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Taking Temporary Workers' Rights Seriously Agency and Consent¹

ANDREI STAVILĂ

Introduction

Since temporary workers are transiently present in their host state, their rights are usually restricted compared to native citizens or other types of migrants. They may be able to apply for jobs only in some economic sectors but not in others, they may not be able to bring their families into the host state, or they may have only a strictly time-limited contract and afterwards they must leave the host state. Adopting a perspective situated at the intersection of normative political theory and international relations theory, this article investigates how we can normatively design the range of rights a temporary worker should enjoy irrespective of her host country.

The second section asks whether temporary migrants' rights can be adequately met through a progressive development in international law. It claims that it is generally impossible to accommodate international institutions with the doctrine of state sovereignty when other concerns than general basic human rights are taken into account. A good example is the Migrant Workers Convention, which has not been signed up to date by any OECD immigration country, and the main reason for this seems to be its incompatibility with the generally accepted principle of state sovereignty. The obvious objection here claims that in practice states did sign many international conventions that actually limit their sovereignty. Why should the case of Migrant Workers Convention be seen differently? The rejoinder explores the conditions emphasised by the international relations theory under which states sign international covenants that limit their sovereignty and show that none of these conditions obtains in the case of the convention under scrutiny.

If we accept that a positive development in international law is not foreseeable in the near future, then how can we approach the problem of temporary workers' rights nowadays? Two points of view must be taken into

¹ I would like to thank Rainer Bauböck, Joseph Carens, David Owen, and Anna Triandafyllidou for their valuable comments on earlier drafts of this paper.

account here: that of migrants and that of host states. The third section discusses host states' point of view, which is usually based on the *rights versus numbers* problem. Basically, this dilemma's horns are whether states should accept a great number of migrant workers without also offering them a large number of rights (especially the right to access full citizenship after a number of years of residence), or if they should accept only a small number of migrants that must be put on the path to citizenship after the same residence threshold is met. This article claims that this dilemma cannot be solved as long as host states do not also take into account temporary migrants' interests.

In consequence, the fourth part discusses immigrants' perspective and asks whether their rights should depend on migrants' own preferences for (a) a higher income over stronger rights or (b) their *social* space of reference over their *political* space of rights. The article supports the claim that democracy's concerns with formal equality should be balanced against migrant workers' needs – however, this balance should be accepted only as long as the trade-off is temporarily limited, is respecting basic human rights, and is acceptable in migrants' own view.

The fifth section tries to pinpoint to the direction we have to look towards in order to find an answer to the question regarding legitimate limits of states' and migrants' bargaining capacities concerning temporary workers' range of rights. Accepting a distinction between “human rights” and “citizenship rights” we can claim that (a) human rights must be observed by immigration states (irrespective of local practices in undemocratic countries), and (b) under strict conditions, some citizenship rights may be *traded off* in order to support migrant workers' projects. The main claim here is that supporting migrants' agency and their freedom to negotiate an “equality based on special status”² may become the most urgent thing to do as long as international conventions on this topic are not going to be observed in the foreseeable future.

The final section hints at a problem in political philosophy: if temporary workers' own perspective is acceptable and if we should take into account migrants' *agency*, then this argument has broader implications that take us beyond migration theory: it may help reviving the *consent theory* as a serious contender in the field of *political obligation*. We may need a broader theory with several principles of political obligation in order to support different individuals' duty to obey the law. If this view is correct, then we might have a case where consent theory may well support political obligations of three specific categories of individuals: temporary workers, irregular migrants and external quasi-citizens. In consequence, the consent theory could become a

² Valeria Ottonelli, Tiziana Torresi, “Inclusivist Egalitarian Liberalism and Temporary Migration: A Dilemma”, *Journal of Political Philosophy*, vol. 20, no. 2, 2012, pp. 202-224.

serious principle supporting migrants' duties and thus could be a part of a general theory of political obligation.

Can Temporary Migrants' Rights Be Adequately Met through A Progressive Development in International Law?

Realists in international relations theory claim that it is difficult to accommodate state sovereignty with international institutions and documents regarding specific categories of rights. Such an accommodation may be possible on the topic of serious criminal state practices such as genocide, but when it comes to lesser human rights violations sovereignty still carries the day and makes international conventions irrelevant. Take the example of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*³, which was adopted by the General Assembly of the United Nations on 18 December 1990. Motivated by the increasing phenomenon of labour migration and by the weaker status (as compared with *native* workers) enjoyed by *permanent resident* workers, temporary workers and irregular migrants in the host societies all over the world, the Convention promised to become a major human rights instrument. The *Migrant Workers Convention* entered into force on 1 July 2003, but by 2015 it had not been signed or ratified by any OECD *major* immigration country.⁴

The justification of this failure is related to the principle of national sovereignty. As one author remarks⁵, although the MWC tried to accommodate competing concerns regarding both sovereignty and human rights, the former seems to have won the debates surrounding the drafting of this document. Firstly, states may ratify it with reservations. Secondly, the "Convention permits state parties to pursue the immigration control policies that they see fit"⁶. If this is the case, then why has no major OECD immigrant country signed the MWC? The answer lies in the fact that fears regarding loss of sovereignty still carry the

³ Henceforth *Migrant Workers Convention*, MWC, <http://www2.ohchr.org/english/bodies/cmw/cmw.htm> (last accessed 12 May 2015).

⁴ Only three OECD countries signed the convention by 2015: Chile, Mexico and Turkey (it is important to note that the last two states may arguably be considered today 'major immigration countries'). Source: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en (last accessed 31 August 2015).

⁵ Linda Bosniak, "Human Rights, State Sovereignty and the Protection of Undocumented Migrants Under the International Migrant Workers' Convention", in Barbara Bogusz, Ryszard Cholewinski, Adam Cygan, Erika Szyszczak (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Martinus Nijhoff Publishers, Leiden/Boston, 2004, pp. 311-341.

⁶ *Ibidem*, p. 316.

day. The extensive human rights protections afforded by the document are seen to infringe both states' right to control immigration and their alleged right to treat citizens and resident aliens differently.

