

The Ethics of Migration Policy Dilemmas

Tipping the scales: the impossibility of ‘fair representation’ in the governance of temporary labour migration.

A response to [Bauböck and Ruhs \(2022\)](#)¹

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In “The elusive triple win: addressing temporary labour migration dilemmas through fair representation”, Rainer Bauböck and Martin Ruhs (2022) argue that Temporary Labour Migration Programmes (TLMPs) can generate ‘triple benefits’ to countries of origin, destination, and migrants themselves if they create fair conditions under which all actors can have their interests represented in negotiations on policies and implementation. Bauböck and Ruhs reject the views that domestic justice concerns require abolishing TLMPs, and that global justice requires open borders, by reviewing three key normative arguments against TLMPs: namely that TLMPs (1) violate fundamental principles of universality, indivisibility and inalienability of human rights; (2) are contrary to the principle that democratic communities must provide all residents with equal member- and citizenship rights; (3) are inevitably exploitative and especially so due to lack of access to justice. However, as a pre-condition, they state that TLMPs must respect the ‘basic human rights’ of migrants, and migrants’ participation in them should be voluntary.

The notion of ‘fair representation’ captures our attention and is the focus of this commentary. Fairness in representation and political decisions is one of the ultimate goals and means of democratic societies, but ‘fairness’ and ‘representation’ in the context of highly integrated and globalised economies can mean many things, and manifest in different ways, especially

¹ The views expressed here are those of the authors and do not represent the views of the International Labour Organization nor its constituents.

if we consider that countries are at different stages of development, and power asymmetries permeate much of global policymaking.

We organise our commentary around three interrelated points. First, we problematise the underlying assumption of the status of the 'playing field' presented in the paper, given the current power asymmetries not only among countries but also between capital and labour that condition ultimate 'fairness' in TLMP design and implementation. Second, we question the notion of representation, with a special focus on migrant workers, as this continues to be a thorny area. Finally, speaking as practitioners, we focus on the role of social minima for the achievement of fairness and protection of rights, and on the difficulty of realising 'fair representation' as depicted by the authors in practice.

Fair negotiation? Asymmetry of power relations

The authors recognise that bargaining results must not be shaped by power asymmetries between migrant workers, origin, and destination countries (*ibid*, 542), and that the structural asymmetries must be addressed for procedural fairness (*ibid*, 544). They also acknowledge that it would be naïve to think that the involvement of international organisations as convenors eliminates those asymmetries, but maintain that these may help reduce them (*ibid*, 545). However, migration policymaking continues to be guided by 'methodological nationalism' (*Wimmer and Glick Schiller 2003*) and the sovereignty of nation-states. There is no universal regime upon which all actors' expectations can converge, and 'giving away' sovereignty in this area is still not as advanced as in other fields of international cooperation. One could argue that the Global Compact for Migration could be a step into that direction, but its non-binding nature, the fact that a few countries have not endorsed it, and the long list of objectives that it presents allows for governments to cherry-pick, creating further space for power asymmetries in negotiation rather than diminishing them. In this context, given the historical legacy of TLMPs (*Hahamovitch 2003*), and how entrenched their primary goal of providing flexible labour for some economies is, designing them so as to overturn pertinent historical power asymmetries between origin and destination countries seems only a distant possibility. One of the key reasons for this is that establishing the visa systems that govern temporary entry is a characteristically unilateral matter. Another reason lies in the fact that there is little evidence that bilaterally negotiated migration agreements alter asymmetries in negotiation², let alone implementation, even though we recognise that in some instances, some provisions, such as fair recruitment, have improved³.

In addition, TLMPs as instruments of migration governance contribute to the creation of a 'parallel reality' in labour markets between national and non-national workers (*ILO 2022*),

2 International organisations tend to reproduce some of those asymmetries within their governance structures and funding mechanisms (see *Bradley 2022*).

3 *Kushnirovich and Rajman (2022)* show that the bilateral agreements signed between Israel and Thailand created detailed procedures for the recruitment process but did not include demands related to the workers' employment conditions. Despite migrants' greater awareness of their rights, which could eventually improve their bargaining power, they did not see any impact on the general precariousness of their employment. These results suggest that even when migrants are covered by local laws, there is a strong need to include specific provisions in bilateral agreements for the strict enforcement of the labour inspection system and workplace protections, as well as adequate mechanisms for lodging complaints and access to justice.

