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Towards Democratic Citizenship for Temporary Migrant Workers: A Non-domination Approach

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Abstract

This thesis considers political exclusion of temporary migrant workers (TMWs) a challenge to the legitimacy of the liberal democratic constitutional state, asking whether, and on what basis, the right to political participation is necessary for protecting TMWs and for legitimising the state's coercive power over TMWs. It compares TMW programmes in Taiwan and Canada to demonstrate the common legal techniques of temporariness and alienage, which generate a particularly precarious and exploitable labour force. The temporariness and alienage of TMWs also mean TMWs are deemed irrelevant to the democratic legitimacy of the host state. To challenge this conventional view, this thesis critically engages with the neo-republican conception of freedom as non-domination to argue that the work relations of TMWs constitute private domination, which is conceptually connected with their exclusion from public participation. Moreover, the democratic boundary of the state should be drawn to include all who are present in the state's territory and who are subject to the entire legal system, regardless of their legal citizenship. These arguments anticipate a conception of democratic citizenship applicable to TMWs. This thesis thus distinguishes itself from the two major camps for TMW protection: rights and citizenship approaches. It also suggests that TMW programmes, as they are now, weaken the democratic legitimacy of the liberal, democratic, constitutional order.

Key words: temporary migrant workers, Taiwan, Canada, freedom as non-domination, Phillip Pettit, neo-republicanism, public domination, democratic legitimacy, citizenship

Contents

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Lists of Abbreviations

AGEE	Act of Gender Equality in Employment
CIC	Citizenship and Immigration Canada
CLA	Council of Labor Affairs
DOH	Department of Health
EI	Employment Insurance
ESDC	Employment and Social Development Canada
ESA	Employment Service Act
FDWP	Foreign Domestic Worker Programme
GFILC	Guide to Foreign and International Legal Citations
HACt	High Administrative Courts
ICRMW	UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
ILO	International Labour Organization
IMP	International Mobility Programme
IRPR	Immigration and Refugee Protection Regulations
LCP	Live-in Caregiver Programme
LI	Labour Insurance
LMIA	Labor Market Impact Assessment
LSA	Labour Standard Act
MENT	Migrants Empowerment Network in Taiwan
MOL	Ministry of Labor
NAFTA	North American Free Trade Agreement
NIEAP	Non-Immigrant Employment Authorization Program
NTD	New Taiwan Dollar
OSCOLA	Oxford Standard for the Citation of Legal Authorities
PRC	People's Republic of China
PS	Labour Pension Scheme
ROC	Republic of China
SACt	Supreme Administrative Court
SAWP	Seasonal Agricultural Worker Programme
SCt	Supreme Court
TFWs	temporary foreign workers
TMWs	temporary migrant workers
TFWP	Temporary Foreign Worker Programme
TIWA	Taiwan International Workers Association
WDA	Workforce Development Agency

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Notes for Citation Formats of Taiwanese Primary and Secondary Sources

This thesis adopts the Oxford Standard for the Citation Of Legal Authorities (OSCOLA) standard as the citation style. However, the OSCOLA does not offer full guidance on how foreign, non-English sources should be cited. Instead, it directs writers to consult the Guide to Foreign and International Legal Citations (GFILC), the citation system of the Journal of International Law and Politics of NYU School of Law. This thesis hence follows the GFILC when citing Taiwanese primary sources. However, for the sake of consistency of style between chapters, secondary sources in Mandarin Chinese, such as journal articles, books, government reports etc., will follow the format of OSCOLA. Several points require further clarification:

1. Titles of Sources—Titles in Chinese, Romanisation of titles and English translation

The title of sources originally in Mandarin Chinese, whether primary or secondary, will be provided in the following formats:

(1) where the source does not have an English title:
Romanised title in Hanyu Pinyin [Mandarin Chinese title] (English translation of Chinese title)

(2) where the source has an English title:
English Title

The GFILC requires the Chinese title of sources to be Romanised in Hanyu Pinyin. However, readers should be advised that there is no unified Romanised system in Taiwan. Most Taiwanese sources do not come with an official English translation either. It is thus inconvenient, if not impossible, for readers to identify and locate the Chinese sources with a Romanised title in Hanyu Pinyin. Therefore, for the sake of accuracy, in respect to the sources which have no formal English title, such as most laws and newspaper reports, the original Chinese title is added in parentheses for accuracy, following the Romanised title in Hanyu Pinyin as per the GFILC and an English translation of the title. This translation, which is mostly done by the author of this thesis, is only meant to help readers to better understand the text, rather than be taken as the official version of the title of the sources. On the other hand, cases where sources do offer an English title in addition to the Chinese one, such as dissertations and some journal articles, the title in Chinese and its Romanisation will not be provided, since the English title alone should be sufficient to locate the source accurately.

2. Publican and On-Line Databases of Primary Sources

The GFILC does not require primary source to be cited with a location in the official print or an official on-line URL. Meanwhile, Taiwan does not have a unified code system for statutes and regulations. It is therefore not possible to cite them with a unified code of the print version.

Statutes and regulations are published in several governmental gazettes, for instance, the Presidential Office Gazette (available at <http://www.president.gov.tw/Page/129>, accessed 12 Dec 2017), Executive Yuan Gazette or other gazettes (available at <https://gazette.nat.gov.tw/egFront/index.do>, accessed 12 Dec 2017). Some may take the gazettes to be the officially published version of laws. However, judicial cases and legal literature in Taiwan hardly cite gazettes to locate primary sources. On the other hand, there are governmental or commercial online legal databases easily accessible to the general public which provide rather comprehensive coverage of Taiwanese laws. Given that, this thesis does not provide the exact location in gazettes for statutes and regulations but explains the selection of databases for this research below. For laws and regulations that cannot not be found online, usually abolished provisions, a location in gazettes will be provided. However, please note that laws found in online statutory databases, even those maintained by government agencies, cannot be deemed the official version.

Some of these databases also provide English translations of the laws. Similarly, the translation is not official and should be read with caution. However, for the convenience of English readers, in addition to the format required by GFILC, this thesis also provides URLs for English translations of important primary sources in the databases, provided that a fixed URL is available.

Regarding selection of legal databases, this thesis mostly relies on the 'Laws & Regulations Database of the Republic of China' maintained by the Ministry of Justice ('MOJ'), available at <http://law.moj.gov.tw/> (accessed 12 December 2017). The MOJ database covers most primary sources discussed in this thesis. It also provides English translation for most statues and some regulations. In addition to the MOJ database, the Ministry of Labor maintains the database 'Law Sources of Retrieving System of Labor Laws and Regulations', available at <https://laws.mol.gov.tw/index.aspx> (accessed 12 December 2017). The MOL database is particularly useful in that it comprehensively covers labour regulations and administrative interpretations of labour laws which may not be available in the MOJ database. Both of the above databases enable readers to search or browse either in Chinese or English. Legislative history and congress debates about bills are searchable via the legal database of the Congress Library (Mandarin Chinese only) at <http://lis.ly.gov.tw/lglawc/lglawkm> (accessed 12

December 2017). Finally, decisions and judgments of courts are available at 'The Judicial Yuan of R.O.C. Law and Regulations Retrieving System' (Mandarin Chinese only) at <http://jirs.judicial.gov.tw/Index.htm> (accessed 12 December 2017). Other governmental or private databases are cited only when a source can be found in none of the above.

3. Secondary Sources

As explained, secondary sources in Chinese are cited as per OSCOLA; their titles are dealt with as explained above. However, this thesis avoids citing journal titles and publishers with abbreviations since widely recognisable abbreviations are not available in Taiwan.

Chapter 1
Introduction

There is nothing more
permanent than temporary
foreign workers.[1]

1. Statement of Research Question

This thesis asks the question of whether, and on what basis, the right to political participation is necessary for protecting temporary migrant workers (TMWs). This question is particularly important and challenging in the context of TMWs because the very purpose of TMW programme is to create a foreign labour force without gaining new citizens, which in turn keeps them precarious and disenfranchised. This thesis, instead, takes political exclusion of TMWs as a challenge to the legitimacy for the liberal democratic constitutional state. It develops a conception of democratic citizenship informed by (1) closely examining the legal construction of TMWs in Taiwan and Canada and (2) critically engaging with neo-republican theory of freedom as non-domination. The conception of democratic citizenship developed here will demand TMWs to be granted the right to political participation, regardless their lack of legal citizenship.

