



**CIRCULAR MIGRATION IN ISRAEL:
LAW'S ROLE IN CIRCULARITY AND THE
AMBIGUITIES OF THE CM STRATEGY**

Guy Mundlak

CARIM Analytic and Synthetic Notes 2008/32

Circular Migration Series

Legal Module

Cooperation project on the social integration
of immigrants, migration, and the movement
of persons (CARIM)



CARIM
Euro-Mediterranean Consortium
for Applied Research on International Migration

Analytic and Synthetic Notes – Circular Migration Series
Legal Module
CARIM-AS 2008/32

Circular Migration (CM) in Israel: The Law's Role in Circularity and the
Ambiguities of the CM Strategy

Guy Mundlak
Tel-Aviv University, Israel

This publication is part of a series of papers on Circular Migration written in the framework of the CARIM project, and presented at two meetings organised by CARIM in Florence: *The Role of Circular Migration in the Euro-Mediterranean Area* (17 - 19 October 2007), and *Circular Migration: Experiences, Opportunities and Constraints for Southern and Eastern Mediterranean Countries* (28 - 29 January 2008).

Please follow this link to access all papers on Circular Migration: www.carim.org/circularmigration

© 2008, European University Institute
Robert Schuman Centre for Advanced Studies

This text may be downloaded only for personal research purposes. Any additional reproduction for other purposes, whether in hard copies or electronically, requires the consent of the Robert Schuman Centre for Advanced Studies.

Requests should be addressed to forinfo@eui.eu

If cited or quoted, reference should be made as follows:

[Full name of the author(s)], [title], CARIM AS [series number], Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole (FI): European University Institute, [year of publication].

THE VIEWS EXPRESSED IN THIS PUBLICATION CANNOT IN ANY CIRCUMSTANCES BE REGARDED AS THE OFFICIAL POSITION OF THE EUROPEAN UNION

European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy

<http://www.eui.eu/RSCAS/Publications/>
<http://www.carim.org/Publications/>
<http://cadmus.eui.eu>

CARIM

The Euro-Mediterranean Consortium for Applied Research on International Migration (CARIM) was created in February 2004 and has been financed by the European Commission. Until January 2007, it referred to part C - “*cooperation related to the social integration of immigrants issue, migration and free circulation of persons*” of the MEDA programme, i.e. the main financial instrument of the European Union to establish the Euro-Mediterranean Partnership. Since February 2007, CARIM has been funded as part of the AENEAS programme for technical and financial assistance to third countries in the areas of migration and asylum. The latter programme establishes a link between the external objectives of the European Union’s migration policy and its development policy. AENEAS aims at providing third countries with the assistance necessary to achieve, at different levels, a better management of migrant flows.

Within this framework, CARIM aims, in an academic perspective, to observe, analyse, and predict migration in the North African and the Eastern Mediterranean Region (hereafter Region).

CARIM is composed of a coordinating unit established at the Robert Schuman Centre for Advanced Studies (RSCAS) of the European University Institute (EUI, Florence), and a network of scientific correspondents based in the 12 countries observed by CARIM: Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Palestine, Syria, Tunisia, Turkey and, since February 2007, also Libya and Mauritania. All are studied as origin, transit and immigration countries. External experts from the European Union and countries of the Region also contribute to CARIM activities.

The CARIM carries out the following activities:

- Mediterranean migration database;
- Research and publications;
- Meetings of academics;
- Meetings between experts and policy makers;
- Early warning system.

The activities of CARIM cover three aspects of international migration in the Region: economic and demographic, legal, and socio-political.

Results of the above activities are made available for public consultation through the website of the project: www.carim.org

For more information:

Euro-Mediterranean Consortium for Applied Research on International Migration

Robert Schuman Centre for Advanced Studies (EUI)

Villa Malafasca

Via Boccaccio, 151

50133 Firenze (FI)

Italy

Tel: +39 055 46 85 878

Fax: +39 055 46 85 755

Email: carim@eui.eu

Robert Schuman Centre for Advanced Studies

<http://www.eui.eu/RSCAS/>

Abstract

Current patterns of e/immigration into and from Israel do not conform to the concept of circular migration. The article argues that circular migration is a broad term, in which its positive prospects suggest the possibility of achieving a joint-gains migration strategy. This view of CM emphasizes migration for short periods of time, which can be shaped in a flexible manner to tailor fit the parties' needs. An analysis of the legal institutions in Israel as a sending country suggest that the legal institutions that are needed to promote circular emigration are partially in place and can be further improved by means of bilateral agreements. By contrast, Israel's legal arrangements as a receiving country are not easily adaptable so as to induce circular immigration. Consequently, promoting circularity under the current legal conditions may be a precarious strategy that will work against migrants' interests and highlight the potential of circular migration to include less generous prospects as well

Résumé

Les caractéristiques actuelles de l'immigration/émigration en Israël ne correspondent pas à celles de la migration circulaire. L'article défend l'idée que la migration circulaire est un concept très large, dont les retombées positives supposées devraient permettre une stratégie migratoire bénéfique pour les pays d'origine et de d'accueil. Cette conception de la migration encourage la migration pour des périodes de courts séjours dans des conditions fixées de manière souple et adaptées aux besoins des parties. Une analyse du dispositif juridique israélien, envisagé comme pays source de migrants, permet de conclure à l'adéquation du cadre institutionnel pour promouvoir la migration circulaire. Pour améliorer ce cadre, la conclusion d'accords bilatéraux est recommandée. Par contre, la même analyse mais cette fois dans la perspective où Israël est pays d'accueil, montre que le dispositif légal actuel n'est pas adapté à la migration circulaire. En conséquence, plaider, aujourd'hui, pour une migration de type circulaire sans adaptation du cadre légal ne servirait sans doute pas l'intérêt des migrants et pourrait même avoir des conséquences bien moins positives que celles annoncées.