The obvious objection to this view is that states have often signed conventions that largely limit their sovereignty, even in the field of immigration. A good example is the 1951 Refugee Convention, under which every country must respect the *non-refoulement* principle, which denies states the right to expel aliens in countries where their lives or basic rights might be threatened. So in fact states *do* sign treaties which limit their sovereignty. Why the case of the MWC is so different?

In international relations theory there are different explanations for the reasons states sign international human rights laws. Goldsmith and Posner offer three possible motives⁷. The first is *coincidence of interests*: governments are rarely interested in committing crimes against humanity⁸. The second is *cooperation*: there are multilateral agreements regarding reciprocal treatment of ethnic minorities. The third is *coercion*: signing under the threat of force. The problem is that multilateral human rights treaties are not based on cooperation, be it symmetric (e.g., the protection of Protestant and Catholic minorities in the post-Westphalian world) or asymmetric (e.g., the UK's "carrot and stick" strategy for ending the slave trade in the 19th century). Since there is no "effective coercive enforcement mechanism", the benefits of signing (economic benefits included) can be rather substantive. In consequence, on the one hand, non-liberal non-democratic states can sign them without any problem, since they incur no or little cost by violating those norms. On the other hand, liberal democratic states can easily sign the treaties because they already comply with their terms; and where they do not comply, RUDs (reservations, understandings, declarations) are easily available tools. The same conclusion is supported by other researchers in international relations theory. Krasner explores Western states' compliance with treaties concerning respect for minority rights in Europe in the last 500 years, and his conclusion is that rights are respected only as long as great powers have (a) an interest in, and (b) enough capabilities for upholding and enforcing them on non-observant states⁹.

Finally, there is another possibility to change states' behaviour towards human rights, both domestically and at the international level. On the one hand, according to constructivist approaches in international relations, when people adopt new understandings and ideas about individual rights (and in the process

⁷ Jack Goldsmith, Eric A. Posner, *The Limits of International Law*, Oxford University Press, Oxford, 2005.

⁸ On the other hand, it is true that governments may have an interest in keeping control over judgments about what constitutes a crime against humanity.

⁹ Stephen D. Krasner, *Sovereignty. Organized Hypocrisy*, Princeton University Press, Princeton, New Jersey, 1999.

challenge “traditional definitions and allocations of entitlements”), the political system can either try to accommodate the new rights claims or, if it fails to do this, it can collapse under such struggles. A good example is the disintegration of imperial systems, which came about when subject peoples, unsatisfied with the metropole’s way of addressing its crisis of legitimacy, turned from “voice” to “exit”¹⁰. On the other hand, some liberal theorists underline that the position of states concerning human rights can be changed through negotiations at the international level. For example, references to human rights in the Charter of the United Nations were not intended by the great powers. On the contrary, this came about as a consequence of the diplomatic efforts of smaller, non-Western states’ (former colonies, Latin-American and Asian countries, etc.)¹¹, and as a consequence of the influence of some providential personalities¹².

Without the intention of exhausting the entire possible range of causes, we can thus conclude that generally a great power signs a human rights treaty if at least one of the following conditions obtains: (a) its domestic practices are already similar to the norms promoted by the international document; (b) it is in the state’s interest to take this course of action¹³; (c) it is the best thing the state can do given the moral and material context within international relations at a specific moment; and (d) changes in people’s paradigms of moral thinking occur, public opinion is gradually convinced by the new perspective, and the struggles for individual rights become powerful enough to change states’ behaviour. Conversely, smaller and/or non-liberal democratic states sign international human rights treaties because: (a) they are not affected by them¹⁴, and even if they are affected, there is no cost of violating signed treaties, or the cost is extremely small; (b) the benefits of signing them can be substantive; (c) there is some threat of force from great powers.

Now let us apply this to the case of temporary workers, in order to find the answer to the question raised above: why has no major immigration country signed the MWC? Underdeveloped and non-democratic states have signed it either because they are not immigrant-receiving countries or simply because the document does not infringe their sovereignty: violating the treaty bears no costs

¹⁰ Christian Reus-Smit, “Struggles for Individual Rights and the Expansion of the International System”, *International Organization*, vol. 65, no. 2, 2011, pp. 207-242.

¹¹ Lynn Hunt, *Inventing Human Rights: A History*, W.W. Norton & Company, New York, London, 2008.

¹² Ann M. Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, Random House Trade Paperbacks, New York, 2002.

¹³ A broader definition of “interest”, which includes the interest to be seen as creating “codes of conduct” and promoting “standards of civilization” needs to be drawn on here (Jack Goldsmith, Eric A. Posner, *The Limits of International...cit.*).

¹⁴ Priit Järve, Vadim Poleshchuk, “Country Report: Estonia”, *EUDO Observatory on Citizenship*, RSCAS/EUDO-CIT-CR 1-16, 2010, available at: <http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=Estonia.pdf>.

since there is no control mechanism. Moreover, their image on the international arena is improved by signing yet another human rights instrument.

But democratic immigration states didn't sign it for five principal reasons. Firstly, they do not already comply with most of the terms set by the MWC. In spite of publicly condemning infamous temporary worker programs like the *Gastarbeiter*¹⁵ program in Europe or the *Bracero*¹⁶ program in the United States, and in spite of a general acceptance that past policies regarding migrant workers' rights cannot be accepted anymore, host democratic states are not ready to receive large numbers of people who can easily qualify, sooner or later, for almost all citizenship rights. The second motive is closely connected with host countries' interests. According to Ruhs¹⁷ and Castles¹⁸ many Western states contemplated before the 2008 global economic crisis the possibility of reintroducing migrant worker programs. In times of crisis the attractiveness of such programs may be indeed lower, but even in such situation high-income states still need temporary workers since 4D (dirty, dangerous, demeaning, and demanding) jobs are still refused by natives. As long as there is a strong demand for them, *temporary migrant workers* may continue to come even if governmental-sanctioned temporary worker *programs* are terminated for political and economic reasons. Since these countries' governments are very much aware of the slogan "there is nothing more permanent than temporary foreign workers"¹⁹, signing a convention that severely restricts their policies regarding the treatment of non-citizen residents is something that states are not ready to engage in²⁰. The third reason is that there is an increase rather than a decrease in demand at the international level not only for foreign workers (within immigration states) but also for more temporary worker programs (within emigration states). The fourth reason is that in spite of many NGOs activities, there are no conditions yet for a major shift in our moral thinking, and the struggles for migrant workers' rights are not powerful enough in order to be

¹⁵ For a general discussion of the *Gastarbeiter* program see Ray C. Rist, *Guestworkers in Germany. The Prospects for Pluralism*, Praeger Publishers, New York, 1978, and Rita Chin, *The Guest Worker Question in Postwar Germany*, Cambridge University Press, Cambridge, 2007.

