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Making Claims for Migrant Workers:  
Human Rights and Citizenship

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Abstract:

Migrant workers claims for greater protection in a globalized world are typically expressed either in the idiom of international human rights or citizenship. Instead of contrasting these two normative frames, the paper explores the extent to which human rights and citizenship discourses intersect when it comes to claims by migrant workers. An analysis of the international human and labour rights instruments that are specifically designed for migrant workers reveals how neither discourse questions the assumption of territorial state sovereignty. Drawing upon sociological and political approaches to human rights claims, I evaluate the Arendtian-inspired critique of international human rights, which is that they ignore the very basis “right to have rights.” In doing so, I discuss the different dimensions of citizenship, and conclude that international rights can be used by migrant workers to assert right claims that reinforce a conception of citizenship that, although different from national citizenship, has the potential to address their distinctive social location.

Key words:

Migrant, human rights, citizenship, employment, international law

**Introduction**

Temporary migrant workers exemplify the problem of justice in a globalized world.<sup>1</sup> In the global North, falling fertility rates, increasing life expectancy, the shift from manufacturing to services and changes in the expectations and living standards of citizen workers have led to a growing demand for those workers who are officially

classified as low-skilled to perform jobs that are dirty, dangerous and degrading. Despite this demand, citing concerns that include preserving the integrity of welfare and fiscal regimes, the wages and working conditions of national workers, as well as national identity and social cohesion, richer, more developed, countries refuse to grant low-skilled workers either (immediate) permanent residence or citizenship status.<sup>2</sup> In the global South, economic trends such as growing inequalities between high- and low-income countries and insecurity, vulnerability, and instability due to economic, environmental and political crises have increased the numbers of men and women who migrate in order to obtain paid work. Remittances are crucial for the survival of household, community and country in a large swath of the developing world, and exporting workers is one means by which governments cope with unemployment and foreign debt. Although national immigration policies have always been very path dependent, shaped by each country's unique history of immigration, there is a convergence internationally towards temporary migrant programs (previously known as guest-worker programs but now called managed or circular migration) for low-skilled workers (Wickramasekara 2010).

A distinctive feature of these temporary, circular or managed migration programs for low-skilled workers is that these workers are often not entitled to the same rights as workers who are nationals of the host state.<sup>3</sup> Typically, migrant workers are subject to a range of mobility, employment and residence restrictions in the country in which they are working that do not pertain to workers who enjoy either permanent resident or citizenship status in the host state. As a matter of international law, sovereign states can, through their immigration laws and rules, require particular categories of entrants to have certain skills and experience, and place restrictions on the freedoms, privileges, rights and entitlements of migrants who enter their territory. Almost all countries use immigration law to create a variety of different migration statuses, some of which are highly precarious, which in turn generate a differentiated supply of labour that, together with migratory processes, produces precarious workers and precarious employment norms (Fudge 2012).

The territorial jurisdiction of nation states and Westphalian notions of citizenship create a mismatch between the scale of justice, which has traditionally been located in the nation state, and the structural causes of many injustices in a globalized world (Fraser 2009, p. 23). For some theorists, lawyers and activists, migration exposes the limits of a

citizenship as a normative discourse when it comes to social justice claims. According to this perspective, “legal citizenship or nationality is an expression of global social inequality” as its “allocation creates and consolidates unequal life opportunities” (Faist 2009, p. 7). International human rights are seen a solution to the lack of congruence between the demand for justice for migrant workers and a system of governance centred on the Westphalian state. International human rights norms, which are invoked and applied on the basis of humanity and personhood, are regarded as offering a more promising avenue for protecting migrant workers than do claims based upon citizenship, a formal legal status that migrant workers do not enjoy in the state in which they are working (Basok, Inclan and Noonan 2006, p. 267).

By contrast, other theorists, lawyers and activists believe the better route for migrant workers (and migrants in general) is to reconceive citizenship on an inclusive basis beyond the nation state. Advocates of cosmopolitan or post-national citizenship invoke Hannah Arendt’s conception of citizenship as the “right to have rights” in order to stretch citizenship beyond the borders of the nation state into the global realm (Arendt 2004, p. 376). Some scholars emphasize the limitations (or directionality) of human rights, and stress instead the political realm of the citizen as the foundation for full emancipation (Arendt 2004; Dauvergne and Marsden 2012).

Rather than evaluating whether international human rights or cosmopolitan citizenship is a more compelling idiom for making claims for greater protections for migrant workers in a globalized world, my goal in this paper is to look at the similarities and the relationship between the two discourses when it comes to migrant workers’ rights. A range of different disciplines – law, political theory and sociology – invokes human rights and citizenship discourses in relation to claiming protection for migrant workers. Yet, despite much overlap, each discipline uses the terminology of human rights and citizenship distinctively. To further complicate matters, it is often unclear the specific register – descriptive/analytic or normative/aspirational – within which the vocabulary is being used. The proliferation of perspectives and registers contributes to the confusion in how the different discourses of human rights and citizenship are being invoked and used with respect to migrant workers.

