

## The Ethics of Migration Policy Dilemmas

### The Equal Protection Deficit of the Triple Win Argument: A Response to Bauböck and Ruhs (2022)

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#### Introduction

Since their comeback three decades ago (Castles 2006), temporary labour migration programmes (henceforth TLMPs) have captured the attention of migration scholars. Including both staunch advocates and critics of these policy instruments in the debate, normative theory has tried to balance TLMPs' well-known capacity to advance global justice (Clemens 2011; Clemens et al. 2018; Ruhs and Martin 2008) with the undeniable harms that have historically resulted from them (Castles 1986). The case of TLMPs in the Gulf States perfectly exemplifies the two faces of these programmes: migrant workers gain access to jobs that improve their well-being by significantly increasing their incomes (Posner and Weyl 2014), but the same workers are victims of human rights violations that have led to the death of thousands over the last decade (Business & Human Rights Resource Centre 2019). This latter element has raised serious scepticism about the moral justifiability of TLMPs.

In their paper, Bauböck and Ruhs argue that TLMPs can be morally justified. According to their triple win argument, these programmes can be designed in ways that maximise their justice-promoting capacities and eradicate their objectionable features. TLMPs that fulfil these two conditions can lead to a so-called triple win: a situation in which the three parties involved in temporary labour migration all reap its benefits. In a nutshell, the triple win argument claims that TLMPs are morally justified when they (i) benefit the three parties involved, (ii) fulfil the requirements of social justice, and (iii) are democratically legitimate.

This short piece will zoom in on the latter element of morally justified TLMPs: democratic legitimacy. I will argue that the triple win argument fails to secure migrant workers' equal protection by the law. This should cast doubt on the triple win arguments' capacity to live up to the democratic legitimacy requirements that morally justified TLMPs must satisfy. I will develop my argument as follows. First, I will spell out why democratic legitimacy matters for TLMPs. Second, I will review the pluralist account of democratic legitimacy behind the triple win argument. Third, I will explain why the triple win argument suffers from an equal protection deficit.

## **Democratic Legitimacy: Why Does it Matter When Designing TLMPs?**

To fully appreciate the relevance of democratic legitimacy in the design of TLMPs, we first need to understand its role as part of the triple win argument. Bauböck and Ruhs' case in favour of TLMPs hinges on showing that, if rightly designed, these programmes can be morally justified. Let us look at each of the three conditions mentioned above: TLMPs can be morally justified if they (i) benefit the three parties involved, (ii) fulfil the requirements of social justice, and (iii) are democratically legitimate.

The first condition is an empirical one. That is, it requires demonstrating that all relevant parties involved in temporary labour migration can benefit from it. Now, whether something counts as a benefit or not can only be determined by each party: migrant workers, the host and the sending societies. As Bauböck and Ruhs show, plenty of evidence backs up the assumption that each party has a lot to gain by participating in these programmes. However, migrant workers have been historically forced to choose between accepting exploitative working conditions in the host society or losing access to their labour market. Regarding these scenarios as morally unacceptable, Bauböck and Ruhs argue that TLMPs' justification cannot solely hinge on the presence of mutually recognised economic benefits. Hence, they conclude that morally justified TLMPs need to comply with further normative criteria.

In light of this conclusion, Bauböck and Ruhs resort to two complementary normative perspectives: social justice and democratic legitimacy. Regarding social justice – the second condition –, the authors establish two criteria: morally justified TLMPs must protect basic human rights and be voluntary. By ruling out trade-offs between basic rights and economic benefits, these two criteria already set some moral limits to guide the design of TLMPs. But beyond these limits, much remains to be said about the specific design of TLMPs. Democratic legitimacy – the third condition – provides a normative framework to determine this content.

Once we take for granted that TLMPs can potentially benefit all the relevant parties and that there is a commitment to designing them in line with social justice criteria, it is up to the democratic process to detail the programmes' specifics. Now, given that TLMPs produce extraterritorial spill-over effects, host societies must guarantee that all relevant parties are properly represented in the design and negotiation processes. A democratic legitimacy framework offers an answer to what counts as proper representation. For this reason, Bauböck and Ruhs resort to a democratic legitimacy framework that offers normative guidelines for transnational policy-making. If these guidelines are respected, the content of TLMPs should be considered democratically legitimate.

## **A Pluralist View of Democratic Legitimacy: A Brief Review**

Bauböck and Ruhs work with a pluralistic framework of democratic legitimacy. Contrary to traditional views ([Dahl 1991](#); [Goodin 2007](#)) that ground democratic legitimacy in one ultimate principle, they conceptualise democratic legitimacy as comprising three principles of democratic inclusion and representation. For the sake of argument, I will not contest the cogency of this view of democratic legitimacy<sup>1</sup> – that takes as complementary principles

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<sup>1</sup> For a detailed account of the pluralist view of democratic legitimacy, see Bauböck ([2018](#)).

commonly conceptualised as exclusive – but simply explain how it works: each principle specifies who should be included at different stages of the political process (i.e., its scope) and in which way they should be included (i.e., its domain). Hence, democratically legitimate TLMPs grant all relevant parties adequate inclusion and representation throughout the political process by adhering to three principles:

All affected interests principle (AAI): all whose interests are affected by a collectively binding decision must have “adequate representation of interests in the deliberation before the decision and in the decision itself” (Bauböck and Ruhs 2022, 14).

All subjected to coercion principle (ASC): all subjected to the law of a legitimate authority “have claims to equal protection by the laws to which they are subjected as well as to contestation of these laws” (ibid, 15).

All citizenship stakeholders principle (ACS): “all whose individual autonomy and well-being depend on the collective self-government and flourishing of a polity have a claim to citizenship in that polity” (Bauböck 2018a, 49).

