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Temporary and circular labour migration: reassessing established public policies

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Abstract

Today, Temporary Labour Migration is a fundamental course of action promoted by relevant economic and political agents, such as the EC, the GCIM, or the OECD. Based on a specific empirical case study of Temporary and Circular Labour Migration in the Catalanian agrarian sector, which has been distinguished as a particularly successful formula, we identify a new area of interest: the emergence of a new empirical migrant category, the *Circular Labour Migrant*, which remains theoretically unnamed and lacks public recognition. We argue that, until now, there have been two historical phases regarding temporary labour migration: one of total deregulation and another of partial regulation, led by private actors with support from public institutions, and featuring circularity. In a developed Welfare State context, it would be normatively pertinent to expect a step towards a third phase, one involving the institutionalization of this new mobility category through the elaboration of a public policy.

Keywords: circular migrant, seasonal migrant programs, migrant rights, labour migration

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0. Introduction

Today, Temporary Labour Migration (TLM) is a fundamental course of action promoted by relevant economic and political agents. TLM emerged after the Second World War, when workers from developing countries emigrated for temporary periods to the United States and Europe, in response to the needs of national reconstruction and the lack of low-skilled workers. The beginning of the 21st century marked a new boom in TLM programs that share some traits with the previous ones (economic sectors, skill level), but at the same time have their own distinctive characteristics. Firstly, on many occasions, these new programmes are managed by business actors who are directly involved in productive activities. Secondly, and most importantly, there has been a tendency toward creating workers’ programmes that are circular in nature¹, guaranteeing, in the majority cases, a migration that is *temporary on a permanent basis*.

Different International Organizations have spoken out in favour of the potential benefits that this new system of circular human mobility presents. Such virtues are a result of the link between three development processes: the country of origin, the receiving country and temporary workers themselves. It is precisely because of this “triple-win” situation that different institutions promote it.

Based on a specific empirical case study of a Temporary and Circular Labour Migration (TCLM) Program,² organized by the largest agrarian business association in Catalonia (Spain), *Unió de Pagesos*, we identify a new area of interest. This TCLM Program (to which we will refer as the “UP Program”) has been distinguished by several international organizations (OECD, EU, IOM) as an innovative and viable way of regulating the flow of adequately trained labour migrants, and preventing irregular migration towards Europe. But the most important aspect, for this analysis, is the

¹ We understand circular migration as “a continuing, long-term, and fluid pattern of international mobility of people among countries that occupy what is recognised as a single economic space” (K. NEWLAND, D. R. AGUNIAS and A. TERRAZAS, 2008: 1).

² This study carried out an in-depth analysis of the UP Program, aiming at theorizing what so far has been a strictly pragmatical endeavour, and making recommendations for its future consolidation and eventual replication. It had an actor-network approach, and was carried out through qualitative techniques. For more information on the project see R. Zapata-Barrero *et al.* (2009).

unexpected outcome of this project: the emergence of a new empirical migrant category, the *Circular Labour Migrant*, which remains theoretically unnamed and still lacks political and legal recognition by public entities.

In this sense, we argue that, until now, there have been two historical phases regarding circular labour migration: one of total deregulation, and another of partial regulation carried out by private actors with public institutional support. In a developed Welfare State context, it would be normatively pertinent to expect a step toward a third phase, one involving the institutionalization of this new mobility trend through the elaboration of a public policy, which recognizes this new migration category as a status; that of the *Circular Labour Migrant*. In order to do so, the current legal, political, social and economical frameworks have to be reassessed.

This paper develops as follows. In section one we look briefly at the literature on temporary circular migration. In section two, we focus on how temporary worker migration has evolved in Europe over the last three decades, with special emphasis on the Spanish case and specifically on our case study (UP Program). Section two is divided into two parts, going from the complete deregulation of the '80s and '90s, to the institutional support of TLM (and its development into TCLM) from the mid '90s onward (what we denominate as “regulated liberalization”). After characterizing the previous and current situations, in the third section we discuss the pertinence of moving on to a new stage, hence, putting an end to the “invisibility of the circular migrant” through the realization of a TCLM policy. This policy should be based on the institutional recognition of the circular migrant status, in order to protect migrants' rights. Finally, we present some conclusions that arise from the empirical analysis and the normative proposal that we defend.

1. Conceptualizing temporary circular migration

In the recent literature, circular migration is considered as a fluid, continuing and long-term relationship between countries where the management rules are flexible and adaptable. According to the Migration Policy Institute (MPI), what distinguishes this “new circularity” of the 21st century, from temporary migration itself, is the combination of *return* and *repetition* (K. NEWLAND *et al.*, 2008: 2). It involves a movement that tends to be repetitive, a shift from the traditional idea of a finite circle, defined by departure and return. This determines a permanent commitment of the

migrant both with the origin and the destination societies. This characteristic is what makes this migratory dynamic different and should be used as a basis for the establishment of a public policy, as we later propose.

The Global Forum on Migration and Development (GFMD) agreed on the following definition in 2007: “the fluid movement of people between countries, including temporary or more permanent movement which, *when it occurs voluntarily and is linked to the labour needs of countries of origin and destination,*³ can be beneficial to all involved” (UNESCO, 2008: 46).

The majority of current definitions for circular migration have a strong prescriptive character (K. NEWLAND, 2008) reflecting, amongst other things, the place that this category occupies in the contemporary debate on migrations and development (UNESCO, 2008: 46). Different International Organizations have adopted standpoints around the interest and benefits of this system of temporary mobility, which would create an expected “triple-win” situation. The Global Commission on International Migration (GCIM) called on developed countries, in 2005, to promote circular migration, applying mechanisms that allow the easy and rapid movement of workers between countries of origin and destination (GCIM, 2005: 33).

