Work Migration, Unions, and Global Justice
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Introduction

Is there a moral obligation towards work migrants? If there is - what is that obligation, when does it exist, what are its limitations, and who is responsible for fulfilling it? These questions have been a core interest of many migration studies. In this paper I would like to look at the particular moral obligation that the theory of global justice might allocate to unions in respect of these questions, and what results from that obligation.

In his theory of global justice Pogge claims that global institutional structures create moral obligations towards “others” who are not members of one’s national country, due to the outcomes that the acts of these institutions bring about, such as poverty and extreme inequality.¹ This theory poses a moral obligation not based on the idea of citizenship, but rather on other institutional or causal bases. Building on Pogge’s theory, I argue in this paper that unions have moral obligations towards “others”, including work migrants. I see global justice theory as a suitable frame of reference for thinking about the questions of migrant movement in search of work, due to the exclusion of migrants from the core model of citizenship. It is not just states that do not see themselves as having commitments towards those who, due to poverty and considerable inequalities among countries, move from one country to another for work;² this view is also shared by unions, employers, and domestic labourers who tend to focus on the national-citizenship setting and less on their obligations in the globalised world. Although unions today are more open to unionising migrant workers, even the undocumented, they do so after those have crossed borders and entered the national state.

In the paper I propose a framework that discusses how the responsibility of unions towards work migrants should be assessed from the time migrants take their first step in the direction

* Many thanks are due to Guy Mundlak, Faina Milman-Sivan and Virginia Mantouvalou for fruitful discussions.
² As opposed to the existing moral obligation towards asylum seekers under the 1951 Convention relating to the Status of Refugees.
of movement, usually in their country of origin, up to and including the point where they work elsewhere. This framework adopts a sector-based analysis that sheds light on union responsibility, and is comprised of three axes. The first axis rests on Young’s distinction between direct and political responsibility. Young’s investigation of consumer responsibility towards sweatshop workers distinguishes between direct responsibility of some actors, based on the idea of liability, and political responsibility that she called a ‘shared responsibility’ of various actors (institutions as well as individuals, including customers), which have an impact, even if indirect, on the conditions of those workers.\(^3\) The second axis derives from the idea of labour connectedness presented by Dahan, Lerner and Milman-Sivan who stress that attention should be devoted, in the allocation of responsibility for the circumstances of work, to the particular relationships that exist in the labour market and to the idea of labour law.\(^4\) The third axis is solidarity.

Through these axes a few important questions might be answered: What does the moral obligation of unions entail? How should it be assessed, considering that “unions” is not a unitary term and there are variations in union activity and power? How should we think about such a moral obligation when the responsibility of unions towards their members and to the idea of democracy is taken into account? And how should such an obligation be transformed into practice? The three axes are helpful for determining the responsibility of unions and for setting the level of that responsibility. Such an obligation should be acted upon by unions, and also recognised by other institutions, including the courts. The responsibility of unions and its possible implications for courts will be discussed here in respect of two cases of the European Court of Justice, Viking and Laval.\(^5\) This analysis is, however, relevant to other situations that involve unions and migrants, such as the recent case of Fraser decided by the Canadian Supreme Court.\(^6\)

The paper is structured as follows: Part I discusses the theory of global justice in respect of labour migration, pointing to the responsibility toward work migrants resulting from that

\(^5\) Case C-438/05 The International Transport Workers’ Federation and The Finnish Seamen’s Union v Viking Line A BP (hereinafter “Viking”); Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others (hereinafter: “Laval”).
\(^6\) Ontario (Attorney General) v. Fraser, 2011 SCC 20.
theory, both at the stage of deciding to make such a move, and once they've entered and begun working within the receiving country. Part II begins by presenting the sector-based analysis and goes on to introduce the three axes of direct and political responsibility, labour connectedness and solidarity. Part III turns to analysing the cases of Viking and Laval. Part IV concludes.

Global Justice and Labour Migration

Several scholars have dealt with and researched the obligations towards work migrants. One of these is Gordon, who offers, in her seminal article on transnational labour citizenship, a structuring of cross-border labour migration based on transnational political citizenship theories. She proposes a reconceptualization of the relationship between the governments of sending and receiving countries, civil society labour institutions and private actors, in order to forge a link between workers and the receiving country, thereby constructing obligations towards migrants in such a situation. The incentive to use citizenship literature to create moral obligations, or better yet transnational citizenship, rests on the notion that only membership in a particular group called "citizens" constructs obligations of social justice. This notion lies at the basis of many theories that tie moral obligations to the existence of a sovereign state and to members of that state or others linked to it. It is also the reason for the extensive literature that has expanded the notion of citizenship across borders.

