laval* (C-341/05) the ECJ ruled that industrial action aimed at representing posted workers from a foreign undertaking could violate the company's freedom to provide services across borders, denying posted workers the right to strike (see Kilpatrick 2009, 845–849), a right available to native workers, and fundamental to the practice of industrial citizenship. These court decisions opened leeway for employers to undermine national regulations and constrained the rights of trade unions to represent posted workers. Prevailing wages or collective agreements in a sector are not (and according to EU jurisprudence cannot be) applied to posted workers, even by unions through free collective bargaining, unless there is a German law generalizing the application of the standard.

Posted Workers and Labour Standards Enforcement

Whereas collective bargaining agreements represent a collective version of exerting workers' voice, enforcement then is responsible for ensuring that these agreements, but also others such as state policies are upheld in order to ensure that industrial citizenship is actually practised. The institution enforcing labour standards for posted workers, the FKS (*Finanzkontrolle Schwarzarbeit* - FKS), and its enforcers have police-like powers, including the power to force entry, search persons and premises, confiscate and retain evidence and arrest without warrant. However, the FKS struggles to detect malpractice by transnational subcontractors and to enforce fines for transnationally operating companies (Wagner and Berntsen 2016). In spite of

the requirement to provide documents for inspection, according to a FKS representative, inspectors rarely notice discrepancies.

The FKS suspects that many host country documents are manipulated whereas the real accounting book is kept in the home country (FKS interview 2012). To detect malpractice the FKS would need to investigate which wage deductions have taken place and whether the correct amount has been paid to the workers. However, in practice this is almost impossible, because “the investigative power of the labour inspection stops at the German border on the grounds that they have to respect state sovereignty” (NGO interview 2012). In case malpractice is uncovered and fines issued, the fine cannot be enforced across the national frontier. Fines and exclusion from public procurement provisions have no dissuasive effect on negligent employers (Zentralverband deutsches Baugewerbe 2006). The co-operation with courts and lawyers in home countries that is required in order to enforce fines is basically non-existent (Sozialkassen der Bauwirtschaft, SOKA BAU interview, 2013). As a result, only 15–20 per cent of the fines are enforced, whereas 80–85 per cent of breaches of the posting of workers regulation have no consequence (Zentralverband deutsches Baugewerbe 2006).

When opportunities to detect malpractice and enforce standards are severely limited, the likelihood of exploitative practices increases. According to a recent government report, many subcontractors do not adhere to minimum standards for posted workers, such as minimum wages or maximum working times (Deutscher Bundestag 2013). The report confirmed that only limited controls take place, because it is time-intensive and complicated. A report from the central association of the German building industry (Zentralverband deutsches Baugewerbe ZdB) reiterates the existence of regulatory gaps. Mechanisms such as double-bookkeeping across borders make it difficult for the FKS to detect avoidance mechanisms used by firms (Zentralverband deutsches Baugewerbe 2006, 8).

The persistence of national borders for labour enforcement agencies, but not firms, is reflected in their limited ability to detect malpractice by transnational service providers. The minimal ability of state actors to enforce posted workers' rights renders posted workers disproportionately vulnerable to criminal victimization and workplace exploitation. This de- and re-territorialization of state borders intersects with significant transformations of labour markets in OECD countries since the 1970s (Wagner, 2015). Access to justice is also found to be increasingly difficult for workers employed in atypical employment contexts within Germany (Bosch and Weinkopf 2008), but posted work adds another dimension to the debate by invoking foreign institutional systems.

Conclusion

This chapter exemplifies how an interrogation of the concepts behind European integration and German industrial citizenship reveals contradictions and tensions in the changing territorialities of the European Union. Whereas some (c.f. Habermas 2012) argue that the EU could resolve the contradictions we identify by assuming the prerogatives of nation states on a larger geographic scale, EU institutions for realization of industrial citizenship are not configured to make them equivalent to national industrial relations systems. In EU political circles, but also in the thinking of national policy elites, there has been a shift in understanding how society is and should be organized. Markets have assumed the highest position in the hierarchy of ideas, whereas notions of citizenship based on other principles, such as democratic, social or even sometimes civil rights have been subsumed.

Free mobility is at the heart of the European Union conception of citizenship, yet it is being implemented in such a way as to threaten the industrial citizenship on which modern welfare

states have been built. One of the ways this is occurring is through opening avenues for employers to use transnational worker mobility to ignore and subvert national industrial relations institutions. This is nothing new as there has never been a perfect correspondence of nation states to territory, and there have always been grey areas, zones of imperfectly implemented sovereignty, and variegations in status between different groups of people. Modern citizenship is an ideal form which has never been, nor can it ever be, perfectly implemented (Zhang 2014).

European regulations for free movement and the employment relations practices they facilitate reveal a fundamental shift in how industrial citizenship is articulated through the development of new notions of territoriality. Industrial citizenship is itself not directly contested, instead new concepts of territoriality change industrial citizenship's practice—the concepts do not so much change as become irrelevant. While the conceptual history approach shows how the meanings of concepts are subject to interpretation and re-interpretation as part of broader political struggles (see Introduction), we see in this case that the question of which concept to fight over can also be important, as actors strategically exploit contradictions between basic principles. In this case, those principles are free movement and labour rights; posted workers mobility served as an argument to structurally exclude them from access to industrial citizenship in Germany. As Skinner (1999) notes, certain concepts link meaning and the legitimacy of institutions: i.e. the meaning that is associated with certain kinds of citizenships legitimates the practices and structures which regulate that form of citizenship. Contradictions between different conceptions of citizenship reveal fault lines of political conflict.

Cosmopolitan and market-inspired ideas of European Union citizenship are associated with a confused regulatory approach in which actors, practices and legal frameworks extend across national boundaries. The logic and institutional construction of industrial citizenship is

grounded on national rights, worker organization, and worker protection which end at the national border, and whose authority does not fully extend to extraterritorial employment arrangements. Although unions seek to represent posted workers their employment relationship is designed so that they remain largely outside the scope of union membership and representation, and works council jurisdiction. Industrial citizenship has been declining in Germany for all workers, so in this respect posted workers are not unique. Nonetheless, their circumstances represent the sharp edge of a wedge. The transnational structure of posted employment puts them outside effective possibility for industrial citizenship, and undermines the power basis which would give posted workers the power to win improvements in their wages and conditions in the German labour market.

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