¹⁶ For a general discussion of the *Bracero* program see Edwin P. Reubens, "Temporary Foreign Workers in the U.S.: Myths, Facts and Policies", *International Migration Review*, vol. 20, no. 4, 1986, pp. 1037-1047.

¹⁷ Martin Ruhs, "The Potential of Temporary Migration Programmes in Future International Migration Policy", a paper prepared for the *Policy Analysis and Research Programme* of the *Global Commission on International Migration*, 2005, available at: <http://economics.ouls.ox.ac.uk/12666/1/TP3.pdf>.

¹⁸ Stephen Castles, "Back to the Future? Can Europe meet its Labour Needs through Temporary Migration?", *International Migration Institute*, Working Paper No. 1, 2006, available at <http://www.imi.ox.ac.uk/pdfs/imi-working-papers/wp1-backtothefuture.pdf/view>.

¹⁹ Martin Ruhs, "The Potential of Temporary Migration Programmes... cit."

²⁰ Stephen Castles, "Back to the Future? Can Europe meet... cit."

able to change immigrant states' behaviour. And fifthly, there is no pressure (regarding migrant workers' rights) at the international level similar to that raised immediately after the Second World War regarding general human rights, which resulted in the proclamation of the 1948 Universal Declaration of Human Rights.

In conclusion, migrant workers' rights are probably not going to be enhanced at the international level in the foreseeable future because of the impossibility of accommodating in this specific case *state sovereignty* and *international institutions*. Even if most countries accepted some limits on their sovereignty, as the general observance of the *non-refoulement* principle shows, there are specific reasons for which further limits on sovereignty are not likely to be welcomed. It is true that today "it is no longer acceptable for a government to make sovereignty claims in defence of *egregious* [my emphasis] rights abuses"²¹. But short of being "egregious", any rights abuse which is not gross enough *can* be defended by making such claims. The fact that the *Migrant Worker Convention* has not been signed yet by any major OECD immigration country fits well in this logic.

The "Rights versus Numbers" Dilemma

If in the international legal system it is difficult to predict a change in migrant workers' rights in the foreseeable future, we should turn our attention to the main actors' perspectives. The present section discusses the host states' viewpoint, while the next one takes into account temporary workers' specific point of view. From the immigration countries' perspective there are moral dilemmas that can appear irrespective of the social and temporal context. Generally, all these dilemmas are more or less instances of one major conundrum: when a receiving polity's interests and migrants' interests clash, which one should take precedence? Is it morally acceptable to restrict individual persons' opportunities because of a liberal democracy's legitimate concern with formal equality?

An instance of this major conundrum, called the *rights versus numbers* dilemma, is based on the claim that integration of immigrants involves economic, social and cultural costs. If these costs are too high, immigration can put pressure on the welfare state, on states' capacity to maintain public order, and it may in principle lead to rapid cultural disruption²². This claim has been

²¹ Beth A. Simmons, *Mobilizing for Human Rights. International Law in Domestic Politics*, Cambridge University Press, Cambridge, 2009, p. 3.

²² Veit M. Bader, "The Ethics of Immigration", *Constellations*, vol. 12, no. 3, 2005, pp. 331-361; Sarah Fine, "Freedom of Association is not the Answer", *Ethics*, vol. 120, no. 2, 2010, pp. 338-356; Sarah Fine, *Immigration and the Right to Exclude*, Oxford University Press, Oxford, 2013.

evidently challenged from many points of view. For example, Jordan and Düvell argue that from the economy's perspective in the case of migration, benefits outweigh costs both in the case of host and in that of origin countries. According to them, if we presuppose that the migrant herself fulfils her goals, then immigration can be a win-win-win situation²³. However, it is not easy to measure, let alone compare, the real economic costs of world migration. Remittances can be an engine for development, but they can also cause inflation and can increase the developmental gap between sending and receiving countries²⁴. Even if remittances have no negative effect, it is still difficult to weight them against the negative effects of brain drain. It is not my intention here to make a definitive argument that migration has costs, hence immigration controls are acceptable, and the dilemma between rights and numbers is valid. I rather want to argue that the costs are reasonable enough in order to make this dilemma a real subject of concern.

If the argument that unrestricted immigration can jeopardise states' capacity to maintain viable social institutions and programs, public order, and protection against rapid cultural change is correct, then some immigration restrictions based on consequentialist arguments (taking into account immigration's effects on the host states) are justified²⁵. For example, restrictions can refer to already over-populated areas, and temporary migrants can receive work permits only for those economic sectors where demand for labour exists – and not for those characterised by high rates of unemployment. Restrictions can be made on other reasonable grounds like housing or general welfare state capacities. One standard counter-argument here is that temporary workers and immigrants in general do not put pressure on the welfare system since they (just like native workers) pay all their taxes. However, we also have to take into consideration migrant workers' dependants – their spouses, and children. If the spouse cannot be employed, or simply cannot find work, she needs social services. Furthermore, children must go to school. If immigration is unrestricted, then it is reasonable that situations like these will put pressure on the welfare system. This is especially the case when migrant workers earn less than natives – or less than the alleged native worker would have earned, had she accepted the job.

²³ Bill Jordan, Franck Düvell, *Irregular Migration: The Dilemmas of Transnational Mobility*, Edward Elgar, Cheltenham, UK, Northampton, MA, 2002.

