

Lund University Faculty of Law

From the Selected Works of Markus Gunneflo

2010

Discourse or Merely Noise? Regarding the Disagreement on Undocumented Migrants

Markus Gunneflo

Niklas Selberg



Available at: https://works.bepress.com/markus_gunneflo/1/

Discourse or Merely Noise? Regarding the Disagreement on Undocumented Migrants

Markus Gunneflo with Niklas Selberg*

Doctoral students, Faculty of Law, Lund University, Lund, Sweden

Abstract

Drawing on Jacques Rancière's theorising of the political, this article analyses the disagreement on undocumented migrants in recent legislation in Sweden and within the European Union as well as in Swedish labour union practice. Both the consensus understanding of the issue of undocumented migrants and the materialisation of dissensus through the political activities of undocumented migrants are studied. The aims of the article are: firstly, to show that undocumented migrants in Sweden engage in a political struggle that is not recognised as such, to analyse the structure or conditions of possibility of this non-recognition, and finally, to analyse the ways in which these conditions might be undone through the political activities of undocumented migrants. The theoretical claim is that the issue of undocumented migrants involves intimately core aspects of both politics and law and that the struggle of undocumented migrants is a process in which our understanding of political and legal subjectivity is called into question. In conclusion we reflect on the question of political change against the background of the theoretical and empirical findings of the analysis.

Keywords

undocumented migrants; Jacques Rancière; dissensus; performative contradiction; labour unions; Sweden; European Union (EU)

1. A Political Disagreement Proper

According to the predominant understanding, undocumented migrants¹ constitute a migration policy problem. Since there already are immigration laws in

* The present article is the result of a collaborative effort. From early ideas to finalised text there have been deliberations between the authors and parts of the text have been co-written (Section 1 and parts of Section 4). That being said, Gunneflo has the primary responsibility for Sections 2, 3.1, 3.2 and 4 and Selberg for Section 3.3. The authors would like to thank the other contributors to this special issue, Mats Tjernberg, Andreas Inghammar, Shannon Alexander and Gregor Noll for their comments on draft versions of the article. In particular we would like to thank Gregor Noll for involving us in this joint publication project and for providing insightful and helpful readings and comments on numerous occasions. We are grateful also to Leila Brännström for her thoughtful and to the point comments on draft versions. Thanks also to Didier Bigo for his stimulating comments on a previous version of this text presented at the Nordic Refugee Seminar in Lund in 2009. For his most thorough language-check we thank David McBride. Finally, we would like to thank the anonymous referee for constructive comments on Rancière's political theory.

¹ The term 'undocumented migrant' (in French; *sans papiers*, in Swedish; *papperslös*) has become the most commonly used term for the protagonist of this paper and is also the term under which the

force along with an administrative procedure to implement them, the problem seems merely one of how to make that system work more efficiently: the desired result is to stop undocumented migrants from entering the territory in the first place and to force those already there to leave. The rights of the undocumented migrants will be catered for only after inclusion through the regular asylum or immigration procedure or by another sovereign, somewhere else.

At the same time there is the speech of undocumented migrants whose rallying cries such as “no worker is illegal”² appear to be aiming at something rather different. Needless to say, such claims go largely unheard because they simply do not fit into the predominant understanding of the “problem”. Thus, it appears that the disagreement on undocumented migrants is a kind of pre-political disagreement, or more accurately, a political disagreement proper.

Drawing on Jacques Rancière’s theorising of the political we will analyse different manifestations of this disagreement in recent legislation in Sweden and within the European Union as well as in Swedish labour union practice. The aims of this article are: firstly, to show that undocumented migrants in Sweden engage in a political struggle that is not recognised as such, to analyse the structure or conditions of possibility of this non-recognition, and finally, to analyse the ways in which these conditions might be undone through the political activities of undocumented migrants. The theoretical claim is that the issue of undocumented migrants involve intimately core aspects of both politics and law and that the struggle of undocumented migrants is a process in which our understanding of political and legal subjectivity is called into question.

2. Jacques Rancière on Politics and Police

In *Disagreement: Politics and Philosophy*, Jacques Rancière develops a political theory that asks us to think otherwise about issues such as that concerning undocumented migrants.³ At the outset it is important to emphasise that politics, for Rancière, refers to something quite different from what we usually think of when speaking about politics. Hence, Rancière notices that generally politics is seen as “the set of procedures whereby the aggregation and consent of collec-

persons concerned themselves unite (see e.g. the French organisation *9ème collectif des sans-papiers* at 9emecollectif.net/, visited 21 July 2009 and the Swedish organisation *Papperslösa Stockholm* www.dennaonsdag.org/Denna%20Onsdag/Denna%20Onsdag.html, visited 21 July 2009. As remarked by Jacques Derrida the term signals that these persons are lacking or are without something. “Lacking would be what the alleged document or paper represents. The right, the right to a right.” J. Derrida, ‘Derelictions of The Right to Justice (But What are the Sans-papiers Lacking?)’, in Elizabeth Rottenberg (ed.), *Negotiations: Interventions and interviews 1971–2001* (Stanford: Stanford University Press, 2002).

² See the web page of *Papperslösa Stockholm* at: www.dennaonsdag.org/Denna%20Onsdag/Denna%20Onsdag.html, visited 21 July 2009.