Stretching the idea of citizenship in order to create moral obligations on a transnational basis has drawn some criticism. One problem is that the idea of citizenship itself is based upon national citizenship historically and thus is always somehow connected to the nation-state, creating tensions with other theories of citizenship. Furthermore, there are always people

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8 This idea is fundamental to theories of justice, such as those of Rawls and Hobbes. For an elaborate discussion on this, and the problems of global justice according to these theories see T Nagel 'The Problem of Global Justice' in T Brooks (ed) The Global Reader 416.
9 Gordon and Bosniak have discussed the problems resulting from the interrelations between the notion of labour citizenship and national citizenship, and their concerns are relevant to other notions of citizenship that have broadened the traditional nation-centered one. Gordon... Bosniak...
left outside citizenship because it is an idea that requires membership. Hence, we should perhaps look for another theory as a moral platform for locating obligations and the responsibilities arising from them towards work migrants. Such a theory should address several periods in the migration story, from the decision to migrate undertaken in the sending country to the arrival and stay in the receiving country. It should touch upon the necessity of moving elsewhere to work due to harsh life circumstances and poverty, as well as to the working conditions in the receiving country.

I believe that global justice theory has potential in both respects. The starting point is Pogge’s approach toward global justice. Pogge claims that the current global order is shaped by institutional schemes that create extreme inequalities and poverty. His underlying assumptions are that there is a shared institutional order that is controlled by the better-off and imposed on the worse-off; that this institutional order is implicated in the reproduction of radical inequality; and that radical inequality cannot be traced to extra-social factors, such as genetic handicaps or natural disasters. Such an institutional order is not natural. It is a product of human beings who are capable of changing it, and this raises a moral obligation towards those suffering from the institutional schemes. As Pogge explains:

In the present international order, billions are born into social starting positions that give them extremely low prospects for a fulfilling life. Their misery could be justified only if there were no institutional alternative under which such massive misery would be avoided.

The moral obligation requires institutions to take steps and adopt less harmful practices. Alongside institutional duties lie duties of individuals, according to which ‘one ought not to participate in an unjust institutional scheme (one that violates human rights) without making reasonable efforts to aid its victims and promote institutional reform’. The negative duty of people not to cooperate in the imposition of unjust practices, together with their participation in unjust institutional schemes, is what creates the obligation incumbent upon them.

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11 Pogge, Eradicating Systematic Poverty (note 1 above) 441
12 Ibid 442.
In his discussion, Pogge focuses on the responsibility towards those who continue to live and work in countries suffering from global institutional inequality. However, the same line of thought applies also to situations where people suffering from institutional inequality wish to move elsewhere due to that inequality. The responsibility of global justice is targeted at individuals who have suffered from poverty and other deprivation due to global institutions that cause such hardship. This is the first element that Pogge emphasises when discussing cosmopolitan positions, moral as well as legal: that the ultimate units of concern are human beings, or persons. As an ideology that is also universal and general, cosmopolitanism has led Pogge, as well as other authors, to claim that global justice is connected with the idea of universal human rights, demanding their recognition and their pursuit. According to this viewpoint, global justice is part of liberalism, it’s an idea of humanity that cuts across borders, making the movement across borders an act which not only does not deny the moral obligation of global justice, but perhaps even fulfils it. The movement of workers results, among other things, from poverty of the global order, and an argument can be made that closing borders while denying those who suffer from extreme inequality the enjoyment of goods, create another part of that injustice. This might lead to obligations in respect of border control and rights within the receiving countries.

A more limited conception of the idea that global justice applies when people wish to move from one place to another can be based on democratic principles. Abizadeh claims that the democratic justification for border control is owed to all who are subject to state coercion, members and nonmembers of the state alike. Migrants who wish to move into a state's national territory are subject to such coercion, and should therefore take part in determining border controls. This again not only makes global justice relevant to the move of people from their countries, but places further obligations regarding their participatory role in democratic processes concerned with borders and other institutional decisions on the national level that affect their freedom.

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14 Ibid 48.
15 Ibid.
One could say that a realisation of Pogge's theory would be to change institutional schemes globally, rather than encourage movement by opening borders and caring for work migrants. But that would ultimately undermine the broader idea of global justice. It is because (a) the moral obligation towards those suffering from extreme inequality and poverty exists irrespective of movement, (b) in the short term no change is foreseen in the global institutional order; and (c) even if there were there would still be a mass movement of work migrants worldwide\textsuperscript{18} — that obligations towards work migrants do apply.

Indeed, in theory, addressing global structural hardship while providing an institutional alternative should annul the moral obligation of global justice. However, until that happens, such an obligation applies towards these individuals irrespective of their location. The obligation exists from the time the migrant takes a first step in the direction of movement, up to the point at which he or she is working in the receiving country. However, responsibility during this period of time might not be equal, and may vary depending on circumstances. I will elaborate on this point below.