Introduction

Israel potentially serves as both a sending country and a receiving country for circular migration. As a sending country, individuals working in the new economy seek employment opportunities abroad, even for a short period of time. Moreover, Israel serves as a temporary 'station' for migrants, mostly from the former Soviet Union, who remain in the country for several years and then move to other receiving countries in North America and Europe. As a receiving country, Israel attracts migrants from Eastern Asia, Eastern Europe, Africa and South America, who work mostly in the low skilled/low waged sectors. At present, these three patterns of migration are not aligned with the objectives underlying the emerging concept of 'circular migration'. They are mostly non-circular patterns of migration.

In this short analysis, I will try to account for the role of law in constituting the gap between the current patterns of migration and those envisioned by the concept of circular migration (CM). This discussion requires us first to reflect on the intrinsic ambiguity of the CM concept. I will argue that this concept is intended to identify a positive strategy of mutual gains for the individuals taking part in CM, the sending and the receiving countries. However, within this triangular mutual-gain strategy there are two axes of conflict – (a) between receiving and sending countries, and (b) between individual interests and the states' interests. Following the theoretical polemics on 'circularity for whom' I will provide the legal details that are relevant to an understanding of CM in and through Israel. In the concluding section I will summarize by alluding to the way in which legal rules and other socio-economic institutions shape the reality of CM and the potential mismatch between the alleged joint-gains strategy and its implementation in action.

A. The ambiguities of circular migration

The usual definition of CM emphasizes, first, the temporary nature of migration, yet also stresses that CM is not to be confused with guest-worker programs, such as those that were developed in Germany (Commission of European communities 2007). Hence, the temporary nature of migration cannot be the sole characteristic. However, it is difficult to pinpoint whether there is a single feature that distinguishes CM from other forms of temporary migration. What seems characteristic about CM is, instead, its aim of enhancing joint-gains. However, it is noteworthy that the institutional design of CM matters, and policy documents warn that the line between CM and other forms of institutionalized short-term migration is thin (Commission of European communities 2007, p.8; OECD 2006, pp. 15-16; Martin 2006; Abella 2006).¹

CM, as a joint-gains type of temporary migration, has a strong affinity to the idea of transitional labour markets (TLM). In fact, it adds a spatial dimension to the theory of TLM, which is based on arrangements related to time (Gier & van der Berg 2005; Schmid 2006). In short, the theory of TLM seeks to rethink the institutional design of moving from a system in which careers involve full-time work for a single employer over the working life-span (from end of education to retirement). TLM seeks to rethink the rules of labour law and the welfare state to accommodate more frequent transitions between work, education, life-cycle phases and personal needs. More generally, thinking about an individual's work-life we must avoid assumptions of linearity and assume instead disrupted transitions that need to be eased and secured.

¹See also the background information distributed for the CARIM conference (2007) at p. 3.

It should be noted that there are distinct concerns that appear in these documents. So there is a significant difference between, on the one hand, fearing that CM will look like the guest-worker programmes of the past (with their harsh repercussions for guest workers) and, on the other, a concern that CM will eventually increase long-term and permanent migration.

As noted, then, the theory of TLM thinks in terms of time (pauses, breaks, life cycles) and CM adds a spatial dimension. Development of human capital, autonomous control over one's life story and the public interest must consider transitions across borders as well. For the same reason that it can no longer be assumed that individuals build a career in a single workplace, it cannot be assumed that they build their career in a single country.

The relationship between CM and TLM is important to note because they share similar premises. The changing world of work and welfare must be better attuned to individual needs. Rethinking the rules can benefit workers, employers and the public alike, but fundamentally it is the individual worker/citizen that should be at the centre of TLM/CM. Hence, in the context of CM, what can help in distinguishing CM from guest-worker programmes is that CM no longer seeks only to resolve the economic needs of the host-state or increase cash-flows to the sending country. The common approach to temporary migration renders the individual instrumental to the host country's needs, providing the migrant with few benefits and many obligations on the basis of a 'take-it-or-leave-it' package. Instead, CM seeks to use temporary migration schemes as a way of opening further options, ensuring individuals can benefit from migration over and above their wages (eg, in terms of improved skills, work experience and the like). CM builds strongly on agreements between host and sending states, hoping that a contractual arrangement will accommodate the internalization of each other's interests.

These objectives of CM also point to its potential problems. Contractual arrangements between states may relax tensions between the receiving and sending states, though power asymmetries between states raise similar concerns to power asymmetries between contracting individuals (such as worker and employer). Yet, more importantly, such arrangements are designed to ensure the interests of the countries involved and may overlook some of the migrating individuals' interests. In this respect, circularity can be a vice or a virtue. For example, the ability to migrate seasonally and plan a year's work in which the same work is utilized by employers in different places is a virtue. At the same time, when migrants pay high sums for obtaining work permits, and incur high transaction costs when moving from one place to another, the need to limit one's stay in favour of the public interests of circularity is a vice. Similarly, making the rules more flexible is a virtue. Making more rules, exceptions and enhancing discretion can also be a vice. The lives of migrants are heavily regulated to begin with and further regulation may amount to a heavy burden.