³ J. Rancière, *Disagreement: Politics and Philosophy* (Minneapolis and London: University of Minnesota Press, 1999).

tivities is achieved, the organisation of powers, the distribution of places and roles, and the systems for legitimizing this distribution.”⁴ Rancière instead conceptualises this system of distribution and legitimisation as ‘The police’. Contrary to what one might think, Rancière does not identify the police with the state apparatus, a notion which, according to Rancière, is burdened by the opposition between state and society in which the state is portrayed as a “‘cold monster’ imposing its rigid order on the life of society.”⁵ Instead, the police order is understood in terms of ‘consensus’ which should not be confused with the result of a discussion or social and political peace. Rather, consensus refers to a sharing of a “common and non-litigious experience”⁶ enabled by a particular ‘partition of the sensible’ [*le partage du sensible*]⁷ determining “a party’s share or lack of it”⁸ and which presence is the absence of any gap or supplement.⁹ Thus, a partition of the sensible gives *everyone* a specific name and a role; it is a system of coordinates defining modes of being, doing, making and communicating which will count and that which will not count. It is a configuration of inclusion and exclusion that produces a set of self-evident facts of perception and makes certain activities visible and others not, certain speech understood as discourse, and others as noise.¹⁰ It is important to emphasize the relation between a ‘partition of the sensible’ as an order of intelligibility and as an order of distribution. As put by Michael Dillon: “An order of intelligibility makes sense but is intimately related also to an order of distribution. An order of distribution derives from an order of sense and, in addition, constitutes social division.”¹¹ Thus, by being simultaneously an order of intelligibility and an order of distribution the police order constructs, maintains and sediments social hierarchies and inequalities.¹²

The term ‘politics’ Rancière reserves for “an extremely determined activity antagonistic to policing”.¹³ Antagonistic because politics is always a reaction against the police in a process initiated when those who have no right to be counted as a speaking being make themselves of some account by setting up a

⁴ *Ibid.*, p. 28.

⁵ *Ibid.*, p. 29.

⁶ D. Panagia & J. Rancière, ‘Dissenting Words: A Conversation with Jacques Rancière’, 30 *Diacritics* (2000), p. 123.

⁷ The French term ‘*partage*’ is one of the terms that Rancière returns to in different contexts and whose different meanings cannot be made justice by any one translation. Thus ‘*partage*’ may be understood as partition, division, but also sharing, of which the last captures the essentially common experience of any given “partition of the sensible” A. Parker, ‘Editors preface’, in A. Parker (ed.), *The Philosopher and His Poor* (Durham and London: Duke University Press, 2003), pp. vii–viii.

⁸ Rancière, *supra* note 3, p. 29.

⁹ J. Rancière, ‘Ten Theses on Politics’, 5 *Theory & Event* (2001), thesis 7.

¹⁰ Rancière, *supra* note 3, p. 29.

¹¹ M. Dillon, ‘A Passion for the (Im)possible: Jacques Rancière, Equality, Pedagogy and the Messianic’, 4 *European Journal of Political Theory* (2005), pp. 429–454, at p. 431.

¹² Cf. R. Van Munster, ‘Jacques Rancière’, in J. Edkins and N. Vaughan-Williams (eds.), *Critical Theorists and International Relations* (London and New York: Routledge, 2009), p. 269.

¹³ Rancière, *supra* note 3, p. 29.

‘wrong’, a “contradiction of two worlds in a single world”, simply by appearing as the supplement that the police order denies.¹⁴ This “appearing” takes place through subjectification by which is understood “the production through a series of actions of a body and a capacity for enunciation not previously identifiable within a given field of experience”.¹⁵ Thus, what characterises politics is the break with the configuration whereby a party’s share or lack of it is defined, *i.e.* by the introduction of a part of those who have no part.¹⁶ Consequently, ‘political activity’ is understood to mean “whatever shifts a body from the place assigned to it or changes a place’s destination in the partition of the sensible of the police order. It makes visible what had no business being seen, and makes heard a discourse where once there was only place for noise.”¹⁷ This undoing of the perceptible division of the police order takes place in “the open set of practices driven by the assumption of equality between any and every speaking being and by the concern to test this equality.”¹⁸

From this last statement we understand that ‘equality’ plays both a peculiar and a significant role in the thought of Rancière. With Rancière equality does not play the passive role of being a principle of distribution *i.e.* that some good should be distributed in accordance with the principle of equal distribution along the line of theories of distributive justice. Instead, equality plays an active role at the very beginning of a political process not as a catchword, but as an axiom, something that is *presupposed* in political activities challenging a police order that has denied someone’s equality.¹⁹

Political action out of the presupposition of equality has the potential of constructing ‘dissensus’, something Rancière refers to as the “essence of the political”.²⁰ As previously noticed, consensus does not refer to social and political peace. Thus, dissensus does not refer to disturbance of such peace. “A dissensus is not a conflict of interests, opinions, or values; it is a division put in the ‘common sense’: a dispute about what is given, about the frame within which we see something as given.”²¹ Politics relies on dissensus so far as politics persists “as long as there is a dissensus about the givens of a particular situation, of what is seen and what might be said, on the question of who is qualified to see or say what is given.”²²

¹⁴ *Ibid.*, p. 27.

¹⁵ *Ibid.*, p. 35. On Rancière’s particular use of the notion of ‘subjectification’ see T. May, *The Political Thought of Jacques Rancière*, (Edinburgh: Edinburgh University Press, 2008), pp. 70–71.

¹⁶ Rancière, *supra* note 3, pp. 29–30.

¹⁷ *Ibid.*, p. 30.

¹⁸ *Ibid.*

¹⁹ *Supra* note 3, p. 17, see also J. Rancière, ‘Afterword to The English-Language Edition (2002)’, in A. Parker (ed.), *The Philosopher and His Poor* (Durham and London: Duke University Press 2003), p. 223. The distinction between passive and active equality is Todd May’s. T. May, *The Political Thought of Jacques Rancière*, (Edinburgh: Edinburgh University Press, 2008).

²⁰ Rancière, *supra* note 6, p. 124.

²¹ J. Rancière, ‘Who Is the Subject of the Rights of Man?’, 103 *South Atlantic Quarterly* (2004), p. 304.

²² Rancière, *supra* note 3, p. 124.