Similarly, the International Organization for Migration (IOM) (2006) highlights the benefits of temporary and circular migration for the different actors involved, particularly for developed countries. The European Commission’s Communication on “Migration and Development” (EC, 2005), and later its Communication on “Circular migration and mobility partnerships between European Union and third countries” (EC, 2007) promotes the exploration of ways to facilitate circular and temporary migration, “inviting to present detailed proposals on how to organize the diverse forms of legal movement between the EU and third countries” (EC, 2007: 2). Finally, the Organization for Economic Cooperation and Development (OECD, 2007: 108) highlights that the circularity model is probably the most recommendable route for the development of many origin-countries.

Despite the international recognition of temporary *migration* in the literature and by institutions, temporary *migrants* (and, now, circular migrants) have received themselves little political or academic attention, and continue experiencing problems in the institutionalization of their rights. Indeed, while the literature attempts to construct

³ The italics are ours.

an agreed conceptual framework that complies with the new reality of circular migration at the beginning of the 21st century, there have not been corresponding adjustments in the categorization of the people who form part of these new migration processes. This lack of conceptual recognition reflects the legal and political invisibility of these migrants. Despite efforts made to regulate their situation, the frameworks used continue to operate following traditional categorizations and, therefore, are incapable of taking into account the complexity, fluidity and potential of this new migration dynamic.

Particularly significant is the fact that the movement of circular temporary migrants is not adequately captured by neither the population censuses nor the administrative data used to measure the entry and exit of migrants, tourists, international students and business visitors, etc. (K. NEWLAND, 2007: 1-2). We know that something that cannot be measured or counted is unlikely to exist in the eyes of the institutions (in origin and/or destination) and, even less so, to be a matter of public policy.

The basic aim of this paper is to justify the need for a new phase in the contemporary debate on circularity, going from the *de facto* confirmation of this migratory dynamic to its institutionalization as a category that may be a subject of public policy.

2. From deregulation to regulated liberalization.

In this section, we shall describe the two phases that temporary labour migration has gone through recently in Europe, focusing more specifically on Spain and in particular on the program that makes up our case study. The first phase was one of irregular labour migration, which entailed a lack of political institutional intervention and the complete absence of migrants' rights. The second –and current- phase is one of temporary labour migration under a system of regulated liberalization. Here, public intervention takes the shape of flows control and support of the labour market through the creation of frameworks for recruiting workers in origin-countries. Based on the evident differences between these two models, we argue (in section 3) the need for a step toward a new phase, the institutional recognition of the temporary and circular labour migrant and, consequently, the protection of his/her rights. This new migrant category requires a public policy response to the migrant's situation, which is different to that of the

temporary immigrant worker, whose ultimate goal is to achieve permanent residence in the destination country.

As schematically represented below:

Table 1. Phases of temporary worker migration.

	PHASE 1 1980's and 90's⁴	PHASE 2 End of the 90's – First decade of 2000	PHASE 3 2010 onward?
Phase name	Deregulation	Deregulated liberalization	Institutional recognition in the form of Public Policy
Principal traits of migration.	Irregular and temporary migration managed by labour market. Context encourages irregular immigration.	Regular migration. Move from guestworkers to temporary and circular labour migration managed by the labour market.	Regular migration. Temporary labour migration characterized by circularity and managed by public sector.
Type of intervention	Little public policy intervention in the irregular labour market.	Management of flows. Protection of some rights (contracts, housing, education, health care, etc.). Emergence of programs, subsidies and grants.	Public or mixed management of temporary work and recruitment. Improved regulation of private activity. Protection of and wider working, union and social rights.
Recognition of temporary labour status.	No recognition.	Partial recognition as worker.	Recognition of circular migrant worker with rights under public policy.

Source: Own elaboration.

Let us now look at the main features of each phase separately, taking into account Spain, in the European context, and specifically our case study (the UP Program).

2.1 Phase 1: The recent past. Deregulation of temporary migration during the '90s

Despite the political restrictions imposed on low-skilled immigrants during the 1990's, labour market needs, in the context of accelerated globalization, encouraged the “informal” recruitment of irregular immigrants (S. CASTLES, 2006: 7). The disparity between the restrictive policy and real labour market needs led to the recruitment of irregular immigrants, on the one hand, and the reintroduction of guestworker programs that had been suspended in the 1970's, on the other.

In Catalonia, and specifically in the province of Lérida,⁵ labour needs due to rural/urban migration were firstly met by workers from the south of the peninsula (Andalusia / Extremadura) during the '60s. Later, by students who worked during the summers, in the '70s and '80s; and again by workers from the south (Andalusia / Extremadura) during the 1980's. Finally, in the 1990's, by workers from Spanish rural areas and irregular immigrants.⁶

During this last period, entrepreneurs resorted to recruiting irregular migrants to cover their need for workers in the agricultural sector. This was provoked, in particular, by the rural exodus of the 1990's alongside the native's lack of interest in this type of work due to the low salaries, low-skills required, harsh physical conditions and its temporary nature.

Despite the legal repercussions (fines or prison) that the recruitment of irregular immigrants entailed for entrepreneurs, the benefits were sufficient to outweigh them. Hence, there were two dynamics linked within one market space. Firstly, irregular immigrants living in Spain were the only workers willing to work in certain sectors of the labour market. Therefore, entrepreneurs looked to them with the objective of carrying out their activity. Secondly, at that time there was a certain laxity in work inspections by public administrations.⁷ The coexistence of these two realities allowed immigrants to rely, for a long period of time, on the possibilities that the irregular Spanish labour market offered (V. GONZÁLVEZ, 1995).

The majority of irregular immigrants, and, later on, regular temporary workers, occupied positions in the agricultural sector, followed by activities in the service and construction sectors. In most cases, job offers took the form of spoken agreements for temporary, low-skilled and low-paid jobs (R. AGUILERA, 2006: 177).