In this paper, I will examine how, and the extent to which, human rights and citizenship discourses intersect when it comes to claims making for migrant workers. My

focus is exclusively on migrant workers who are part of a recognized managed migration program in which the migrant worker's residence is treated as temporary as a condition of entry imposed by the host state.<sup>4</sup> This focus allows me to concentrate on official immigration policies and migrants who are considered to have a lawful status to reside, albeit for a limited duration, in a host state. My concern is with migrant workers who are considered by the host state to be low-skilled workers since the migration programs open to these workers tend to impose greater restrictions on the migrants rights that programs designed to attract high-skilled workers (Ruhs and Martin 2008). I am interested in these workers because there has been less attention to their claims and the normative language they invoke than there has been to migrants (such as the *sans papiers*) who do not have the requisite legal status to reside in the country in which they work.<sup>5</sup>

I begin by briefly sketching the relationship between international human rights and cosmopolitan citizenship. Once I have shown the connection between these two forms of claims making, I will examine where migrant workers fit within the international human rights instruments, focusing on those instruments specifically designed for migrant workers. My perspective is descriptive and analytic. At the first part of the paper, I will introduce the critique of international human rights for migrant that they are unable to address the foundational problem of the "right to have rights". In the second part, I will discuss two instances of this critique, and use them as a jumping off point for a critical evaluation of Hannah Arendt's problematic in relation to migrant workers. My assessment draws upon Jean Cohen's disaggregation of the incommensurable components of citizenship and Jacques Rancière's critique of Arendt's understanding of the "Rights of Man." I conclude that the practice of human rights claiming by migrant workers is a valuable supplement to citizenship discourses is the goal is to improve the ability of migrant workers to achieve their life projects.

## **I. The Relationship between International Human Rights and Cosmopolitan Citizenship**

There is a close, and deepening, relationship between human rights and citizenship. Both are exemplary normative discourses for claims making in the twentieth and twenty-first centuries, their roots are "closely entwined" in liberal individualism and

they share a commitment to equality (Nash 2009, p. 1068). Their attractiveness as discourses of claims making is closely associated with the fact that both are momentum concepts with a universalistic logic that includes an ever-widening circle of people and claims under their compass.

John Hoffman (2004, p. 12) defines momentum concepts as “infinitely progressive and egalitarian: they have not stopping point and cannot be realized.” He contrasts momentum concepts with static concepts, which “are repressively hierarchical and divisive” (Ibid.). While freedom, autonomy and citizenship are examples of the former, state, patriarchy and violence are instances of the latter.<sup>6</sup> Momentum concepts have an historical dynamic “which means they must be built upon and continuously transcended” (Ibid.). They “unfold” in a manner that requires their ceaseless reworking to they realize “more and more their egalitarian and anti-hierarchical potential” (Ibid, p. 138).

Citizenship exemplifies the progressive and inclusive dynamic of momentum concepts (Ibid., p. 13). Human rights also partake in this logic, expanding both in scope and substance. Not only are they homologous, citizenship is often defined in terms of concentric circles of rights that expand outwards. Claims to citizenship have enlarged not only the types of rights – from civil and political to social and economic – included within the rubric of citizenship, but also who counts as a citizen. During the twentieth century, both civil and social rights were gradually extended to people, such as women, ethnic minorities, and migrants, who had hitherto been considered to be members of marginal populations. The normative force of the expansion of the personal scope of citizenship, which was driven by political struggles, was reinforced by the international human rights regime that was constructed after World War II. The Universal Declaration of Human Rights established a new form of legitimation for nation states under the rule of law, which is adherence to international human rights. Like citizenship, expanding circles of “marginalized groups struggling for social justice” invoke human rights (Lister 2007, p. 49). In highly developed countries, the judiciary played a strategic role in establishing the rights of refugees and migrants by reference to international human rights instruments (Benhabib 2004).

At the same times as international human rights added momentum to the expansion of citizenship claims, they also revealed citizenship’s exclusionary side. The

universal aspect of human rights threw into sharp contrast the extent to which citizenship is confined to the boundaries of the nation state. The tension between the inclusionary and exclusionary sides of citizenship is an increasing focus of study (Bosniak 2006; Fudge 2004). In fact, “much of the contemporary citizenship literature is marked by the challenge it poses to citizenship’s exclusionary tendencies and by its attempt to make real citizenship’s inclusionary promise” (Lister 2007, p. 49).

The attempt to construct an inclusive cosmopolitan citizenship is intertwined with the international human rights regimes. Cosmopolitan citizenship seeks to extend democracy and claims making beyond the nation-state (Held 1995). New institutions, “which are autonomous and independent” of the nation-state framework and “whose legitimacy is derived from the universal rights of the global citizens” must be devised (Chandler 2003, p. 334). For such cosmopolitanists, democracy must be “extended from the nation to humankind as a whole” (Chandler 2003, p. 33, referring to Beetham 1999). International human rights are a source of inspiration for proponents of cosmopolitan citizenship; human rights have been characterized as a form of universalized citizenship (Ruhs 2009, p. 7). As Anuscheh Farahat explains, “the legal principle of progressive inclusion emanates from the basic idea of the universal protection of human rights, i.e. the idea that individuals have rights independent from their location – whether they are in a home state or any other state” (Farahat 2009, p. 702). The legal principle of progressive inclusion is a prominent feature of the international human rights regime, which, according to Jean Cohen, constitutes “an international symbolic order, a political-cultural framework, and an institutional set of norms and rules for the global system that orients and constrains state” (Cohen 1999, p. 206). Cosmopolitan citizenship is no longer limited to the nation state, but instead attempts to use international human rights measures to develop an infrastructure of global citizenship that is more inclusive than national citizenship (Nash 2009, p. 1068).

One of the best-known proponents of cosmopolitan citizenship is Seyla Benhabib, who claims, with specific reference to Europe, that the international human rights have made citizenship increasingly cosmopolitan (Benhabib 2007). She argues that the proliferation and development of international human rights norms and institutions, which increasingly guide national institutions like constitutional courts and legislatures, have led to the spread of cosmopolitan norms. Although the link between national

citizenship and privilege of voting still remains, citizenship is no longer the basis for the right to have rights. According to her, citizenship understood as legal status has less salience than residency when it comes to claiming social rights in the European Union (Ibid).<sup>7</sup> Citizenship has become uncoupled from the territory of the nation state as a basis for claims making.