Rancière offers a number of examples of political activity or the introduction of a wrong into the police order and the construction of dissensus ranging from the (failed) Scythian slave rebellions²³ to contemporary events. One such example is when Jeanne Deroin presented herself as a candidate for the French legislative election in 1849. An election she, as a woman, could not run in. Thus, Deroin demonstrates a police logic with a universal right to vote that nevertheless excludes her sex from any such universality. However, Rancière asks us not to jump to conclusions. Deroin's demonstration is not a simple denunciation of an inconsistency or a lie regarding the universal. Instead it is the "staging of the very contradiction between police logic and political logic which is at the heart of the republican definition of community."²⁴ It is political because it "makes obvious the extraordinary confused or complicated disagreement marking the republican relationship between the part of women and the very definition of the common of the community."²⁵

Thus far, our take on Rancière's theorising of politics has focused on politics and political subjectivity. What then about law and legal subjectivity? This is not least important because the claims of undocumented migrants often are framed as claims of human rights. Through a reading of Hannah Arendt's critique of human rights, Rancière has answered the question: "Who is the subject of the rights of man?" by conflating the subject of politics and the subject of the rights of man. This is done in the, at first sight, peculiar definition: "the Rights of Man are the rights of those who have not the rights that they have and have the rights that they have not."²⁶

In order to explain this double paradox Rancière first acknowledges that the declaration of rights states that all men are born free and equal. Then he asks: what is the sphere of implementation of these predicates? Arendt's answer is that it is the sphere of citizenship or the sphere of political life separated from the sphere of private life. The important problem for Rancière is, however, the question where to draw the line separating the different categories of life. Rancière claims that politics is precisely about this border, or more accurately, it is a process that keeps bringing this border into question.²⁷ Once again Rancière explains this with an example; this time from France during the revolution and the famous statement of Olympe de Gouges: If women are entitled to go to the scaffold they are entitled to go to the assembly. De Gouges argument shows the line

²³) At the beginning of *Disagreement* Rancière retells and analyses Herodotus' tale of the Scythian slaves. In fact, this tale provides somewhat of a background to his development of police and politics and he also return to the Scythian slaves at numerous occasions in developing these concepts (Rancière, *supra* note 3, pp. 12–13, 24, 27, 30–31). This provides a poignant point of communication between the present article and the contribution of Gregor Noll to this special issue 12(2) *European Journal of Migration and Law* (2010) 241–272.

²⁴) Rancière, *supra* note 3, p. 41.

²⁵) *Ibid.*, p. 41.

²⁶) *Supra* note 21, p. 302.

²⁷) *Ibid.*, p. 303.

drawn between women being able to be sentenced to death for political reasons and thus included in political life but at the same time being excluded from political life in the form of being barred from the legislative assembly. Rancière claims that thanks to the declaration of rights, de Gouges is able to demonstrate both that they were deprived of the rights that they had, and, that they have the right that the constitution denied them. Thus, “they acted as subjects that did not have the rights that they had and had the rights that they had not.”²⁸

3. Undocumented Migrants in Recent Legislation and Labour Union Practice

In what follows we will analyse the police or consensus understanding of undocumented migrants; a configuration of the perceptible where undocumented migrants are in the position of being “included but not belonging”.²⁹ We will also analyse the materialisation of dissensus through the political activities of undocumented migrants.

3.1. *Directive on Sanctions against Employers of Undocumented Migrants*

On 18 June 2009 the Council of the European Union and the European Parliament jointly adopted Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.³⁰ The rationale behind the Directive is to reduce the “pull factor” consisting of the possibility of finding work within the EU by targeting the employment of third-country nationals who are staying illegally.³¹ This recent piece of legislation is interesting because it is a good example of the place of undocumented migrants within the police order and thus how policies on undocumented migrants are focusing on a very specific understanding of the issue of undocumented migrants.

According to the Directive, Member States shall prohibit the employment of illegally staying third-country nationals (Article 3.1). Each Member State shall ensure that infringements of this prohibition is subject to the sanctions and measures laid down in the Directive (Article 3.2) including financial sanctions and payments of costs of return of illegally employed third-country nationals in cases

²⁸ *Ibid.*, p. 302.

²⁹ Cf. E. Van Den Hemel, ‘Included But not Belonging, Badiou and Rancière on Human Rights’, Issue 3 *Krisis – Journal for Contemporary Philosophy* (2008) www.krisis.eu.

³⁰ Directive 2009/52/EC of The European Parliament and The Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ 2009 L 168 30.6.09.

³¹ *Ibid.*, recital para. 2. See also the original Commission Proposal: Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals (COM (2007) 249 final), p. 2.

where return procedures are carried out (Article 5.1.b). Furthermore, the Directive obliges Member States to hold both natural (Article 10) and legal persons (Articles 11 and 12) criminally responsible for employment of illegally staying third-country nationals when committed intentionally under certain aggravating circumstances (Article 9).

In the original Commission Proposal it is made clear already at the outset that “the proposal is concerned with immigration policy, not with labour or social policy.”³² The wording of the proposal makes this seem like a choice where a directive on labour or social policy for undocumented migrants would be a viable alternative even though, one might argue, given the place of undocumented migrants in the police order, a directive on labour or social policy targeting undocumented migrants would be highly unlikely.

However, this is complicated in the section where the consistency of the proposal with the other policies and objectives of the Union is elaborated. The original Commission Proposal states that the proposal indeed does comply with fundamental rights since it does not affect third-country nationals’ rights as workers, such as the right to join a trade union, to participate in and benefit from collective bargaining and to enjoy working conditions that come up to health and safety standards.³³ Needless to say, given the waiver concerning the proposal not being concerned with social or labour policy, there are no positive legal obligations to safeguard such rights apart from a provision on back payments to be made by employers of outstanding remuneration in cases of termination of employment on account of illegal employment (Article 6). Again, we have a clear positioning of the undocumented migrant in the Directive as such, but at the same time statements, as it were, in the margins of the proposal, that seem to gesture toward the possibility of another understanding of undocumented migrants by acknowledging that they have rights as workers.