²⁴ Mark J. Miller, "Introduction [Special Issue: Temporary Worker Programs: Mechanisms, Conditions, Consequences]", *International Migration Review*, vol. 20, no. 4, 1986, pp. 740-757. For the counter-argument which emphasizes that there is no evidence that remittances have created inflationary pressure in the development of Asian countries see Charles W. Stahl, Fred Arnold, "Overseas Workers' Remittances in Asian Development", *International Migration Review*, vol. 20, no. 4, 1986, pp. 899-925.

²⁵ This evidently implies that other immigration restrictions based on non-consequentialist grounds like ethnic homogeneity are unacceptable.

Another standard counter-argument is that in order to solve this welfare state problem the government should guarantee equal pay for equal work to both native and migrant workers. The argument can also be made for equal working conditions, equal social housing, etc.²⁶. It has of course not been used in order to restrict immigration, but to support equal rights for native and migrant workers. But the claim misses the point, since making migrants' wages identical to those of native workers would not solve the problem. Firstly, such a policy would undermine the very reasons for implementing a temporary foreign worker program: had the employers been obliged to hire migrant workers on contractual terms identical to those they must offer to natives, they wouldn't have demanded migrant workers in the first place. Some may be content with this proposal, which would terminate the need for such programs, but the scholars who support labour migration as a way of alleviating at least a small part of global poverty might disagree. Secondly, the presupposition according to which "there are no jobs for which [native] workers cannot be found if the pay is high enough"²⁷ is at best unfounded. Even if salaries are significantly – but also reasonably²⁸ – increased for 4D jobs, it is doubtful that native workers would necessarily agree to do them. This is because, from the conceptual point of view, dirty, dangerous, demeaning and demanding jobs are not necessarily identical with low-paid jobs. Even increasing significantly wages for current 4D jobs, they will still remain at least dirty, dangerous and demanding (if not also demeaning), since augmented economic value does not necessarily mean added social and cultural value, and many native workers may still refuse to accept them.

It is thus obvious that if states want to accept migrant workers, they must be ready not only to enjoy the benefits, but also to pay the costs. And these costs may be quite high for a host country committed to liberal-democratic values. If such a state accepts migrants, it must be able to set them on the path to full citizenship status after the qualification condition concerning the number of residence years spent in the host state is satisfied. However, non-liberal democracies do not have such a problem. As we will see in the next section, when a state is not committed to the idea of equality of individuals as human beings – and maybe not even to the idea of equality of citizens – then it can accept large numbers of migrant workers. The latter will not put pressure on states' capabilities as long as their rights are severely restricted. For example,

²⁶ Joseph Carens, "Live-in Domestic, Seasonal Workers, and Others Hard to Locate on the Map of Democracy", *The Journal of Political Philosophy*, vol. 16, no. 4, 2008, pp. 419-445; Robert Mayer, "Guestworkers and Exploitation", *The Review of Politics*, vol. 67, no. 2, 2005, pp. 311-334.

²⁷ *Ibidem*, p. 432.

²⁸ This is an important caveat. It may be the case that even a celebrated university professor would quit her job and prefer to wash dishes in a restaurant for three million US dollars per month, but the example is too far-fetched.

they may not have the right to bring their families to the receiving country, they may have restricted access to social services, etc. But this amounts to creating a “caste-like” system. Indeed, *permanent partial citizenship* without the possibility of acquiring full citizenship rights amounts to establishing such a scheme²⁹. We could confidently say about temporary workers in these polities that “[while] they are guests, they are also subjects. They are ruled, like the Athenian metics, by a band of citizen-tyrants”³⁰.

As a consequence, it seems that the choice a polity faces is between restricting numbers in order to offer more rights (an option usually selected by Western countries) and, as we will see in the next section, restricting rights in order to admit more temporary workers (preferred by immigrant-receiving polities like Hong Kong and Singapore). The crucial point is that it is not obvious that the moral, liberal-democratic solution is either better or more desirable than the non-liberal, undemocratic one. Firstly, to use Bell’s realist assessment, the Asian example demonstrates that migrant workers leave poor but fairly democratic states in order to work in wealthier, undemocratic countries – and it seems they fare better in the latter. A lack of democracy seems beneficial for foreign domestic workers also for another reason: had natives, especially employers, the chance to vote for their representatives, they would have favoured policies more disadvantageous for temporary workers’ interests. Conversely, as long as politicians are not compelled by a democratic decision-making process to satisfy the general public’s preferences, foreign domestic workers enjoy some level of protection, low as it may be³¹.

Secondly, what seems the right thing to do *prima facie*, at a closer look may not necessarily represent the right action required by justice. Chang formulates the same dilemma between rights and numbers as “the immigration paradox”: liberal democratic states take for granted the moral principle that, once accepted, guest workers must be given equal rights. But the impossibility of offering equal rights to large numbers is the reason that guest workers are not accepted in the first place. In other words, concern for the well-being of temporary migrants makes liberal democracies accept fewer migrants, thus rendering their situation worse than it would have been, had host states accepted them and offered them fewer rights. But ‘this moral stance is unsatisfactory from the standpoint of human welfare. The liberal who prevents a poor alien

²⁹ Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership*, Princeton University Press, Princeton, N.J., 2006.

³⁰ Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality*, Basic Books, New York, 1983, p. 58.

³¹ Daniel A. Bell, “Justice for Migrant Workers? Foreign Domestic Workers in Hong Kong and Singapore”, in S.-H. TAN (ed.), *Challenging Citizenship: Group Membership and Cultural Identity in a Global Age*, Ashgate, Aldershot, Hants, England & Burlington, VT, 2005, pp. 41-62.

from escaping poverty while citing principles of justice and equality for that alien seems vulnerable to the charge of “superstitious ‘rule worship’”³².

If this is the case, then the choice is between two evils, guest-worker programs being one evil and exclusion the other. Both Bell and Chang consider that accepting more temporary migrant workers while restricting their rights is clearly a better alternative than largely closing borders to immigrant labour. This alternative is “better” because immigration states may have to somehow solve a dilemma between their commitment to equality and the moral duty to alleviate the world’s poverty. Since according to the quoted authors the last quest is more important, the problem of rights versus numbers should be solved by immigration states in favour of numbers, and temporary migrants’ rights may thus be restricted. However, none of these scholars offers guidelines regarding the extent of such restrictions.