CM is also better suited to skilled workers – students, professionals, craftsmen, entrepreneurs and the like. It does not provide a significantly enhanced set of options for the low-skilled workers who are employed in agriculture, construction or services. With regard to the former, the CM tradeoffs make more sense – allow the receiving countries to draw on these skills and, in return, ensure that the workers upgrade their skills and take them back to their home country. Humans are the vehicles of knowledge, moving from one country to the other. Yet, the interests of menial workers are often overlooked by both the sending and the receiving countries, and may potentially remain outside the joint-gains ideal of CM.

It is arguable that any system that creates more options than a simple guest-worker programme is a benefit to the migrants. If the only alternative to a one-off short-time stay is remaining as an undocumented worker, then any set of migration rules will be better. It was similarly argued in the past that the short-term stay offered by the guest-worker programme was better than a no-admissions policy. However, there are various options, for example – an increase in the number of migrants admitted or an increase in investments in the sending countries and the relocation of industry there (at the price of losing jobs in the EU)². Falling short of these options, the gains and losses of CM's institutional design must be scrutinized. Can CM really do away with the instrumental view of

² Obviously migration strategies and development policy need not be viewed as substitutes, and some of the policy papers emphasize the need to link immigration policy and development. In fact, currently the right to human development enjoys a unique position as being an umbrella-right that pulls together other human rights. Cf. the Action plan written by the Euro-African Ministerial Conference in Rabat (2006).

migrants that has characterized the law of immigration for so long? The reliance on bilateral and multi-lateral agreements seeks to internalize the conflicting interests of the sending and receiving states. It assumes that an agreement-based process can affect a more just outcome. Given that the interests of neither state are identical with those of the individuals, it is also worthwhile investigating how to internalize the individuals' interests and not only the states. Interestingly, trade unions, NGOs and other agents in the civil society are not presented as an integral part in the development of CM, raising the concern that individuals' interests may be lost in a democratic deficit.

B. The state of the law in Israel

As noted, Israel is both a receiving and a sending country. In identifying the relevant norms that can enhance or inhibit CM in Israel, I will discuss the case of Israel, first, as a sending country (b1) and, second, as a receiving country (b2).

b1. Israel as a sending country

Freedom of movement

As a sending country, Israel's laws of immigration affect two of the three categories mentioned at the outset – the group of new-economy workers, students, and the like; and the group of immigrants who view Israel as a transition state. The applicable rules for the groups are rather similar, because the transition immigrants can be easily naturalized in a very short period of time. Those who choose not to receive Israeli citizenship can obtain a temporary-residence status that provides the social rights granted to those who do adopt citizenship, but does not grant them political rights.³ The ability to choose between the two options is itself a privilege of newcomers.

The freedom of movement is one of the few rights that has been formally enshrined in the Israeli Bill of Rights.⁴ However, the important question is not whether there is a liberty to come and go, but whether there are substantive losses emigrants should consider when making the decision to leave the country. The group of passing-migrants may risk their 'absorption package' if they leave after a short period of time, but they may do so nevertheless.⁵ Given the relative size and nature of the absorption package, which is not typical of a receiving country's policy, a condition of ongoing residency is considered to be morally and legally valid and is not viewed as a restriction on the constitutionally-enshrined freedom of movement.⁶ It should also be noted that most of the privileges accorded as part of the absorption package require residency and, therefore, cease once the migrant leaves the country. There are particular arrangements for those who leave and come back, and the term of benefits halts during the absence and, for the most part, is renewed when they re-enter the country.

As for native Israelis who emigrate, the applicable legal norms are embedded in a broader social view on emigration. Generally, (Jewish) citizens who left the country for a long period of time were deemed to flag up a social problem. They were referred to as traitors or as the 'weakest of the weak'. The legal implications of this approach were twofold. First, citizens who left Israel for a long period of time were excluded from some of the social and economic benefits of citizenship, such as the

³ The Entry into Israel Law (1952), section 2; Bylaws Entry into Israel (1974), section 6.

⁴ Basic law : Human Dignity and Liberty (1992)

⁵ The absorption package is based on the Absorption Package Law (1994), though I use the term more broadly to include various benefits and assistance measures that are extended to new immigrants. For an overview of these benefits, see http://www.moia.gov.il/NR/rdonlyres/374A8641-4D1C-4701-8EFD-2FBA0AE6289F/0/moleh_en.pdf (last visited November 2007).

⁶ This assessment of the constitutional validity is the author's and has not been tested in court.

universal old age pension.⁷ These benefits are administered on the basis of *residency* rather than *citizenship stricto sensu*. Second, to ‘hold on’ to expats and encourage them not to join permanently the ‘weakest of the weak’, the criteria for residency were designed to include expats for a relatively long period of time, assuming that they did not dissolve their life-centre in Israel altogether. In other words, for both passing migrants and Jewish emigrants, the flexible definition of residency which emphasizes the notion of domicile (where one thinks of his or her home as being) sought to retain and encourage the ongoing contact of those who left with the perceived homeland.

Social rights

With regard to some social benefits, re-admission to Israel may require a period of rights’ accumulation, for example in the field of health care.⁸ This is intended to deny the abusive use of the health-care system in which those who ceased to contribute to the system temporarily return to enjoy its benefits. In the context of CM, it is important to note that for some benefits, most notably for health care, emigrants may retain their rights by continuing to pay the public health-care system a minimal sum (equivalent to that which is collected from students and the unemployed). Nevertheless, even this payment may only preserve rights that an individual can enjoy upon returning to be a resident: that is, the preservation of rights is not a substitute for residency.