The statement concerning the third-country nationals’ rights as workers is particularly interesting in a Swedish context because of the insistence of major Swedish labour unions on the impossibility of organising undocumented migrants because of their work being illegal and that decriminalisation³⁴ is necessary for the labour unions to organise them.³⁵ Thus, if particular statements in the original Commission Proposal may be interpreted as a gesture towards another understanding of undocumented migrants, *i.e.*, a gesture towards dissensus, this gesture is met with police logic or consensus by the major Swedish labour unions. This

³²) Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals (COM (2007) 249 final), p. 2.

³³) *Ibid.*, p. 3.

³⁴) In this context it is worth mentioning that Chapter 20 Section 5 of the Swedish Aliens Act (2005:716) criminalised the employment of a person without work permit even before Directive 2009/52/EC entered into force.

³⁵) Landsorganisationen i Sverige, *LOs 26:e Kongress 2008. Kongressprotokoll del 2*, p. 540.

serves to remind us not to confuse the police order with the state apparatus. While policing may well be performed by the state, it is frequently done so also by other entities, in this case the major Swedish labour unions.

The Commission Proposal further states that under the current proposal it is the employer who will be sanctioned, not the illegally employed third-country nationals. This statement is, however, preceded with a laconic statement within brackets “(but the Commission’s 2005 proposal for a Return Directive would, as a general rule, require Member States to issue a return decision to third-country nationals staying illegally.)”³⁶ The Returns Directive makes quite clear that Member States indeed will be obligated to issue a return decision to any third-country national staying illegally on their territory (Article 6).³⁷

The Directive with sanctions against employers of illegally staying third-country nationals read together with the Returns Directive lends support to the introductory remarks concerning both the predominant understanding of the issue of undocumented migrants and the preferred remedies for “solving” the issue. What we need to do is simply stop undocumented migrants from entering the territory in the first place, in this case by reducing the “pull factor”, and, furthermore, force those already on the territory to leave. Thus, the legal framework of the European Union for undocumented migrants provides a totalizing account where undocumented migrants are given a very specific name; “illegally staying third-country nationals” and role characterized by their not belonging. This is accompanied with instructions to others how to treat them. Employers: do not employ them. States: issue them a return decision. The apparent passive role of the undocumented migrant in the police order, as it appears in the Directive, is worth noting. The provisions all relate to the “not belongingness” of the undocumented migrant and how the undocumented migrant should be handled by others. Provisions that assume any agency on the part of undocumented migrants, even in the form of a criminal sanction, are nowhere to be seen.

3.2. *Recent Swedish Legislation*

On 15 December 2008 an amendment to the Swedish Aliens Act³⁸ entered into force, reforming the rules for immigration of foreign labour. *Inter alia*, the amendment made it possible for certain foreigners to apply for a temporary residence and work permit from inside Sweden on the basis of already having work in Sweden. However, there is no doubt that undocumented migrants fall outside the scope of application of the amendment since, in order to be granted a temporary residence permit, the applicant would have to satisfy the criteria of having

³⁶) *Supra* note 32, p. 2.

³⁷) Directive 2008/115/EC of The European Parliament and The Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ 2008 L 348 24.12.08.

³⁸) Aliens Act (2005:716).

been employed for at least six months and have guaranteed employment for at least a year from the date of the application (Chapter 5 section 15, first indent).³⁹ Furthermore, there is a time limit for the application of the temporary residence permit of two weeks from the entry into force of the rejected asylum claim (Chapter 5 section 15, second indent).

However, undocumented migrants have not been completely ignored in the reform. In one passage in the proposal, where the rationale for the amendment legislation is declared, it is stated that Sweden shall continue its policy of regulated immigration and thus that residence and work permits shall be applied for before entry to Swedish territory. Asylum seekers may, however, apply for residence permit even after having entered Swedish territory. Furthermore, it is explained that it is of the utmost importance that a system is not created that enables a person to enter Swedish territory in order to get access to the labour market, the reason being that this might lead to the undermining of the right to asylum “and its legitimacy”⁴⁰ as well as lead to increased costs for the reception of asylum seekers. One of the fundamental intentions with the existing immigration legislation is that the asylum procedure shall have a distinct beginning and ending and the asylum applicant shall receive a final decision as soon as possible. In order to maintain the legitimacy of the asylum system it is furthermore important that rejected and enforceable asylum decisions are respected.

Creating a possibility of applying for residence and work permit after a decision on expulsion has entered into force may, according to the government proposal, engender uncertainties concerning the terminal point of the asylum procedure. On the other hand, it may be considered unreasonable and expensive for a person who has already established herself in the Swedish labour market to be forced to leave Sweden in order to apply for residence and work permit prior to entry. The government concludes the passage by stating that, “all things considered”, there should be a possibility for a foreigner who has received a negative decision on her asylum application to, under certain circumstances, apply for a residence and work permit from inside Sweden.⁴¹

The recent legislative work on immigration of foreign labour in Sweden may, like the Directive on sanctions against employers of illegally staying third-country nationals and the Returns Directive, be theorised as a “product” of the

³⁹⁾ The exclusion of undocumented migrants from the scope of application of the amendment legislation is highlighted in a motion from the Left Party of Sweden (*Vänsterpartiet*). The Left Party of Sweden labelled the government proposal a deceit against the undocumented migrants and argued amongst other things for a stronger position for undocumented migrants on the labour market, the right to healthcare and schooling for children as well as a “right” to residence permit. With regard to the specific proposal of the government the Left Party of Sweden argued that it would be completely unreasonable to exclude undocumented migrants from the possibility of applying for a residence permit in a system with expanded possibilities of immigration of foreign labour given that this would mean that persons already living and working in Sweden would be expelled while at the same time other foreigners would be “imported” to do the same work (Motion 2007/08:Sf27).