This thesis stands at the intersection of immigration regulations, labour laws and political theory and seeks for fruitful conversation between them. It contributes to present democratic citizenship as a useful theoretical tool for labour lawyers to go beyond protective regulations for TMWs and pose the legal construction of TMWs as a critical case for political theorists to deepen the theorisation of democratic legitimacy and citizenship.

To contextualise the research question, in the following, it is first indicated that the precariousness of TMWs is related to their dual identity as workers and foreigners. Two approaches are often suggested to transcend their status as foreigners: the human rights approach and the citizenship approach. Both could be described as an equality-based argument. That is, methodologically they draw on the moral or legal normative force of

[1] Martin Ruhs, 'The Potential of Temporary Migration Programmes in Future International Migration Policy' (2006) 145 International Labour Review 7.

equality. However, the force of equality is usually limited or problematic when it comes to the border regime of a sovereign state or involves non-citizens. I thus suggest an alternative angle to approach the special case of TMWs: a freedom-based argument and its implications for democratic legitimacy of the state. It will further be explained below that there are at least three conventional assumptions that prevent us from taking the freedom-based argument and its bearing on democratic citizenship of TMWs. They pose the challenges which this thesis will seek to meet.

Precariousness under Intersections of Laws

TMWs are introduced in many countries as a solution to labour shortages in sectors where working conditions are deemed unattractive to citizens. As TMWs face undesirable working conditions and insecure employment, they are among those who most need robust labour protection.[2] Yet many aspects of the vulnerability of TMWs are related to immigrant regulations that are specially designed to suit the labour market of the receiving state.[3] Beginning with the initial recruitment, hiring criteria[4] and employment restrictions that are inapplicable to citizens of the host society, are institutionalised in every aspect of TMW programmes. After entry, the temporary nature of their stay effectively forces them to forsake legal rights because access to justice simply takes too long to achieve.[5] In addition, the constant threat of dismissal and deportation are disciplinary tools which make TMWs obedient workers.[6] TMWs are moulded by immigration regulations which set forth the conditions of their entry and stay. These regulations in turn shape TMWs' employment relationships and decide their status and prospects in the labour market. In short, vulnerability of TMWs resides

[2] ILO, 'Towards a Fair Deal for Migrant Workers in the Global Economy. Report 92 VI' (2004) 8 <http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_PUBL_9221130436_EN/lang--en/index.htm> accessed 15 August 2018.

[3] Bridget Anderson, 'Migration, Immigration Controls and the Fashioning of Precarious Workers' (2010) 24 Work, Employment & Society 300, 306.

[4] While employers are generally banned from discriminating against workers or job seekers based on sex, race, age, or health conditions, among others, such principles of equal protection are generally inapplicable when recruiting TMWs. Employers are often allowed (or even forced) to select TMWs solely on the basis of sex, ethnicity, and nationality (typically a proxy of race). Kerry Preibisch, 'Pick-Your-Own Labor: Migrant Workers and Flexibility in Canadian Agriculture1' (2010) 44 International Migration Review 404, 416.

[5] Fay Faraday, 'Made in Canada: How the Law Constructs Migrant Workers' Insecurity' (Metcalf Foundation 2012) 93–94 <http://metcalffoundation.com/publications-resources/view/made-in-canada/> accessed 8 January 2015.

[6] Martin Ruhs and Bridget Anderson, *Who Needs Migrant Workers? : Labour Shortages, Immigration, and Public Policy* (OUP 2010) 29–30.

in the intersection of immigration and labour regulations. Addressing precariousness of TMWs, who possess the dual identity of workers and foreigners, might require not only implementing labour protections but also challenging the immigration powers of the sovereign state.[7]

The Human rights Based Approach and the Citizenship Approach

Given the special circumstances of dual identity of TMWs, there are two commonly suggested approaches which aim to transcend the negative impacts of the foreign status of TMWs: first, invoking human rights protection for TMWs, which extends the scope of right bearers beyond the boundary of the citizenry. Second, demanding legal citizenship for TMWs, which includes TMWs in the citizenry and thus overcomes whatever differences that legal citizenship might make.[8]

More specifically, the human-rights approach broadly refers to the efforts to strengthen TMWs' positions through international norms on no-less-favourable treatment, labour standards and rights and entitlements. For example, Conventions Nos. 97[9] and 143[10] of the International Labour Organization (ILO) are especially dedicated to protection of migrant workers, which importantly demand equal treatment in payments, social securities, working hours, union membership etc.[11] The UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) further provides a more detailed list of human rights for authorised and irregular migrant workers, including equal pay and the right to join unions.[12]

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[7] Bridget Anderson, *Us and Them? : The Dangerous Politics of Immigration Control* (OUP 2013) 87–89.

[8] I will provide a close examination of the rights-based approach (not in the context of human rights but at a theoretical level) and the citizenship approach in Chapter 6.

[9] ILO Convention (No. 97) concerning Migration for Employment (Revised 1949) (adopted 1 July 1949, enter into force 22 January 1952) 120 UNTS 71.

[10] ILO Convention (No. 143) Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (adopted 24 June 1975, enter into force 9 December 1978) 1120 UNTS 323.

[11] ILO Convention No. 97 art 6; ILO Convention No. 143 art 10; Ryszard Cholewinski, 'The Human and Labor Rights of Migrants: Visions of Equality' (2007) 22 Georgetown Immigration Law Journal 177, 189; Ryszard Cholewinski, 'International Labour Migration' in Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (CUP 2012) 287–88.

[12] International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, enter into force 1 July 2003) 2220 UNTS 3 arts 25, 26.

On the other hand, the citizenship approach refers to the position that permanent status must eventually be available to TMWs. Political or legal theorists who hold this view are virtually asking for elimination of TMW programmes. For instance, Walzer argues that it is unjust to exclude guest workers who have resided in a host country for a long time from the citizenry.[13] Dauvergne and Marsden strongly argue that in the absence of citizenship, TMWs are always kept in a slavery status in the Arendtian sense.[14]

The human rights approach affirms the merits of TMW programmes but attempts to remedy precariousness therein, while the citizenship approach negates the legitimacy of the programmes. Despite the difference, both approaches derive their force of argument from the principle of equality in the legal or moral sense. The human rights approach demands equal treatment based on the status of workers, whereas the citizenship approach anticipates equal treatment (at least in the long run) based on the status of citizens. The former takes the local workers as the norm to compare, whereas the latter relies on citizens as comparators.

However, the normative force of equality works most powerfully when two categories of people are deemed comparable. For the purpose of the immigration regime, foreigners are by default non-comparable to citizens. The language of equality is weak when confronting the reality of the border.[15] It is thus perhaps unsurprising, for example, that the deprivation of employment mobility for TMWs, which is usually operationalised through setting conditions governing admission to the country and restrictions on employment, is more tolerated under international labour rights instruments.[16] Moreover, the equal treatment between local and migrant workers becomes less relevant where TMWs are segmented into secondary economic sectors where almost no local workers participate (such as live-in caregivers).[17] On the other hand, the citizenship approach, while affirming equal status between citizens, necessarily

[13] Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books 1983) 60.

[14] Catherine Dauvergne and Sarah Marsden, 'The Ideology of Temporary Labour Migration in the Post-Global Era' (2014) 18 Citizenship Studies 224, 23–24.

[15] To be clear, the international human rights law demands equality for all persons, regardless citizenship status. Nonetheless, freedom of movement and right to political participation are two rights reserved for citizens. The argument that the principle of question is weak in front of the border line is based on the legal reality that, by default, freedom of movement, especially the right to entry, needs not be equally enjoyed by foreigners.

[16] E.g. ILO Convention No. 143 art 1 (4); ICRMW arts 61, 62.Convention No. 143 allows member states to place restrictions on migrant workers' freedom to select employment for two years. Under ICRMW, free choice of employment could be banned in the case of project-tied workers.