Another institution for preserving social rights in Israel for those who leave are bilateral agreements that are signed between Israel and other countries.⁹ Currently there are several agreements that have been signed, and which allow the preservation and continuation of rights, despite the move back and forth between countries. In broad strokes, such agreements seek to prevent dual payments to social-security systems, as well as the continuity of entitlements at the rate of the country of residence. Hence, payment for the social security system of another country exempts one from payment in Israel. Ongoing benefits, such as children allowance are paid in the foreign country without having to wait for an accreditation period, and upon return there is continuity of entitlements in Israel. Different types of CM patterns may benefit from such agreements to different degrees. Individuals (or households) that move for short periods of time (seasonal work or short affiliations with multinational companies and sister companies abroad) are likely to enjoy, for the most part, exemption from double payments to social security (akin to similar arrangements in the tax system). Those who move for more considerable lengths of time, maintaining their Israeli domicile, but having temporary engagements abroad (eg, for a sabbatical, for temporary posting in the headquarters of a multinational and the like) will particularly benefit from the continuity of rights abroad and upon their return to Israel. Those who move for considerable length of time, abandoning their link of domicile with Israel, may enjoy the initial guarantee of continuity but, over time, the effects of the agreement fade, as they establish their permanent residence in a foreign country.

⁷ This is an ongoing debate. While the Supreme Court at first suggested this arrangement may be in violation of the right to social security, the courts later upheld the state’s decision not to extend old-age benefits to those who have left Israel upon reaching old age. High Court of Justice 890/99 Chalamish V. National Insurance Institute, PD 54(4) 432; Labour Court 386/99 Ilana Donievski – National Insurance Institute PDA 37 696.

⁸ National Health Care Law (1994), section 58.

⁹ In the EU – these include: Germany, (Switzerland), Austria, the Czech Republic, Finland, Belgium, Denmark, Sweden, France, the Netherlands, the UK and Italy. According to the EU-Israel ENP Action Plan (http://ec.europa.eu/world/enp/pdf/action_plans/israel_enp_ap_final_en.pdf) section 2.3.3. the plan is to “implement the provisions under Article 64 and 65 of the Association Agreement as regards the co-ordination of social security”. This has not yet been achieved.

Political rights

The right to vote is accorded to all citizens¹⁰ and citizens who move outside of the country do not lose their political rights. Somewhat paradoxically, it is easier to maintain political rights than social rights. This point is underlined by the fact that Jews may obtain citizenship in Israel relatively easily, even if they do not intend to remain in the country. The political impact of the Jewish diaspora is therefore potentially extremely powerful. However this impact has thus far been marginal, because Israel does not allow voting outside the state's territory. Hence, those who want to influence Israeli politics by exercising their right to vote (for the state government or for local government) must fly to Israel and pay a high economic price to do so. Given the general scepticism of the efficacy of voting, not many are willing to pay such a price. Nevertheless, there were incidences of political parties, mostly ultra-religious parties, who encouraged voters to fly into Israel to vote for a particular party at the polls.¹¹ Putting aside these incidences, the ease with which citizenship is gained is generally balanced by a continuous and strong rejection of re-occurring proposals to allow extra-territorial voting.

Labour markets and employment conditions

One of the important factors that determine individuals' decision to migrate and which can also affect their decision to engage in CM, is the labour market in the sending country. Absence of adequate employment opportunities, low wages, low-employment security and discrimination (to include various forms of relative deprivation within the labour market) – are all factors that encourage emigration and which may discourage return to the home country after a temporary stay.

Israel's labour market has undergone significant transformation, most of which can be characterised as the neo-liberalization (or the Americanization) of the labour market. From what was a highly corporatist system (similar to Austria or the Netherlands), the Israeli system is currently growing to resemble an American system (Mundlak 2007; Cohen et al 2007). This transition has many implications, including a significant lowering of membership rates in trade unions, declining coverage of collective agreements, growing inequality in society and in the labour market, the growing peripheralization of employment (temp work and temp agencies, short-term contracts, outsourcing and the like) and a gradually rising share of the working poor and low-waged workers.

How do these processes resonate with the requirement of sending countries to implement programmes for improving productive employment (COM (2007)) and decent work (ILO 1999, 2001)? The answer here is ambivalent and requires a response at multiple levels. First, in my own personal view, many of these processes get in the way of productive and decent work. This having been said, many of the processes that have taken place in Israel are in line with similar processes in Europe (Standing 1999, Sciarra 2006). Thus, my critique of these changes is not state-specific; there is limited disparity between Israel and the receiving countries and the effect of these changes on the decision to migrate or to return are assumed to be marginal.

A second point to emphasize here is that both 'productive employment' and 'decent work' are rather vague terms. This is particularly true of the EU's use of 'productive employment', which does not even attempt to include a definition. Measuring productivity is not the same as assessing whether work is decent or dignified. These terms, then, conceal whether we are only looking at increasing productivity or also at how an increase in productivity affects the distribution of gains (ie, labour share in the profits). Clearly some matters are not controversial. So there are *indicia* of discrimination in the labour market, for example, of the Arab minority (Wolkinson 1999). Hence, removing discrimination is particularly important to encourage CM. This is of particular importance in the context of high-

¹⁰ Basic Law: The Knesset, section 5. Citizenship remains with the citizen even if he leaves the country. Supreme Court HCJ 754/83 Renkin V. Minister of Interior Affairs, PD 38(4) 113.