### *International Human Rights for Migrant Workers*

Do international human rights specifically designed for migrant workers create a foundation for cosmopolitan citizenship? The most obvious distinction between the human rights and citizenship discourses is their territorial scope; while the boundaries of citizenship claims seem to contiguous with the nation state, human rights operate at a universal and international scale. However, upon closer examination, migrant workers disclose the boundaries of international human rights, which, in almost all instances with the exception of asylum seekers, stop at the territorial border of the nation state.

The United Nations (UN) and the International Labour Organization (ILO) advocate a rights-based approach to managing temporary migration programs, which embodies the principle of progressive inclusion that derives from the basic idea of the universal protection of human rights. The core notion is that migrants should be included within a host state by progressively granting them, on the basis of length of residence, contribution or social connection, the rights enjoyed by citizens in that country. The legal principle of progressive inclusion also reflects the position that rights should cross borders and be available to exercise against every state (Farahat 2009, p. 702).

However, as Farahat cautions, this is not the only principle that operates in the field of international law when it comes to migrant workers. It is in tension with an older, and very potent, principle, which he calls the principle of congruence between a state's territory, authority and citizenry and to which I shall refer as the principle of state sovereignty. Farahat explains, "according to this principle, granting rights to non-citizens is always geared to the ideal image that the persons permanently living on a territory are – in reality – part of the citizenry of the state and subject to the state authority" (Ibid., p. 706).

The tension between these two principles shape how international human rights instruments treat migrant workers. When it comes to the right of migrants to enter into a



state's territory, the principle of state sovereignty is virtually untrammelled. According to the International Commission of Jurists, "as a general principle of international law, it is at the discretion of the State to grant entry to its territory to non-nationals" (Commission of International Jurists 2011, p. 43). There are, however, some limited exceptions to the principle of state sovereignty, the strongest of which is international refugee law, over entry to its territory.<sup>8</sup> Although the central obligation of receiving states is that of *non-refoulement* – a commitment not to return an asylum seeker to a situation that threatens life and freedom – this principle has been interpreted by the authoritative body, the Executive Committee of the United Nations High Commission on Rights (UNHCR), as including an obligation on states to admit asylum seekers at least on a temporary basis so that a refugee determination can take place (Thomas 2011, p. 412). However, states are under no obligation to facilitate the arrival of asylum seekers at national borders. In fact, many states impose restrictions (like visas and carrier obligations) that create hurdles for asylum seekers to exercise their Geneva Convention on Refugee Rights.

International human rights instruments provide extremely limited incursions on a state's right to exclude non-nationals. By contrast, human rights instruments place explicit limitations on a state's right to prohibit a national from leaving the state's territory. For example, the United Nations Declaration on Human Rights "recognizes the right of every person to leave any country, including his or her own, and the right of every person to return to her home country," although "there is no corresponding right to enter or to stay or work in a third country" (Farahat 2009, p. 703).

Nevertheless, the absence of an international right to enter a state's territory does not mean that there are no restrictions upon how a state exercises its sovereign right to control immigration. In exercising control over their borders, states must act in conformity with their international obligations. For example, even though the Racial Discrimination Convention permits states to make distinctions between citizens and non-citizens, it has been interpreted as prohibiting racial discrimination in immigration criteria (Thomas 2011, p. 412).<sup>9</sup>

When we turn to human rights instruments specifically designed to protect migrant workers, the conflict between the principle of progressive inclusion and that of state sovereignty is particularly sharp. In fact, as illustrated below, migrant workers' rights instruments "do not provide absolute rights for migrant workers. There are

restrictions on job mobility, social security, and family unification rights depending on the length of employment and residence” (Wickramasekara 2008, p. 1258). These restrictions on migrant workers’ rights are permitted because both the ILO and UN accept the principle of national sovereignty over immigration.

Since its founding in 1919, the ILO has been concerned about the protection of workers outside of their home country. During World War II, the problems of migrant workers were also given special mention in the Philadelphia Declaration. The ILO has two conventions specifically designed for migrant workers: Convention 97, *Migration for Employment (Revised)*, (1949), was adopted to deal with labour migration in post-war Europe, while Convention 143, *Migrant Workers (Supplementary Provisions)* (1975), was designed for the construction boom that occurred in the Middle East as money and migrants flowed to that region after the 1973 oil-price hikes. Convention 97, and its accompanying Recommendation, aims to regulate the entire process of migration from entry to return. It also spells out procedures for private and public recruitment, and it encourages countries to sign bilateral agreements governing labour migration. Most importantly, it established the principle of equal treatment with national workers for migrant workers (Article 6). However, it applies only to regularly admitted migrants. Convention 143 extended the principle of equal treatment of migrant workers and addressed the growing problem of undocumented or illegal migration. Significantly, neither convention was designed to address the problems specific to temporary migration programs.

Both conventions adopt a broad definition of migrant worker; a “migrant worker” means “a person who migrates or who has migrated from one country to another with a view to being employed other than on his own account.”<sup>10</sup> Convention 97 “requires that migrant workers be treated no less favorably than nationals in areas including pay, working hours, holidays with pay, apprenticeship and training, trade union membership and collective bargaining, and, with some limitations, social security” (International Labour Organization 2006, pp. 128-129) Convention 143 goes even further by requiring states to promote “equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms” for migrant workers and their families (Article 11).

However, there are some exceptions to the equality of treatment principle.

Both Convention 97 and Convention 143 exclude frontier workers, seamen and members of the liberal professions and artists who are given permission to enter for an undefined short period.<sup>11</sup> In addition, Convention 143 also excludes persons who enter specifically for purposes of training or education from the equal rights provided in Part II, although such workers are covered by other ILO conventions once they take up an employment relationship (Convention 143, Article 11(2) (d)). Migrant workers with special qualifications who go to a country to carry out specific short-term technical assignments (Convention 143, Article 11(2)(e)). Moreover, Convention 143 permits member states to restrict free choice of employment for lawfully resident migrant workers to a maximum of two years (Convention 143, Article 14(a)).