[17] Judy Fudge, 'Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers' (2012) 34 Comparative Labor Law & Policy Journal 95, 129.

implies that inferior treatment is permitted, or even required, prior to the point that foreigners obtain legal citizenship. It reinforces the hierarchies of citizens and non-citizens and naturalises subordination of the latter.[18]

Freedom-Based Argument

Given the limitations of the equality-based arguments, I propose a distinct perspective from which to approach the precariousness of TMWs: a freedom-based argument and its implications for democratic legitimacy of the polity. Even prior to closer investigation, it appears that TMWs are grossly unfree persons. They are subjected to layers of constraints, either imposed by the employer or by coercive laws. The question becomes, what justifies the severe restrictions imposed on TMWs. In a liberal democratic state, an intuitive way to justify legal restrictions is that the restrictions are democratically approved. Nonetheless, TMWs are by definition foreign and thus disfranchised. This situation of TMWs—having severe restrictions imposed on them without democratic voice, casts doubt on the democratic legitimacy of the political community. If we insist that people should have a say over severe restrictions on their freedom, should not TMWs also have a say about their circumstances? Following this argument, it anticipates that TMWs should be part of the democratic community of the host state. This freedom-based argument has the advantage of placing TMWs within the discourse of citizenship and the ambit of democracy without further strengthening the hierarchies between citizens and their Others.[19]

Nonetheless, admittedly, excluding TMWs from democratic participation is a common practice, and this is hardly considered as compromising the democratic legitimacy of the liberal democratic constitutional state. Indeed, almost all foreigners are politically excluded. Being free or not, TMWs are not taken to be the subjects to whom the host state owes democratic legitimacy. This conventional view that democratic participation is irreverent to TMWs is supported by three underlying assumptions.

First, it is assumed that an individual's vulnerability in the economic realm is not related to being politically isolated. Although abuse in the market and work relations necessitates remedies, they have no bearing on political inclusion and democratic participation, whatever the remedies might be. Emphasising political participation wrongly attributes the cause of the

[18] Donna Baines and Nandita Sharma, 'Migrant Workers as Non-Citizens: The Case against Citizenship as a Social Policy Concept' (2002) 69 Studies in Political Economy 75, 82–83.

[19] In Edward Said's Orientalism, the Other is the binary construction of the West; the Other is what the Western is not. Invoking Said's interpretation, by the citizens' Others, I mean TMWs are what the citizen is not. Edward W Said, *Orientalism* (Penguin Books India 2006) 39.

problem. It misses the point, at best, over-simplifies exploitation experienced by TMWs, at worse.[20]

Secondly, equal political participation may or may not contribute to one's free status in relation to the state or private agents. Freedom and democracy are not necessarily corelated. Traditionally, liberals reject the conceptual connection between democracy and freedom, and argue for the possibility that an authoritarian regime can protect or harm freedom as much as a democratic government.[21] Even at a common-sense level, many people would hold this separation of democracy and freedom true.

Finally, the self-governing people of a state should in principle be constituted by those who happen to possess the legal citizenship of the state. As Miller said, the right to vote in national elections is considered 'one of the defining features of citizenship, and it would be anomalous, therefore, to extend it to immigrants who have not yet acquired that status'.[22] This view also reflects a specific model of citizenship, the 'disaggregation' framework. It is said that the idea of citizenship contains four related but distinct dimensions: formal legal status (nationality), equal rights and benefits, active political participation, and identity.[23] While the dimension of rights may be detached from legal citizenship, extended to non-citizens, under the human rights regime and the liberal constitutional order, the dimension of democracy is still closely linked with legal status and identity.[24] Accordingly, democracy and legal citizenship are inseparable. This connection is also considered the basis for popular sovereignty.[25]

These three assumptions constitute the main theoretical challenges to the freedom-based argument defended in this thesis. I maintain that the neo-republican theory of freedom as non-domination will provide essential theoretical resources to develop the argument to meet the

[20] Judy Fudge, 'Making Claims for Migrant Workers: Human Rights and Citizenship' (2014) 18 Citizenship Studies 29, 38.

[21] Isaiah Berlin, 'Two Concepts of Liberty' in Henry Hardy (ed), *Liberty* (OUP 2002) 176. See discussion in Section 2.1 of Chapter 5.

[22] David Miller, *Strangers in Our Midst* (Harvard University Press 2016) 117.

[23] Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton University Press 2006) 18–20.

[24] E.g. Seyla Benhabib, 'Another Cosmopolitanism' in Robert Post (ed), *Another Cosmopolitanism: Hospitality, Sovereignty, and Democratic Iterations* (OUP 2006) 28–31; Saskia Sassen, 'Towards Post-National and Denationalized Citizenship' in Engin F Isin and Bryan S Turner (eds), *Handbook of Citizenship Studies* (SAGE Publications Ltd 2002). See discussion in Subsection 2.4.3 of Chapter 6.

[25] See discussion in Subsection 5.3 of Chapter 2 and Subsection 5.2 of Chapter 3.

challenges. The notion of domination, I argue, will be the linchpin to explain the proper connection between freedom, democracy and citizenship. Eventually, freedom as non-domination will sustain equal democratic participation of TMWs, both as a necessary means to resist extreme precariousness and as a necessary condition for the democratic legitimacy of the state.

Below I further explain the methodology of this thesis, clarify terminology and scope, and give a detailed preview of the outline of each chapter.

2. Methodology

In order to address the aforementioned research question, this dissertation is divided into two main steps: a case study and a subsequent theory development. In the following, I explicate the relationship between the method of 'case study' and the development of theory; explain reasons for case selection; and, finally, clarify the methodological approach to political theory.

Case Study and Theory Development: a Two-way Dialogue

This thesis is a project of normative evaluation of conditions of constitutional legitimacy in the special case of TMWs. It aims to develop a conception of democratic citizenship informed by freedom as non-domination which demands TMWs be granted rights to political participation. This theoretical project, however, starts with a case study. The obvious reason for this choice of method is that a case study contextualises the legal phenomenon that the theory developed here aims to capture, analyse and evaluate. More generally, case studies are important in formulation theory for two reasons. Firstly, concepts and principles of normative theories (either legal or political) should be, in Miller's words, 'fact-dependent'.[26] Case studies provide the necessary legal and sociological background for formulating and testing meaningful theoretical questions. The significance, implications, and limits of a theory can only be fully appreciated when the theory is understood in light of situations which nurture the theoretical endeavour in the first place.

[26] David Miller, 'Political Philosophy for Earthlings' in David Leopold and Marc Stears (eds), *Political theory: methods and approaches* (OUP 2008) 31.
As Miller further indicates, the 'validity [of concepts or principles] depends on the truth of some general empirical propositions about human beings and human societies, such that if these propositions were shown to be false, the concepts and principles in question would have to be modified or abandoned'. ibid.

Secondly, some disagreements about moral conceptions and evaluation are rooted in different readings of facts. For example, there is a debate about whether guest workers are exploited.[27] Stilz thinks not, from which I dissent. This disagreement is not only conceptual, but also empirical. Stilz argues that in the US context guest workers are those who are relatively well-off in their home countries. They have reasonable alternatives and enjoy easy exits if they are dissatisfied.[28] This reading of guest workers' circumstances is not accurate in my view, which will be further discussed in Chapters 4 and 6. However, my point here is that whereas normative principles should be tested against facts and cases, relevant facts are not self-evident. They need to be closely examined and debated too. The factual basis for the theoretical assumptions can thus be transparent and can be challenged as well. In this regard, the discussion in Chapters 2 and 3 (the case study) is also part of the effort to reveal my factual basis, which sheds light on the subsequent theoretical arguments.

The case study and theoretical evaluation are a two-way dialogue. Whereas theories must be tested against relevant phenomena and our intuitive judgment about them, the relevance and significance of phenomena are recognised through theories. Theories offer a perspective from which a pile of seemingly unrelated facts can be systematically understood so that a deeper view can be revealed.