It was not until the beginning of 2001 that the situation of irregular immigrants was brought to attention at national level. This was triggered by various events, including the death of a group of irregular immigrants in the south coast of the peninsula.⁸ One of the first responses was an ambiguous outbreak of social alarm

⁵ To locate Lérida see: <http://maps.google.com/maps?q=lerida&oe=utf-8&rls=org.mozilla:es-ES:official&client=firefox-a&um=1&ie=UTF-8&sa=N&hl=es&tab=wl> last visited October 23rd 2009.

⁶ The concept of circular migration first appears in internal migration studies (Hugo 1982). Therefore, the internal movement of Spanish workers from one region to another could be considered circular migration. However, here we will only discuss international circular migration.

⁷ In agreement with Portes and Haller (2005: 419-420), we must not forget that irregular employment leads to a series of positive effects for both the employer and the State. Employers benefit from low costs and highly flexible labour and the State enjoys a reduction in the cost of production with repercussions for the rest of society.

⁸ On the 3rd of January 2001 a group of twelve irregular immigrants from Ecuador were killed on their way to work in the fields in Lorca, Murcia. The van in which they were travelling was crushed by a train. See *El País*,

regarding two issues that suddenly became evident: the inefficiencies of administrative controls over work inspections, but also the tolerance of the government, entrepreneurs and unions in regard to this extended practice (S. GIL ARAUJO, 2005:16-17). The political reaction was to regulate the labour market through bilateral agreements. At the end of 2001, Spanish and Ecuadorian governments signed the first bilateral agreement on the control of flows. Following this, agreements were signed with Colombia, the Dominican Republic and Morocco.⁹ These agreements had the desired effect of reducing irregular contracts and regulating the recruitment of workers directly in origin-countries. Thus, begins a new phase. Our case study, the UP Program, forms part of this new phase and is key in providing temporary workers to the farmlands of Lérida.

2.2 *Phase 2. The current reality. Regulated liberalization in the first decade of the 21st century*

Today, seasonal temporary worker programs exist in Germany, the Netherlands, Norway, Ireland, Belgium, Sweden, Greece, Italy, Spain and the United Kingdom (P. PLEWA and M. J. MILLER, 2005). In this new context in Europe, there has been a huge growth in the number of temporary migrant workers taking up the opportunity to legally work in high-income countries (GFMD: 2007: 3).

These are considered an improvement on the previous set of programs. Through careful design, they are expected to avoid the errors of the postwar temporary worker programs, and specifically, maintain the temporary nature of migration (S. CASTLES, 2006: 11-12). Current programs are much smaller scale than previous ones; they have a limited scope and are focused on specific sectors, territories and industries (including, yet again, agriculture, construction and tourism) (GFMD, 2007; P. L. MARTIN, 2006; S. CASTLES, 2006). They tend to be adjusted to pre-established “contingents” in function of labour market needs and recruitment takes place in origin-countries, through embassies and consulates or by intermediaries that are strictly supervised in some countries and less so in others (M. ABELLA, 2006: 28).

04/01/2001,”Mueren en un paso a nivel 12 inmigrantes que viajaban hacinados en una furgoneta en Murcia” o *El País*, 04/01/2001, “Los ecuatorianos muertos trabajaban para un empresario condenado por explotación”.

⁹ On Migration Agreements see:

<http://extranjeros.mtin.es/es/NormativaJurisprudencia/Internacional/ConveniosBilaterales/ConveniosMigratorios/> last visited 23rd October 2009.

Their careful design consists of two basic features: the guarantee of the *permanent temporary nature of migration*, with circularity acting as the key element; and the appearance of economic actors as managers of the migration process.

In fact, the mechanism of circularity has not only become one of the distinctive features of this new batch of programs, but has also turned up to be one of the most efficient mechanisms protecting the temporary nature of migration. The incentive of returning the following year, under reasonably good conditions and with a certain level of income guaranteed, becomes a deterrent against permanent, regular or irregular migration.

Another distinctive feature of current programs is the fact that they are designed and managed by actors from the private sector, and on occasions the third sector. These actors have also taken a leading role in influencing policymakers, in order to establish the legislative framework needed for carrying out these programs (K. NEWLAND, 2007: 4).

In Spain, during the '90s, previous experiences of temporary migration began to give way to guestworker programs. These in turn lay the foundations for the emergence of a new generation of circular labour migration programs at the end of the decade.¹⁰ Therefore, there was a motion from a period of very restrictive policies for granting work permits to low-skilled workers, coexisting with totally deregulated labour markets, to the opening of procedures that permitted the channeling of flows within a new legal framework. This new consensus aimed at the *regulated liberalization* of the movement of workers, making up for the shortage of native workforce (M. ABELLA, 2006: 41). Seasonal agricultural programs are a great example of the attempts made to reconcile a flexible labour market (needed by a sector that competes globally, and requires a large number of low-skilled workers, in a temporary and cyclical way), with regulation (the prevention of irregular immigration and definitive settling of unqualified workers).¹¹

In Spain, as in the rest of Europe, these developments were possible due to the existence of a well-defined institutional framework. Different bilateral agreements have been the building blocks for organizing labour migration flows in general, and in particular the migration of low-skilled temporary workers. There is a diversity of these mechanisms, each with its own criteria for admission and norms for regulating the

¹⁰ One of the first programs introduced was the UP Program (our case study) in 1999.

¹¹ In fact, these are the same objectives that orientate all labour immigration policies in developed countries today. The points system introduced as a part of the reform to the British immigration model represents the most explicit institutional application of this two-pronged framework (Home Office, 2006).

length of stay and the status of workers. On one hand, there are framework agreements between governments, establishing the parameters to which all actors involved must comply.¹² However, there is also a wide range of more specific agreements between governments (from countries of origin) and regional local authorities (for example, the Spanish Autonomous Communities). Lastly, an endless amount of agreements have been established between governments (from countries of origin) and private recruitment agencies, and even directly with workers' unions or business associations.

