

The Ethics of Migration Policy Dilemmas

Responding to critics

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Can temporary labour migration programmes (TLMPs) contribute to goals of global social justice without undermining receiving states' commitments to domestic social justice? Can they be beneficial for migrants, receiving and sending states? In our essay ([Bauböck and Ruhs 2022](#)), we proposed that the policy dilemmas lurking behind these questions can be addressed through minimum standards of human and democratic rights and fair representation of all three parties in the negotiation and governance of TLMPs. We are very grateful that our critics have all engaged constructively with this idea. All contributions contain helpful summaries of our argument and seem to share our goal of searching for action-guiding principles under real-world conditions. They also raise important points and insights that we are happy to take on board. In the spirit of critical exchange, we will focus in this rejoinder on selected objections that we think are particularly important for us to address.

Must TLMPs include a right to stay?

Valeria Ottonelli and Tiziana Torresi ([2022](#)) contend that "exit options must include not just the possibility of return to the migrant's country of origin but also the possibility to stay in the host country." They point out that we acknowledge that temporary labour migration must be voluntary in order to be defensible. On their view, this does not merely require that migrants must have some choice over whether to leave or stay in their country of origin, but also over whether to return to that country or stay in the host state. The option of voluntary return alone is not sufficient. Without the substantive option to remain in the host country, "migration fails to count as voluntary despite the negotiated conditions under which the TLMP was defined and decided." One reason for this is that an original plan and commitment to return may change when conditions in the home country have deteriorated economically or politically.

We acknowledge the latter point. Like any contract that relies on the parties' free consent, migrants' agreement to a return condition included in a TLMP can be overruled if background conditions during the period of implementation change in such a way that the initial consent can no longer be assumed to be binding. A TLMP is an agreement that assumes return (temporarily or permanently) as the default option and specifies the conditions for host country admission and stay as well as for return to the origin country. The consent of migrants to this default assumption can count as voluntary if it matches migrants' life plans at the time of admission and if relevant background conditions do not change during their stay in the host country. If conditions for return migration deteriorate substantially because of a severe economic crisis or a new political regime that violates fundamental rights, this is a strong reason for regarding the initial consent to return as no longer binding. In the latter case, temporary labour migrants ought to be accepted as "refugees sur place," at least until conditions in their home countries improve again. Similarly, if the conditions for return are changed by the host society because the migrants' employment contracts and residence permits keep being renewed (because of strong demand for migrant labour and pressure by employers) and temporary migrants become de facto long-term residents, then their rootedness in the host society invalidates the initial agreement about voluntary return.

Both scenarios exemplify instances where this agreement becomes invalid, rather than ex ante conditions for regarding temporary migration as voluntary. We agree, however, that liberal democratic host countries are normatively bound to respond to these changes of conditions by providing options for initially temporary migrants to stay. They can and should do so through separate provisions in their domestic laws that expand a non-refoulement principle to include a provision covering also severe economic deprivation in case of return. There could also be laws that foresee that after a certain time of residence (say 5 years) temporary permits of all kinds will be automatically transformed into permanent ones. Such a policy already exists in many countries. For example, in the European Union, the 'EU Directive on the status of non-EU nationals who are long-term residents' stipulates that anybody who has lived legally in an EU country for more than five years can obtain the status of a long-term resident. We do not object in principle to building such provisions also into TLMP agreements. Practically speaking some of these policies may have the effect of diminishing incentives for both host and origin countries to conclude such agreements, as it may strengthen the expectation that the exception will become the rule and temporary migration will inevitably lead to permanent settlement.