Should Migrant Workers’ Rights Depend on their Own Preferences?

If we take temporary migrants’ preferences into account, the solution may be to design different systems of rights that depend on migrants’ own predilection for (a) higher income over stronger rights or on (b) their *social* space of reference over their *political* space of rights. This section intends to investigate both proposals.

According to the first suggestion, there is no moral problem in having different practices regarding temporary migrants’ access to rights in different parts of the world. Bell argues that Canada may legitimately accept few temporary workers while setting them on the path to full citizenship, and Hong Kong may also legitimately admit large numbers of temporary workers while denying them many social, economic and political rights³³. Bell makes his argument in four steps. Firstly, he takes into account the personal concerns of temporary workers and reveals that in some Asian countries they do not see the problem of equal rights as their most pressing issue. Quite the contrary, they are usually worried about other, more pressing subjects: they fight *against* the idea of limiting their work to eight hours a day, against cutting wages in time of crisis, and against the “two-week rule”, according to which if they lose their job they must go home as long as they don’t find employment in two weeks. Secondly, in some parts of the Asian continent lack of democracy benefits temporary workers: some of them leave democratic countries in order to work in autocratic but wealthier states; in some minimal democratic countries temporary workers fare worse than in dictatorial regimes; and, finally, lack of

³² Howard F. Chang, “The Immigration Paradox: Alien Workers and Distributive Justice”, in Roger M. Smith (ed.), *Citizenship, Borders and Human Needs*, University of Pennsylvania Press, Philadelphia, 2011, p. 97.

³³ Daniel A. Bell, “Justice for Migrant Workers? Foreign Domestic Workers... cit.”.

democracy may be beneficial for temporary workers since in some states if employers would have the chance to vote for their decision makers, they would prefer policies that go against migrant workers interests, and politicians would also favour their constituency and not migrant workers' concerns.

Thirdly, Bell accepts that ideally migrant workers should be given equal rights, but still claims that some counter-arguments have their own merit. Migrants consented to come to the host state (and such a consent cannot be compared with selling oneself into slavery); in some undemocratic states citizens would not agree with extending migrant workers' rights as long as their own rights are restricted; sometimes, as we have already seen, it is not clear that the rights versus numbers dilemma should be solved in favour of rights; and global poverty reduction may be better served through migrant workers programs than through idealistic arguments like increasing foreign aid. Fourthly, cultural characteristics must also be taken into account. Unlike citizens in the western states, Asians consider domestic workers as "extended family members". This is the explanation of a lack of demand for day-care centres in Asia: given "the choice between at-home care for children and day-care, most people seem to prefer the former"³⁴.

A second proposal of taking migrants' interests into account is connected to their social spaces of reference, and is usually referred to as the "bases of self-respect" puzzle. As we have already seen, migrants are ready to trade off some of their rights for material gains, thereby making vulnerable not only their own position within the host country, but also their prospects regarding savings, possibility of return, family reunification, etc. The interesting question here is why they are so ready to undertake this bargain. Additionally, we may ask what the normative grounds which make such a trade possible are.

An interesting argument claims that temporary migrants' self-assumed vulnerability undermines liberal egalitarian ideals³⁵. The problem is complicated by the fact that the standard solution (i.e., offering them more rights) fails. Interestingly enough, this shows that even if the dilemma discussed above between rights and numbers can be solved, this does not necessarily imply a solution to the problem of migrant workers' vulnerability. And the standard solution fails because even if these individuals formally enjoy equal rights, they would still be ready to trade them off (as shown by the case of EU citizens from new member states who trade off their rights under pressure to secure employment in the 'old' member states' segmented labour markets). This is because liberal democracies presuppose an identity between the *political space of rights* and the *social space of self-respect*: for their citizens, equal political rights represent the *sine qua non* condition for their "right to pursue their own happiness and life plans"³⁶. However, this is not the case of temporary migrants.

³⁴ *Ibidem*, p. 57.

³⁵ Valeria Ottonelli, Tiziana Torresi, "Inclusivist Egalitarian Liberalism and Temporary Migration: A Dilemma", *Journal of Political Philosophy*, vol. 20, no. 2, 2012, pp. 202-224.

³⁶ *Ibidem*.

In their situation, there is no match between the *social* and *political* spaces. Their bases of self-respect are situated in the origin country: their migration project is intended to improve their life plans *at home*. However, the political space of equal rights is situated in the *host state*. Since these two spaces are disconnected, the trade-off becomes possible. Migrants are simply ready to trade temporarily some (arguably, many) of their rights in order to improve their future condition at home.

This creates a problem for any liberal democracy dedicated to the principle of individuals' equal standing. The choice is between letting temporary workers pursue their plans and thereby abdicating the principle of equal standing, on the one hand, and upholding this principle which means to disregard migrants' life plans, on the other³⁷. We face again the conflict between the public interest and migrant workers' interests. Like Bell and Chang, Ottonelli and Torresi support a solution which gives more weight to temporary workers' concerns. In this case, "the more ambitious goals of social equality" should be given up in order to make room for a more complex notion of "equality based on special status" which is supposed to be more sympathetic to migrant workers' plans.

But neither of these authors further develop their normative solution for this unresolved dilemma in the standard liberal approach: which rights can be traded off, and for how long such a bargain is acceptable? What rights could be lowered for the sake of better immigration opportunities and higher remittances for country of origin populations? No author seems able to provide the necessary tools to impose limits on what can be traded off by foreign temporary workers when their interests collide with those of a liberal democratic host country.

What Can Be Negotiated and What Cannot Be Traded Off?

A useful distinction can be made between *citizen rights* (based on state sovereignty and on the view of the individual as a member) and *human rights* (based on transnational society and on the view of the individual as a person)³⁸. Against Bell's proposal one could argue that human rights should be imposed on states irrespective of local practices. The prohibition of genocide may be a good example that such top-down impositions are feasible at the international level in spite of the sovereignty doctrine.