Case Selection

This thesis selects the TMW programme in Taiwan as the major case and use similar programmes in Canada to supplement the finding. For the purpose of this project, the case study would be more useful if it could offer a typical case of TMW programmes. That is, the ideal case is one which shows institutional designs and characteristics of TMWs' legal status that are observable in similar programmes of other jurisdictions. Meanwhile, since the theoretical focus concerns democratic principles and legitimacy of the state, the case study would be sensible to focus on liberal democratic polities where democracy is honoured in the constitution and in practice. Taiwan is a useful choice under the above considerations.[29] Its guest worker programme exhibits many common features which can be found in similar programmes, especially in East Asia.

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[27] Since this issue is not directly related to the project of the thesis, it will not be discussed further. For the debate see Chapter 6 n 27.

[28] Anna Stilz, 'Guestworkers and Second Class Citizenship' (2010) 29 Policy and Society 295, 302.

[29] For a brief comparative analysis of temporary migrant worker programs in thirteen jurisdictions, see Ruth Levush and others, 'Guest Worker Programs' (February 2013) <http://www.loc.gov/law/help/guestworker/index.php> accessed 8 January 2015.

On the other hand, Canada is selected as a supplement since it is well-documented and conventionally considered as a model of best practice.[30] In addition, Canada in general has a less ethnic-centred immigration regime than Taiwan. This distinction potentially would help to generate meaningful observations: If well-administrated TMW programmes in a country with a liberal immigration regime, e.g. Canada, share similar power structures with TMW programmes within the strict policy framework in a country with more a restrictive immigration regime, e.g. Taiwan, then this might imply that the shared power structure is fundamental to TMW programmes. The theoretical arguments based on such observation are more likely to capture the logic underlying the schemes and thus have wider applicability.

The focus of the case study will be placed on the background, policy goals, and the function and impacts of the immigration regime in shaping work relations of TMWs. The Taiwanese case would be used to lay out the main features of power relations in a historical context. The review of the Canadian case is not meant to stand alone. However, it will be used to deepen and diversify the understanding of the phenomenon. Taken together, they demonstrate the legal techniques of temporariness and alienage. These two legal techniques further pose challenges to subsequent theory development in Chapters 4 to 6.

Methodological approach to Political Theory

Chapters 4 to 6 rely on methods of analytic normative political theory, specially republican theory, to develop the argument of this thesis. Normative political theory has been highly related to law, especially to constitutional law and constitutional theory, [31] offering a normative or evaluative critique of the phenomenon.[32] Analytical methods here widely refer to an argument-based approach which checks 'logical rigor, terminological precision, and clear exposition' of political conceptions, principles and theories.[33] I mostly rely on the internal criteria, such as logical coherence, to evaluate arguments. I also examine plausibility and desirability of conceptions and arguments by referring to our intuitive judgments about

[30] Jenna L Hennebry and Kerry Preibisch, 'A Model for Managed Migration? Re-Examining Best Practices in Canada's Seasonal Agricultural Worker Program: A Model for Managed Migration?' (2012) 50 International Migration e19, e20.

[31] John S Dryzek, Bonnie Honig and Anne Phillips, 'Overview of Political Theory' in Robert E Goodin (ed), *The Oxford Handbook of Political Science* (OUP 2009) 63.

[32] However, it is not without controversy. E.g. Christopher T Wonnell, 'Problems in the Application of Political Philosophy to Law' (1987) 86 Michigan Law Review 123.

[33] Christian List and Laura Valentini, 'The Methodology of Political Theory' in Herman Cappelen, Tamar Szabó Gendler and John Hawthorne (eds), *The Oxford Handbook of Philosophical Methodology* (OUP 2016) 1 <http://eprints.lse.ac.uk/65367/> accessed 13 August 2018.

related phenomena,[34] to relevant moral judgments, or to the proper relationships between relevant ideas.[35] To be more specific, I briefly explain below the relevant methods used in each chapter:

Chapter 4 tests the internal coherence of the conception of freedom as non-domination in the private realm against the paradigmatic examples, work relations and market relations. It points out the inconsistencies and contradictions to intuitions, revises the conception accordingly and further probes the implication of the revised view to the related conception of public domination.

Chapter 5 evaluates the best interpretation of public interests by referring to normative principles which are generally accepted by both republicans and liberals, such as anti-paternalism. It also assesses how different interpretations affect the proper relationship between democracy and freedom. It suggests a normative idea of democracy which could be best defended against opponents.

Finally, Chapter 6 infers a plausible democratic boundary based on the conception of freedom as non-domination. It also evaluates alternative views by referring to the internal consistency of the democratic principle.

Freedom as Non-domination

Finally, it will be helpful to explain my selection of the republican theory of freedom as non-domination to be the starting point. At first glance, republican freedom is an unlikely resort for TMWs. Traditionally at the core of republicanism is a theory of citizenship. It conceives of people firstly and primarily as citizens and insists that they should be so respected in all spheres of life. This uncompromised recognition of the status of citizens used to help resist against monarchy. Yet, in today's global context, the permanent focus on citizenship—the relation between the polity and its members—might appear archaic. It conveys an exclusionary gesture towards foreigners and is in tension with the gospel of the free market,

[34] This is the famous method of reflective equilibrium of Rawls, which seeks mutual fits between the theory or principles and judgments about a particular situation. In this context, reflective equilibrium refers to the process of deliberating back and forth between (a) moral judgments that one makes in a particular situation, and (b) moral principles that one supposes governs such judgements, together with other competing principles. The process involves constantly revising judgments and principles, and seeking a higher level of principle(s) that unifies conflicts between competing principles if necessary, until coherence is reached among all elements.
John Rawls, *A Theory of Justice* (Rev ed, Belknap Press of Harvard University Press 1999) 42–44; Norman Daniels, 'Reflective Equilibrium' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2013, 2013) <http://plato.stanford.edu/archives/win2013/entries/reflective-equilibrium/> accessed 6 January 2015; List and Valentini (n 32) 17.

[35] List and Valentini (n 32) 18.

in which individuals are mainly conceptualised as economic participants, such as consumers, or investors, rather than equal political participants.

However, freedom as non-domination is useful to analyse vulnerability of TMWs particularly because, as will be indicated in chapter 4, being a theory of citizenship, it shall reveal that private domination has an unbreakable basis in public domination. This perspective will help to posit TMWs' domination in the labour market, a seemingly mere economic affair, in the orbit of political legitimacy. In addition, republican freedom is a theory about problematic power imbalance with deep roots in social, economic and legal structures and institutions. Focusing on domination necessarily brings the underlying legal construction of private domination to the fore and calls for public action to address the power imbalance. It will also be argued in Chapter 6 that the focus of domination will help to build a new model of citizenship which includes TMWs as equal members of the democratic community.

3. Terminology

Before entering to the outline of this thesis, a few terminological remarks need to be clarified:

TMWs, TFWs and Low-skilled Workers

Following the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 'migrant worker' refers to 'a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.'[36] *Temporary* migrant workers refers to migrant workers whose 'residence and employment on the basis of a temporary work permit alone does not create an entitlement to stay permanently in the host country.'[37]

The terms 'temporary foreign workers' ('TFWs') and 'temporary foreign worker schemes' are also used, mostly in Chapters 2 and 3. They are understood mainly as legal terms. Their scope is defined by relevant positive laws in each jurisdiction. It is, however, worth noticing that the term 'foreign workers' could have a derogatory implication in the Taiwanese context.[38] For this reason, I generally avoid using 'TFWs' other than when referring to the legal sense or to indicate the negative meaning in the language.

[36] ICRMW art 2.

[37] Ruhs (n 1) 9.

[38] See discussion in Subsection 2.1 of Chapter 2.

This thesis takes only TMWs who perform low- or semi-skilled agricultural, industrial or domestic labour as the subject of study, because the thesis focuses on precariousness and domination experienced by TMWs during cross-border migration. This is not to say that skilled workers would not experience similar vulnerability. Indeed, skilled workers often face devaluation of qualifications when they migrate across borders; they might also be as insecure as low-skilled workers are under the immigration regime.[39] It is also true that the idea of 'skill' is socially constructed and could reinforce the economic reality that some skills are under-valued and invisible.[40]

However, these critiques should not present an obstacle for this thesis' reliance on the notion of 'low-skilled workers'. Taking low-skilled workers as the prototype for discussion does not exclude the possibility that the theoretical arguments could have wider implications and be applicable to high-skilled workers. Meanwhile, it will be observed in Chapter 2 and 3 that the states usually adopt discriminatory immigration policies towards foreign professionals and foreign workers,[41] which could further affect the terms and conditions that they are subject to in work. In other words, lower-skilled workers face legal restrictions which high-skilled workers would not endure. This establishes the lower-skilled workers as an independent and suitable category for analysis for the purpose of this thesis.