Saying that an agreement becomes invalid when objective background conditions for consent have changed is not the same as saying that voluntariness implies that one party has the right to change her mind. If migrants who have initially accepted to return change their life plans and do not want to return without having been uprooted in their country of origin and sufficiently deeply rooted in the host country, this alone cannot invalidate their initial consent. Host countries may still deal with such cases by accepting large numbers of temporarily admitted migrants as permanent ones, as European countries recruiting guestworkers in the 1960s and early 70s eventually did. As we point out in our paper, many TLMPs across high-income countries allow for a regulated (i.e. conditional) upgrading to permanent residence. So it would not be unusual for host countries to allow some of their temporary migrants to stay permanently, and this regulated transfer to permanent residence could also be part of the negotiated agreement.

The effect of the right to stay on the balance of power

Ottonelli and Torresi provide a second argument for including a right to stay in TLMPs. They think that if host countries have to assume that temporary migrants could also become their future citizens and voters, this might strengthen the migrants' bargaining position and thus help to reduce the power imbalance that we acknowledge as a structural obstacle for fair representation.

We believe the opposite conclusion is more plausible. If host country governments have to assume that temporary migrants can freely choose to change their status to that of permanent residents and eventually citizens, the former are more likely to exclude the latter through reducing or even shutting down temporary migration opportunities. So there can be – and in many countries is likely to be – a fundamental trade-off in TLMPs between openness and the right to stay permanently (see Ruhs 2013). We make a moral case why Western states should enter TLMP agreements, but the voluntary nature of these agreements applies obviously not only to migrants and their origin states, but also to destination countries. If they have no say over whether temporary migration will actually be temporary, they can neither be expected nor morally obliged to enter such agreements.

Ottonelli and Torresi also think that migrants who are liable to be denied membership in the host society have a diminished status and less political leverage in the negotiations. But if temporary migrants were represented in TLMP negotiations as potential citizens of the destination country, this could diminish their clout vis-à-vis their countries of origin, making it harder, for example, for migrant representatives to push for better reintegration programmes and other support for returnees. It would also misrepresent the aspirations of migrants who, on Ottonelli's and Torresi's own account (2010), do not generally aspire to be included in the host country's citizenship.

Temporary migration and free movement

Finally, Ottonelli and Torresi suggest that including an option to stay in arrangements meant to facilitate return might be “the best way to ensure high rates of return.” We can indeed see such an effect in free movement arrangements like those in the European Union. Under such conditions, migrants can realise their aspirations to return or move onwards without having to fear that they will then lose their right to come back to their current country of residence. In an ideal world, TLMPs would be replaced not by permanent immigration programmes but by free movement between states that agree to keep their territories and labour markets open to each other's citizens. Yet, as we have argued in our article, TLMPs are mainly justified as a partial response to the non-ideal conditions of huge economic disparities between countries. It is these conditions that block the option of free movement (Bauböck 2009). We accept therefore that a right to stay for temporary migrants might make it easier for many to realise their plan to return. But building such a right into TLMPs as a necessary core feature would make the instrument that could help to improve the situation of many poor countries and millions of migrants rather ineffective.

Does equal protection of the law require a right to stay?

Mario Cunningham (2022) proposes a very different reason why temporary migrants need to

be granted access to permanent residence. He points out that, in our view, equal protection of the law in the host society – even beyond the moral requirement of safeguarding migrants’ fundamental human rights – is an important condition for democratic legitimacy of such programmes. Cunningham argues that “a right to stay – most likely in the form of permanent residence – is necessary for [migrants] to effectively enjoy equal protection of the law.”

Cunningham arrives at this conclusion from a series of empirical assumptions: equal protection requires access to courts and that in turn requires long-term presence. Migrants cannot effectively claim their rights in court (e.g., by suing their employers in cases of wage theft) from outside the country. A right to re-entry or various forms of vicarious legal representation are not realistic alternatives given their prohibitive costs.