reinforcing asymmetries in power for migrant workers as they continue to be excluded from the scope of labour regulations in some contexts, which render them subjects of 'immigration laws' but not necessarily of labour laws. In view of this, we would advocate to move away from conceptualising 'labour migration' as a separate issue-area in the regulation of global markets, and thus, as a 'self-contained' area of governance. The mobility of capital and labour across borders is interlinked – among other issues - with international trade, corporate taxation and the legal accountability of multinational enterprises operating across borders, many of which dictate parameters of TLMPs (see [ILO 2021](#)). Because of this, the fostering of TLMPs should not be addressed in isolation but understood as interwoven with the production of global economic disparities through processes rooted in production structures, Foreign Direct Investment (FDI), integration into global supply chains and international trade. This would call for re-embedding labour migration by regarding it as a result of dislocations in the global economy ([Delgado-Wise and Marques Covarrubias 2012](#)) rather than an object of 'management' as represented by TLMPs.

The paper assumes a world divided into a homogenously rich North, with potential to exploit a 'Global South.' This lens prevents us from focusing on the transnational issue of how the inequality between capital and labour has been widening in general, making societies more unequal domestically, and eroding the capacity of labour - in particular migrant labour - to affect political processes, also because political dynamics give ever more space to the 'private'.⁴ In this vein, the fact that employer-driven TLMPs have become dominant in many parts of the world highlights the role of capital as another actor at the negotiating table, illustrated further by the common principle that employers have sponsoring functions in the context of TLMPs ([Howe 2016](#)).

Multinational corporations and other private actors with sponsoring power do alter the balance of negotiations. Thus, asymmetry in power relations is difficult to overcome i) because nation-states at different stages of development utilise labour migration - including participation in TLMPs - as bargaining tools to realise interests in other spheres in global politics, and ii) because of the disproportionate power of the private sector to exercise associational power within TLMPs.

Fair representation? Who has the mandate to represent?

The authors note that migrant workers, alongside countries of origin and countries of destination should have the right to send representatives to advocate for their interests in negotiations. While accepting that there is a plethora of interests within countries of origin and destination, they posit that in democratic countries, there are internal mechanisms by which a plurality of actors have a voice in shaping the national interest and policy adopted by government.⁵ However, finding a similar mechanism to represent the diverse voices of migrant workers is far more complex. The authors suggest that migrants' interests can be addressed through engaging NGOs.

4 We refer here to the rising influence of multinational corporations in matters of governance.

5 Though it should be noted that, even in democratic countries, achieving a 'whole of government' approach on migration is very challenging. For example, in bilateral labour agreement negotiations, it is often Ministries of Foreign Affairs that take the lead, and Ministries of Labour (with their mandate to ensure rights of workers) may find their priorities side-lined or their presence in negotiations limited.

Do NGOs represent the interests of migrant workers? From an industrial relations perspective, and especially in democratic societies, trade unions have historically represented the interests of workers. In recent years, the labour movement has also incorporated migrant workers as part of their constituency (See [Marino, Roosblad and Pennix 2017](#)). Despite the fact that trade unions are the only organisations that, in principle, have the democratic legitimacy to speak on behalf of workers, including migrant workers, it is well-known that migrant workers are extremely poorly represented in trade unions in the countries where they work. According to the ITUC (2014), less than 1 per cent of all migrant workers are members of trade unions. There are many reasons for this, such as lack of legislative protection for migrant workers (particularly in TLMPs), restrictive legal provisions, anti-union environments, and lack of access to information on rights, among other factors. Practical obstacles continue to exist for men and women migrant workers to form and join trade unions, and for trade unions to promote the organising of migrant workers (ILO, forthcoming).

This is a critical challenge for the governance of all migration, but especially temporary labour migration, because freedom of association and collective bargaining are not only fundamental rights safeguarding procedures of organisation and negotiation; they are also enabling rights, which make it possible to promote and realise a range of other rights, such as good workplace conditions, fair wages, and access to social protection. In other words, ensuring migrant workers can organise and collectively bargain is not only important in the negotiation of the design of 'fair' TLMPs, it is a critical mechanism for the effective implementation of such schemes (for example, trade unions can expose human rights abuses and seek reparation and justice). Yet, trade unions are routinely left out of discussions on migration policies and agreements (see ILO Trade Union Survey 2021, in ILO, forthcoming), and are unable to exercise their role in monitoring the conditions of workers, and other migrant worker organisations are not empowered to take up this role either. Indeed, in contexts where access to the right of freedom of association is restricted by specific political regimes, trade unions have engaged with NGOs (see [Ford 2019](#) for the case of Asia) or migrant workers have created their own organisations. For example, affiliates of the International Domestic Workers Federation, a global union federation representing more than 590,000 domestic workers⁶ around the world, may be trade unions or member-based organisations with informal status.