Following this line of literature, unions should be seen as having moral obligations towards migrants in search for work. Their responsibility may stem from their institutional actions in the global sphere, or from their membership in an order that creates such inequality and poverty. The two situations entail different kinds of duties. Variation in duty and its degree is also attributable to the fact that unions are not a unitary term. There are considerable differences in union activities, union power, political participation and influence in various national and international settings. Furthermore, as noted above, the duty of unions towards work migrants may vary according to the stage of the migration process, or depending on the involvement of other institutions and people partaking in the situation that brings about migration. It becomes more complicated to determine union duty towards work migrants when the role of unions in respect of their members and the ideas of democracy and solidarity is taken into account. There is therefore a need for a framework that can more accurately discuss the allocation of union responsibility and its degree in light of the complexity of union activity as presented above. The next Part offers such a framework.

\textsuperscript{18} See...
Part II: Three Axes for Determining Union Responsibility

Against the backdrop of a moral obligation that exists towards "others" who due to global institutional schemes are in a situation of extreme inequality and poverty, the responsibility of unions becomes clear. But it becomes even clearer once a sectoral-based analysis is added to the discussion. This Part begins with an introduction of the sector-based analysis, and then turns to such questions as how the responsibility of unions should be allocated, at what level it should be set, and how it should be translated into practice. To answer these questions, I propose to look at three axes: direct and political responsibility; labour connectedness, and solidarity.

A Sector-Based Analysis

Adding another level of analysis of the global order, and even of the unitary global labour regime, bears the promise of tracing additional practices that bring about inequality. Here, the sector-level analysis helps to shed light on union responsibility. Sectors, in the meaning referred to in this paper, are defined according to a particular trade or labour activity, e.g., the banking sector, hospitality sector, domestic service sector, etc. The term 'sectors', as opposed to industries or trades, is used because it captures more accurately labour market divisions due to the inclusion of service activities that are exempted from the other notions listed above. Sectors are not a natural part of the labour market. Their existence, as well as their boundaries and the rules according to which they operate, are an outcome of political interests and processes in which various actors take part, including the legislators that shape sector-specific pieces of legislation, governments that adopt sector-oriented policies, international organisations, and unions as well.

Legislation of the labour market is frequently sectoral. For example, Britain’s minimum wage legislation was sectoral until 1993, and the British agriculture sector still has a sector-specific piece of minimum wage legislation. Health and safety legislation in Britain also

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19 The Trade Boards Act 1919, the Catering Wages Act 1943, and the Wages Councils Act 1945 that replaced the Trade Board Act applied to specific sectors of the market, and were repealed in the Trade Union Reform and Employment Rights Act 1993. On the selective British minimum wage system see: F Bayliss, British Wages Councils (Basil Blackwell, Oxford 1962).
20 The Agricultural Wages Act 1948.
applies different rules to distinct sectors of the market. In Israel the legislature established the administrative process of extension orders that can extend labour conditions set in collective agreements to an entire sector or to the labour market as a whole. Policy is also frequently sectoral. Again taking the example of Britain, in 2005 the British government launched a targeted enforcement policy that was sectorally based, and in Israel the Ministry of Labour has issued numerous extension orders over the years.

The sectorality of legislation and policy is very much evident when it comes to the regulation of labour migration. It is very common to allocate migrant workers to particular sectors of the market through visa schemes. Migrants can get work permits in Israel only for work in the care sector, construction, agriculture and tourism. In Britain there have been several sector-based policies throughout history, the latest being the Sector-Based Scheme, introduced in May 2003 and making it possible to issue permits for low-skilled jobs in a number of sectors. Canada is another case of sectoral policies for migrant workers, like the Seasonal Agricultural Workers Program and the Live-in-Caregiver Program.

Capital is a further institution that structures sectors. Weil, for example, examines particular interactions of firms in the markets of sectors to derive important insights into the sources of workforce vulnerability. He shows how the capital of sectors impacts the players within them - workers and employers - referring to the influence of strong buyers sourcing products in competitive supply chains, central production coordinators managing large contracting networks, small workplaces linked to large, branded, national organizations, and small workplaces and contractors linked together by common purchasers. In this way he stresses how breakdowns of traditional employment relationships occur in the context of specific markets and sectors, varying from one sectoral setting to another.