The problem of temporary migrants’ access to the justice system is a real one but we wonder whether a right to stay (permanently) is necessary to resolve it. Lower-skilled and low-paid migrants can lack effective access to judicial remedies even where they have a right to stay – as mobile EU citizens do. And effectively fighting for workers’ rights in court requires in most cases that organisations like unions support a case and de facto or de jure represent migrants not individually but collectively, as a group that has suffered the same deprivation of rights. Even if courts do not allow for class action, which is the case in most European jurisdictions, and may call on individual witnesses, it does not seem essential that every migrant represented needs to be present at such a trial. And even if that were necessary, such presence hardly grounds a claim to permanent residence permits.

So our impression is that Cunningham’s chain of reasoning has some weak links. We acknowledge, however, that there is an important tension between temporariness of status and the extent to which migrants enjoy equal protection of rights. This is not so much because of an impossibility to adjust host state institutions. The justice system in liberal states has developed all sorts of procedures for dealing with absentees both as litigants and as defendants. It is also possible, for example, to grant temporary migrant workers whose fundamental rights have been violated time-limited extensions of their temporary permits, to enable them to stay in the host country until court procedures have been completed (compare the EU Employer Sanctions Directive).

It is also important to consider the problem that meaningful rights protections for temporary migrant workers are jeopardised if temporary migrant workers lose their residence status as an immediate effect of termination of an employment (which is often but not always the case). Migrants will be reluctant to complain about rights violations if their complaints lead to dismissal and, as a consequence, loss of legal residence status and forced return to their home countries. But, again, policy provisions could be made to mitigate this problem, for example by allowing migrants to change employers within certain sectors/occupations and by offering temporary migrant workers whose fundamental rights are found to have been violated temporary ‘redress work permits’ that would allow them to stay and work in the host country for an additional period of time (compare [Fox-Ruhs and Ruhs 2022](#)).

To us, a core problem seems to lie in temporary migrants’ orientation towards return. If the purpose of work is exclusively to achieve a savings target in order to remit and then return, then one will be less motivated to demand equal protection of one’s rights. Other aspects of work, such as the social status it conveys in the host society, and the self-respect one can

derive from it become less important. Temporary migrants are therefore typically harder to unionise and less likely to file complaints or fight for their rights in court than those migrants who see their long-term future in the host society. This trade-off emerges from migrants' own projects and cannot be avoided by granting them permanent residence permits. It can, however, be mitigated if unions and other organisations commit to defending temporary migrants' rights and representing them, individually and/or collectively, in the host society.

Cunningham points to another practical problem with our argument. Since "many migrant workers' organisations claim 'permanent status for all,'" they would likely block TLMPs that do not include a pathway to permanent residence and citizenship if they were given a seat at the table and veto powers in matters regarding temporary migrants' basic rights.

Our answer to this objection is that we should not assume that host-state based migrant workers organisations sufficiently represent all the interests of migrants that need to be considered. Specifically, the interests of would-be temporary migrants in countries of origins need to be taken into account alongside those of migrants already present in host countries. We assume that the former would strongly advocate for an expansion of such programmes and facilitation of return migration rather than a right to permanent residence for those who have already been admitted as temporary migrants. Within our approach and proposal, the migrant workers organisations that represent the interests of migrants in the design and implementation of TLMPs would need to consider both how to expand opportunities for labour migration and how to protect the rights of migrants after admission.

Why should temporary labour migration be beneficial also for rich host countries?

Unlike the other contributions, Christine Straehle's (2023) main critique focuses on our defence of a triple benefit justification for TLMPs. One point that she raises has also puzzled other readers. Why do we advocate TLMPs as a response to global injustice that allows states in the Global North to also pursue their own interests in temporary labour migration? If these states have duties of global justice to massively redistribute resources to the Global South, why should we let them get away with a policy through which they can advance their own interests as long as it also generates benefits for countries and migrants in the Global South?

A first point to note in response is that we advocate for TLMPs as a partial response to global justice. We certainly do not regard it as a sufficient one. What we want to reject is the view that policies of redistribution to and controlled migration from the South are somehow alternatives rather than complementary instruments. Moreover, we think that redistributive policies are plagued by at least as many, and probably even more problems of feasibility and efficacy as TLMPs, especially where there is a lack of stable democratic institutions in the recipient countries.