This plural institutional framework clearly reflects the double objective of liberalization and regulation. More specific bilateral agreements take care of the needs of a flexible and ever more transnational labour market, and private actors in destination countries are responsible for directly negotiating the optimum conditions for increasing productive in their respective sectors. The result is an uneven set of tailor-made, highly deregulated bilateral agreements at a non-governmental or semi-governmental level, and programs eminently put in practice by the private sector. State control concentrates on the selection of countries outside the EU for the establishment of framework agreements, as well as the control of entrance and permanency mechanisms. There should be no doubt: there is no relaxing of border controls, but rather an increased capacity for effective regulation of access (who enters, for what reason and for how long). In fact, foreign policy considerations play an important role in defining what countries framework agreements are to be established with, allowing for specific agreements to be developed afterwards. Thus, Spain has developed formulas for legally admitting temporary workers from countries such as Morocco (similar to Italy and the Albanians), in exchange for the readmission of irregular immigrants and cooperation in reducing irregular migration (P. L. MARTIN, 2006: 11; GFDM, 2007: 7).

The UP Program is an excellent illustration of this new generation of programs. It is a formula for the private management of circular, temporary, seasonal labour migration, which has been used by the Catalan agricultural sector since 1999. The Program is managed by the *Unió de Pagesos*, a farmer's association¹³ that groups together 70% of all Catalan agricultural business.¹⁴

¹² Spain recruits a large part of foreign workers via the framework of nine bilateral agreements, the majority with African and Latin American countries.

¹³ As it mainly groups together small farmers, *Pagesos* could be considered -erroneously so, in our opinion- a workers' union. In fact, it has been referred to as such in various articles and documents by international organisations that have highlighted the Program as a "good practice". See for example, Newland, Agunias and Terrazas 2008 and IOM 2006.

¹⁴ From an organizational point of view, the program was initially placed in the *Unió's* "corporate social responsibility" activities. Later, in 2001 the *Unió* founded *Fundació Pagesos Solidaris* (the Farmer's Solidarity

In response to an urgent need for labour during the critical fruit picking period, the *Unió* has generated a recruitment system in origin-countries, bringing temporary workers to work in their members' fields. In order to do so, they have resorted to the framework on foreign workers' contingents.

The Regulation for the development of the Organic Law 4/2000, passed by Royal Decree 2393/2004, establishes the conditions for contingents as well as the authorization of temporary residence and employment for a determined period of time. This norm designates the offers of temporary work to countries that have signed bilateral agreements with Spain and limits the length of temporary contracts to nine months, within a twelve-month period. It also establishes obligations for employers to provide adequate housing for workers during their stay, as well as organizing the travel logistics to and within Spain. The contingent is adjusted annually and approved by the Government. Workers are recruited in origin-countries based on the offers presented by entrepreneurs. There are also provisions for entrepreneurs to participate in the selection process in the country of origin.¹⁵

Unió de Pagesos, has not only been able to interpret and take advantage of the normative framework. In fact, it has acted as a lobbyist at all relevant legislative levels (state, autonomous and provincial), and has directly endorsed an Agreement with the Colombian Ministry of the Interior and Justice. For this reason, UP may be considered co-designer of the current institutional framework. The UP Program, which began with the recruitment of 35 Colombian workers, permits workers to come and work in a repeated manner, for several months of the year (between 3 and 9 months), in the different agricultural campaigns in Catalonia, Valencia and Majorca,¹⁶ later returning to the country of origin, and coming back again to Spain the next year. In 2008, the number of workers contracted in origin was as high as 3.211 (mainly Colombians but also Moroccans).

With respect to the migrant as part of the so called "triple-win", it is important to point out that participation in the program results in a significant improvement in the quality of life of temporary circular migrants, in economic terms. One of the main consequences of money coming into the family environment is access to health and

Foundation), the "Unió's philanthropic branch". It should be highlighted that the legal difference between the private actor (*Unió*) and the non-governmental actor (the *Fundació*) is what permits access to a series of funds and subsidies of a social nature that would not otherwise be available to the program.

¹⁵ This has allowed UP to open offices in Colombia and to recruit workers directly.

¹⁶ The UP Program employs a model of chain employment, provided for by Spanish legislation, according to which a worker may move from one company to another, but always within the same sector.

education systems. Remittances mean children can continue attending primary and secondary school, and on many occasions even permit access to university, which results in very positive social (generational) mobility for the family and community. Remittances are also used to pay off debts, incurred in order to undertake the trip or by previous commitments. However, the biggest investment made by workers during their first year is improving living conditions (the purchase of a house, or improvements made to an existing house). The basic way in which money is spent changes with the amount of time migrants spend in the program. Therefore, after some years participating in the program workers consider the possibility of setting up their own productive projects, as they have been able to accumulate a significant amount of capital compared to their usual income.

Furthermore, and taking into account the entire set of temporary agricultural migrants in the region, the move from irregular to regulated migration has had an important impact on the situation of workers and the protection of their rights. There has been a shift from a situation of complete vulnerability to mistreatment and abusive working conditions to the recognition of a basic set of social and labour rights.¹⁷ In principle, the UP Program ensures various basic guarantees.¹⁸ Firstly, salaries are equal to those of native workers, and workers are protected from the risk of entering into forced labour. Secondly, workers are entitled to social security during their stay, to housing that reaches minimum standards, to have the costs of plane tickets to Spain covered by the employer, to a determined working day and a day of rest, to holidays and to have a union representative in the workplace (their own representatives or unions in destination country).