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21 ...  
23 See: http://www.gov.il/FirstGov/TopNavEng/EngSituations/ESMigrantWorkersGuide/ESMWGComing/  
25 See discussion on these schemes in J Fudge ‘The Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers’ (forthcoming).  
26 D Weil ‘Rethinking the Regulation of Vulnerable Work in the USA: A Sector-based Approach’ 51(3) Journal of Industrial Relations 411.  
27 Ibid 418-420.
The international labour regime is also very much sectoral. The GATS Mode 4 agreement covers modes of service provision by one member of the WTO to another. This entails the movement of capital and labour in one of the service sectors covered by the GATS, such as health professionals, construction workers, tour guides, accountants, software developers or others. In its many years of activity the ILO has also adopted various sectoral policies, including Conventions, policies through its Sectoral Activities Department, and other schemes, such as the Better Work Program that focuses on specific industries. These sectoral policies might have a positive effect on workers, especially when they are based on a human rights agenda and focus on sectors that have been historically disadvantaged in comparison to others. However, they may also entail dangers, such as the creation of distinctions between workers, leading to exemptions or to lower valuation of skill, profitability, remuneration, etc.

Other institutions noted above also play a role in the international sphere. Capital is an obvious example, with TNCs investing in particular sectors of the market in developing countries and not in others. Healthcare, domestic service and sectors where profit cannot be made are left with no foreign investment, and their workers are the poorest amongst the poor. Governments are a factor in strengthening some sectors in comparison to others in international bilateral agreements that enable the movement of workers into specific occupations.

As noted above, the division into sectors, their structure and their rules are not neutral. They are shaped by the political interests of the parties that take part in structuring sectoralism in the labour market. Literature on the segmentation theory has shown that, contrary to traditional economic analysis, segments of the labour market, among them sectors, are not only an outcome of rational choice decision-making, but also of conceptions and historical

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28 The GATS covers twelve general service sectors that are further divided into sub-sectors. On this see...  
29 Examples include the Night Work (Bakeries) Convention, 1925; the Repatriation of Seamen Convention, 1926; the Sheet-Glass Works Convention, 1934; the Food and Catering (Ships' Crews) Convention, 1946; the Dock Work Convention, 1973; the Nursing Personnel Convention, 1977; the recent Domestic Workers Convention, 2011 and others. 
30 The Sectoral Activities Department (SECTOR) promotes decent work by addressing social and labour issues in specific economic sectors, at both the international and national levels. On this department, see: [http://www.ilo.org/sector/lang--en/index.htm](http://www.ilo.org/sector/lang--en/index.htm). 
31 On 'Better Work,' see: [http://www.betterwork.org/EN/Pages/newhome.aspx](http://www.betterwork.org/EN/Pages/newhome.aspx). 
33 ...
processes that affect the creation of the segment and those who are in it.\textsuperscript{34} The segmentation theory reveals the underlying reasons why we find women, racial minorities, migrants, the elderly and other disadvantaged groups in particular segments of the market - certain occupations and specific sectors.\textsuperscript{35} These include labour demand conditions (levels of wages, job hierarchies, and labour control strategies that are created by custom and practice rather than by external market forces); labour supply conditions (explaining market structure by reproduction, household division, stigmatization of certain social groups as secondary workers, etc.); the state (that structures divisions through its welfare provisions, eligibility rules, industrial relations and labour contract regimes, emphases on education and training, immigration rules, and more);\textsuperscript{36} and the spatial effects on segmentation (the spatial entrapment and spatially contingent job markets).\textsuperscript{37} This brings about inequalities in the national context, and also in the international setting.

What part do unions play in the sectoral institutional scheme? Unions are one of the main institutions creating divisions between sectors, which result in increasing inequality among workers. By the way they structure collective agreements and employment disputes they have a pivotal role in shaping the structure of sectors and their rules in the national sphere. Unions are, of course, not bereft of political interests, one of these being to care for their members even at the expense of other workers. This has led to the adoption of policies that set lower rates of pay for groups who were not central to union activity. At first these were women (during the nineteenth century),\textsuperscript{38} then youth,\textsuperscript{39} and today migrants.\textsuperscript{40} Unions also shape the labour market by pricing work in some sectors at higher rates than in others, thus setting a different value for types of work and for distinct workers performing them, a

\textsuperscript{34} C Craig and others, Labour Market Structure, Industrial Organisation and Low Pay (CUP, Cambridge 1982).
\textsuperscript{36} JA Peck, Work-Place The Social Regulation of Labor Markets (Guilford Press, NY 1996) 60-61.
valuation that still has profound implications for today's labour market, and is not clean from stereotypes and cultural conceptions toward particular groups of workers.\textsuperscript{41} It is important to stress that I do not say this in order to undermine the voice that unions give workers, but only to shed light on the more complex outcomes of union activity.\textsuperscript{42}

Furthermore, unions play a central role in the creation of the global sectoral market regime. They do so by participating in tripartite bodies at the international level, such as the ILO, and by providing consultation to various international bodies such as the European Employment Strategy.\textsuperscript{43} There are also international unions and federations, such as the International Trade Union Confederation (ITUC) founded in 2006, which brings together national trade unions worldwide.\textsuperscript{44} The ITUC decides what campaigns to launch, what issues to promote, and which trade unions to support through its solidarity fund. Unions also decide when to act in cooperation with others on the global scale,\textsuperscript{45} and the ways to address migrants who move in search for work.