¹¹ Cf. Adam Nagourny, *Jets Are Chartered For Israelis in U.S. To Get Out to Vote*, NY Times (May, 8, 1999).

skilled workers who are being discriminated in workplaces and cannot capture the returns on their investment in education and training. But beyond these clear cases, there is no reference to the disputed question regarding the relationship between increased employability and raising labour standards. It is therefore very difficult to assess, for example, if the freezing of minimum-wage indexing: increases employability; infringes on the workers' right to well-paid work; or both?

Thirdly, as noted – when Israel is considered as a sending country, the current demographics of emigration indicate that it is for the most part the higher-skilled workers who are the candidates for pursuing CM. One of the outcomes of the liberalization of the labour market in Israel is the growing wage disparity between higher- and lower-skilled workers, as the former are receiving a greater share of the growth (Kristal et al 2006). Part of this growing inequality is a product of the wages of these high-skilled workers being higher abroad. Hence the market is responding in a way that relaxes the need for the highly-skilled to migrate, although the process is not taking place evenly across all the high-skilled occupations. As noted in the second point, *supra*, whether the state should encourage policies that may reduce the tendency of high-skilled workers to emigrate for higher wages, even at the price of increasing social inequality in Israel (which is very high to begin with) is a policy matter that both concepts – decent work and productive employment – are too broad and general to address.

Conclusion: The conditions for CM in Israel as a sending country

Overall there are no clear barriers for Israeli citizens who wish to take part in CM to Europe. Increasing the reach and scope of bilateral agreements in which continuity of social security provisions will be ensured is maybe the most important step. Yet, the current state of affairs indicates that those engaged in CM have very few problems, if any, in the spheres of political, social and civil rights: now have they problems in the labour market. It is my impression that migration for temporary work and study in the EU has a much greater potential than is currently understood. In fact, it is mostly bureaucratic hurdles (particularly with regard to visas) on the European side that inhibit migration. Relaxing requirements, offering better schooling integration between Europe and Israel and better short-term employment opportunities, could foster closer cultural and economic relations on both sides.

B2. Israel as a receiving country

The issues regarding Israel as a *receiving* country are rather different than those discussed in the previous section. Here, Israel must take more drastic steps to offer a situation that is conducive to the positive ends of CM, and one that can avoid the pitfalls of guest-worker programmes. Israel already experiences extensive labour immigration. Indeed, the share of migrant workers among the workforce in Israel is second only to that of Switzerland (when compared to European countries). On the one hand, most of the migrant workers are not short-term workers, but, on the other, they have no way to become residents. They remain long-term-temporary workers. I would argue that in this dialectical state of affairs, promoting circularity may be precarious for workers and against their interests.

Two points should be clarified at the outset: (a) In the following description I will compare Israel's law to the expectations prescribed by the EU for European receiving countries. However, it should be remembered (though this is obvious) that Israel is not bound by the same benchmarks and is not part of the EU. As a sending country it conforms to the role of a "third country", but, as a receiving country, it does accept upon itself the obligations (hard and soft) of EU member states. (b) CM is relevant only to the group of migrants currently entering as migrant workers. Issues of Aliya ("ascendancy" – the entry of Jewish newcomers), family unification and asylum-seeking do not provide an applicable sphere of action for CM. However, while at present it is not politically feasible, CM might have important implications in the future for any economic re-integration between Israel and Palestine. Assuming a two-states solution to the conflict, neither strict separation nor freely open borders are likely to be the preferred solutions. Given the strong economic asymmetry between Israel

and the Palestinian Authority both the strictly-regulated and the non-regulated option preserve distorted power relations (Mundlak 1998, 1999). CM offers a coordinated third way, the details of which must be negotiated to the benefit of the workers crossing the borders.

Background: the binding system

The entry of migrant workers to Israel has always been worked by linking the entry visa with the work permit¹². Moreover, the work-permit was linked to a particular employer. Hence, the worker was not admitted to take part in the labour market generally, but to work for that single employer. This has been popularly designated as the “binding system”. The problems of the binding system are numerous: it infringes on the right of the migrant to take part in the labour market; and, at the same time, it makes the worker particularly vulnerable to the employer, because losing one’s work, for whatever reason, also implies the loss of the working visa.

The binding system had an effect both on entry (the aspect of migration) and on the duration of stay (the question of labour). Since the influx of migrant workers into Israel in 1993, an informal and generally illegal system of permits brokerage has been established. Workers pay non-Israeli temporary work agencies (TWAs) high sums to obtain the work permit and the visa, sums going as high as 12,000\$, which is an extraordinary sum for workers in countries like China where wages are low¹³. Given that these sums are being pocketed by various middlemen, they also create an incentive for a high level of circulation. That is, the interest of the employers and the TWAs is to prevent long-term employment, and to share the sums collected from the migrants upon entry. This interest in maintaining a high-turnover complement those of the state that wants to prevent claims of residency (impossible as, we shall shortly see, these claims are).

With regard to the labour market the binding system has the effect of significantly disempowering the worker. Even if the worker does not receive their contractual wage, minimum wage or other fringe benefits, it is less likely that they will try to claim their rights in court, for the fear of losing their job and hence their visa. The high sums collected for the entry documents render such a decision economically precarious. Once the worker is deported to the state of origin he or she will not be able to pay the debts they have incurred while paying for entry. Consequently, many workers have an incentive to flee the designated employer and continue their residence in Israel as undocumented workers. The benefits of being documented were slim, the wages for undocumented workers are higher, and at least for some years deportations were too few to make their course of action risky. Paradoxically, the binding system encouraged workers to become undocumented. These kinds of perverse incentives have actually been one of the factors mentioned in the policy documents advocating CM as an alternative.