The more important theoretical question is, however, whether global justice duties can be delivered through policies that are also beneficial for rich countries. We do not see why not. The point of global justice duties is not to inflict harm on countries that are currently privileged but to improve the situation of the globally worse-off. In fact, we think that the long-term enlightened self-interests of citizens in the Global North include compliance with global justice duties. Consider climate change: Rich countries damage the prospects

of their own future generations if they do not invest heavily into loss & damage funds that bring countries in the South on board for globally binding carbon emission reduction policies.

The second reason why we think pursuing host country benefits in TLMPs is legitimate has to do with democracy. The citizens of democratic countries elect governments to pursue their common good. Citizens themselves have moral duties to factor imperatives of global justice into their political preferences and mandate their governments to pursue these goals. But the governments are accountable to their citizens, not to humankind. The interests of outsiders ought to be heard and represented before deciding on policies that affect them, but this does not provide the outsiders with a mandate to elect the government ([Bauböck 2018](#)). “Compatriot partiality” ([Miller 2016](#)) is thus a feature, not a flaw of democratic legitimacy. If a policy can be shown to produce a benefit for the country while also contributing to global justice, this is a reason to prefer it over policies that might satisfy strongly cosmopolitan theorists of global justice but have a much lower chance of winning democratic support.

Real world theory and utilitarian policies

This leads us to clarify another point raised in Straehle’s contribution as well as in some of the others. Our argument is indeed firmly situated in a real and non-ideal world context. Yet it is important to be clear about what aspects of this world we regard as non-ideal. These are, on the one hand, the huge economic disparities between countries that produce unacceptable levels of global inequality of resources and opportunities and, on the other hand, the lack of sufficiently strong institutions of global governance to address this global injustice as well as other problems, such as the looming climate disaster. By contrast, we do not regard the fact that democratic governments are committed to pursue the common good of their citizens and residents as a non-ideal feature of our world. We accept it instead as a core aspect of democracy and we think that a pluralism of democratic polities each of which legitimately pursues its collective interests is to be preferred over either a world state or a utopia in which governments rival with each other to meet global justice goals at the detriment of their own citizens’ interests.

Straehle’s main worry is that a triple benefit strategy might be utilitarian in the negative sense that allows for overriding individual rights for the sake of collective gains. In her view, pursuing triple benefits could “instrumentalise individual migrants for purposes of economic benefit for both sending and host states.”

A first response is that the two conditions that we specify as moral requirements for TLMPs before discussing their democratic legitimacy conditions already rule out a fully utilitarian justification. These are the protection of fundamental human rights of temporary migrants and the voluntary nature of their migration, both of which imply that individuals and their autonomy take priority over a utilitarian calculus that maximises collective benefits. A second response is that, under our proposal of fair representation in the design and implementation of TLMPs, migrants (or another non-state actor representing migrants’ interests - see below) would effectively have veto power, so migrants could not be ‘instrumentalised’ against their will.

Another of Straehle's worries is that temporary migrants' interests, and especially those of female care workers, will not be adequately protected by host and origin countries. For example, with respect to the former, Straehle notes that deskilling of migrants might be an "integral part of the motivation for host states" to engage in TLMPs. Similarly, Straehle points out that, given global inequalities and the perceived need to generate remittances, origin countries may not prioritise the effective protection of the rights of migrant workers. She argues, for example, that women's rights and interests may be "rendered subordinate to the benefits of sending them to be employed in specific sectors [abroad]." If TLMPs are to play a fundamental part in the economic strategies of low-income countries of migrants' origin, such countries are unlikely to be effective advocates for their migrant workers.