Including a sector-based analysis in the discussion offers a more multifaceted approach to union activity and its outcomes. How is this connected with the allocation of responsibility of unions towards work migrants? This will be discussed through the three axes proposed in the paper: direct and political responsibility, labour connectedness and solidarity.

Direct and Political Responsibility

In her analysis of consumer responsibility for the working conditions of sweatshop workers, Young distinguishes between two types of responsibility. The first is the responsibility borne by the corporations or individuals owning these sweatshops, as well as the countries in which such activity takes place. These bear responsibility in the sense of liability,\textsuperscript{46} causally connecting the specific circumstances for which responsibility must be assigned with specific actions of these agents. This is a more direct and stronger type of responsibility, and it looks

\begin{thebibliography}{9}
\bibitem{1} Rubery (note 35 above).
\bibitem{2} What Do Unions Do...
\bibitem{3} ... .
\bibitem{4} On the ITUC see: \url{http://www.ituc-csi.org/}.
\bibitem{5} Their decision to boycott... in the case of Laval is an act on the global level. They do not take such steps in the majority of other instances. This reflects the major focus of unions which is usually national.
\bibitem{6} Young (note 3 above) 375.
\end{thebibliography}
backward, referring to a particular event or action. The second sort of responsibility is what she terms political responsibility resulting from social connections, and it means responsibility for things that agents have not done by themselves, but nonetheless stem from the social and economic structures in which they act and mutually affect one another. Young claims that such responsibility is not bound to a specific nation-state, due to the widening of structural connections among persons in the world. In today’s global institutional climate, people should be seen as responsible for distant others when participating in structural processes that condition the lives of those living far away.\(^{47}\) This type of responsibility differs in several ways from the liability model; it is less strong, and it looks forward in the sense that its aim is to take action and reform the structures affecting people’s lives in a negative way, to bring about results. Its form is political, and it requires joining others in a public discourse in an attempt to promote courses of collective action that will contribute to solving the problem. Political responsibility is also shared by all who live in the communal social and economic structures creating inequalities, both victims and others. As Young says:

> The point is not to blame people participating in the institutions and structures that produce injustice, because in many cases avoiding such participation is difficult or impossible. Having understood that structural processes cause some injustices, those participating in the production and reproduction of the structures should recognize that their actions contribute along with those of others to this injustice, and take responsibility for altering the processes to avoid or reduce injustice.\(^{48}\)

Unions can have either direct or political responsibility, which becomes clear once a sector-based analysis is added to the discussion. The sector-based viewpoint sheds light on situations in which unions have direct responsibility towards “others” suffering from poverty and extreme inequality. This can occur when they play a direct role in structuring inequalities and poverty, or directly affect the poor working conditions of “others” in their countries. In other circumstances, they can be seen as having political responsibility resulting from their social connections.

Whether their responsibility is direct or political has implications for the degree of responsibility. In cases where a union or unions have a direct impact on inequality and poverty, a greater responsibility arises, in the sense of liability for harms that have occurred.

\(^{47}\) Young (note 3 above) 377.

\(^{48}\) Ibid, 379.
Their responsibility in this case is not only backward looking, but forward looking as well, meaning that when they had a role in creating inequalities, they have a moral obligation to change the global order they have generated. This responsibility is towards all who suffer from the unequal order, including, as discussed in the previous Part, work migrants. At the same time unions have a political responsibility, requiring them to make an effort to change the structural schemes that create, sustain and deepen extreme inequality and poverty. This is solely due to their participation in the social and economic structures that affect inequality. Their responsibility might require them to take action against policies that contribute to this situation, including, perhaps, migration policies, policies regarding the terms and conditions of employment for migrants, etc.

Determining whether unions have direct and/or political responsibility depends on many factors, including their power, activities, intentions, etc. But what does this responsibility entail, especially when discussing shared-responsibility? The axis of labour connectedness can be helpful in thinking about this question, to which I now turn.