Democratic citizenship and Legal citizenship

The term 'citizenship' could refer to related but different dimensions as indicated above. To avoid confusion, I distinguish the terms 'democratic citizenship' from 'legal citizenship'. Legal citizenship refers to nationality, whereas democratic citizenship refers to the membership by which its holders are entitled to full political rights and political participation, most importantly, the rights to vote and to stand for elections. This thesis argues for democratic citizenship of TMWs, i.e, their equal political inclusion. This argument is distinct from the citizenship approach above which demands permanent status for TMWs.

In Chapter 6, I will argue that democratic citizenship is normatively severable from legal citizenship. In other words, legal citizenship needs not, and should not, be a prerequisite for equal political inclusion. However, this view is compatible with the scenario where the state

[39] Sandro Mezzadra and Brett Neilson, *Border as Method, Or, the Multiplication of Labor* (Duke University Press 2013) 141.

[40] Ruhs and Anderson (n 6) 19.

[41] For the general trend, see Ayelet Shachar, 'The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes' (2006) 81 New York University Law Review 101.

decides to grant legal citizenship to those who are entitled to democratic citizenship, so that the scope of the citizenry could correspond with the scope of the self-governing *demos*.

Democracy and Universal Suffrage

This thesis uses the term 'democracy' refers to the legal order which is imposed by the people who are subjected to the order directly or indirectly.[42] Suffrage and the right to vote, on the other hand, are only one of the institutions to realise democracy. They are a formal and irreplaceable channel of political participation, but by no means the only one. Chapter 5 will argue that democracy is necessary to freedom. To the extent that suffrage and the equal right to vote are essential mechanisms for any plausible conceptions of democracy, it could be inferred that the equal right to vote is also essential to freedom. Similarly, in Chapter 6, the argument that TMWs are entitled to equal democratic participation implies that TMWs should be granted political rights on a par with citizens, including the equal right to vote. For their close co-relation, some of expression in Chapters 5 and 6 may convey the (inaccurate) impression that democracy and the equal rights to vote or suffrage are used interchangeably. However, they are understood distinctly in this thesis.

4. Structure of the Thesis

Finally, this section provides an outline of the arguments in each chapter. This thesis is structured in two major parts: the case study and the theory development. The former probes the construction of TMWs, contextualising the phenomenon which will in turn raise theoretical challenges for the latter.

4.1 Case Study

Chapters 2 and 3 are devoted to the case study, starting with a close look at the TFW scheme in Taiwan and then proceeding to a comparative, supplemental, observation of Canada's scheme. Although the chapters are divided by jurisdictions for the sake of clarity, they are structured to cross-refer to each other along three major lines: (1) background and policy goals, (2) temporariness, and (3) alienage. The chapter 2 is deliberately detailed in background, scheme design and sources. This is meant to enrich the relatively small amount of English literature on legal analysis of foreign workers in Taiwan. To the contrary, since

[42] James Tully, 'The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy' (2002) 65 The Modern Law Review 204, 205.

Canadian TFW schemes have been well documented, chapter 3 is selective, more focused on highlighting the function of temporariness and alienage.

Chapter 2 observes that the TFW scheme in Taiwan is shaped by institutionalised biases and anxieties with regard to race, class and gender. The chapter traces the complex administration of border crossing to show how border control power is privatised in the hands of employers. It further examines temporariness and alienage within the TFW scheme. These features guide the policy goals of the TFW scheme and are also used as legal techniques to keep TMWs 'useful' yet precarious. They also constitute the ideological, institutional and theoretical obstacles to envisioning democratic citizenship for TMWs.

It is argued that temporariness of foreign workers, executed through forced rotation, is a legal fiction, but the fiction serves essential functions. It enables the employer to transfer business risks to TMWs, provides illusory security for the receiving society, and legitimises the substandard conditions of TMWs. On the other hand, alienage of TMWs subjects them to the immigration regime which directly or indirectly deprives them of fundamental rights of workers. Alienage reflects the pervasive anxieties of the host society towards TMWs, institutionalises their exclusion and, most importantly, reconciles the scheme of severe deprivation of rights and inequality with the liberal constitutional order.

Chapter 3 similarly interrogates the racial tension underlying the TFW scheme of Canada. The rise of TFW schemes is said to be an attempt to reinforce race, ethnic and class exclusion in a race-neutral immigration regime. The Canada TFW programme is embedded in a friendlier border regime towards TMWs, with less dense physical monitoring, more rationalised enforcement and fewer formalised discrimination than is the case in Taiwan. However, it is particularly illuminating that the more lenient scheme still shares the techniques of temporariness and alienage, sometimes in different forms. In addition to the phenomenon noted in the case of Taiwan, the Canadian scheme demonstrates that temporariness is often founded on a perpetual or sustained presence, and that alienage of TMWs renders them 'structurally necessary' for the employer. TMWs are irreplaceable by local workers, because, through the border control regime, they can be deprived of rights that local workers cannot be made to endure.

Taken together, the schemes are established on the dual exclusion of TMWs from equal participation in both political and economic spheres, institutionalised through the legal techniques of temporariness and alienage. This implies that the effort to challenge the basic logic of the TFW schemes has to target political exclusion and economic deprivation at the same time. And yet, to challenge political exclusion of TMWs, we will need theoretical tools to

overcome the three assumptions as posed in Section 1 and the obstacles of temporariness and alienage. The next three chapters embark on this task.

4.2 Theory Development

As stated, this thesis seeks to develop theoretical foundations for equal democratic inclusion of TMWs through engaging with the republican theory of freedom as non-domination. The theoretical project is proceeded with three major arguments; and each constitutes the main theme of chapters 4 to 6 respectively. First, private domination, properly understood, is conceptually connected with public domination in the sense that the latter conditions the former (Chapter 4). Second, equal democratic participation for all is a necessary and minimum condition to achieve non-domination in the public realm (Chapter 5). Third, the democratic boundary of the state should be drawn to include all who are present in the state territory and subject to the entire legal system, regardless of legal citizenship (Chapter 6). Each responds to one of the conventional assumptions presented in Section 1.

Chapter 4 responds to the first assumption of the lack of connection between economic vulnerability and political participation, by examining (1) the conception of domination and (2) the connection between public and private domination. Starting with Phillip Pettit's conception of freedom as non-domination, this chapter, however, argues that Pettit's conception of domination is insufficient in that it fails to fully recognise structural, systemic and extractive power. This insufficiency is demonstrated through a close examination on Pettit's treatment of unequal wealth and the free market. The treatment would in turn lead to a limited view of domination in work relations. Based on a critique of Pettit's conception, it will then be appropriate to re-appraise the connection between public domination and private domination. Namely, the imbalance between structural, systemic and extractive power among private agents necessarily has legal and institutional supports constructed through political struggle. The state has a significant role in shaping or relieving private domination. For this reason, public domination conditions private domination. This republican proposition anticipates that one has to be a free citizen to be a free worker. This chapter concludes with a portrait of power imbalance and domination experienced by TMWs.

Chapter 5 responds to the second assumption that freedom is irrelevant to democracy. It argues that equal political democratic participation is the necessary condition to obtain free status in relation to the state. The enquiry into the proper relation between freedom and democracy is fundamentally an inquiry into the republican theory of the free state, asking how the state which is expected to intervene in private relations to prevent domination could itself

not be a source of domination. This question is answered through a debate about the conception of arbitrary state power and how public interests are recognised. Contrasting two rival approaches, I suggest Pettit's control approach is the most plausible account. Nonetheless, the control approach is problematic in holding (1) an instrumentalist relationship between democracy and freedom and (2) an enclosed citizenship model which rejects democratic membership for non-citizens. Instead, Chapter 5 argues that democracy should perform an epistemic function in the control approach. From this perspective, freedom in the public realm necessitates equal democratic participation.