The ILO migrant worker conventions were the catalyst and model for the UN *Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (ICRMW).<sup>12</sup> Rather than establish new rights, the ICRMW offers a more precise interpretation of human rights in the case of migrants (Antoine Pécoud and Paul de Guchteneire, 2006, p. 246, Weissbrodt, 2008, p. 186). However, the shift from the tripartite institution of the ILO to the UN, which is controlled exclusively by states, explains the “more state-centered ethos” of the UN convention (Cholewinski 2006, p. 415). For example, Article 79 provides “nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admissions of migrant workers and members of their families” (ICRMW, Article 79).

The major employment-related protections of the ICRMW are in Part III, particularly Articles 25-27, which prescribe equality in wages and working conditions for authorized and unauthorized migrant and national workers, allow migrants to join unions, and call for migrant workers to receive benefits under social security systems to which they contribute or to receive contributions upon departure. Authorized immigrants are covered by additional rights in Part IV, which include the right to information about jobs abroad as well as a list of “equal treatment” goals, including freedom of movement in the host country, and equal access to employment services, public housing, and educational institutions.

However, Part IV also provides for a number of restrictions on the rights of a range of migrant workers with limited residence and work authorizations. Like Convention 143, it permits member states to restrict free choice of employment for

lawfully resident migrant workers to a maximum of two years (ICRMW, Article 52 (3)(a)). Moreover, the rights of certain specific categories of temporary migrants, such as seasonal workers, project-tied workers or specified employment workers, are curtailed explicitly in Part V of the ICRMW or remain entirely unprotected. Under Part V, seasonal workers are limited to the rights provided under Part IV “that can be applied to them by reason of their presence and work in the territory of the State of employment and that are compatible with their status in the State as seasonal workers, taking into account the fact that they are present in the State for only part of the year” (ICRMW, Article 59 (1)). Similarly, Part V excludes project-tied and specified-employment migrant workers from a range of rights in Part IV of the ICRMW, including free choice of employment (ICRMW, Article 61 and 62). Project-tied workers are also excluded from the rights in Articles 53-55 concerning equal treatment with national workers with respect to protection against dismissal and access to alternative employment in the event of loss or termination of work (ICRMW, Article 61(1)).

Although the migrant workers rights instruments purport to embrace the principle of equal treatment between migrant and national workers, they are perfectly compatible with the right of states to provide a range of different migrant statuses, some of which are very precarious, for workers they admit into their territory (Fudge 2012). What the instruments do is limit the length of time and the extent of the restrictions placed on migrant workers’ rights. They provide access to a tier of rights that depend upon type of occupation, the length of residency in the host country, and the type of immigration permit granted. International human rights instruments do not, in and of themselves, provide a basis for an inclusive cosmopolitan notion of citizenship; as Lydia Morris notes, they “offer no obvious means of addressing the different legal statuses occupied by noncitizens or the stratified nature of their rights” (Morris 2003, p. 79).

Not only do the international human rights instruments that are specifically designed for migrant workers contemplate a range of different migrant statuses that correspond to different employment-related and residence-related rights, the mechanisms for enforcing them are weak. Few states have ratified either of the ILO’s migrant workers conventions and even fewer have ratified the ICMWR.<sup>13</sup> The ILO’s migrant workers conventions provide, through the ILO’s general supervisory machinery, an individual-complaint mechanism; however, the sanctions that attach to successful complaints are of

the soft (shaming) rather than hard (penalty) variety (Rodgers, Swepston and Van Daele 2009). By contrast, even though the ICRMW contemplates that inter-state and individual complaint can be brought to the Committee established pursuant to the Convention, too few states (despite the low threshold of ten that was set) have made the relevant declarations to make the Committee competent for such monitoring (Noll 2010, 255).

The problem is that “human rights norms cannot . . . ease the spectre of the territorial border and the significance of citizenship and immigration status for both entitlement to, and the enjoyment of human rights” (Kesby 2012, p. 116). These limitations in human rights instruments for migrant workers call into question the utility of human rights discourse as a normative vocabulary and institutional assemblage for achieving improved working and living conditions for migrant workers. In their critique of the “ideology of temporary labour migration in the post-global era,” two legal scholars, Catherine Dauvergne and Sarah Marsden, argue that “rights solutions can only ever be partially successful because the condition of temporary migrant work is anchored in a fundamental subordination” which they identify as the “right of the state to exclude non-members as an aspect of sovereignty. This exclusion power undermines attempts to articulate rights claims for those with any type of temporary status, and reinforces a fundamental inequality between citizens and non-citizenship” (Dauvergne and Marsden 2012, p. 22). They invoke Hannah Arendt’s conception of citizenship as “the right to have rights” to illustrate the inability of rights claims to get to the root of the problem for migrant workers – their lack of citizenship (Ibid 23 citing Arendt 1951).

## **II. Citizenship, Human Rights and Migrant Workers**

It is important to explore Dauvergne and Marsden’s use of Arendt’s conception of citizenship to lodge a fundamental critique against human rights as an emancipatory normative discourse for migrant workers. Not only is their critique important in its own right, it exemplifies a strand of argumentation within political theory, and increasingly within legal scholarship, that challenges the very universality of human rights protection, typically drawing on the example of the stateless person or refugee, in order to problematize claims to an universal entitlement to human rights regardless of civic membership. The widely accepted point of departure of this debate on the “right to have rights” is Hannah Arendt’s *Origins of Totalitarianism* (Noll 2010, p. 242). What is

significant is how recent scholars had expanded the Arendt's critique of human rights that centred on the stateless to migrant workers, leading some like Dauvergne and Marsden, conclude that cosmopolitan or global citizenship is a better discourse than human rights for expressing the claims of migrant workers.