The Labour Connection

Dahan, Lerner and Milman-Sivan state that labour relations constitute a unique type of social connection, called the labour connection. According to them, all actors who take part in social schemes that create extreme inequality bear some responsibility towards workers, but greater responsibility lies with those who partake of the labour connection. The labour connection is defined either in the legal terms of employer-employee relations or in substantive terms, i.e., actors who contribute to the production chain and participate in bringing a product to the market.\(^{49}\)

Dahan, Lerner and Milman-Sivan’s idea of the labour connection has important implications for thinking about global justice and the allocation of responsibility in the global labour market. This is due to the differences between labour and other social connections in the global sphere. Their definition is, however, a bit narrow. Despite acknowledging changes in the labour regime in the past few decades, it rests on a rather traditional conception of

\(^{49}\) Dahan, Lerner and Milman-Sivan (note 4 above) 135.
labour relations, shunting aside other actors that can be seen as playing significant roles in employment, such as customers.\footnote{On the centrality of customers in today’s world of work, especially that of services, see: E Albin ‘Labour Law in a Service World’ (2010) 73(6) The Modern Law Review 959, and also E Albin ‘A Worker-Employer-Customer Triangle: The Case of Tips’ (2011) 40(2) Industrial Law Journal 181. Hence, in some situations we might see customers as having more responsibility for workers’ conditions than other, more traditional, actors.} It also rests on a limited view of the structures that create inequalities in the labour market, which are not limited only to those who contribute to the production chain. I think that the analysis of the labour connection should include other institutional schemes that create hardship in the global labour market, such as sectors.

Moreover, Dahan, Lerner and Milman-Sivan’s discussion on responsibility for workers, or prospective workers, focuses mainly on the state and employers. This might be explained by an assumption that workers and unions have shared interests. This, however, is not necessarily the case, especially in the global regime and when discussing work migrants. It is therefore necessary to take a look also at union responsibility towards workers, and I believe that the framework they offer may be useful for this purpose as well.

Dahan, Lerner and Milman-Sivan propose four principles for allocating responsibility to remedy unjust labour conditions. The first is connectedness. This principle allocates responsibility depending on the strength of the connections between people involved in joint activity, common membership in institutions, or solidarity among communities. These obligations carry extra moral weight. The second is capacity. It refers to the capacity of an agent to relieve workers’ hardship and unjust conditions. The third is benefit. It asserts that moral obligations depend on the extent to which one benefits from the injustice. The fourth and last is contribution to bringing the hardship about.\footnote{Dahan, Lerner and Milman-Sivan (note 4 above) 136-141.}

The four parameters offered by Dahan, Lerner and Milman-Sivan, together with the sector-based analysis, are useful for discussing the responsibility of unions. The connectedness of unions to work migrants is not obvious. Unions tend to focus their work on their members, or on the broader group of workers in their domestic domain. Their connectedness to work migrants usually starts when the latter have already entered the country in which the union operates. This may create greater responsibility for unions at this stage of work migration, in comparison, for example, to the period of travel. The claim could be made, however, that a connection exists between unions and work migrants even before the latter have crossed
borders, based on the joint activity of work and on the shared idea of balancing the inequality between labour and capital. Unions and workers, or prospective workers, both aim to promote the agenda that labour is not a commodity. According to this viewpoint, the idea of solidarity should apply not only to union members, or other fellow working citizens, but to all workers, including those who are located elsewhere.

Indeed the connection to the more distant workers is weaker, but in some circumstances it might get stronger. Hence, for example, the closer workers get to the borders within which unions are active, the stronger the connection becomes, as does union responsibility. Additionally, such a connection may be stronger for workers working in the same sector – such as workers in the construction sector in Spain, Israel, Canada and China. Work connections exist between sectors across borders. The banking sector is a good example, as are high-tech, medicine and others. People share information, work together on a daily basis, meet at conferences, etc. Shared efforts are also made by workers and unions in the global domain, such as the cooperation of domestic workers and unions in promoting the recent ILO Convention and recommendation on domestic work.\(^{52}\)

Unions might also have the capacity to relieve workers’ hardship and unjust conditions, depending on circumstances as noted above. When workers enter the receiving country the capacity of unions becomes greater, depending on their power within that country. However, unions have capacity at an earlier stage as well. They can act globally, and can either take action on their own on behalf of work migrants or through the ITUC, ILO, EU or international bodies. In certain circumstances unions have the political power to take action in their own national state, affect migration policy, and make it easier for work migrants to enter.

There are situations where unions also benefit from the injustice. They may be able to keep the working conditions of their members at a higher level on account of work migrants. Benefit exists when the terms and conditions of work for migrants are lower in the receiving country, but also when migrants are denied entry, or allocated to particular sectors of the market and not to others. Sometimes unions have a direct role in determining these sectoral practices and rules, and it may be part of their politics. When migrants are excluded from the

\(^{52}\)
decision-making circle within unions, this becomes more possible. Lastly, unions can have a role in contributing to bringing the hardship about, even if not directly, all as detailed and discussed above.