Finally, Chapter 6 embarks on the task of challenging the enclosed citizenship model. It responds to the third assumption that democratic citizenship is closely tied with legal citizenship. Chapter 6 is also an effort to overcome the theoretical obstacles posed by temporariness and alienage for democratic citizenship of TMWs. It starts by revisiting the debate between the rights-based approach and citizenship approaches on how TMWs should be protected. Despite their differences, they commonly attribute ethical significance to TMW's length of stay and take political participation for foreigners as marginal. Rejecting the two views commonly held by the rights-based and citizenship approaches, this chapter engages with the debate of the democratic boundary, namely who should constitute the self-governing people. Based on the idea of freedom as non-domination, it is contended that popular control of state power should be granted to all who are comprehensively dominated by the legal system of the state. The *demos*, understood as such, foresees a territory-sensitive yet time-insensitive boundary. It challenges the enclosed model of citizenship, loosens the tie between formal legal citizenship and political participation and undermines the role that time plays in determining democratic citizenship. Under this view, TMWs should be democratically included based on their dual status as workers and aliens, which leaves them exposed to a high degree of public domination. The arguments of Chapters 4 to 6, taken as a whole, support the freedom-based argument in responding to the precariousness of TMWs, as suggested in Section 1.

Chapter 7 summarises these arguments.

Chapter 2

The Temporary Foreign Worker Scheme in Taiwan

1. Introduction

Together, Chapters 2 and 3 provide the case study of the temporary foreign worker (TFW) scheme in Taiwan and Canada. The goal of the case study is twofold. On the one hand, it introduces the backgrounds, policy goals and legal techniques of the TFW schemes under the two jurisdictions to contextualise the theoretical discussion in Chapters 4 to 6. On the other, it highlights how immigration control shapes the work relations of TMWs to realise policy goals by legal techniques of temporariness and alienage.

With the examples of the cases of Taiwan and Canada, I argue that TFW schemes are organised around three themes. Firstly, TFW schemes contain irreconcilable policy goals which simultaneously perceive TMWs to be both potential threats and victims. The measures which aim to protect TMWs from falling victim to abuse is often compromised by the techniques that are used to guard against TMWs being alien threats to the host society or to local workers. In the context of Taiwan, it will be observed that the more the state seeks to control the flow and impacts of TMWs; the more power is granted to the private hands of the employers; and the less mobility and freedom workers enjoy, which, in turn, increases the vulnerability of these workers.

Secondly, the labour force under the TFW schemes is, by definition, temporary. However, temporariness is a legal fiction established on perpetuity; but the legal fiction serves real functions. Temporariness legitimises the subordinate status of TMWs and their exclusion from the host state. Poor circumstances and the deprivation of basic freedom and rights appear to be more bearable and acceptable if they are only temporary, a merely transitional phase, both in the worker's life and as a short-term respite in the host state. Temporariness constantly interrupts the continuity of workers' time—their seniority at work, qualifications for social insurance and links with the host political community. It also strengthens the employers' powers over workers, for it raises opportunities to reassess such workers at the end of each term.

Finally, TMWs are permanently subject to border control. They are confined by the precarious status of alienage, so that they can be both super flexible and yet immobile. A successful TMW scheme is expected to facilitate workers' mobility across borders, ensuring their timely arrival when they are needed and their timely repatriation when they are redundant. Cross-border mobility presents TMWs as being voluntary, free workers in pursuit of profitable opportunities. However, once they enter the host state, being foreign ensures that TMWs can be kept unfree, tied to a specific employer, a particular job, a location, or an economic sector. Being workers, TMWs should be treated equally to local workers; whereas, being foreigners, TMWs can be disparately treated. Their exclusion unavoidably reflects the self-understanding of the nation and the practical and symbolic values of legal citizenship.

In general, the Canadian TFW scheme is a friendlier model for low-waged foreign workers, since it grants less power to the employer, implants equal rather than minimum pay, allows more employment mobility, and provides channels for acquiring permanent status. However, structurally, it shares commonalities with the Taiwanese scheme, despite rather different legal and immigration backgrounds. It is the commonalities between the case of Taiwan and Canada that reveal the deeper realities about the guest worker programmes: TMWs must be confined in the legal fiction of temporariness and kept permanently as aliens in order to be a 'useful' labour force for the employers and the receiving state.

This chapter will be deliberately more detailed than the following chapter on Canada, because the Taiwanese TFW scheme is less well documented in English legal literature than is its Canadian counterpart. In Section 2, I demonstrate that race, class and gender biases are institutionalised through policy goal settings. The policy goals were set in such a way that they necessarily prioritise local workers and employers' interests, and they embody immigration anxiety against TMWs. It is only in recent years that TMWs have been perceived as the potential victims of exploitation. Section 3 traces the administrative papers of border crossing. It argues that the TMW scheme is a privatised and extended border control regime through which the employer is granted comprehensive power, together with the responsibility of control, over TMWs. Meanwhile, protective measures for TMWs usually fall into mere paperwork, which reinforces the *status quo* by acquiring TMWs' informed consent for them, rather than adjusting the power relations between parties.

Sections 4 and 5, respectively, analyse the techniques of temporariness and alienage that are imposed on TMWs. Temporariness is built on frequent forced rotation of TMWs through the limit on the maximum period of stay and compulsory intervals. Both measures prove that they fail to be temporary at all. Temporariness is merely fictional. However, this fiction

effectively makes TMWs more exploitable, their lives more precarious and causes them to be more flexible. It further justifies their subordinated status, for it is allegedly short-term. Finally, alienage casts TMWs into permanent border control. It portrays TMWs as an imagined, alien threat. To guard against the threat, it permits and naturalises measures which would not have been permissible had border-crossing not been involved: terminating the employment of sick workers, banning the employment mobility of workers, treating workers unequally. The constitutionality of alienage is upheld by the underlying theory of the trichotomy of rights, which envisions a specific vision of democratic community and relations among its members. The theory reveals that TFW schemes are established on the double exclusion of TMWs from the constitutional guarantees of equal economic and political participation. Later, in Chapters 4 to 6, I shall develop a theory of republican citizenship as partly being an effort and strategy to challenge this double exclusion.

2. Overview

Subsection 2.1 explains the class, racial and gender biases that are embedded in the TFW scheme through language usages. The next subsection contextualises the development and effects of the policy guidelines, under which TFWs are perceived to be both threats to, and burdens on, the host society.

2.1 Wai Lao: A Term of Class, Race and Gender Connotations

The Mandarin Chinese term '*Wai Lao*' (外勞), literally, foreign workers, refers specifically to temporary migrant workers who are introduced through the migrant worker scheme[1] for blue-collar, (allegedly) lower-skilled positions in Taiwan's contexts. It is a term laden with specific class, race and gender connotations, which are not necessarily conveyed through its English translation.

On its face value, the term *Wai Lao* could refer to any person who migrates across the state border to be employed outside his/her country of origin. However, in both the daily and official usage of language, *Wai Lao* is never meant to include foreigners employed in white-collar, professional positions outside the TFW scheme. The term is therefore more aptly

[1] They are categorised as 'Type B foreigners' for the purpose of recruitment and work permit controls. Gu Zhu Pin Gu Wai Guo Ren Xu Ke Ji Guan Li Ban Fa [Regulations on the Permission and Administration of the Employment of Foreign Workers] (雇主聘僱外國人許可及管理辦法) 2004 art 2.

understood, sometimes derogatorily, as guest workers. A salient example is that the statistics published by the Ministry of Labour (MOL) relating to the state of migrant workers introduced through the TFW scheme, are labelled '*Wai Ji Lao Gong* statistics' (literally, 'foreign workers'), while the statistics for non-nationals who work in Taiwan outside the TFW scheme are classified as '*Wai Guo Zhuan Ye Ren Yuan*' (literally, foreign professionals).[2] Not only do *Wai Ji Lao Gong* statistics include figures of 'missing status', the 'status of crimes committed',[3] and the 'passing rate of health examination',[4] but there is no similar data available regarding foreign professionals. Tactically, this shows that *Wai Lao* are deemed to be a threat to the host state, requiring a close monitoring of their physical presence, crime rates, and health. Another example is that on the website of the Workforce Development Agency, MOL (WDA), the information that addresses migrant workers in the TFW scheme is entitled 'for Foreign Workers', while information aimed at non-nationals outside the TFW scheme is found under the title 'for Foreign *Talents*' (or '*Wai Guo Ren Cai*', *emphasis* mine).[5]