However, one could also reasonably argue that it is permissible for states to tolerate temporary workers as "partial citizens" and to allow them a "margin of trading off" their rights as residents, as long as their consent is acknowledged, the possibility to leave is not only formal but also substantive,

³⁷ *Ibidem*.

³⁸ Yasemin Nuhoğlu Soysal, *Limits of Citizenship. Migrants and Postnational Membership in Europe*, University of Chicago Press, Chicago, 1994.

and their human rights (and possibly other crucial social and economic rights) are safeguarded. Bargaining some social or political rights (if we look at the problem from a migrant workers' perspective) or denying such rights to a class of residents (taking the host country's point of view) is permissible only as long as human rights are not affected by the trade-off and as long as this bargain or denial is *temporary*. The immigration state is thus responsible to either limit temporary workers' contracts to less than the specific residence condition for citizenship acquisition in the host state (for example, three or five years), or to put them on the path to full citizenship status once the requirement of three or five years of residence is fulfilled.

The *temporary* character of this transaction is important not only for immigrants themselves, who otherwise would be transformed in a class of "metics" ruled by a "band of citizen-tyrants"³⁹, but also for the immigrant-receiving polity, for two main reasons. Firstly, by accepting only short-term departures from its liberal-democratic values based on foreign workers' special status and taking seriously into consideration their own projects, such a polity can consistently uphold its values and, at the same time, recognise that it may temporarily bypass them when other more important moral values are at stake. Secondly, even such a temporary bypassing can be tolerated only as long as the number of partial citizens is low: if sidestepping political rights were permanent and the numbers of long-term partial citizens large, a liberal democracy accepting this situation would face dramatic decline. Indeed, as Bauböck argues using his "hypermigration" model, in a world in which "in most countries a majority of citizens would be non-residents and a majority of residents would be non-citizens [...] the impact on democracy would be quite dramatic"⁴⁰.

However, the most difficult questions here are: what are the limits to individuals' free choice? How much can they bargain? Which rights can be traded off for material benefits even for a short period of time? Who decides what these "marketable" social and economic rights are and on what basis one decides that? For example, one may argue that an international convention or maybe even each state may decide minimum standards that must be acknowledged besides human rights, and may set a limited package of rights that can be negotiated by employers and employees. There is no space to outline here such a project; however, ever since John Locke⁴¹, Immanuel Kant⁴² and

³⁹ Michael Walzer, *Spheres of Justice*...cit.

⁴⁰ Rainer Bauböck, "Temporary Migration, Partial Citizenship and Hypermigration", *Critical Review of International Social and Political Philosophy*, vol. 14, no. 5, 2011, p. 684.

⁴¹ John Locke, "The Second Treatise of Civil Government", in Ian Shapiro (ed.), *Two Treatises of Government and A Letter Concerning Toleration – John Locke*, Yale University Press, New Haven and London, 2003 (1690), see Chapter IV. *Of slavery*.

⁴² Immanuel Kant (1785), *Fundamental Principles of The Metaphysic of Morals*, translated by Thomas Kingsmill Abbott, The University of Adelaide, last updated 16 March 2013, available at: <http://ebooks.adelaide.edu.au/k/kant/immanuel/k16prm/>.

John Stuart Mill⁴³, it is obvious that freedom of will cannot justify unlimited power to negotiate a contract. Selling oneself into slavery cannot be a morally valid action even if one freely consents to it.

This view is also embedded in international human rights instruments. For example, art. 3(a) of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children* lists slavery as one category within the broader term of “exploitation”, while the latter notion is defined as the purpose of trafficking. Further, art. 3(b) clearly states that the consent of a victim is irrelevant even if (as stated in the preceding paragraph) the consent was achieved as a consequence of receiving of payments or benefits⁴⁴. However, it is extremely difficult to define what slavery is: when can a practice be considered as slavery? In a paper exploring the anti-slavery project, Quirk notes that

“[...] it can often be difficult to say whether the term is being invoked literally or rhetorically. Behind this conceptual ambiguity is an underlying model, which maintains that particular practices can be equated with slavery when they cross a certain threshold and are sufficiently horrendous and/or analogous to be classified as such. This model is at the heart of contemporary slavery, but it is not always clear where this threshold applies, or whether it should apply in one case but not another [...]”⁴⁵.

Thus it is difficult to say where the threshold lies between trafficking and forced labour, on the one hand, and smuggling and indentured migration, on the other. While the former always imply overt coercion and can be easily termed as slavery, the latter examples may or may not imply such practices.

The threshold problem brings us back to migrants' agency and interests. Because Bell, Chang, Ottonelli and Torresi support locally-negotiated practices regarding migrant workers' rights, their perspectives avoid the line of criticism according to which foreign workers are presented with an already-designed contract offered on a ‘take it or leave it’ condition⁴⁶. In practice, this happens in many Western immigrant-receiving countries but not, as Bell emphasised, in some Asian polities like Hong Kong where many associations for the protection of foreign workers' rights are constantly negotiating wages and immigration laws such as the two-week rule. I am suggesting neither that the organisational support for migrant workers is stronger in Asian polities like Hong Kong than in

⁴³ John Stuart Mill, *On Liberty* (1859), The University of Adelaide, available at: http://ebooks.adelaide.edu.au/m/mill/john_stuart/m645o/; see Chapter V. *Applications*.

⁴⁴ United Nations, *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children*, 2000, http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf (last accessed 12 May 2015).

⁴⁵ Joel Forbes Quirk, “The Anti-Slavery Project: Linking the Historical and Contemporary”, *Human Rights Quarterly*, vol. 28, no. 3, 2006, p. 578

⁴⁶ Rainer Bauböck, “Temporary Migration...cit.”, pp. 665-693.

Western states, nor that the presence of NGOs renders legitimate the polices against which they are protesting. But I want to suggest that in some Asian states, migrants' agency may be (for better or for worse) exhibited in ways it is not in the Western states, and incidentally this does not go against migrants' own plans. The attractiveness of such a perspective is given by its capacity to account for both migrants' and governments' agency, thus not only resurrecting the consent theory in political philosophy, as we will see in the next section, but also (and more importantly) turning attention from liberal democracies' own concerns regarding equal rights to temporary foreign workers' interests.