In a seminal decision in 2006, the Supreme Court held that the binding system was unconstitutional.¹⁴ It required the state to change the system of entry and to allow movement between employers without risking the visa. Even prior to the decision, the state started to gradually relax the binding system on a sector-by-sector basis (Strauss 2006). Before and after the decision the state did not de-couple the two altogether, but, instead, sought to provide some free movement between employers. This was done either by allowing individuals to request movement from the Ministry of the Interior, or to employ TWAs that can move workers between employers, while still securing the relationship of any given worker to one stable employer. In addition workers can move between

¹² This was also true for Palestinian daily workers from the Occupied Territories who were admitted to work in Israel.

¹³ These sums are tracked and documented by the Workers’ Hotline (www.kavlaoved.org.il). They are also confirmed by government officials. Cf The Knesset’s Committee on Foreign Workers – Protocols of a meeting from 30.8.05; The State Comptroller Report 53B (2003) 649-666 ; Jerusalem District Court for Administrative Affairs 420/02 Deng Lin – Minister of Interior Affairs (unpublished, 2002)

¹⁴ High Court of Justice 4542/02 *Worker's Hotline et al. vs. State of Israel* (March 30, 2006).

TWAs, with some restrictions. Both methods have not yet been completed, in some sectors the decoupling of the visa and the work permit has not even started, and the practical implementation of the new methods have been shown to have their share of problems – bureaucratic and substantive alike.¹⁵

There are important implications to the binding system and its aftermath with regard to the development of CM. The binding system and its by-products, most notably – the flourishing industry of payments to middlemen for visa and work permits, is antithetical to the underlying objectives of CM. Moreover, they are precisely the factors that can make CM work against the interests of the migrant workers. As long as migrants need to pay high sums for entry, any idea that they need to return to the sending country after a short period of time will undermine their ability to return past debts and earn a decent profit. Moreover, as long as workers are severely constrained in drawing on their market power, they cannot be expected to pick up on the gains of migration. The current system is oriented too heavily to the gains of employers, and to a lesser extent to those of the state, and does not sufficiently acknowledge the interests of the workers themselves. The attempt to achieve CM through joint agreements between states also suggests potential precariousness. Some sending states, such as China, are implicated in problematic practices, and are not acting as guardians of their citizens' rights. Moreover, in an exceptional case the Supreme Court also upheld an agreement between Israel and Turkey in which the binding of Turkish workers was part of a broader political *quid-pro-quo*.¹⁶

The labour market

Generally, migrant workers enjoy equal rights in the Israeli labour market. This principle of equality has been developed since the Palestinian workers from the occupied territories were formally admitted in 1970 (Mundlak, 2007a at Chapter 7). There are no formal legal statements that permit discrimination. There are judicial rulings upholding the principle of equality with regard to the implementation of statutory employment rights, as well as collective agreements and extension decrees¹⁷. Despite the formal statement of the law, two reservations should be noted. First, equality is intended to secure the rights of domestic workers, and only those of migrant workers as an afterthought. This may seem to be of little importance and often has few practical consequences. But it is worth mentioning as it is indicative of how the government's policy on migrant workers is, for the most part, one-sided, and not based on bilateral negotiations of interests; either with the sending countries or with the migrant workers themselves, who are individuals at the mercy of a rights' regimes while lacking collective representation. Second, and of more practical importance, the formal principle of equality is difficult to implement in practice, and is occasionally challenged or disregarded by public agents or semi-public actors such as trade unions and employers associations.

Given the partial relaxation of the binding system and the more stringent measures for deportation, the gap between the high wages for undocumented and the lower wages for documented workers has narrowed. The Labour Courts have made an effort to ease the judicial review of cases brought by

¹⁵The Workers' Hotline and the Hotline for Migrant Workers, FREEDOM INC. (Aug. 2007) http://www.hotline.org.il/english/pdf/Corporations_Report_072507_Eng.pdf

¹⁶High Court of Justice 10843/04 The Hotline for Migrant Workers and the Workers Hotline V. State of Israel (yet unpublished, 2007). It is noteworthy that the dissenting opinion voiced by Justice Levi analogized this arrangement to state sponsored debt bondage and highlighted the price that workers are paying for political agreements between states. For an English overview of the case see the report prepared by the Workers Hotline (http://www.kavlaoved.org.il/media-view_eng.asp?id=1141).

¹⁷For many years the equal application of labour law was based on the implicit principle of territoriality – that is that all workers who work within Israel should benefit from the protection offered by labour law. Cf. Regional labour Court (Be'er Sheva) 1040/01 Tomasanga – Ambassador Hotel (unpublished, 2002). More recently the labour court suggested that the basis for equality should be found in the Equal Opportunities in Employment Law (1988) that prohibits discrimination on the basis of, *inter alia*, state of origin. Regional Labour Court (Be'er Sheva) 6042/04 Ahmed Montilo – Isrotel and others (unpublished 2005).

migrant workers. Moreover, the courts have always been unequivocal regarding the right of equal employment for undocumented workers. However, there is still much room for improvement in migrant workers' rights, migrant workers these who suffer from slack enforcement in Israel and from, more general, vulnerability owing to their status as migrants.