The contrast in the language in these two examples reveals that the term *Wai Lao* bears an implicit connotation of class. The TFW scheme is currently only open to three categories of '3D' jobs. This term suggests that such job are dirty, dangerous and demeaning: (1) marine fishing, (2) household help and caregiving, and (3) construction and manufacturing.[6] Compensation, i.e., pay, for these positions is lower than, or only nominally equivalent to, the monthly minimum wage.[7] On the other hand, foreigners outside the TFW scheme represent the talents and skills that states strive to attract. They include the managers of foreign-invested business, college or foreign language teachers, athletes or coaches, missionaries, artists, performers, the crews of vessels, and professionals such as researchers.[8] In fact, in the

[2] MOL, 'Lao Dong Tong Ji Ming Ci [Labour Statistic Terminologies] (勞動統計名詞)' <https://statdb.mol.gov.tw/html/com/statnoun.htm> accessed 27 December 2017.

[3] MOL, 'Tong Ji Bao Gao [Statistic Reports] (統計報告)' (*MOL*, 28 June 2015) <https://www.mol.gov.tw%2fstatistics%2f2452%2f> accessed 26 December 2017.

[4] MOL, 'Tong Ji Zi Liao Ku Cha Xun [Labour Statistics Database Browser] (統計資料庫查詢)' <https://statfy.mol.gov.tw/statistic_DB.aspx> accessed 28 December 2017.

[5] 'Home Page' (*Workforce Development Agency*) <https://www.wda.gov.tw/en/Default.aspx?Create=1> accessed 27 December 2017. WDA is the major governmental agency in charge of foreign labour forces.

[6] Jiu Ye Fu Wu Fa [Employment Service Act] (就業服務法) 1992 art 46, para 1, subparas 8-11 (ESA).

[7] See discussion in 5.3.

[8] ESA art 46, para 1, subparas 1-7.

Taiwanese context, there is no generalised term which specifically refers to migrant workers outside the TFW scheme. The absence of a specific term reveals that only blue-collar migrant workers are taken as a homogenous group, assigned a problematised label.[9] *Wai Lao* are faceless labour units without individuality, temporary and fungible; but white-collar migrant workers are unique individuals who bear no assigned labels.

Perhaps it is not totally accurate to describe *Wai Lao* as faceless, because the term is reminiscent of racial and nationality stereotypes. Taiwan only successfully establishes TFW schemes with a few Southeast Asian countries, including Indonesia, the Philippines, Vietnam, and Thailand.[10] As Tseng points out, the politics of nationalism play a significant role in deciding on eligible countries for the TFW scheme.[11] These countries are selected, partly because their peoples are deemed 'distinguishable' from the Taiwanese and speak different tongues. *Wai Lao* are considered to be the Other, who would never fit into the (imagined) homogenous Han Chinese society.[12] Dissimilarities between 'they' and 'us' are essentialized and naturalised,[13] which, in turn, justifies the policy that *Wai Lao* are permanently temporary. Racial distinctions aid the success of TFW schemes, since the fundamental goal of the schemes is to prevent migrant workers from staying and mingling with locals. Visible racial tracts—skin and faces—become a handy grip over immigration control, since *Wai Lao* can easily be racially profiled by their sheer presence. Contrarily, workers from the People's Republic of China (PRC) were not allowed, despite being welcomed by employers due to their language

[9] For a similar observation, see Yung-Djong Shaw, 'Examining the Constitutionality of the Restrictions on Migrant Workers' Right to Change Employers: An Equal Protection Approach (從憲法角度檢視移工不得自由轉換雇主之相關規定：以平等權論述為核心)' (Master's Thesis, National Taiwan University 2007) 32 n 61. Also, Lucie Cheng points out that Taiwanese daily conversations only have language to describe two kinds of workers: *Ben Lao'* (domestic or local workers) *vis-à-vis Wai Lao* (foreign workers), while the more natural term, migrant workers, is not used. Foreign workers are deemed to be inherently temporary, exogenous, alien, as opposed to the local. Lucie Cheng, 'Transnational Labor, Citizenship and State-Building Ideology in Taiwan (跨國移工、臺灣建國意識與公民運動)' [2002] Taiwan: A Radical Quarterly in Social Studies 15, 30.

[10] A very small number of Malaysian and Mongolian nationals used to be introduced but the scheme did not last. MOL, 'Foreign Workers in Productive Industries and Social Welfare by Nationality' (*Monthly Bulletin of Foreign Workers as of End of November 2017*) <http://statdb.mol.gov.tw/html/mon/c12030.htm> accessed 27 December 2017.

[11] Yen-Fen Tseng, 'Expressing Nationalist Politics in Guestworker Prorgram: Taiwan's Recruitment of Foreign Labor (引進外籍勞工的國族政治)' [2004] Taiwanese Journal of Sociology 1, 23.

[12] The myth that Taiwanese society is composed of a homogenous Han Chinese society can only be sustained by erasing indigenous people's historical memories and cultural heritages. This imagined purity is a continuity of the society of ethnic Chinese, and it is a side product of Chinese nationalism ideology invented in nineteenth and twentieth centuries. Cheng (n 9) 27.

[13] Tseng (n 11) 43.

and (alleged) cultural similarities. PRC workers appear to be indistinguishable from the locals. Their language, culture and personal capitals increase the risk of their overstaying.[14]

Wai Lao replace the underclass status that used to be attributed to alien Others, such as indigenous people, under the colonisation of the Han Chinese.[15] Derogatory rhetoric and racist language are pervasive in public discourses, portraying migrant workers as being prone to spreading diseases,[16] to committing crimes, to engaging in sex work and lack of moralities.[17] On the other hand, stereotypes based on nationality are also deployed as a marketing strategy to 'position the product' (of human resources) from different countries,[18] such as Filipinos, are expressive but difficult to manage, Indonesians are loyal and suitable for arduous work, Vietnamese are similar to ethnic Chinese, but they tend to run away,[19] Thais are mild-mannered and less likely to raise disputes.[20]

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[14] ibid 29. This does not mean to say that the necessity to separate *Wai Lao* from nationals is the only reason that Chinese workers are excluded. Rather, Tseng's argument points out how the idea of a homogenous Us works.

[15] Pei-chia Lan, *Global Cinderellas: Migrant Domestics and Newly Rich Employers in Taiwan (跨國灰姑娘：當東南亞幫傭遇上臺灣新富家庭)* (5th edn, Flâneur Publishing House 2014) 97.

[16] Two random examples elaborate upon the attitude of some of the elites. They are certainly not alone in making stigmatising remarks: In 1991, Chang Po-Ya, then Minister of Department of Health, now President of Control Yuan, wrote an open letter, saying that Taiwan was facing an AIDS crisis due to, among others, 'surges of *Wai Lao*'. Cited from Huang Hans Tao-Ming and Chen Po-His, 'World AIDS Day, National Pedagogy and the Politics of Emotion in Taiwan (台灣國家愛滋教育之國族身體形構與情感政治：以世界愛滋病日為線索)' [2012] Cultural Studies 9, 15. Originally published in Po-Ya Chang, 'Dui Kang Ai Zi: Gao Quan Guo Gong Kai Shen [Fighting AIDS: An Open Letter to Fellow Citizens] (對抗愛滋：告全國公開信)' *Min Sheng Bao[The People's Livelihood Newspaper](民生報)* (Taiwan, 5 November 1991).