When designing and negotiating TLMPs, these principles translate as follows: AAI requires the interests of migrant workers and sending states to be represented at the levels of discussion and decision-making. At the latter level, veto powers on fundamental aspects such as migrants’ rights are necessary to achieve adequate representation; ASC guarantees equal protection by the laws to migrant workers and a right to contest these laws in host states, but not permanent residence (i.e., the right to stay); and, finally, ACS accords migrant workers local citizenship rights in the host state while at the same time protecting their political rights in their home countries.

According to these criteria, TLMPs that do not provide permanent resident status to migrant workers can be morally justified if temporary status does not de facto last for more than five years. In the remainder of this piece, I will show that this conclusion does not hold in light of the principles of democratic legitimacy. Namely, I will argue that migrant workers can only retain their entitlement to equal protection by the law if their status effectively ensures their access to justice. Since temporary status prevents migrant workers from effectively accessing justice, it infringes upon their entitlement to equal protection by the law. If so, TLMPs that do not provide temporary workers with the right to stay suffer from an equal protection deficit. Therefore, they violate ASC. This undermines their democratic legitimacy rendering them morally unjustified.

### **The Equal Protection Deficit of the Triple Win Argument**

According to Bauböck and Ruhs, ASC does not ground temporary migrant workers’ entitlement to permanent residence – let alone citizenship. The rationale behind this claim is that temporary migrant workers’ “presence in the [host state’s] territory is less essential for their life projects” (Bauböck and Ruhs 2022, 15) when compared to citizens and permanent residents. However, the fact that these workers are coerced by the host state’s laws and authority entitles them to “equal protection by the laws to which they are subjected as well as to contestation to these laws” (ibid).

I take “equal protection by the law” to have at least two meanings. On the one hand, it means that temporary migrants should presumptively enjoy all legal protections and

entitlements that the host state guarantees its inhabitants. Deviations from this domestic standard of equality are possible, but they require justification. Designing TLMPs with this principle as a starting point guarantees the protection of migrant workers' rights. Liberal democratic states that do not follow this principle undermine the rule of law ([Raz 1979, 215–216](#)). On the other hand, it also means that the law should be applied in a way that offers full protection to all subjected to it. In other words, it "is democratically illegitimate (...) to subject persons to the same laws in such a way that some are offered full protection and others only some or no protection at all" ([Bauböck 2018b, 241](#)). One of the primary instances in which the equal protection principle is violated stems from the unequal access to justice that we often find in liberal democratic societies ([Mor 2017, 630](#)). Two leading causes preventing equal access to justice and, hence, equal protection by the law are, first, rendering courts physically inaccessible ([Lucy 2020, 382](#); [Raz 1979, 217](#)) and, second, imposing prohibitive costs on accessing them ([Lucy 2020, 398](#)).

Now, even if one agrees that migrant workers are not entitled to full citizenship status on coercion grounds, they are entitled to a status that effectively guarantees them equal protection by the law. Such status must warrant the effective right of access to justice – a constitutive part of the entitlement to equal protection by the law – which, in turn, requires effective access to the legal institutions of the host society. If so, Bauböck and Ruhs are wrong in claiming that ASC does not ground a right to stay for temporary migrants. On the contrary, a right to stay – most likely in the form of permanent residence – is necessary for them to effectively enjoy equal protection by the law.

Take the case of wage theft as an example. As recently reported, repatriation is among the main practical barriers that impede migrant workers from filing or pursuing their judicial claims in wage theft cases ([Farbenblum and Berg 2021, 19](#)). Moreover, the lack of the right to stay renders the costs of labour rights enforcement too high for temporary migrants, given that many migrant workers risk losing employment when filing a wage theft claim against their employers. This situation leaves temporary migrant workers ultimately unprotected against rights violations - even in countries where they can change employers, such as Sweden ([Herzfeld Olsson 2016 204](#)).

One could argue that protecting temporary migrants' rights does not require the right to stay. Maybe a right to re-entry in the host country or some type of vicarious representation for repatriated workers suffices to ensure the right of access to justice. However, both alternatives are unrealistic. A right to return would be economically prohibitive for most (if not all) repatriated migrant workers. Likewise, most migrant workers do not have access to affordable – not to mention free – legal representation, rendering the latter alternative unfeasible ([Farbenblum and Berg, 2021, 7](#)).

In addition, the fact that many migrant workers' organisations claim "permanent status for all", arguing that the lack thereof prevents migrants' effective exercise of their rights ([MRN, 2022](#); [MWAC, 2020](#)), backs the idea that temporary migrants see the right to stay as fundamental for effective equality under the law. Moreover, because the right to stay plays a central role in the agenda of migrants' advocacy groups, Bauböck and Ruhs' framework faces a practical hurdle. Namely, if we take these groups' claims seriously, it is hard to imagine migrant representatives refraining from using their veto powers when negotiating TLMPs that exclude migrant workers' right to stay or a path to citizenship.

To sum up, Bauböck and Ruhs claim that democratically legitimate and morally justified TLMPs can guarantee migrant workers' equal protection by the law without granting these workers the right to stay. This claim is untenable, given that, as I have argued, equal protection by the law requires that migrant workers have access to justice, which is, in turn, impossible without the right to stay. Therefore, equal protection by the law requires the recognition of migrant workers' right to stay. If so, TLMPs following Bauböck and Ruhs' design violate ASC and, hence, fail to be democratically legitimate and morally justified. Thus, as it stands, those in favour of the triple win argument ought to either revise their commitment to fully temporary TLMPs or opt for a less demanding normative framework that allows for this type of programme.

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