⁴⁰⁾ Government Bill 2007/08:147, p. 47.

⁴¹⁾ *Ibid.*, pp. 47–48.

consensus. It is evident that undocumented migrants were included in the considerations when preparing the amendment. However, it is equally evident from the preparatory works and from the amendment legislation, that undocumented migrants have no place in or do not belong to the question under consideration. How? Precisely through the agreement on the terms of the issue, or, what Rancière refers to as the consensus making up the configuration of the perceptible of the police order.

In the passage from the preparatory works referred to above, the undocumented migrant is included in the form of the embodiment of a threat: undocumented migrants use the asylum system in order to gain access to the labour market, an activity which, according to the preparatory works, leads both to the undermining of the right of seeking asylum and to increased costs for the reception of asylum seekers. For the consensus, the undocumented migrant thus appear as someone whose being, doing, making, and communicating present a threat to both those already included in the nation-state, through increased costs for reception of asylum seekers *etc.*, and those who may be included through the regular asylum procedure, by, allegedly, undermining the right to seek asylum. This understanding constitutes simultaneously the exclusion or the “not belonging” of the undocumented migrants living and working in Sweden and thus the consensus effectively manages to get rid of politics.

Another way of analyzing such exclusion and performative creation of a threat would be to see what it does for the communal identity of those included and supposedly “threatened”. The basis of such an analysis would be the insight that a community is not a pre-given entity or subject with a fixed identity once and for all constituted, but that community is instead (and has to be) constantly in a state of becoming. Thus, the exclusion of undocumented migrants may be interpreted as part of the performance of communal identity.⁴² This performance is also evident in the depiction of undocumented migrants as a threat to the legitimacy of the asylum system. What is threatened is nothing less than the very process in which migrants “are put back in their place in the national state system” either by being returned to the country of origin or by becoming part of the community of the country of asylum.⁴³

The position of undocumented migrants being included but not belonging was further evident at a hearing concerning the government proposal at the social security committee of the Swedish parliament on 23 September 2008. That hearing provides us with an interesting example of political activity of undocumented migrants.

⁴²) G. Noll, ‘The Asylum System, Migrant Networks and the Informal Labour Market’, in P. Cramér and T. Bull (eds.), *2 Swedish Studies in European Law* (Oxford and Portland: Hart Publishing, 2008), p. 13.

⁴³) *Ibid.*

At the hearing the government proposal was presented by the Minister for Immigration. Stake-holders such as the labour unions, the immigration authorities, and NGOs working for the rights of asylum seekers as well as researchers within the fields of history and economics gave their opinions on the proposal and the members of the social security committee asked questions to the Minister and other participants. Among the invited participants there were also a few persons from an organisation for undocumented migrants, *Papperslösa Stockholm*, among whom was a Bangladeshi by the name of Sarwar, an undocumented migrant, who has been living and working in Sweden for the past four years after his asylum claim was rejected by the Swedish immigration authorities.⁴⁴

Following a request by a member of the social security committee for the Swedish Left Party for the views of the undocumented migrants, Sarwar spoke. After thanking the committee for this opportunity Sarwar stated (in Swedish): “I am from *Papperslösa Stockholm* who struggle for their rights. I would like to say a few words.”⁴⁵

He stated that there are approximately forty five thousand undocumented migrants in Sweden and that it would be both unreasonable and unnecessary to “cleanse” the society of those migrants who have already settled. He went on to say that they are not a burden to society, they lead honest lives despite being poor and forced to accept dangerous, bad, dirty and underpaid jobs, and that there are also many children, sick, handicapped, blind and deaf for whom it is impossible to find work. After having said a few things on the setbacks of the amendment legislation from the point of view of the asylum seeker, Sarwar concluded by saying: therefore, “we think and we demand that before the amendment legislation enters into force the persons that are already here should be regularised.” The chairperson then gave the floor to a member of the social security committee who proceeded, perhaps with a gesture to the previous speaker, by saying “It is clear that these questions stretch over a lot of different issues, but I would like to direct a question to the Confederation of Swedish Enterprise [Svenskt Näringsliv]...” and then asked about what could be done concerning the lack of certain skilled craftsmen in Stockholm. The deliberations never returned to the question of undocumented migrants.

We suggest that if one is interested in the political and legal subjectivity of undocumented migrants, one must attend to the kind of speech, of which the statement of Sarwar at the hearing of the social security committee is an example.

First and foremost, in the speech Sarwar pronounces a “we” that appears to be important. First in the statement: “I am from *Papperslösa Stockholm* who struggle for their rights” suggesting that he, as a singular subject, is but part of a larger

⁴⁴) L. Granestränd, ‘Papperslös i Sverige – en dag med Sarwar’, *Dagens Nyheter*, 1 June 2008. www.dn.se/nyheter/sverige/papperslos-i-sverige-en-dag-med-sarwar-1.772267, visited 22 July 2009.

⁴⁵) The entire hearing can be watched at the web page of the social security committee: www.riksdagen.se/templates/R_ExternalPage_3383.aspx?op=anf&anf=1110809230062164912, visited 22 July 2009.

whole or a “we” in the form of an organisation that struggles for the rights of undocumented migrants, that is to say, a collective subject. Secondly, at the end of the speech Sarwar speaks as a “we” when he says, “we think and we demand”. What does the “we” do in this instance?

Rancière argues that politics take place when a person or a group of persons challenges the police order by acting out of the presupposition of equality. In this case, what is being challenged is the specific place assigned to undocumented migrants in the partition of the sensible of the police order, *i.e.* the consensus understanding of undocumented migrants.