All four parameters of the labour connection assist in thinking about the allocation of shared-responsibility, i.e. political responsibility to unions. But the picture is more complex. The discussion of union responsibility should be conducted in respect of another consideration, a third axis, that of solidarity. The axis of solidarity touches upon the tension that might (or might not) exist within the broad category of ‘workers’ – domestic as well as work migrants – and where that leaves unions.

Solidarity

Solidarity is a term grounded in connections. It means the integration of people and their shared ties. Solidarity can be natural, as in families or tribes, or it can be created through social mechanisms. Some of these social mechanisms are the sovereignty of a nation state, educational or religious training, shared occupations and sectors, etc.53 The responsibility arising from solidarity is thus partly included within the parameter of connectedness presented above. However, there is another aspect to solidarity that justifies positing it as a separate, although interrelated, axis. It has to do with the conflicts that may arise out of different circles of solidarity, and the allocation of responsibility in those contradictory situations.

Discussions on solidarity of unions are usually structured around membership or representation. Unions provide collective voice to their members or to a broader group of represented workers, vis-à-vis an employer. This has many advantages that have been discussed lengthily in the literature. The activity of unions creates a social mechanism that transforms individual workers from separate entities into a group, generating solidarity and shared interests.

53 Durkheim The Division of Labour in Society
Unions have responsibilities towards their members, based on the idea of democracy. But over the years they have also formed solidarity among broader groups, by making efforts to improve the situation of the working community at large, both within their national states and abroad. Activities such as legislation, national strikes, and lobbying have formed social mechanisms of solidarity towards workers, beyond the scope of union membership. Moreover, together with other central global institutions, mainly the ILO, unions have created an even broader social mechanism of solidarity, encompassing the entire working population worldwide. Hence, it can be said that there are different circles of solidarity. Tying this with the literature on responsibility and its different forms, it can also be said that each circle creates different degrees of union responsibility, and diverse requirements that unions should act upon. This becomes very clear when notice is taken of the labour connection parameter and its outcomes.

It is important to note that tensions may exist between the different circles of solidarity, confronting union activity with conflicts. The question then is how unions should deal with their conflicting responsibilities towards union members, other workers in their nation state, and work migrants. This is a central point that should be considered in future research – how can theories of membership, democracy and global justice address these conflicts.

However, it is also important to note that such conflicts do not always exist. In that case, the solidarity axis might only play a role in strengthening the labour connection axis. When this happens, as in the two cases of Viking and Laval, then union action that protects work migrants should be assessed not on the basis of the regular discourse of union activity – which rests on the idea of citizenship – but rather through the framework of global justice. That is how the European Court of Justice (ECJ) should have interpreted unionisation in the cases of Viking and Laval, which I shall now discuss.

54 Webb, Industrial Democracy...
Part III: Viking and Laval

If unions have considerable responsibility towards work migrants, based on a moral duty, then that duty is enforceable, ‘in the sense that third parties may be justified in applying sanctions to those who default on them,’ I have argued above that the moral obligation of unions towards work migrants varies according to the three axes. When the responsibility is acute, however, other parties, such as courts, have justification for protecting action taken to fulfil such responsibility. When the cases of Viking and Laval are considered from this viewpoint, it highlights the problematic nature of the ECJ’s decisions. I believe that if the ECJ, in both cases, had been more sensitive to the responsibility resulting from global justice, a different balance between economic and social interests might have been achieved.

The case of Laval discussed a company incorporated under Latvian law that posted around 35 workers to Sweden to work on building sites without signing a collective agreement with the main Swedish building and public works trade union. Negotiations between the parties took place, but they did not lead to a signed agreement. As a result, the posted Latvian workers were paid less than €9 per hour, compared to Swedish workers who received €15-16 per hour. The union took collective measures against Laval, blockading the building site where the workers were to perform their work. Other measures included preventing delivery of goods to the site, placing pickets, and stopping Latvian workers and vehicles from entering the site. A month later, an electrician’s union initiated sympathy action. Consequently, the workers posted by Laval went back to Latvia and did not return to the site. Laval petitioned the Swedish Court, claiming, among other claims, a breach of Article 49 EC, which protects the freedom to provide services within the European Community, and a breach of Directive 96/71, and requesting damages from the trade unions and an interim order to halt the industrial action.

In balancing the right to unionise against the freedom to provide services within the European Community, the ECJ interpreted EU law as precluding a trade union in one member state from taking action that is intended to force a service provider from another member state to enter into negotiations with it over the rates of pay for posted workers and to sign a collective agreement setting conditions more favourable than those resulting from

the relevant legislative provisions.\textsuperscript{56} This, of course, limits unions to working to improve the conditions of employment only of workers in their national state, obscuring their obligation to act on behalf of workers who are less advantaged due to global institutional structures.