Temporary Workers and the Consent Theory of Political Obligation

The argument regarding migrants' bargaining capacity has an implication not entirely made obvious by its proponents: by turning our attention from the public interest of host countries to temporary migrants' projects, we cannot avoid the latter's agency. Usually concerned with liberal and democratic values in Western liberal democracies, political theorists tend to forget, or at least to minimise, the choices individuals make within a polity. This attitude is not necessarily odd, since apart from Locke few major liberal theorists really took seriously the consent theory of political obligation. The main questions here are what exactly grounds a moral duty to obey the laws of one's state and how a person acquires such an obligation. According to the consent theory (and contrary to other contemporary theories of political obligation based on other singular principles like gratitude, fair play, association, or natural duty), citizens must obey a polity's laws because they accepted to live on that polity's territory. However, since no citizen ever "actually" (i.e., conscientiously and formally) consents to her state's laws, today political theorists generally agree that consent can be neither a principle for individuals justifying their duty to obey political authority's laws⁴⁷, nor a principle for political associations justifying their character as voluntary associations⁴⁸.

However, new developments in immigration theory and citizenship studies may offer new grounds for reviving the consent theory. The increase in the number and the speed of means of transportation, low fares, greater accessibility, the development of tourism and structural needs of various labour

⁴⁷ A. John Simmons, *Moral Principles and Political Obligations*, Princeton University Press, Princeton, N.J., 1979; George Klosko, "Reformist Consent and Political Obligation", *Political Studies*, vol. 39, no. 4, 1991, pp. 676-690.

⁴⁸ Sarah Fine, "Freedom of Association is not the Answer", *Ethics*, vol. 120, no. 2, 2010, pp. 338-356. The most important recent defences of consent theory are offered by Harry Beran, *The Consent Theory of Political Obligation*, Croom Helm, London, 1987 and Andrew Altman, Christopher Heath Wellman, *A Liberal Theory of International Justice*, Oxford University Press, Oxford & New York, 2009.

markets and economic systems have allowed people to move faster and more often. According to some estimates, in 2008 there were over 200 million inter-state migrants worldwide; that is, over 3 percent of the world's population⁴⁹. In some Western European countries the share of immigrants is between five and ten percent of the total number of citizens, and in Germany more than fifteen million people have an "immigration background".

What these developments show is that people are increasingly *choosing* their country of residence and they are doing this intentionally, knowingly, more or less voluntarily, and in spite of all the difficulties generally associated with the act of emigrating or of those linked with the reality of competing loyalties. All individuals who emigrate and apply for another country's citizenship can thus be seen as *consenting* to the authority of the political power of the host society. If this view is correct, then two consequences need to be taken into account.

Firstly, the consent theory of political obligation must be revisited. It cannot justify the obligation of all citizens of a state (especially of those who did not openly consent) to comply with that state's laws. However, it is not clear why a single principle should account for political obligations of all types of members: the compliance with a state's laws may be justified by different principles for different categories of citizens. If this is true, consent theory can account for political obligations of at least three large groups of individuals: irregular immigrants, temporary workers and dual citizens⁵⁰.

Some people disagree on this point. Carens believes that this is not self-evident and offers the usual example used against the consent theory: "If a robber says 'your money or your life' and you give him your money, have you consented?"⁵¹. Carens is thus worried about the underlying legitimacy of the political and social orders within which individuals have to make choices. However, unlike native citizens, a migrant's situation is not best explained by the robbery example. Any migrant makes plans before leaving her origin state, and she also reflects on which country she would like to move to. Unlike a native-born citizen, the migrant has a list of options regarding accessible host countries, and this makes her choice valid. It may not be a perfectly unconstrained choice, but it is still an authentic one. And what Carens calls the "underlying legitimacy of the political and social orders within which individuals have to make choices" is a problem for the home country (the

⁴⁹ United Nations, Department of Economic and Social Affairs, Population Division, "International Migration Report 2006: A Global Assessment", http://www.un.org/esa/population/publications/2006_MigrationRep/report.htm (last accessed 12 May 2015). See also Arash Abizadeh, "Citizenship, Immigration and Boundaries", in Duncan A. Bell (ed.), *Ethics and World Politics*, Oxford University Press, Oxford & New York, 2010, pp. 358-376.

⁵⁰ Of course, this is not true for dual citizens *by birth* who never consented to either of their citizenships.

⁵¹ Personal communication on file with the author (October 2013).

country where the migrant usually makes her choice), not for the host country where the migrant wants to arrive.

Secondly, consent is not only a principle justifying some categories of citizens' duties to obey the law; it also becomes *a principle of inclusion into the demos*. As one author puts it trying to make a stand against the idea of *automatic/mandatory* acquisition of citizenship⁵², “naturalization can be either discretionary or an entitlement, but *it always depends on the active consent* [my emphasis] of the person to be admitted”⁵³. For both temporary and permanent migrants the contract theory and the consent it presupposes (the consent of both the migrant and the host state) can be seen as principles of membership. For example, a sociologist observes that “every foreigner that is admitted to reside in France for the first time or that has entered France regularly between the age of 16 and 18 needs to sign a ‘reception and integration contract’. This contract makes provisions for civic training and, if necessary, language education”⁵⁴.

Sociologists as well as economists have supported the link between migration and consent, even as political theorists have rejected it. Criticizing the neoclassical approach, which tries to explain labour migration using “push” and “pull” factors, or “in terms of wage-rate-differentials and unemployment-rate-differentials”⁵⁵, one author proposes a demand-determined approach which takes demand for foreign labour in the host country as the sufficient condition, and the “migration-willing workers” as the necessary condition for labour migration⁵⁶. Taking a “migrant’s projects” point of view, like Ottonelli and Torresi, and connecting it with the rational choice theory, Straubhaar enlists some elements which are involved in an individual’s decision to migrate to work in another country: the costs related to migration abroad; profession-specific factors (sometimes subjective evaluation of the job can override higher salaries); expectations regarding return and employment in the origin country; availability or lack of information regarding conditions in the host country; the personal degree of risk-aversion; the evaluated risk of remaining unemployed in the receiving state; and so on⁵⁷. Migrants’ agency in explaining the causes of labour migration is crucial: it elucidates why labour migration does not occur at a much higher scale, as the neoclassical approach emphasizing only push and

⁵² Ruth Rubio-Marín, *Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United States*, Cambridge University Press, Cambridge, UK, 2000.