Although the regulatory role of the State that receives temporary workers is focused mainly on the control of entry and exit, it has also been extended to the area of social and working conditions, as can be seen in the UP Program. The result is a radically different situation from the previous phase of total lack of regulation. Nevertheless, the difference between temporary workers' rights and the rights of permanent immigrants continues; even more so, it seems to play an important role in the delicate system of incentives and punishments managing temporary and circular migration (M. ABELLA, 2006: 18).

¹⁷ It would be unrealistic to believe that the recruitment of irregular workers has stopped because of the creation of temporary worker programs (circular or not). In fact, in 2005 a regulation process for those with a labour record in Spain was launched, permitting the legal recognition of 600,000 irregular migrants (G. PINYOL, 2007:91).

¹⁸ As we shall see later, this basic "package" of rights presents various deficiencies when closely examined.

3. The need to advance towards a public policy on TCLM

The transition from a deregulated phase of temporary migration to the current situation, with programs that channel the mobility of these workers, has had a very positive impact on all the actors involved; country of origin, country of destination and the temporary circular migrant. However, there is still important room for improvement of the existing institutional mechanisms.

Until now, the literature that has endeavored to establish a system of “good practice” and make recommendations for the improvement of programs¹⁹ has focused on two principle issues: how to strengthen the contribution of temporary circular migration to the development of countries of origin, and how to promote and protect the temporary and circular nature of this type of migration. The focus, therefore, has been placed on the origin and destination countries. In our proposal, we suggest focusing attention on the third actor in the so-called “triple-win”. From a normative point of view, the figure of the temporary circular migrant (in particular, in his/her the dimension of rights-bearer) poses significant challenges and exposes some pending issues.

As we have already mentioned, a smaller number of irregular migration cases has implied an improvement in the labour conditions of temporary workers, and the move from temporary to circular migration. However, the recognition of temporary circular migrants’ rights is subject to some of the limitations inherent to their condition and to their institutional invisibility.

This is the starting point for our argument in favour of advancing towards a new phase of public policy for temporary circular migration. Such a policy should clearly define the legal frameworks that liberal-democratic Welfare States use for categorizing temporary migrants. This is a fundamental step for receiving countries to effectively face, in consistence with their own principles of justice, the challenges that new migratory realities pose.

Always focusing on the UP Program, we firstly attempt to demonstrate how the “temporary circular migrant” continues to be a difficult category to pin down in conventional frameworks. This in turn favours weak public intervention in current

¹⁹ For example, GCIM, 2005; Ruhs, 2005; IOM, 2006; Martin, 2006; Agunias and Newland, 2007; GFMD, 2007; Newland, Agunias and Terrazas, 2008.

temporary labour migration programs. After discussing this, we go on, in a second part, to illustrate our findings on the current situations that involve the infringement, or risk of infringement, of the rights of temporary migrants.

3.1 The “invisibility” of the temporary circular migrant

As we have already pointed out, recent literature on circular *migration* speaks little of the temporary circular *migrant*; and when it does, it rarely employs the language of rights or considers the temporary circular migrant as a new status. There appears to be a consensus within the academic community and international organizations that new programs are of such superiority to the previous situation of total deregulation, that the rights of workers are no longer considered a problematic issue. Temporary programs that continue to suffer problems with the recognition and the infringement of rights, it is said, are those carried out in undeveloped and/or non-democratic countries. Unfortunately, these suppositions have meant that not enough attention has been put on the deficits that, as we shall see, still exist, even in particularly successful and well-managed programs like the UP Program. Certainly, they do not involve problems as flagrant as those encountered by the irregular worker, or those that predominate in countries with authoritarian regimes or with fewer resources. However, the type of labour relation analyzed here displays a sufficient component of vulnerability for the issue to be brought to the attention of union organizations in destination, the administrations and the State.

In this section, we shall go more deeply into three factors which, occurring simultaneously, have contributed to maintain the current vulnerable reality of temporary migrants, leaving them in the hands of economic forces without institutional counterweights: a) the *trade-off* between rights and economic gains; b) the inadequacy of international systems for rights’ protection; c) the blindness of the State in relation to the temporary circular migrant. Altogether, these factors make up a virtual condition of invisibility of the temporary circular migrant, to actors located outside the private sector.

a) The trade-off between rights and economic gains

In the first place, it seems to have become common sense to accept that all temporary worker programs “will necessarily involve some trade-off between the economic gains (...) and restrictions of some of the individual rights of migrants while employed abroad” (M. RUHS, 2005: 14). It is assumed that the two basic features of these programs (their temporary and circular nature) demand, for their continued existence, that migrants enjoy only a limited level of rights.²⁰ This is legitimate, it is argued, not only because of the economic benefits for the destination country but also for immigrants, given the high incomes that can be earned during the stay abroad.²¹ In addition, on many occasions the workers themselves are willing to give up their rights in exchange for earning a higher salary during their stay.²² Ultimately, it appears that rights are just another instrument to be weighed up when designing a program: rights are included and cut, always for the sake of the competition needs of the sector in question, and of the delicate balance that secures the temporary and circular nature of this form of migration. As in the past, workers rights become material for negotiation; yet again, they become contingent.²³

b) The misalignment with international systems for the protection of rights

Secondly, if national and international normative frameworks have proved inadequate in seizing the phenomenon of migration in general,²⁴ the reality of temporary migrants results even more elusive. Even international rights’ organizations have problems with this “anomalous” category. In reality, the system established during the 20th century for the protection of migrant workers’ rights scarcely covers a very small group of them (P. L. MARTIN, 2006: 39). The two International Labour Office (ILO)²⁵ Conventions dedicated specifically to migrant workers (N°97, 1949 and N°143, 1975)

²⁰ Two clear examples are the right to freedom of movement in the labour market and the right to family reunification; although, as we will see, the list of restricted rights does not stop here.