Referring to Arendt's 1958 book, *The Human Condition*, Dauvergne and Marsden claim that Arendt's contrast of "citizenship, not with non-citizenship, but with slavery" ... "could have been tailored to the condition of the temporary migrant worker" (Dauvergne and Marsden 2012, p. 24, Arendt 1958, p. 217). They quote Arendt's assertion that "the chief difference between slave and modern, free labour is not that the labourer possesses personal freedom – freedom of movement, economic activity, and personal inviolability – but that he is admitted to the political realm and full emancipa[tion] as a citizen" (Dauvergne and Marsden 2012, p. 24). They interpret Arendt, who follows Marx in this respect, as claiming that "free wage labour" is, in fact, a form of unfreedom since economic necessity requires human beings to sell their labour (power) in order to subsist. However, they claim that Arendt offers an additional conceptual insight for understanding the specific subordination of migrant workers. Here they refer to Arendt's analogy between the "labouring classes" prior to the abolition of the property requirement for voting rights and "resident aliens" (Ibid.). Building on Arendt's insight, Dauvergne and Marsden suggest that economic necessity compels people to become migrant workers who lack citizenship rights in the state in which they work. Thus, they conclude, "insofar as the main proxy for membership is the formulation of the worker as labour in a free market through an employment relationship, categorical unfreedom for the migrant worker is implied in the basic terms of the relationship" (Ibid.). Since unfreedom in the sense of exclusion from the political community of the nation state is a basic condition of the migrant worker, rights will only palliate, but not resolve, the essential problem. Invoking Arendt again, they claim that in the contemporary "post-global era, where the forces of globalization have become part of the backdrop to our social and political reality" citizenship must move into the global realm (Ibid., p. 25).

Are migrant workers unfree because they lack citizenship rights in the host country in which they are working? Martin Gibney (2009) describes non-citizens, who he calls, "precarious residents" as "a modern variant of the stateless men and women [who]

Hannah Arendt so eloquently described in the late 1940s in her work, *The Origins of Totalitarianism*.” He goes on to explain that “in *Origins*, Arendt described the stateless, a category which for her included refugees, as ‘the most symptomatic group in contemporary politics’ because their dire plight revealed the emptiness of human rights (what she called the Rights of Man) for those who lacked effective or formal membership in an actual nation state community” (Ibid., p. 3). While Gibney acknowledges these migrants “are rarely formally stateless and are, in many cases, not refugees,” the problem is that they “lack security, basic civil, political and economic rights, and opportunities in the countries to which they have migrated. Their day to day experience may involve a kind of statelessness in the sense of an effective absence from state protection that is linked to their being outside the country of the citizenship” (Ibid.).

Gibney is building on Arendt’s important insight that membership in a political community is critical to the enjoyment and exercise of rights in an international order based on state sovereignty over territory. Moreover, he considers the practical significance of citizenship. He is careful to distinguish citizenship as a form of social entitlement, which, in many (liberal democratic) countries has expanded to include residents, from citizenship as a legal status. As a legal status, citizenship is the formal status of membership in the state, or nationality as understood in international law, and typically encompasses the right to enter and to remain in the territory, access assistance and diplomatic protection, and the franchise (Macklin 2007). Gibney (2009, p.6) helpfully identifies what he characterizes as two major goods associated with citizenship as a legal status: voice, the right to participate in the political life of a community, and security, the right to entry and to remain in a territory and to seek consular services when abroad.

Although the concept of citizenship is frequently used in discussing the disadvantaged position of migrant workers, the problem with this term is that it encompasses too much. Citizenship is used to refer to both the nation state’s power to exclude migrants (either by refusing entry or via deportation) from its territory and the entitlements that accrue to migrants once they are working in the territory of the host state. Gibney uses the term “precarious residents” to refer to people living in a state in which they possess few social, political or economic rights, are highly vulnerable to deportation, and have little or no option for making secure their immigration status (Ibid.)

However, this term, too, lacks precision. While all residents who do not have either permanent residency status or citizenship are, to some extent, precarious, some migrant statuses are much more precarious than others (Morris 2003). The different migrant statuses are important in channeling migrant workers into different labour market locations. For example, entry to Canada as a high-skilled migrant worker provides a range of rights, such as family accompaniment and a clear path to permanent residence, that is simply not available to migrant who is admitted as a seasonal agricultural worker (Fudge and MacPhail 2009; Fudge 2012). The concept of migrant status allows for a range of different migrant statuses that differ in terms of rights and entitlements and, especially, the right to stay in the host country.

The concept of migrant status has the added benefit of enabling us to be more precise about the different modalities and degrees of unfreedom at play in the preceding discussion of migrant workers. Sociologists have developed the concept of unfree labour to describe migrant workers who are not free to circulate in the labour markets of the host countries in which they are working (Miles 1987; Satzewich 1991; Basok 2002). This understanding of unfree labour has its origins in Marx's central idea that the working class was formed as peasants (the paradigmatic agricultural workers) were detached from the land (Marx 2008). This detachment resulted in a dynamic, contradictory, double sense of freedom; workers were free of the land, in the sense that they no longer had customary rights to work it and subsist on it, and they were also free of the demands imposed by lords and masters who exercised direct proprietorial rights over their labour (Cohen 2006, p. 12).