The extent to which these valid concerns become actual realities in practice will vary and depend on the specific contexts and cases under consideration. Nevertheless, we acknowledge these points as they reinforce our own argument that in order to achieve a triple benefit, the interests of temporary migrants cannot be adequately represented by host or sending country governments. What is needed instead are representatives that have either themselves shared the migrants' experience or that are sufficiently independent from host and sending country governments to stand in for temporary migrants and stand up for their interests whenever these might be overruled.

Do power asymmetries make fair representation unfeasible?

Echoing some of the concerns expressed by Straehle, Fabiola Mieres and Sophia Kagan (2023) question the feasibility of 'fair representation' in the governance of temporary labour migration programmes in practice. They focus on two particular concerns that we also identified and discussed briefly in our paper: the effects of power asymmetries between countries at different stages of economic development (e.g., between relatively rich destination countries and relatively poorer origin countries); and the challenge of representing the interests of migrants in negotiations about the fair design and implementation of TLMPs. These are clearly important and difficult practical challenges that one cannot hope to ever overcome fully. Compared to Mieres and Kagan, however, we are more optimistic that it may be possible to mitigate these concerns to an extent that their effects do not necessarily and fundamentally threaten the feasibility of fair representation in TLMPs.

Power asymmetries can result in an agreement where the weaker negotiating party accepts terms and conditions that it would not agree to if it were in a stronger position. For example, an economically weaker origin country, under pressure to create opportunities for labour emigration to higher-income countries, may agree to particular restrictions of migrants' rights for fear of being seen as 'too demanding' and potentially replaceable by another origin country with lower demands. As we have argued in our paper, we believe that the involvement of an international organisation, such as the ILO, may go some way toward mitigating these asymmetries; although we agree with Mieres and Kagan, who both work at the ILO, that there are limits to the extent to which an international organisation can change and influence these power asymmetries. It is important to point out, however, that our proposal also includes limits to what can be negotiated (basic human and labour rights should be non-negotiable) and that the independent representation of migrants' interests in these negotiations is a novel feature that, if it can be implemented effectively (see below),

could lead to more balanced power dynamics in these negotiations than we have seen in many of the existing bilateral temporary labour migration agreements.

The increasing politicisation of migration, and especially of irregular migration, in many high-income countries may be shifting some of the power dynamics around migration between low and higher-income countries. As we point out in the paper, European and other high-income countries are intensifying their efforts to cooperate with lower-income transit and origin countries to reduce irregular migration, and it has become increasingly clear that, to be acceptable to economically weaker origin and transit countries, such cooperation agreements need to include legal labour migration pathways to high-income countries. In other words, the multidimensionality and cross-issue linkages of these migration policy cooperation agreements could provide lower-income countries with more power and leverage in negotiations about TLMPs.

Mieres and Kagan are also concerned that growing power asymmetries between capital and labour in both global and domestic markets and political processes have in practice eroded the capacity of workers to influence political dynamics and policy-making, and this also affects the design and implementation of TLMPs. In terms of global markets and economic integration, TLMPs negotiated and agreed along the lines we suggest would be a major tool to reduce asymmetries between the high mobility of capital across borders and the much more restricted international mobility of labour (see [Barry and Goodin 1992](#)). TLMPs have the potential to expand international labour mobility and the choices of workers in poorer income countries, especially lower skilled workers whose international labour mobility is currently highly limited by rich countries' restrictive immigration policies.

At the national level, it is of course true that employers, including multi-national companies, often play an outsize role in labour migration policymaking in many countries and that immigration has the potential to weaken labour standards and power. We would argue, however, that this need not necessarily be the case and, in practice, depends on the institutional and socio-economic context (such as prevailing labour market regulations including strength of trade unions and enforcement of minimum labour standards for all workers). While distributional conflicts between capital and labour within countries are obviously an important issue in migration debates and domestic policymaking, we do not think that it is impossible to conceive of trilateral negotiations about TLMPs where the destination and origin countries' policy positions are not fully 'captured by capital.' Many countries conduct their labour immigration policies in a way that evaluates critically employer demand for (more) migrant labour and that aims to regulate employers' recruitment and employment decisions (e.g., [Ruhs and Anderson 2010](#)).