²¹ In our study, we heard this argument from some workers, various employers and also neighbours in the localities where the UP Program is run.

²² Many workers ask to work more hours than those established in labour agreements, with the objective of increasing their income.

²³ Also, the plural nature of bilateral agreements and current programs gives rise to a repertoire of differentiated rights for each group of temporary migrants, depending on the program.

²⁴ See Pécoud, 2009.

²⁵ The ILO is a UN agency engaged in the definition of decent work standards, focusing especially on the protection of vulnerable workers such as migrants.

were elaborated with the model of permanent migration in mind, hence excluding temporary migrants from the specific rights determined there.²⁶ Only recently some efforts have been made to fill the gaps in the protection of migrants' rights. Two examples are: the International Convention on the Protection of the Rights of all Migrant Workers and their Families passed by the UN's General Assembly in 1990 (P. L. MARTIN, 2006: 39) and the ILO Report (2004) "Towards a Fair Deal for Migrant Workers in a Global Economy". The latter declares that temporary migrant workers enjoy the protection of fundamental principles and rights, and are entitled to benefit from the provisions in Convention N°97, referring to equal treatment. It also establishes that temporary migrants are not included in the provisions made by Convention N°143 (M. ABELLA, 2006. 17). However, despite these reflections, there has not been a solid and indisputable incorporation of temporary migrants into the normative system made up by these instruments for the protection of rights.

c) Invisibility to the eyes of the State

Thirdly, temporary circular migrants are "invisible" to the eyes of destination States.²⁷ At international level the current categorization in use distinguishes between the "immigrant" (that is, a person of foreign origin who has moved to another country, specifically for work, and who plans to carry his/her personal or family life there), and the "migrant" (a person in the process of movement from his/her country to another). According to the IOM (2004: 21), immigrant status is the "status that a migrant is accorded under the immigration law of the host country" and it is this (not the migrant status) that guarantees his/her institutional recognition and protection under law, in the destination state (for example, through work or residence permits that serve as a basis for the acquisition of certain rights). In fact, until now, the "migrant" condition has not been thought of as a status, as it is considered a transitory process. However, the phenomenon of circular migration has changed this situation *de facto*, making the lack of protection suffered already by temporary workers more visible.²⁸

²⁶ Convention N° 97 aims to regulate migration and protect migrants, defining procedures for both public and private recruitment, assuring non-discrimination in salaries and benefits, and consecrating the right to participate in union activities. Convention N°143 goes further, calling for the sanctioning of employers who recruit unauthorized workers, and those involved in trafficking people, and recommending equal treatment in salaries and other benefits for irregular migrants. The first Convention was signed by 42 countries, the second, by only 18 (Martin, 2006: 39).

²⁷ And, importantly, to the eyes of origin States, since they are not considered *emigrants*.

²⁸ By virtue of the temporary and circular aspects of these programs, the "migrant" condition becomes permanent, for many workers, for a prolonged period; therefore becoming a separate status in itself. Consider, for example, those

In the destination country, the legal situation of temporary migrant workers remains outside ordinary parameters, and they are only afforded selected and partial rights, in contrast to native and permanent immigrants. Neither do they benefit from the policies and programs directed at the immigrant community, as they do not form part of it. At civil society level they do not participate in immigrant associations or, as we shall see, in workers unions.

Lastly, although international migration statistics record the movement of temporary migrants,²⁹ at destination-State level these movements are not adequately measured, neither by census data nor by the kind of administrative data employed to measure the entry and exit of migrants, tourists, international students, visiting entrepreneurs, etc. (K. NEWLAND, 2007: 1-2). As Agunias and Newland (2008: 17) point out, in a wider sense, “the nature of the transnational movement of people requires data to be collected from countries of origin and countries of destination, which in turn calls for coordination of such data from various sources. (...) (But) the permanent settlement migration paradigm still defines our data collection systems. Thus, no system is yet in place to capture adequately the contemporary movement of people.” Certainly, it is difficult for something that cannot be measured or counted to exist to the eyes of institutions, and even less so for it to become a matter of public policy. There cannot be a better governance³⁰ of this type of migration –as organizations such as the GCIM and the IOM demand-, if we cannot grasp the very phenomenon we are speaking of.

In short, as long as temporary migrants continue to constitute a “blind spot” for both States and the international system for the protection of workers rights, it is unrealistic to expect program managers to systematically recognize workers rights. This lack of recognition generates a lax normative environment, where rights that do not substantively affect the rules of the game are respected while rights that could prove potentially conflictive are respected little or not at all (on paper or in practice).

workers that have worked for over 6 years, for periods of 9 months each year, in the Catalan farmlands/fields, as part of the UP Program.

²⁹ Although adjusted to the frameworks of permanent migration: during the time spent in the destination country, all short-term migrants are considered residents.

³⁰ Understood as a system of institutions, legal frameworks, mechanisms and practices aimed at regulating migration and protecting migrants (UNESCO, 2008: 31).

3.2 Problems with the recognition and protection of rights

In order to present the deficits we have detected in the UP Program, we will make a distinction between legal, social and labour conditions. In this section, both the non-recognition of rights (in the formal level), and the infringements of rights (informal practices that systematically transgress the formally established provisions for the protection of rights) are included.

a) Legal conditions

We begin by describing some characteristics of the legal conditions of temporary circular migrants. Their current situation does not favour the reclamation of any type of rights, thus worsening the problems related to the social and working conditions that we make reference to hereinafter.