Influenced by Hegel's association of the freedom of the subject with the ability to engage in the exchange of property (which included, for Hegel, her own productive capacity), Marx defined labour power as a commodity (Brass 2011). The freedom to circulate in the labour market and to sell their labour power to a number of different employers was the hallmark of the "free" labour of wage earners. But, in his dialectical understanding of labour, Marx highlighted the fundamental tension at the heart of capitalist social relations: that workers are free insofar as they have the capacity to sell their labour as a commodity, and unfree insofar as they are compelled to do so in order to sustain themselves. This tension is also at the heart of attempts to define and regulate unfreedom in contemporary labour markets (Strauss 2009). It conforms to the first sense



of how Arendt uses unfreedom in Dauvergne and Marsden's discussion of her work in the context of migrant workers. However, both they and Gibney also invoke the second sense that Arendt uses unfreedom, which is to capture the absence of political status of the slave in the Greek demos or the stateless person in the Westphalian international order. Because migrant workers lack political membership in the state in which they work they are unfree.

The problem with this invocation of Arendt's discussion of unfreedom in the context of migrant workers is that it over-eggs-the-pudding; the expansion of unfreedom to the political sphere simultaneously obscures, and diminishes, how unfreedom operates in labour markets. It also assumes that migrants ought to be recognized as members of every political community in which they reside.

There are many forms unfreedom – or labour control – in the labour market, ranging from chattel slavery, serfdom, debt bondage and contract labour – that can be placed along a continuum of exploitation (Skrivankova 2010). Dimensions of freedom/unfreedom include personal (including psychological) integrity, personal self-determination, political self-determination, the right to circulate in the labour market, the right to choose one's residence, and the right to seek legal redress. Each of these dimensions is shaped by both *de jure* and *de facto* factors. It is important to be precise about where a particular form of labour control falls along the continuum and whether the dimensions of unfreedom are *de jure* or *de facto* since how we characterize the problem of unfreedom will influence how we attempt to resolve it.

Temporary migrant workers who are part of managed migration programs are not free to circulate in labour markets in the host country in which they work. Many have *de jure* employment rights, but are *de facto* unable to exercise them. But, treating all migrant workers as a unified category of precarious residents obscures the extent to which different migrant statuses and different social locations endow migrants with different entitlements and capacities to exercise them.

Nor are migrant workers generally free to vote in host-country elections. However, the majority of them are not slaves; they can, despite hardship, return to their home countries and they can exercise their citizenship rights there. Not only does the analogy with slavery obscure the real problems with temporary migration regimes, it also denies the agency of migrant workers who, when faced with economic constraints in their home

countries, choose to cross borders in order to attempt to improve their (or their families') life prospects.

### *Disaggregating the Dimensions of Citizenship*

For Arendt, citizenship, understood as membership in a political community, was the essential basis for rights. Her experience of statelessness after World War II demonstrated to her that human rights are "impotent at the moment of their greatest need" (Kesby 2012, 1). The absence of a political community to guarantee human rights made such rights worse than hollow for Arendt. The plight of the stateless revealed the "perplexities" of human rights (Arendt 2004, p 290); reduced to the status of "being humans in general" and stripped of all the political and legal entitlements of citizenship, the stateless are rightless (Ibid., p. 302). According to Arendt (2004, p. 296-7), "we became aware of the existence of a right to have rights (and that means to live in a framework where one is judged by one's actions and opinions) and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights because of the new global political situation." The right to have rights is the right to be a citizen, which is to be a member of a political community.

This conception of the right to have rights is shaped by Arendt's republican notion of politics and her Aristotelian understanding of human nature. She saw humans as essentially political beings, deriving dignity from speech and action (Kesby 2012, p. 4; Schaap 2011, p. 26). This emphasis on politics helps to explain why Arendt saw the slaves of classical Greece, who could not participate in the demos of the polis, as exemplifying unfreedom. It also explains why she has little interest in the social (or private) sphere, which she regards as a place of inequality, and those who must toil in household or economy (Schaap 2011, p. 32). For Arendt, freedom, equality, and rights derived from republican citizenship.

It is useful to interrogate the conception of citizenship underpinning Arendt's conception of the right to have rights. The concept citizenship is generally agreed as having three distinct components: the political principle of democracy, the juridical status of legal personhood, and the social status of membership (Cohen 1999, p.248). Cohen makes the important observation that the three distinct components of citizenship "can

and do come into conflict, and that every historical synthesis entails a set of political choices and tradeoffs that tend to be forgotten once a conception becomes hegemonic” (Ibid., p. 248). She explains that the democratic conception of citizenship that puts political equality and participation at its centre is also particularizing and exclusionary; it is narrower than the second component of citizenship, which is the juridical conception. In this conception, the citizen is the legal person who is free to act by law and expect the law’s protection. This component is inherently universal, and, according to Cohen, “it is on this basis that transnational or global citizenship is at least conceivable” (Ibid., p. 249). However, the very universality of the juridical component tends to depoliticize and undermine solidarity. It is in tension not only with the democratic component, it also fits uneasily with the membership component, which like the democratic component is also exclusionary. Cohen emphasizes the “‘elective affinity’ between a strong democratic stress on citizenship as the self-rule of a sovereign demos (which presupposes membership) and a communitarian stress on belonging and identity” (Ibid., p. 250).

Cohen argues that the three elements of the citizenship principle appeared to map congruently onto each other in the terrain of the constitutional, national, territorial, and welfare state. Using T. H. Marshall’s conception of citizenship as the modern paradigm, Cohen claims that he foregrounded the juridical component but linked it to the principle of equality in ways that promoted social integration and inclusion. The underlying tension between juridical component and democratic component was easy to ignore so long as the “cultural identity of the demos [was] construed as a nation,” but, if, as Cohen suggests, attention shifts from Marshall’s focus on the substantive rights of citizenship ... to the formal dimension of membership’ then citizenship becomes an instrument of social closure and exclusion (Ibid., p. 253). The background presumption of this hegemonic or paradigmatic conception is that citizenship involves membership in a sovereign, territorial nation-state within a system of states. Here Arendt’s insight that “the attribution of exclusive territoriality and inviolable sovereignty to each nation state over internal matters contributed to the willingness of states to deprive non-citizens of basic rights and to threaten the rights of national minorities, even if they were citizens” is crucial (Ibid., p. 253).