Who can and should represent the interests of migrants?

Mieres and Kagan raise the important question of who can and is best placed to represent the interests of migrant workers in negotiations about the design and implementation of TLMPs. As we discuss in our paper, adequate representation of migrants' interests is hard because there is no obvious representative agent: temporary labour migrants (current and prospective) do not have their own organisations to represent them in such international negotiations. It is an important implication of our argument that adequate representation

of migrants' interests is required to achieve the 'triple benefits condition' of our proposal. In our paper, we suggested that NGOs may be able to play this role, adding that it would by no means be straightforward to identify a suitable NGO for this purpose, partly because in many countries civil society organisations that work on different aspects of labour migration are highly fragmented. Mieres and Kagan suggest that trade unions also need to be involved, potentially in collaboration with migrant workers' associations. The International Domestic Workers Federation is mentioned as an example of an organisation whose members include "unions and member-based organisations with informal status."

We agree that trade unions have an important role to play in the protection of labour standards and, therefore, should play a central role in labour migration policymaking. However, whether and to what extent they can represent (current and prospective) migrant workers' best interests in negotiations about TLMPs is, in our view, debatable and depends partly on the specific case and sector under consideration. Migrants' interests in TLMPs relate to both their opportunities for labour migration and their rights and employment standards while working abroad. National trade unions are primarily concerned with rights and conditions of existing workers and not with their mobility across borders. Indeed, in some cases trade unions may consider labour immigration specifically as a threat to their members, and so they can have conflicted objectives when it comes to international labour mobility. This may be less applicable in cases where migrant workers dominate a particular sector of employment, such as domestic care work.

In any case, we agree that power asymmetries and the representation of migrants' interests are important and open questions that affect the practical feasibility of our proposal. We believe that there is a strong case for pilot programmes that test different institutional arrangements for 'fair representation' in the design and implementation of TLMPs.

What should be the non-negotiable, minimum standards?

Our paper argues that the protection of basic human rights (e.g., the rights and freedoms specified in the ICCPR) and basic labour rights is a necessary (but not sufficient) precondition for any liberal justification of a TLMP. At the same time, we propose that some of the socio-economic rights of temporary migrants should be negotiable within the social justice and democratic legitimacy constraints that we set out. An important next step would be to specify more precisely which rights need to be protected as fixed and non-negotiable in discussions about TLMPs.

Mieres and Kagan suggest that the list of non-negotiable labour rights should include the ILO's fundamental principles and rights at work, which comprise: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; (d) the elimination of discrimination in respect to employment and occupation; and (e) a safe and healthy working environment. In addition, Mieres and Kagan also advocate for the right to change employers to be included in the list of non-negotiable rights for temporary migrant workers.

We agree that the ILO's fundamental rights at work are a useful starting point for identifying the list of rights that need to be fixed under any TLMP. As we discuss in the paper, the right to change employers is a more difficult issue because it is a fundamental rationale for host countries to engage in TLMPs to use temporary migrant labour to address perceived shortages in specific sectors and/or occupations. Providing temporary migrant workers with an immediate and unconditional right to change employers and jobs across the host country's labour market would undermine this basic objective. We agree, however, that the 'tying' of migrant workers to specific employers – as is current practice under many TLMPs – creates significant potential for exploitation. Innovative policies need to be found that allow temporary migrant workers to change employers freely within specific sectors and occupations, after a minimum period of employment in the host country. There should also be opportunities for a regulated change of employers, e.g., through a new work permit application for work with a different employer. Such policies would be entirely compatible with the processes for negotiating TLMPs that we propose.

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About the “Dilemmas” project

This commentary contributes to the [‘Dilemmas’ project](#) at the EUI’s Migration Policy Centre. Dilemmas analyses and debates fundamental ethical dilemmas in policy-making on migration and refugee protection.

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