Social, civil and political rights

While the fundamental principle with regard to migrant workers' employment rights is that of equality, the opposite holds with regard to social rights (such as health, education, housing and social security). Since 1993 the state's position has been that migrant workers do not deserve the fundamental rights of citizenship. Over the last decade, pressure from civil society and the media have led to an incremental and positive change, and partial civil and social rights were accorded to migrant workers. For example, migrant workers are now entitled to health insurance, but cannot be part of the national health-care system (hence, receiving private-health insurance from their employers).¹⁸ Similarly, in the area of civil rights, rights in detention and deportation proceedings have been improved following several lawsuits in the Supreme Court, but are still lacking when compared to rights of detainees and prisoners in the Israeli penal system.¹⁹ Political rights are non-existent, and it is noteworthy that Israel's major trade union, the General Histadrut does not accept migrant workers as members, which is not perceived as a problem by the State.²⁰ Several NGOs have taken up the challenge of advancing migrant workers' political claims, and some municipal institutions, particularly in Tel-Aviv have worked toward similar ends.

In social security migrant workers are only entitled to three rights – occupational-injury compensation, aid in times of employers' bankruptcy and partial maternity payments. Other rights are conditioned on 'residency'. If it was unclear in the past as to how long a migrant worker must reside in a country to become a resident, a law was passed stating that migrant workers are categorically not residents, regardless of their personal circumstances.²¹ Consequently, while the law has enabled a certain relaxation of the maximum stay period, particularly for care-workers, allowing them sometimes to stay for many years, these workers are still excluded from benefits that depend on residency (Mundlak & Shamir 2008).

While the role of bilateral agreements on social security was emphasized in the discussion of Israel as a sending state, these agreements are non-existent when considering Israel as a receiving state. Israel's agreements are solely with similarly developed or more developed nations, and not with the countries from which migrant workers arrive. Consequently, lacking any bilateral arrangements of this kind, Israel provides only limited social benefits to those who work in Israel, and is not implicated in the provision of rights once they leave the country.

¹⁸ Initially a petition was filed requesting the issuance of an injunction ordering the state to issue regulations extending the National Health Insurance Law (1994) to migrant workers (High Court of Justice 6433/01 Maria Emily Filora v. Minister of Health (2001). As it was clear that this strategy would not succeed in the courts, after the Foreign Workers Law was amended in 1999, requiring employers to privately insure foreign workers, NGOs turned to litigate within new framework of regulated private insurance for migrant workers. Cf. High Court of Justice 82/04 Physicians for Human Rights v. The Insurance Commissioner (petition was withdrawn on 18.12.2004).

¹⁹ High Court of Justice 4963/98 Hassan Barry Sasai v. Minister of Interior Affairs (the petition was withdrawn in 2001 after amendment to the Entry to Israel Law). Additional petitions against the amendment to the law were filed in High Court of Justice 6535/02 The Hotline for Migrant Workers v. Minister of Interior Affairs (unpublished 2005); High Court of Justice 9402/02 The Hotline for Migrant Workers v. Minister of Interior Affairs (unpublished 2003). In both cases the petitions were denied but the court commented that the petitions triggered changes in the procedures for detention and expulsion from the state).

²⁰ The General Histadrut's bylaws require citizenship as a precondition for membership.

²¹ This amendment was challenged in a petition to the Supreme Court and was found to be constitutional. See Supreme Court HCJ 494/03 Physicians for Human Rights V. Minister of Treasury, PDI 59(3) 322 (9.12.2004).

Conclusion: the conditions for CM in Israel as a receiving state

Labour migration to Israel has attracted mostly low-skilled workers. Israel did not encourage, and even restricted, labour migration of high-skilled workers who wanted to take part in its flourishing high-tech economy (eg, from India). The institutional design of labour migration into Israel is currently far removed from the positive joint-gains objectives we wish to attribute to CM. Entry processes are cumbersome, and most importantly – costly. The labour market is drawing on this labour, but does little to contribute to the development of workers' skills. Labour migration therefore serves for the most part as a means for accumulating resources and remitting them. Many of the programmes considered in the context of CM seek to complement work with study and training. Yet, Israel has not created the appropriate infrastructure for these purposes. Other programmes, such as those that encourage seasonal and recurring short-term entries can only be considered after the current system of entry is re-constituted to remove the abusive practices.

An interesting change of likely future developments can be seen in a recent (September 2007) bilateral agreement between the governments of Thailand and Israel to direct migration from Thailand through the IOM (International Organization of Migration), sidestepping temporary work agencies.²² While travel costs between Thailand and Israel may be prohibitive for CM, the mutual effort to limit the costs of migration and seek a neutral third party that would focus on the migrants' rights and interests is of particular significance. The agreement seems to be in response to a petition filed by the Workers' Hotline (an NGO representing migrant workers) who asked for an injunction holding that the State is obligated to fulfil its formal policy from 2005, according to which agreements will be signed to allow migrant entry with the aid of IOM to avoid any illegal fees being collected from the migrants.²³

C. How law determines the nature of CM in action

The move away from current patterns of migration to patterns that resonate with the positive objectives of CM is first and foremost *not* a legal question. Migrants do not move across borders *because* of the law, but primarily for economic reasons (as well as various personal reasons). Still, individual decisions are embedded in the institutional structure of both the sending and the receiving states. Not only do these institutions determine the costs and the benefits, but they also provide approval or condemnation of certain migration patterns. The law is therefore more a facilitative device for migration (or a negative obstacle); it is primarily economic and social conditions that determine the (positive) factors shaping the decision to migrate.