However, Arendt’s solution to the problem of the exclusive notion of membership based on nationalism, which substitutes for it the idea of civic polities that grant

citizenship on legal criteria for national identity, misses what Cohen identifies as the crucial dilemma, viz., that the three components of citizenship are in essential tension and cannot be resolved at the same institutional level. According to Cohen, the democratic component of citizenship, not only the membership component, is in tension with the juridical conception even within a liberal constitutional democracy because the democratic conception requires the identification of a defined demos. It entails a distinction between members and non-members. Who belongs to the demos cannot be democratically determined.

For Cohen, there is no easy solution to this dilemma; “democracy cannot guarantee justice, but neither can moral justification appeal to some absolute truth that exists independently of consensus” (Cohen 1999, p. 265). However, it is possible to minimize the tensions between the components by disaggregating them and institutionalizing them at different levels. Cohen argues that “the starting point for a disaggregated model of citizenship and the imperative behind the articulation of universal rights of persons is the presence of large numbers of non-citizens in most countries and hence the impossibility of pretending that all of those subject to or affected by the law (given interdependency) are also its authors” (Ibid., p. 264). Thus, while membership in the demos must be limited in order to keep it active and vital, everyone has the right to citizenship understood as political participation somewhere. Migrant workers may not have the right to vote in their host state, but, in most cases, they enjoy the democratic political component of citizenship in their home state. The right to be a citizen somewhere, however, does not entail the right to be a citizen everywhere. Nor does it preclude the right of non-citizens to have their personhood respected everywhere. The democratic component of citizenship does not need to be coterminous with the juridical component in order to achieve just social relations.

The various components of citizenship need to be disaggregated and institutionalized at a number of different levels. The critical question is to distinguish “the set of rights that should belong to citizens as a members of a discrete polity, the rights associated with residence, and the rights that should belong to everyone” (Ibid., p. 262). Resident migrant workers should not only enjoy the same labour and employment rights as host state nationals (or citizens), they should have access to effective enforcement mechanisms. It may be best to institutionalize these rights and mechanisms in the host

state and, perhaps, at the sub-national level. Migrant workers might also need specialized expedited dispute resolution mechanisms to enforce their work related rights given the temporary nature of their residence. Portable provisions for social benefits and remittances may be important for migrant workers, and such provisions would need to be institutionalized beyond the nation state at the bilateral or transnational level. Justice for migrant workers might better be furthered by providing them with special rights that reflect their social location simultaneously in two states rather than providing them with the formal political rights available to citizens in host states (Ottonelli and Torresi 2012, pp. 220-221). Institutionalizing the different components at different levels would help to counteract the different modalities and degrees of unfreedom to which migrant workers are subjected.

International human rights discourses provide an important resource for deepening and disaggregating the juridical component of citizenship from the other two components. It is precisely the openness and indeterminacy of human rights discourse that makes human rights a momentum concept par excellence (Cohen 1999, 262). There is, contrary to what Dauvergne and Marsden claim, no ineluctable directionality or ideology to human rights (Dauvergne and Marsden 2012, pp.22-23). Human rights do not inevitably run up against the borders of nation states. Sometimes they are invoked by national courts and elected officials within the territory of the nation state (Benhabib 2007, p. 33). As Benhabib notes, “the paradoxes of the right to have rights are ameliorated by those who exercise their democratic-republican rights with or without the correct papers” (Ibid., p. 30).<sup>14</sup>

However, what is significant about human rights is not the fact that courts and other state institutions recognize them, but, rather, that subordinated groups actively claim them. It is helpful to see human rights as an activity and a practice, with human rights functioning as a generative principle with an emancipatory logic (Ingram 2008, p. 411). Human rights are a momentum concept, they are actively claimed by migrant workers, and it is the act of claiming, and not the claim’s recognition, that is important. Here Jacques Rancière’s critique of Arendt’s problematic in her discussion of the right to have rights is instructive.<sup>15</sup>

Rancière takes issue with Arendt’s understanding of the political subject – the predetermined citizen. Instead of seeing politics as “specific sphere, separated from the

realm of necessity,” politics is the contested border between the sphere of citizenship and political life and the sphere of private life (Rancière 2004, p. 303). Just at this border is constituted through contestation, for Rancière the political subject is fluid, constituted in a process of “subjectivization” (Ibid.). Andrew Schaap nicely captures how Rancière cuts through Arendt’s perplexity over the “Rights of Man”

Following Arendt’s analysis, the Rights of Man must belong either to “those who have no rights” (the human as such) or to “those who have rights” (citizens). Instead, Rancière suggests “the Rights of Man are the rights of those who have not the rights that they have and have the rights they have not” (Rancière 2004, 302). On this account the subject of human rights emerges through political action and speech that seeks to verify the existence of those rights that are inscribed within the self-understanding of the political community. In doing so, political subjects demonstrate the reality of both their *equality* as speaking animals and of their *inequality* within the social order (Schaap 2011, 34 emphasis in original).