One issue is that these migrants' legal status depends exclusively and directly on their employers (R. KRAFT and M. de LARRARD, 2007): they are not permitted to change employer or job during their stay. The work visas they hold do not grant them autonomy, as they are dependent on a specific work contract. This restricts their right to move freely within the Spanish labour market, limiting their possibilities of finding better working conditions through a change of job, and facilitates exploitative situations. International experience has demonstrated that the dependency on one job and one specific employer conspires against workers' capacity to organize themselves and make demands on their employers, due to the fear of losing their visas and having to leave the country, or even becoming part of a "black list" and not being "selected" for return the following year (P. L. MARTIN, 2006: 26). As the GFDM (2007: 15) and the GCIM (M. RUHS, 2005:15) propose, although the movement between sectors is difficult to implement in circular programs, the mobility between employers in the same sector should be authorized.

Secondly, Spain's current legislative framework envisages the possibility of granting permanent residency after four years of temporary visa and under contract from an employer. When interviewed, some migrants expressed interest in this option. However, evidence suggests that this is not happening, at least not in significant numbers. Farmers prefer circular migrants to permanent immigrants, and there are no incentives –from the point of view of development in destination- encouraging them to

break circularity by offering indefinite contracts, even though legislation authorizes it. Therefore, although the right is formally established, in practice it is not applied. The only option for workers who wish to remain in the destination country is for them to become irregular immigrants.

Lastly, it should be pointed out that temporary migrants are not entitled to the right of family reunification (a situation shared by the majority of TLMs around the world) (M. ABELLA, 2006: 21-11).

b) Social conditions

Although there have been significant improvements in the area of the social conditions of the TCLM programs (particularly in developed countries), certain worrying conditions persist.

Firstly, although workers are formally registered in the social security at the beginning of each work season, they do not enjoy all the guarantees associated with it. They are left in an anomalous situation, of selective participation in the existing benefits. Ultimately, the protection that social security in a Welfare State should provide becomes a new source of inequality between temporary migrant workers and permanent, national and immigrant workers.

For example, since 2009, temporary workers in Spain are exempt from paying unemployment contributions. This measure is consistent with the tendency of temporary programs, to transfer unemployment costs to the source countries (W. MEJÍA, 2008: 4).

In addition, although the portability of pensions is considered a fundamental aspect to be guaranteed in these kinds of programs (R. HOLZMANN, J. KOETTL and T. CHERNETSKY, 2005), in Spain, temporary workers are not forced to make contributions into government pension schemes. The repeated rotation for various months of the year, and over many years, will imply a huge gap in pension provisions. Long periods without making contributions put the future pension funds of these workers in serious jeopardy, considering they already come from countries with deficient pension schemes, many of which have been recently privatized and liberalized.

Registration in the social security guarantees access to health care. Nevertheless, we have found that this right is not being effectively put to practice: workers deliberately avoid visiting the doctor when they are ill and only go after suffering accidents in the work place. Again, this is because they are not entitled to yet another

basic right of the social security, the right to take sick leave. This means that the days not worked go unpaid. Given the fact that they have fixed expenses associated with their stay abroad (food, personal items and accommodation) and wish to maximize their earning during their stay in Spain, there are few incentives for making use of the healthcare system.

Last, but not least, although migrant housing officially meets a series of predefined standards, in practice many of these dwellings leave a lot to be desired. Collective housing with bad living conditions, lack of space for recreational activities, insufficient equipment for the number of habitants in each lodging, and housing located in city outskirts are a few of the most common problems. Although this situation is the exception and not the rule, it poses a question on the level of monitoring of living conditions currently in force.

c) Working conditions

Although temporary agricultural workers are formally a part of the same collective bargaining agreement³¹ as nationals, without distinction, their working conditions tend to be worse than those of natives –although not to the radical extent recorded in some developing countries, where discrimination may be established even in the legislation (see M. ABELLA, 2006: 28). Rather, it is a question of unequal treatment occurring at the level of everyday practices.

As Martin (2006: 26) has pointed out, seasonal temporary programs represent an authentic “litmus test” for the effectiveness of measures for the protection of workers in industrialized countries. Finding themselves in the destination country for only a limited period of time, with intense work schedules and dispersed around rural areas, often remote, and in private houses, it is specially difficult for unions or social and labour representatives to inform them about their rights. In addition, as we have already stated, there are aspects to their visas, and to circularity itself, that operate as effective disciplining mechanisms, deterring workers from reporting abusive situations and attempting to obtain better working conditions.

This set of elements (geographical dispersion, intense rhythm of work, dependency on employer for work permit) and, particularly, the uncertainty about being

³¹ The Agricultural Collective Bargaining Agreement of Catalonia and/or provincial agreements.

recruited in the future, means that the right to unionize or become member of a workers union is not put to practice.

Another detrimental situation for temporary workers is that, even though they have signed contracts for definite periods of time, there is no guarantee of continuous work during that period. Periods of prolonged inactivity are frequent,³² for climatic reasons (rain, hail stones...) and for lapses between the end of one campaign and the beginning of another, or simply due to a lack of work (surplus of labour compared with the amount of work available at that moment). Considering that there is no base salary, these periods without work represent a very negative economic impact for migrants. In addition, what becomes apparent is the asymmetric relationship between the two parties involved in the contract, especially when we compare their capacity to make demands when a contract clause is breached.

This situation is further aggravated by the fact that workers do not have access to all the information about contracts, living conditions during their stay and prevailing regulations before they come. Additionally, this labour relation, by definition asymmetrical, is not intermediated by any regulatory bodies.³³

Lastly, as we have already said, there are no certainties around the continuity of contracts or the criteria behind these decisions. Workers move, year after year, with the uncertainty of not knowing whether they will be “chosen” for future periods. The decisions around circularity are, on the one side, in the hands of the employer, and on the other, in the hands of intermediaries in the countries of origin. Furthermore, the recruitment of workers is carried out through links that have some features of patronage systems. When all is said and done, the perception of those involved is that the contract depends on arbitrary factors: a “*migration lottery*” (R. KRAFT and M. de LARRARD, 2007) that generates serious doubts about the equality of the selection process and the real criteria used to orientate it.