The first observation made concerning the reform was that undocumented migrants were excluded from it, or rather, they were in the position of being “included but not belonging” and that they were understood as a threat to both those already included and those yet to be included through the regular asylum or immigration procedure. This understanding stands in stark contrast with the subject that appears at the hearing in the Swedish parliament. Thus, Sarwar speaks about undocumented migrants as people who lead honest lives despite being poor and forced to accept dangerous and underpaid jobs. Undoubtedly these are circumstances under which also those *included* may find themselves and may thus be interpreted as a gesture of equality, but the political significance lies rather in the assumption of equality behind Sarwar speaking in the parliament in the first place, even though, as we shall soon see, *what* he says is marked by both police and politics.

The assumption of equality behind Sarwar speaking at the hearing at all may be interpreted as a way of reconfiguring our shared field of experience through the introduction of a wrong, *i.e.* an instance when those who have no right to be counted as speaking beings make themselves of some account, or in other words, “the introduction of a part of those who have no part”. Thus, Sarwar appears here as precisely a political subject.

Earlier, a point was made concerning Rancière’s understanding of the subject of the rights of man as a conflation of political and legal subjectivity. How is legal subjectivity relevant for what took place at the hearing? More specifically, Sarwar speaks of *Papperslösa Stockholm* who struggle for the rights of undocumented migrants. What does this mean in this context? From the fact that the group ‘undocumented migrants’ consists of persons who either have had their asylum claims rejected or do not find it meaningful to apply for asylum, we understand that it does not mean the right to seek asylum, a right which is not contested by the police order. Clearly, it must mean something else. Presumably, the rights Sarwar is speaking about are nothing less than equal rights with those already included. These are rights undocumented migrants clearly do not have. Thus, in this particular case, the “we” act here as “subjects that did not have the rights that they had and had the rights that they had not”, much in the same vein as Olympe de Gouges did when she stated that if women are entitled to go

to the scaffold, they are entitled to go to the assembly. The equivalent to the statement of De Gouges would thus be: if undocumented migrants are entitled to be returned, they are entitled to stay.

However, while this may be interpreted as a political activity, in a Rancièrian sense, the demand for “regularisation” made by Sarwar as such is strictly consensual in that it builds on the logic of first: inclusion, and then: rights, and thus serves to reinforce the consensual understanding of undocumented migrants. This combination of consensus and dissensus is also discernible in the declaration of *Papperslösa Stockholm* which states: “We demand regularisation of all undocumented migrants who reside in Sweden, that is to say, permanent residence permits for all undocumented migrants residing in Sweden.”⁴⁶ In what is referred to as the “background” of the declaration it is, among other things, said that undocumented migrants do not have the right to fundamental rights such as the right to health care other than emergency medical care, right to education, the possibility of claiming a decent wage for work performed, the possibility to file a complaint when one has been the subject of a crime. *Papperslösa Stockholm* cannot accept that human rights in Sweden are not understood to be the rights of human beings, but instead equated with citizenship rights. The last sentence of the “background” of the declaration states: “The only way for undocumented migrants to be guaranteed these rights, within foreseeable time, is through a regularisation.”⁴⁷

While the declaration itself makes the consensual demand for regularisation, there is, in the “background” of the declaration, the dissensual argument aiming at undocumented migrants being *human* but nevertheless denied *human* rights. It is worth noting that the demand of regularisation is consensual for two independent reasons. The first concerns the simple fact that it is formulated as a demand as opposed to an action out of the presupposition of the equality of any and every speaking being. The second concerns the consensual logic of regularisation. Regularisation functions much like the ordinary asylum or immigration procedure by offering a procedure for inclusion in order to then receive rights and is thus, just like the regular asylum or immigration procedure, a process where undocumented migrants are “put back in their place in the national state system”.⁴⁸ Thus, while regularisation may be embraced as a decision that temporarily leaves the police order in a better shape with regard to the situation of undocumented migrants, it in no way infringes on the “partition of the sensible” of the police but rather takes it as its point of departure and thus leaves it perfectly intact for future generations of undocumented migrants. However, the temporal dimension, invoked in the last sentence of the “background” of the

⁴⁶ The webpage of *Papperslösa Stockholm*: www.dennaonsdag.org/Denna%20Onsdag/Plattform.html, visited 22 July 2009.

⁴⁷ *Ibid.*

⁴⁸ Noll, *supra* note 42, p. 14.

declaration may be interpreted as strengthening the dissensual potential of the declaration itself. Apparently regularisation is not the only way, but the only way “within foreseeable time” to guarantee the human rights of undocumented migrants.

3.3. *The Practice of Swedish Labour Unions*

Undocumented migrant workers are, generally speaking, paid less than other workers, and their working conditions poorer than for other workers. Some undocumented migrant workers have countered this exploitation by demanding membership in and assistance from Swedish labour unions. Others claim that regularisation is the only strategy and thus oppose organizing in labour unions since this will not solve the problem of their “illegality”.⁴⁹

In Sweden there are basically two labour unions for blue-collar workers. The established, large, politically connected *Landsorganisationen i Sverige* (LO), and the small, stigmatized syndicalist union *Sveriges Arbetares Centralorganisation* (SAC). LO is embedded in enterprise and state apparatus, but this is not true for SAC.⁵⁰

At the LO congress in 2008 a petition demanding LO to organize undocumented migrant workers was rejected by a large majority of delegates.⁵¹ How should this decision be understood?

When, on the presupposition of equality undocumented migrants seek membership of LO, LO cannot grant them membership because, embodying police logic, LO conceives these workers not as *workers*, although they perform work under an employment contract, but as undocumented migrants. Apparently, what counts for LO, is not that the work is performed on Swedish territory but that those who perform it belong to the nation and, according to the consensus, undocumented migrants do not. Hence, the consensus puts the right of residence before worker status, and thus establishes an inequality between workers: some are workers, others are undocumented migrants. The position of LO is supported by legal arguments.⁵² Such arguments are based on the understanding that the application of the law on employment protection, *i.e.* protection against certain unfair dismissals, presupposes a work permit,⁵³ which cannot be obtained

⁴⁹ B. Frank and K. Lindquist, ‘Arbetsrätt eller papper först? Papperslösa oeniga om hur kampen ska föras’, *Arbetaren*, 28 November 2007.