The subject of human rights is neither the human of the Rights of Man nor the citizen of the political community, but the collective subject who invokes the rights inscribed in human rights instruments and challenges the gap between human and citizen (Kesby 2012, 124). It is by exploiting the interval between these statuses that the political subject is born. By challenging the common sense that excludes them from the political sphere, migrant workers enact a scene of dissensus, which brings the inequality of the social sphere into collision with the equality inscribed in human rights instruments (Rancière 2004, p. Kesby 2012, 126).<sup>16</sup>

What is important for Rancière is not, as it is for Arendt, that the claiming subject be recognized as an equal by the political community, but that the claim be asserted. As Schaap (2011, p. 35 emphasis in original) explains, “the political is constituted when those who are not qualified to participate in politics presume to act and speak *as if* they are.” The significance of international human rights for migrant workers is that they are taken up and used by migrant workers to assert their equality with citizens. On this reading, human rights are neither the emanations of powerful institutions that govern from above nor moral imperatives that can easily slide into paternalism; they are inscriptions that can be asserted to claim equality. “On this view,” according to James

Ingram (2008, p. 413), “the politics of human rights is a creative, democratic politics of contestation, challenging particular exclusions and inequalities in the name of the open-ended principle of equal freedom, which acquires its particular contours only through this contestation” (Ibid., 413). The meaning of human rights for migrant workers is not predetermined; it is shaped by the global political economy and contested by subaltern agents and their advocates.

## **Conclusion**

Migrant workers exemplify the limits of human rights instruments, which recognize the authority of nation states to control entrance to their territory, the competing demands and tensions between the different components of citizenship, *and* the need for a political understanding of the significance of human rights. In order to minimize the enduring tension between justice and democracy it helps to disaggregate the different components of citizenship. Human rights claims are a resource for expanding the juridical component of citizenship. Equal legal status is an important, albeit not sufficient, condition of full citizenship. Migrant workers and their advocates can use international human rights instruments to make political claims. However, it is unlikely that global citizenship will simply be a form of national citizenship writ large; instead, it is likely to require the institutionalization of a different set of rights at a range of different levels.

Human rights do not provide a royal road to justice. They play an “ambiguous role” in the contemporary political economy; “the uneven application of human rights law combined with existing social and economic inequalities between citizens and non-citizens” can result in a “proliferation of statuses regarding citizenship and human rights rather than an equalization of treatment for citizens and non-citizens” (Nash 2009, p.1079). But, the problem is that there is no easy alternative. Citizenship discourse, even if articulated at the global level, does not offer a more secure path to justice. The democratic component of citizenship can be corroded by money, membership can be narrowed by the resurgence of nationalistic populism, and Marshallian conceptions of social citizenship can be hollowed out by austerity-driven reregulation of labour markets and the contraction of social services. All solutions are contingent and reversible. What migrant workers do, however, is illustrate the need both to rethink our old paradigm of

citizenship, which was tethered to the nation state, and to embrace a variety of tools, including human rights, to contest the various of forms of unfreedom that subordinate workers in a globalized world.

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<sup>1</sup> I am using the term ‘migrant worker’ to refer to workers employed in Canada who hold temporary visas but who do not have Canadian citizenship or permanent residency (landed immigrant status).

<sup>2</sup> Low-skilled work refers to work performed by workers whose skills and qualifications are not recognized by the host or receiving country.

<sup>3</sup> In many countries (like Canada), low-skilled workers are not entitled to the same rights as high-skilled workers.

<sup>4</sup> I appreciate that this focus excludes undocumented or irregular migrant workers and that regular status can become irregular and that what may initially be temporary residence may become more permanent.

<sup>5</sup> For a discussion of irregular workers see Krause 2008; Frank 2011.

<sup>6</sup> Not all concepts are so neatly categorized; for example, democracy is likely to a momentum concept, whereas liberalism, because of the commitment to property rights, is not (Hoffman 2004, p. 12).

<sup>7</sup> Benhabib (2007, 28) recognizes that cosmopolitan conceptions of citizenship have more purchase in some regions than in other, contrasting the increasing cosmopolitanism of the EU with the “unilateral reassertion of sovereignty of the US.”

<sup>8</sup> There is a limited obligation on states to permit migrants to enter a state’s territory if it is necessary for purposes of family reunification. Convention Relating to the Status of Refugees, 189 U.N.T.S. 137(July 28, 1951) (the Refugee Convention). There is a limited obligation on states to permit migrants to enter a state’s territory if it is necessary for purposes of family reunification.

<sup>9</sup> The Human Rights Committee, which monitors the International Covenant of Civil and Political Rights, recognizes the rights of State parties to decide in principle who enters their borders, but requires that this right should not be exercised in a discriminatory manner.

<sup>10</sup> See Article 11 in each convention.

<sup>11</sup> See Article 11(2) (b) in both conventions.

<sup>12</sup> General Assembly Resolution 45/158 of 18 December 1990. The Convention came into effect on 1 July 2003. It took 13 years to receive the twenty ratifications required to bring the Convention into force.

<sup>13</sup> As of June 9, 2012, 49 countries had ratified Convention 97, while only 23 had ratified Convention 143. At the same time, there were only 34 signatories to the ICRMW, of which only two (Mexico and Turkey) were members of the OECD.

<sup>14</sup> There are several different interpretations of how to deal with the Arendt’s paradox of the right to have rights. Benhabib (2004) stresses the distinction between a moral and a legal right. Some commentators try to minimize the Aristotelian foundations of Arendt in order to provide a reading of the practice of human rights that is compatible with Rancière. For a discussion of these nuances see Kesby 2011, p. 120-121; Schaap 2012; Ingram 2008. Following Schaap, I keep the contrast between Rancière and Arendt stark.

<sup>15</sup> There is a growing and rich literature on Arendt’s right to have rights, and I have been selective in my reference to it. See Kesby 2012, Schaap 2011, Barbour 2012, Bohman 2012; Besson 2012 for references and discussions.

<sup>16</sup> Dissensus is the activity of highlighting the disagreement between the common sense world where equality and rights are denied with the claim by the excluded that they are equal and have rights, see Kesby 2012, p. 125; Rancière 2004, p. 305-6.