⁵³ Rainer Bauböck, “Reinventing Urban Citizenship”, *Citizenship Studies*, vol. 7, no. 2, 2003, pp. 139-160.

⁵⁴ Henri Courau, “Country Report – France”, *Clandestino, Undocumented Migration: Counting the Uncountable. Data and Trends Across Europe*, 2009, available at http://clandestino.eliamep.gr/wp-content/uploads/2009/10/clandestino_report_france_final_2.pdf, p. 14.

⁵⁵ Thomas Straubhaar, “The Causes of International Labor Migrations - A Demand-Determined Approach”, *International Migration Review*, vol. 20, no. 4, 1986, p. 852.

⁵⁶ *Ibidem*, p. 835.

⁵⁷ *Ibidem*, pp. 838-839.

pull factors or differences in wages and unemployment rates between wealthy and poor countries would seem to imply.

What is important to stress is the fact that Straubhaar lays emphasis not only on migrant workers' consent, but also on the receiving polity's will. The author explicitly says that "if no government wants to admit foreign workers, no international labor migration will occur"⁵⁸. The host country's consent plays an important role for other scholars too. Although he accepts the "free choice of the migrant", Penninx quotes Bohning⁵⁹ and considers that

"we do not start from the assumption that the 'free choice of the migrant' explains all migration phenomenon: in the context of international (labor) migration the 'free choice' of the migrant is largely determined by and dependent on regulations set by the receiving industrial nations, which draw a borderline around themselves over which non-belongers may not step without explicit or tacit consent"⁶⁰.

All of the above seem to imply that both host polity's *consent* and temporary foreign workers' *free choice* play a crucial role in explaining both international labour migration and migrants' inclusion in the receiving society. If this is correct, then further normative work is needed in order to fully develop a new role for consent theory in the field of political obligation. This section only tried to illustrate the main directions of such a development and how could one get together *migration theory* and *political obligation*.

Conclusion

The importance of these considerations on migrants' agency is crucial especially in our time. Rist wrote in his book on *Guestworkers in Germany*: "To build and firmly establish the legitimacy of a multicultural society stands as perhaps the preeminent challenge to Germany today"⁶¹. On October 2010, 32 years later, German Chancellor Angela Merkel declared that "attempts to build a multicultural society in Germany have 'utterly failed'"⁶², and that "immigrants needed to do more to integrate – including learning German". Other European

⁵⁸ *Ibidem*, p. 853.

⁵⁹ W.R. Bohning, "Elements of a Theory of International Economic Migration to Industrial Nation States", in Mary M. Kritz, Charles B. Keely, Silvano M. Tomasi (eds.), *Global Trends in Migration. Theory and Research on International Population Movements*, Center for Migration Studies, New York, 1981, pp. 31-33.

⁶⁰ Rinus Penninx, "International Migration in Western Europe Since 1973: Developments, Mechanisms and Controls", *International Migration Review*, vol. 20, no. 4, 1986, pp. 961.

⁶¹ Ray C. Rist, *Guestworkers in Germany. The Prospects for Pluralism*, Praeger Publishers, New York, 1978, p. xiii.

⁶² "Merkel says German multicultural society has failed", BBC news, 17 October 2010, <http://www.bbc.co.uk/news/world-europe-11559451> (last accessed 12 May 2015).

leaders followed suit. In Munich on 5 February 2011, British Prime Minister David Cameron declared that in the UK “state multiculturalism has failed”⁶³; five days later French President Nicolas Sarkozy said that multiculturalism was a “failure”, warning that such a concept fostered extremism⁶⁴.

Rists’s call for multicultural policies was meant to come as an appropriate answer to the fact that Germany became a multicultural polity as a result of its “guest worker program”. In his view, since so-called temporary workers had already permanently settled and were economically perfectly integrated, denying social and cultural integration would be an unacceptable policy. A few years later, exploring the case of Sweden as a happy exception from the European *Gastarbeiter* program, Hammar went even further and warned that “[i]f many foreign workers are excluded from political participation over a long period of time, the legitimacy of the political system is endangered”⁶⁵.

In the context in which all high-income countries openly or tacitly accept migrant labour and if after the economic crisis which began in 2008 some of these countries will consider to reintroduce state-sanctioned temporary foreign worker programs, the above declarations of the German Chancellor, French President and British Prime Minister are not only detrimental to multicultural policies *per se*. By moving from one extreme (accepting *permanent second-class citizenship* of migrant workers in the 1970s and beyond) to the other one (*forced assimilation* and integration) they are also detrimental to every future migrant because they destroy the most important insight revealed by authors like Bell, Chang, Ottonelli and Torresi; namely, temporary migrants’ agency, and their freedom to negotiate an equality based on special status.

⁶³ “State multiculturalism has failed, says David Cameron”, BBC news, 5 February 2011, <http://www.bbc.co.uk/news/uk-politics-12371994> (last accessed 12 May 2015).

⁶⁴ “France’s Sarkozy: Multiculturalism Has Failed”, CBNNews.com, 11 February 2011, <http://www.cbn.com/cbnnews/world/2011/February/Frances-Sarkozy-Multiculturalism-Has-Failed/> (last accessed 12 May 2015).

⁶⁵ Tomas Hammar, “Citizenship, Aliens’ Political Rights, and Politicians’ Concern for Migrants: The Case of Sweden”, in Rosemarie Rogers (ed.), *Guests Come to Stay. The Effects of European Labor Migration on Sending and Receiving Countries*, Westview Press, Boulder and London, 1985.