⁵⁰ R. Fahlbeck, *Nothing Succeeds Like Success. Trade Unionism in Sweden*, (Juristförlaget i Lund, Lund, 1999) *passim*.

⁵¹ *Supra* note 35, pp. 536 and 543.

⁵² *Ibid.*

⁵³ *I.e.*, the Court’s decision to prolong an employment contract in cases of unfair dismissal. *Labour Court Case AD 1979 no 90*. Other aspects of the employment contract might be upheld by the Court. See on this matter the contribution of Inghammar in this issue; 12(2) *European Journal of Migration and Law* (2010) 193–214.

without the right to reside in Sweden. Other parts of labour law, *de iure* applicable to all work performed in Sweden,⁵⁴ are *de facto* not applied to undocumented migrants. Thus, labour law rights are generally distributed according to the right to reside and work in Sweden, not according to the fact of actually working in Sweden.

The decision of LO was not to forbid the member unions of LO from organizing undocumented migrants. Some member unions support a “labour union centre” for undocumented migrants. The fundamental claim of the centre is that undocumented migrants have rights at work! However, the support offered appears to be mainly directed at providing information on “their rights on the labour market”,⁵⁵ *i.e.* “advice on salaries, working conditions and health and safety issues at work”.⁵⁶ Instead of answering the call from undocumented migrant workers acting under the presupposition of equality with full membership, the irregular “labour union centre” is created where undocumented migrants may receive support by informing themselves in order to be able to better consider their interests. The construction of this irregular platform is such that the undocumented migrants can relate to it only passively, while the core of a regular trade union is the active membership and organisation among the workers themselves.

Although the “labour union centre” might have provided help to undocumented migrants, the solution appears to be perfectly consensual in as much as it does not blur the consensual understanding of undocumented migrants by including them among the other members of the union and thus acknowledging them as workers. Furthermore, the centre appears to make a similar gesture to that made by Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.⁵⁷ The labour union centre and the EC Directive both appear to recognise that undocumented migrants do have rights as workers, however, it is for someone else, in this case the undocumented migrants themselves, to secure those rights.⁵⁸

In contrast, SAC, responded to the demands for inclusion of undocumented migrant workers by explicitly recognizing that they are *workers*, and, as such,

⁵⁴) That is work performed under a contract of employment. See *e.g.* Government Bill 1998/99:90 p. 14.

⁵⁵) See the web page of *Fackligt Center för Papperslösa*. www.fcfp.se, visited on 22 July 2009.

⁵⁶) *Ibid.*

⁵⁷) *Supra* note 30.

⁵⁸) In this context it is worth mentioning that a recent article in the magazine *Mana* reports that undocumented migrants are not satisfied with the services provided by the centre. The undocumented migrants claim that they have been excluded from negotiations regarding their situation at workplaces and that the centre has not been able to help them with relevant information. It is furthermore reported that the centre lacks funding and that the connection to LO and the Social Democratic Party contributes to the lack of enthusiasm for issues concerning the situation for undocumented migrants. “Papperslösa hoppar av”, Aida Ghardagian, *Mana* nr. 4–5 2009.

they should be organized in labour unions.⁵⁹ Thus, undocumented migrants form a recognized group within SAC and act and speak as workers with the support of the union.

Not only might the act of seeking membership in a labour union be understood as a political activity of the undocumented migrants but their recognition by and organization within a labour union may further contribute to the undoing of the partition of the sensible. Hence, in the terms of Rancière, we appear to have a “wrong” at our hands, a “contradiction of two worlds in a single world”,⁶⁰ the world where they are workers and the world where they are not workers but undocumented migrants.

4. Dissensus, Performative Contradictions and Political Change

This article has explored different manifestations of the consensus such as how undocumented migrants are understood in a way that makes their being, doing, making, and communicating a non-issue from the point of view of the police order. We have also analysed fragments of dissensus within the police order instigated by the political activities of undocumented migrants, out of the presupposition of equality, acting as if they did not have the rights that they had and had the rights that they had not and, *inter alia*, seek membership of Swedish labour unions.

In conclusion we would like to approach a question that has been, as it were, lurking in the background of this article, namely the question of political change.

Rancière’s political theory is a theory of political change, but it is also a theory that lacks a pre-set direction for this change. Instead Rancière offers a theory of change in the form of the disruption of the partition of the sensible of a given order, when someone acts otherwise, becomes the supplement that was denied, turns the neat order of the consensus where peoples being, doing, making and communicating was organized in accordance with their respective roles, into a dissensus characterized by a dispute about or uncertainty concerning the frame within which we see something as given. Rancière seems to leave us with this non-foundational or anti-essentialist dynamic, because, for Rancière, there simply does not exist any foundation for politics upon which a vision of utopia can be built.⁶¹ In fact, Rancière claims that one cannot think of a future dissensual community. That it is impossible to do so.⁶² To be sure, dissensual collectivities frequently give birth to new capacities and bear ideas of future communities but

⁵⁹ R. Warlenius, ‘Civil olydnad i kamp för papperslösa’, *Arbetaren*, 7 April 2004.

⁶⁰ Rancière, *supra* note 3, p. 27.

⁶¹ See further *supra* note 3, p. 16.

⁶² J. Rancière et al. ‘Democracy, Dissensus and the aesthetics of class struggle: An exchange with Jacques Rancière’, 13 *Historical Materialism* (2005), p. 292.