³² Periods of inactivity do not cost employers, who invoke the established legislation (75% minimum of time worked). Therefore, this is not a problem for employers; it is the workers who directly assume the burden.

³³ In contrast to a similar program with Guatemalan temporary workers in Canada, where there is a permanent monitoring carried out by three parties: employers, the IOM (who administers the program) and the Government of Guatemala (in charge of mediating conflicts between workers and entrepreneurs, and of visiting workplaces and housing for supervision) (IOM, 2008).

4. Conclusions: A basis for entering into Phase 3. Institutional recognition in the form of Public Policy. From 2010 onwards?

For liberal democratic States such as Spain which, additionally, operate as Welfare States in relation to their citizens, the situation that we have described presents important normative problems. As Ruhs (2005: 23-24) points out, currently there are two ways of responding to whether the restrictions of temporary immigrants rights required for the success of these TCLM programs, can be justified and promoted as desirable immigration policy measures, in liberal democracies. The first response is deontological in nature and depends on the ethical framework considered optimum for evaluating public policy. The second kind of response is consequentialist: TCLM has proven to be the best alternative for managing the flow of low-skilled workers into countries with labour shortage, superior in practice to both irregular and permanent migration. Ultimately, we are faced with the “numbers versus rights dilemma”, also put forward by Ruhs (2009): if all migrants were legal and received the same benefits as local workers, there would be a risk of entrepreneurs seeking less workers in origin as these workers will have lost their vantage point within the global labour market. The question would be whether we want more temporary migrant workers, or better conditions for them. “The logic motivating migration is difference, while the logic of protection seeks equality. There is no easy way to resolve this numbers-rights dilemma” (P. L. MARTIN, 2006: 40). Until now, although maybe by omission, Spain and the majority of EU countries are responding in this second way.

Admittedly, TCLM programs would not prosper if they were too bureaucratic, rigid, costly or very slow in responding to the needs of employers and changing market conditions. As Newland *et al.* (2008: 22) remind us, labour markets are dynamic: “by the time central governments authorities recognize and certify labour needs, employers satisfy requirements for trying to recruit already resident workers, and governments authorize employers to hire foreign workers, labour markets are likely to have shifted”. This, in part, explains why programs such as the UP Program have emerged through private initiative and are managed by those directly involved.

Furthermore, the tendency in current TCLM programs has been, as Martin (2006: 27) points out, to “trust the employer”; employers and their associations have been given increasingly more power of decision in relation to admissions, the transport

and assignment of work to temporary workers.³⁴ As we have already seen, they have even been granted the capacity to sign bilateral agreements with governments in origin-countries. Our case study is a clear example of this. At the end of the day, despite the apparent diversity of agents involved (NGO's in origin, *Fundació Pagesos Solidaris* and individual employers), only one entity (the *Unió Pagesos*) is responsible for the recruitment, transport and contracting of workers. It is the *Unió* itself, not the State nor the regional government, that has signed the Agreement with the Colombian Interior and Justice Ministry for the establishment of these programs.

The literature states that the unequal treatment of temporary migrants has taken particularly severe forms in countries where the organization of migration is left in the hands of job brokers, intermediaries or contractors and where the work of union institutions is weak or illegal (M. ABELLA, 2006: 18). Returning, now, to the deontological approach, we believe that it is fundamental to pose certain questions: How are we to act in order to widen the gap between these situations of rights infringements and the *de facto* violation of rights that persist in current programs in democratic countries with Rule of Law? What are the policy instruments available for States to reinforce the regulation of these programs and protect the rights of temporary migrant workers? When it comes to migratory flows and international relations, which roles may legitimately be transferred to private agents and which should remain in the hands of the State? What alliances can be established with entrepreneurs, international organizations and unions in order to increase the level of transparency and accountability of TCLM programs? What adjustments do organizations such as the Labour Inspection, the Social Security or the National Statistics Institute need to make, in order to approach with increased effectiveness the challenges posed by the category of temporary circular migrants?

All of these questions should feed the debate on a public policy for temporary and circular labour migration. We have already said that current programs have attempted to replace guestworker programs that permitted exploitation, by mutually beneficial systems of voluntary circular migration. However, this agenda goes beyond the capacities of programs as such. For it to be carried out, there is a need for "a set of appropriate government policies designed to secure equal treatment of migrant workers while abroad, enforce sanctions against both employers and migrant workers who

³⁴ While worker representatives are seldom involved in the design and management of TCLM programs (P. L. MARTIN, 2006: 27).

violate the terms of the programs, encourage migrants to return home, and assist in their reintegration” (GCIM, 2005).

Despite arguing here in favour of a third phase of temporary circular migration in the context of the Welfare State, there are also some more basic assumptions that remain yet to be questioned. New circular programs are based on the unverified hypothesis that circularity in itself implies benefits for all those involved.³⁵ While we have mentioned some of the problems migrants face in terms of their rights, it is equally true that circularity also implies potentially negative consequences for the two other actors: the countries of origin and destination.³⁶ It would be extremely hasty to take for granted that with the incorporation of circularity, temporary worker programs have been elevated to a *new* and *better* phase in ethical and practical terms. If we take into account the fact that the older TCLM programs have only been running for ten years, it becomes apparent that there is a lot of empirical research to do before we can confirm or reject this assumption.

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³⁵ In fact, here lies a second hypothesis: their superiority with respect to postwar experiences.

³⁶ For more information on the consequences of circular programs (specifically the UP Program) see R. KRAFT and M. de LARRARD (2007), Mejía (2008), Mejía et al (2008) or Zapata-Barrero, Sánchez Montijano and Faúndez García (2009).

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