Once the axes proposed above are considered, in this case the union seems to have had an acute responsibility towards the work migrants. They had already entered the national state of Sweden where the union operated; they worked in a sector where unions played a central role; the union had the capacity to relieve the workers’ hardship; and if it had not taken action it would have been taking part in bringing the hardship about. In terms of solidarity, there was no conflict between the union’s responsibility towards its members and its responsibility towards the migrants stemming from global justice. The ECJ did not recognize all this. On the contrary, instead of recognising the union’s moral obligation and necessary steps resulting from that obligation, it stated that the union is precluded from operating in such circumstances, disregarding the union’s global role, reducing it to a merely national actor. This is interesting, especially because the entire decision turned around the movement across borders, which is understood by the court to be an essential part of capital activity, but not of union action.

A very similar analysis is relevant to the case of Viking. Viking Line, a Finnish passenger ferry operator, owns the Rosella, which plies the route between Estonia and Finland under a Finnish flag. The Rosella’s workers are members of the Finnish Seamen’s Union (FSU), which is the Finnish affiliation of the International Transport Workers’ Federation (ITF), headquartered in London. One of the ITF’s principal policies is its flag of convenience policy, the aim of which is ‘to eliminate flags of convenience and to establish a genuine link between the flag of the ship and the nationality of the owner, and second to protect and enhance the conditions of seafarers serving on FOC ships.’ Viking wanted to reflag the Rosella, register it in Estonia, employ an Estonian crew, and pay lower wages. The FSU together with the ITF planned to boycott the Rosella and other Viking vessels in an attempt to prevent the reflagging and, particularly, to thwart the degradation of employment conditions. Viking brought a legal action claiming, among other claims, that the FSU, and especially the ITF, breached Article 43 EC, which protects freedom of movement.

\textsuperscript{56} Laval (note 5 above), para 111 of the ECJ decision.
In its judgment the ECJ stated that the collective action taken by the FSU has the effect of making Viking's exercise of its right to freedom of establishment less attractive, or even pointless, and that hence such collective action constitutes a restriction of freedom of establishment within the meaning of Article 43 EC. The interpretation of Article 43 EC is that collective action which seeks to induce an undertaking registered in one Member State to enter into a collective work agreement with a trade union regarding terms and conditions set in another Member State constitutes a restriction of the Article.

As in the case of Laval, while the ECJ recognised the importance of global action in regard to freedom of movement, it did not extend similar recognition to the activities of unions. In this case such an interpretation, which sets aside obligations stemming from global justice, is even more problematic given that the union involved was the ITF, an international federation of unions whose responsibility is very acute in these circumstances. Here, the responsibility is also very much reliant on the sectoral connection, and also on the global scope of the union's activity.

Conclusion

In this paper I have claimed that unions have a moral obligation towards work migrants. This obligation begins when migrants take a first step in the direction of movement, and continues after they enter the receiving country and throughout the period of their work. The argument is based on Pogge's moral theory of global justice resulting from institutional structures, to which I have added a sector-based analysis.

As I have shown, unions were and still are involved in the creation of sectoral divisions in national contexts, in establishing hierarchies among workers, and in shaping the politics that create and sustain sectoral segments in the labour market, bringing some groups of workers in and leaving others out. They have played a major role in structuring the boundaries of sectors through their own politics, including the exclusion of migrants from some sectors and their allocation to others, and the exemption of migrants from the protection of collective agreements and from the unions' internal political processes. On a global scale,

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57 Viking (note 5 above), paras 72 and 74.
58 Ibid, para 90.
their activities within international institutions, such as the ITUC, the ILO, and the EU, as well as in other global federations, have led to the relegation of some workers outside the scope of discussion and policy. Accordingly, they are a central actor in the structuring of global inequality and have a moral obligation.

The responsibility of unions toward work migrants varies according to circumstances - those of the journey, as well as those of unions and of other actors. In light of these variations, I have proposed here to look at three axes for allocating responsibility to unions: direct and political responsibility, labour connectedness, and solidarity.

The moral obligation of unions stemming from global justice differs from the citizen-based model. Its basis is global. Such an obligation should be acted upon by unions, and also recognised by other institutions, including the courts. The analysis of the cases of Viking and Laval has revealed that despite the global recognition accorded by the ECJ to freedom of movement and to the freedom to provide services, the global obligations of unions have not yet been acknowledged. However, such acknowledgment is necessary, especially in today’s global world. By assessing both capital activity and union activity on the same global scale, I believe that a better and more accurate balance can be achieved between social and economic interests in the era of globalisation.