Rancière claims that it is impossible to think of the future community as a projection of those kinds of communities.⁶³ Thinking of utopia means thinking of a form of community that would not lend itself to dissensus.⁶⁴ In such an understanding emancipation cannot be understood as a goal but only as a process, “a break in the past rather than an ideal put in the future.”⁶⁵

Like Rancière Judith Butler sees the political potential in similar disruptive or declassifying practices. Butler understands instances when the “right to rights” is exercised as instances of “performative contradiction”, e.g. when those who have no right of free speech under the law nevertheless speak freely, precisely in order to demand the right to speak freely. Butler further claims that such performative contradiction “leads not to impasse but to forms of insurgency”⁶⁶ and even suggests that such action might be a necessary condition for radical political change:

Once we reject the view that claims that no political position can rest on performative contradiction, and allow the performative function as a claim and an act whose effects unfold in time, then we can actually entertain the opposite thesis, namely, that there can be no radical politics of change without performative contradiction. To exercise a freedom and to assert an equality precisely in relation to an authority that would preclude both is to show how freedom and equality can and must move beyond their positive articulations. The contradiction must be relied upon, exposed, and worked on to *move towards something new* [our emphasis].⁶⁷

The point with Butler’s “performative contradictions” is, like Rancière’s “political activity”, not the establishment of a new and better (police) order, but precisely this “move towards something new”.⁶⁸ In order to achieve this Butler emphasizes the importance of letting the performative contradiction function as a claim in itself, to be relied upon, exposed and worked on.

This speaks to the political activities proper of undocumented migrants carrying this potential of moving towards something new. The practices theorized by both Rancière and Butler are precisely such practices that disrupts the “partition of the sensible” that otherwise guides our being, doing, making and communicating. These are moments when we come to understand that what we take to

⁶³ *Ibid.*, p. 291.

⁶⁴ *Ibid.*, p. 292.

⁶⁵ *Ibid.*, p. 292.

⁶⁶ J. Butler & G.C. Spivak, *Who Sings The Nation-State? Language, Politics, Belonging* (London, New York and Calcutta: Seagull Books, 2007), p. 63.

⁶⁷ *Ibid.*, pp. 67–68.

⁶⁸ This motif can be found elsewhere in Butler’s thought. Thus, as noticed by Christina Masters, the importance that Butler places with drag in e.g. *Gender Trouble* lies not in the appropriating of or parodizing with gender norms but instead in the moment of uncertainty, of not knowing rather than knowing whether one is confronting a man or a woman, the unsettling of the very categories through which one sees man and woman. C. Masters, ‘Judith Butler’, in J. Edkins and N. Vaughan-Williams (eds.), *Critical Theorists and International Relations* (London and New York: Routledge, 2009), p. 119–120. Cf. J. Butler, *Gender Trouble. Feminism and the Subversion of Identity*, (New York and London: Routledge, 1999), p. xxii.

be “real”, what we invoke as naturalized knowledge is, in fact, a changeable and revisable reality.⁶⁹ Thus, as remarked by Rancière; “[p]olitics can certainly be described as an ontological conflict: it is a question of constructing a real in opposition to another.”⁷⁰ Butler adds that even though such a cognitive shift might not in itself constitute a political revolution “no political revolution is possible without a radical shift in ones notion of the possible and the real.”⁷¹ The quote from Butler speaks, equally directly, to the demands for regularisation in the declaration of *Papperslösa Stockholm* and made by Sarwar at the hearing in the Swedish Parliament. While these demands, if met, may well result in an improvement for those regularised, it does not create dissensus, that is to say, a dispute about the frame within which we see, speak and act on the “issue” of undocumented migrants and a dispute about who is qualified to see or say what is given about undocumented migrants. Thus, it changes little or nothing for coming generations of undocumented migrants.

Rancière’s thought speaks also to those professionally committed to any of the “meeting points between police logic and egalitarian logic”⁷² of which the law is a prominent example. Rancière makes it quite clear that the law may define both a structure of political action and a structure of the police order and thus emphasizes the very entanglement of both logics.⁷³ This can be noticed also in our analysis where the law figures in both the policing of the European Union, the Swedish parliament and the major Swedish labour unions and in the political activities of undocumented migrants. As put by Rancière “[p]olitics acts on the police. It acts in the places and with the words that are common to both, even if it means reshaping those places and changing the status of those words.”⁷⁴ Obviously, this leaves those professionally engaged in the shaping of those places and establishing the precise meaning of those words in the first place – lawyers in the case of law – in the situation of being preoccupied with what is acted upon by politics, that is to say policing, irrespective of whether her place of work is a court of law, a human rights NGO or university law faculty.

In reversing our understanding of political and legal subjectivity Rancière make us see the emancipatory potential in practices that would otherwise perhaps appear minor, insignificant or even pointless. Rancière draws attention to how practices, at the margins of politics, as it is commonly perceived, may function so as to destabilise even the most robust of political institutions. What is at stake when, for example, an undocumented migrant seeks membership of a

⁶⁹ J. Butler, *Gender Trouble. Feminism and the Subversion of Identity* (New York and London: Routledge, 1999), p. xxiii.

⁷⁰ J. Rancière, ‘A Few Remarks on the Method of Jacques Rancière’, 15:3 *Parallax* (2009), p. 119.

⁷¹ Butler, *supra* note 69, p. xxiii.

⁷² Rancière, *supra* note 3, p. 34.

⁷³ *Ibid.*, p. 33.

⁷⁴ *Ibid.*

Swedish labour union is not only the possibility for one person or collective to organise and enhance their working conditions but also the very conditions, ultimately the Westphalian nation-state system, that enable us to distinguish between workers and undocumented migrants in the first place.

Returning to the current situation of undocumented migrants in Sweden, the question is, however, not if the “lawmakers” in the Swedish Parliament, the European Union and the major Swedish labour unions can meet the claims of undocumented migrants, but rather whether their speech comes through to us as discourse or merely noise?