We argue that for workers' interests to be represented in TLMP negotiations and governance, it is critical that migrant workers' organisations are provided the opportunity to engage in discussions and dialogue, along with trade unions, and that a 'non-negotiable' requirement of TLMPs be that migrant workers have the right to freedom of association and collective bargaining, including the creation of organisations of their choosing. Particular attention needs to be paid to the opportunity of women to organise, especially in sectors where organising is particularly challenging – such as the domestic work sector.

However, the challenge of representation does not stop with the ability of migrant workers to organise and participate in negotiations. TLMPs evolve constantly, and new schemes are regularly being negotiated. Who then represents the 'potential migrants' who would be migrating if a new TLMP was created or an existing TLMP expanded to other countries not

⁶ See 'Who We Are' at IDWF Website, available at: [About Us - International Domestic Workers Federation \(idwfed.org\)](#).

originally included or other branches of industry? What about the families and communities of the temporary labour migrants who would also be impacted by the TLMP in the countries of origin? As noted in the paper, migrants' interests need not coincide with those of the country of origin since governments may have a different agenda. However, migrants are only the most visible of a broader community of individuals and communities that are impacted and may need to be represented too.

Fundamental rights or negotiable conditions?

The authors acknowledge that for well-designed and governed TLMPs some rights need to be fixed in advance under a democratic principle of equal protection, while other rights could be the legitimate outcome of negotiations. The authors refrain from cataloguing the minimum rights for fair TLMPs but allude to freedoms and rights included in the International Covenant on Civic and Political Rights (ICCPR) as well as 'basic labour rights,' drawing a distinction between socio-economic rights of temporary migrants, where there are plausible arguments against equality of treatment vis-à-vis national workers, particularly in the context of (non-contributory) social assistance. The role of social minima in ensuring that workers benefit from minimum acceptable conditions of employment is an important one for fair representation.

From a protection perspective, the ILO's fundamental principles and rights at work provide a framework for which rights are key to secure 'fairness' towards workers in TLMPs ([ILO 1998 amended in 2022](#) to include occupational safety and health). These principles and rights include the rights of all workers, including temporary migrant workers without distinction whatsoever to establish and, subject only to the rules of the organisation concerned, join organisations of their own choosing without previous authorisation. Thus, removing restrictions which continue to exist in some countries should be non-negotiable aspects of TLMPs ([ILO 2022](#)).¹

Another important element of basic rights for temporary migrants is the right to change employers. The ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR) has noted that "providing for appropriate flexibility for migrant workers to change their employer or their workplace assists in avoiding situations in which they become particularly vulnerable to discrimination and abuse" ([ILO, 2012, para. 779](#)). The threat of deportability in TLMPs, as previously discussed, diminishes the potential for temporary migrant workers to exercise their voice because of fear of retaliation or not being selected for future employment. Still, de jure and de facto flexibility to change employers can be an important factor in ensuring that workers are not exploited. This could include minimum safeguards such as lengthy grace periods ([ILO 2022](#))² and ensuring that employer retaliation is prohibited (ILO, OHCHR, UN Women and IOM, forthcoming).

7 For example, requiring citizenship for the establishment of trade unions, requiring a certain proportion of members to be nationals, or subjecting foreign nationals to conditions of residence and reciprocity in terms of eligibility for trade union membership (or leadership positions in trade unions)...

8 Most TLMPs require workers to obtain a new work permit if they leave their employer. But the time required to find a new employer, and to have them fulfil the criteria to sponsor a work permit, typically exceeds the available grace period. See for example Sumption ([2019](#))..

To conclude, given the power asymmetries upon which the world economy still rests, fair representation in determining the terms of labour migration, though highly desirable, continues to be an empirical challenge, nationally and transnationally. Nation-states do not all hold equal capacity to embark on deliberation and negotiation. This is evidenced by the composition of delegations in global negotiations and the number of experts they possess to address various topics, including labour migration. In addition, the imbalances between capital and labour are eroding the political capacity of workers to influence policymaking in many domains, and this diminishes their potential for representation. Trade unions and workers and civil society organisations can and should try to fill this vacuum, but the position of capital, manifested in the role of global business to influence policy design, is still advantaged. In particular the sponsoring functions granted to employers by governments through immigration laws, as well as the difficulty for workers to change employers explicit in national laws in many contexts, place workers in unfavourable conditions to bargain. The temporary nature of these programmes and their embedded deportability condition constitute additional factors in the disadvantaging of migrant workers. We therefore maintain that consensus on Fundamental Principles and Rights at Work as well as the possibility to change employers constitute key areas to achieve fairness if TLMPs are here to stay.

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About the “Dilemmas” project

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