The current patterns of migration into/out of Israel pose different sets of concerns. As a sending country, Israel's emigrants to Europe are either native-born or were born in the former Soviet Union. A somewhat outdated estimate holds that approximately half prefer North America as their destination (Cohen & Haberfeld 1997). It seems that there is a greater potential of attracting these relatively high-skilled workers to Europe and further expanding short-term migration. This can benefit European countries in need of high-skilled workers, opening opportunities for Israelis who currently do not have access to cross-border migration, while, at the same time, strengthening ties between Israel and the EU. The legal infrastructure for such cross-borders movement is already in place; Israeli law poses few barriers and, in fact, provides norms that can facilitate such moves. Despite the promise to ease difficulties associated with migration made in the joint agreement between Israel and the EU, this matter has not yet been dealt with. Removals of barriers in obtaining a visa and work permit, and forging stronger bilateral agreements with the EU can easily address the objective of enhancing CM.

²² Amiram Cohen, *Slave Traffickers Will have to Find a New Job*, Haaretz 25.9.2007.

²³ Petition High Court of Justice 2405/06 Workers' Hotline V. The Administration of Migrant Workers in the Ministry of Industry, Commerce and Employment (filed 14/3/2006, still pending).

These can pave the way to more ambitious proposals, such as joint employment and placement bureaus.

,Then Israel is also a receiving country of mostly low-skilled workers from over fifty countries. The legal infrastructure here was devised to allow mesa-term migration, and would be difficult to adapt to short-term CM. In fact, advancing short term migration patterns while maintaining the current legal system might be precarious to the migrant workers and would severely undermine their interests. This should be of concern when thinking of CM in a regional perspective as some migrant workers who have exhausted their stay in Israel and were deported have chosen to move on to the EU, rather than return to their home-countries. Thus, despite Israel's situation as a third-national to the EU, it is still among the receiving countries of the European and Mediterranean region. The constant search for a coherent immigration policy emphasizes the need for regional coordination, and an extraordinary differential in receiving countries' policies may be detrimental to the project as a whole.

A key to invigorating CM for high-skilled workers is the development of an appropriate legal infrastructure to ensure continuity and the preservation of rights in both states. This is best achieved by means of bilateral agreements. The key to the creation of the appropriate legal infrastructure for the CM of low-skilled workers entering Israel also requires the involvement of non-governmental organizations, whether in the civil society and/or international institutions. While the market power of high-skilled workers in a global world can, to some extent, compensate for the democratic deficit that is involved in migration, low-skilled workers have neither state- nor market-protection for their interests. Under these circumstances the involvement of civil society is indispensable.

References

- Abella, Manolo (2006), "Policies and Best practices for Managing Temporary Migration" UN/POP/MIG/SYMP/2006/03.
- Cohen, Yinon & Haberfeld, Yitchak (1997), "The Number of Israeli Immigrants in the United States in 1990" *Demography* 34(2):199-212.
- Cohen, Yinon, Haberfeld, Yitchak, Kristal, Tali, and Mundlak Guy (2007), "The state of organized labour in Israel" *Journal of Labour Research*, 28: 255-273.
- Commission of the European Communities (2007), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on circular migration and mobility partnerships between the European Union and third countries, Brussels, 16.5.2007 - COM(2007) 248.
- Gier, Erik de & Axel van den Berg (2005), *Managing social risks through transitional labour markets: towards an enriched European Employment Strategy*, Het Spinhuis Publishers.
- ILO, 2001, "Reducing the decent work deficit: A global challenge", *Report of the Director-General* (Report I (A)), International Labour Conference, 89th Session, 2001, Geneva.
- "Decent work". *Report of the Director-General*, International Labour Conference, 87th Session, 1999, Geneva.
- Kristal, Tali, Yinon Cohen & Guy Mundlak (2006), "Rising Economic Inequality and Trade Unions in Israel, 1970-2003", *Economy & Society, Van-Leer Institute – Policy Studies*, No. 1 (2006) [Hebrew]
- Martin, Philip. (2006), "Managing Labour Migration: Temporary Worker Programmes for the 21st Century", UN/POP/MIG/SYMP/2006/07, UN International Symposium on International Migration and Development, Turin.
- Mundlak, Guy (2007), "Litigating Citizenship Beyond the Law of Return", in: Sarah Willen (ed), *Transnational Migration to Israel in a Global Context*, Lexington, forthcoming.
- (2007a), *Fading Corporatism: Israel's Labour Law and Industrial Relations in Transition* (Cornell University Press).
- (1999), "Power Breaking or Power Entrenching Law? The Regulation of Palestinian Workers in Israel", *Comparative Labor Law and Policy Journal* 20(4), 569-620.
- (1998), "Labor in a Peaceful Middle East: Regional Prosperity or Social Dumping?", in Ilan Peleg (ed), *The Middle East Peace Process*, 191-221.
- Mundlak, Guy & Hila Shamir (2008), "Between Intimacy and Alienage: the legal construction of domestic & care work in the welfare state", in: Helma Lutz (ed) , *Migration and Domestic Work: a European Perspective on a Global Theme*, Aldershot, forthcoming.
- OECD Development Center, "Policies for migration and Development: A European Perspective", *Policy Brief* no. 30 (2006).
- Schmid, Gunther (2006), "Social Risk Management Through Transitional Labour Markets" *Socio-Economic Review* 4:1.
- Sciarra, Silvana (2006). "National and European Public Policy: the Goals of Labour Law" in: Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law*.(Hart Publishers), 245-270.
- Standing, Guy (1999), *Global Labour Flexibility*, Palgrave Macmillan

Straus, Shoshana (2006), "Israel: The legal dimension of migration", in: *CARIM – annual Report 2006*, pp. 69-77.

Wolkinson Benjamin (1999), *Arab Employment in Israel: The Quest for Equal Employment Opportunity*, Greenwood Press.