A journal article by Chun-Chig Chang, currently Vice President of the university, published in 2002, written by Chun-Chig Chang, , argued that: (1) *Wai Lao* have negative impacts on social order as they tend to be mentally unstable; (2) The introduction of *Wai Lao* frustrates Taiwan's effort to fight against the HIV, Dengue Fever and TB epidemics. However, Chang correlated *Wai Lao* with HIV only because he believed that Thailand was suffering from an HIV/AIDS epidemic; and a significant proportion of *Wai Lao* came from Thailand. Chun-Chig Chang, 'Wai Ji Lao Gong Dui Jing Ji She Hui Zheng Zhi Ceng Mian Ying Xiang Zhi Fen Xi [Analysing the Economic, Social and Political Impacts of Foreign Workers] (外籍勞工對經濟、社會、政治層面影響之分析)' [2002] Bulletin of Labour Research 257, 271–72.

[17] Lan (n 15) 98–102.

[18] Anne Loveband, 'Positioning the Product: Indonesian Migrant Women Workers in Taiwan' (2004) 34 Journal of Contemporary Asia 336, 339–340.

[19] Lan (n 15) 112.

[20] Ke-Jeng Lan and others, 'Wai Ji Lao Gong Zheng Yi Yang Tai Yu Chu Li Mo Shi Zhi Yan Jiu [Patterns and Processing Models of Foreign Workers' Labor Disputes](外籍勞工爭議樣態與處理模式之研究)'

Finally, *Wai Lao* is also a phenomenon of gender significance in some contexts. The biases against *Wai Lao* are sexualised: male *Wai Lao* are connected with violent crimes;[21] the female, on the other hand, are deemed to be sexualised bodies who require discipline, or who are helpless victims in need of rescue,[22] or they are potential sex workers.[23] In addition, the labour market for TFWs in Taiwan is sexually segmented. TFW schemes are divided into two sub-categories: *Wai Lao* for the social welfare sector (meaning foreign domestic workers, home caregivers and nursing) and for the productive industries. The absolute majority of social welfare *Wai Lao* are female, whereas male workers are the majority in the productive industries' sector. In terms of number, more than 99.4% of social welfare foreign workers are female; but male industrial foreign workers number two and half times the number of female workers.[24] Gender segmentation in the labour market is not a phenomenon unique to foreign

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(New Taipei City Government 2011) RG10012-0604 92–93 <http://www.grb.gov.tw/search/planDetail?id=2308062&docId=0> accessed 19 December 2017.
This research is itself an example of making a finding that is based on unconscious and unchallenged stereotypes of nationality. It observes that the nationality of migrant workers affects the outcome of labour disputes. It interviews employers, brokers, officials and non-governmental organizations; and then draws from their observations to conclude that different nationals take different approaches in labour disputes. For instance, it is reported that Thai and Indonesians, unlike Filipinos and Vietnamese, are more easy-going and they are hesitant in making a formal complaint, or in insisting on the intended solutions.

[21] Wen-Tsun Huang, 'Wai Lao Guan Li Wen Ti Yan Xi [Analysis on the Management Problems of Foreign Workers] (外勞管理問題研析)' (The National Police Agency of the Ministry of the Interior 2005) 8–10.
This is a report prepared by a police officer which embodies the unfounded, yet popular, link between the introduction of foreign workers and social disorder. This report first makes clear that, contrary to the popular impression, the criminal rate of foreign workers was far lower than that of nationals. The criminal rate among Taiwanese were about eight times higher; more than 90% of criminal offences committed by foreigners were thefts. However, contrary to the evidence, the report suggests three 'adverse effects' of foreign workers on the social order: (1) The locals feel antipathy towards the fact that some foreign workers are involved in prostitution (2) Women and children are frightened by foreign workers gathering and wandering around in public areas. (3) The society is shocked by foreign workers' collective protests. In other words, mere presence of foreign workers counts for a social order problem (frightening women and children), not to mention their fighting for their rights in public. The fact that reports of this kind are publicly funded reflects that the police department is in the mindset of solving the 'social problems' of foreign workers.

[22] Lan (n 15) 100, 154–56.

[23] The speech of legislators, Yung-Hsiung Wu and Yu-Cheng Cheng, during discussion of the Bill stage of the Employment Service Act is an example. Both opposed the introduction of foreign workers by saying that female workers, specifically home domestics, might become sex workers. 'Yuan Hui Ji Lu [Records of Yuan Sittings] (院會記錄)' (1992) 2533 Legislative Yuan Gazette 26, 59, 255.

[24] MOL, 'Foreign Workers in Productive Industries and Social Welfare by Industry' (*Monthly Bulletin of Labour Statistics: Foreign Workers*, 20 December 2017) <http://statdb.mol.gov.tw/html/mon/c12020.htm> accessed 12 December 2017.
Male social welfare foreign workers are 1,681 in number, but females 247,960, as of the end of November, 2017. There are 125,230 female foreign workers in the productive industries, while males numbered 299,780 as of the end of November, 2017.

workers. However, the gender disparities render the poor conditions of social welfare for foreign worker a concern of sexual equality. Just as female workers in the mainstream labour market are often under-valued,[25] women in the TFW schemes are even more systematically disadvantaged.[26] Home domestics are not protected by the Labour Standard Act (LSA).[27] Nor are their employers required to register them for Labour Insurance (LI).[28] Their ability to become pregnant has made them especially threatening to the host state and they are often thought of as being unfit to be productive workers.[29]

In short, *Wai Lao* is not a neutral, descriptive category. It is crafted by the anxieties of national identity, racial superiority and class and gender stereotypes. The race, class and gender connotations of *Wai Lao* have institutional bases. The underlying connotations both shape the features of the TFW scheme and are reinforced by practices of the scheme. In the following Subsection, I will look at the legal regulations which construct *Wai Lao*. It will be observed that while labour regulations are gradually proceeding towards equal and fuller protections for foreign workers, the discriminatory effects of immigration controls are taken for granted

[25] The average hourly earnings of female workers in the non-agriculture sectors was 85.5% of that of male worker as of 2015. Directorate-General of Budget, Accounting and Statistics, Executive Yuan R.O.C., *Gender at a Glance in R.O.C. (Taiwan) Version 2017* (2017) 6 <https://eng.stat.gov.tw/public/data/dgbas03/bs2/gender/eb/2017/2017E.pdf>.

[26] According to the MOL survey, as of June, 2016, the average monthly wage of social welfare Wai Lao is 19,643 NTD (about US$660), including overtime pay of 1,919 NTD (about US$65). They are usually required to be on standby around the clock. Their average daily working hours are more than 13 hours a day. Even if rest time between tasks and meal times are deducted, the average hours of 'actual' working are close to ten hours a day. About 34.5% of social welfare Wai Lao never have days-off. (The overtime paid are in fact the price for buying days-off.) About 2% of social welfare Wai Lao report that they have neither days-off nor overtime pay. MOL, 'Diao Cha Tong Ji Jie Guo Shi Yao Fen Xi [Summary of Statistical Analysis of Survey in 2016] (調查統計結果提要分析)' (*105 Nian Wai Ji Lao Gong Guan Li Ji Yun Yong Diao Cha [Survey on Management and Utilization of Foreign Workers in 2016] (105 年外籍勞工管理及運用調查)*) 35–36 <http://statdb.mol.gov.tw/html/svy05/0542analyze.pdf> accessed 27 December 2017.
In comparison, during the same survey period, in the case of industrial *Wai Lao*, the average monthly working hours were 210.7, including 33.3 hours of overtime; the average monthly days off were eight days; and the average monthly wage 25,440 NTD (about US$855), including the overtime pay of 4,010 NTD (about US$135). (ibid 10, 12.)

[27] Council of Labor Affairs, Executive Yuan, '87 Nian 12 Yue 31 Ri Tai 87 Lao Dong Yi Zi Di 059605 Hao Gong Gao [Tai-87-Lao-Do-Yi-Zi No. 059605 on 31th December 1998 Announcement] (87 年 12 月 31 日臺 87 勞動一字第 059605 號公告)' [1999] Executive Yuan Gazette 14, 14.

[28] Lao Gong Bao Xian Tiao Li [Labor Insurance Act] (勞工保險條例) 1958 art 6 as amended on 5 December 2012. English translation available at 'Labor Insurance Act' (*Laws & Regulations Database of the Republic of China*) <http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=N0050001> accessed 4 January 2018. See further discussion in Section 5.3.

[29] See discussion in Section 5.1.

(Section 3). The legal techniques of temporariness and alienage constrain foreign workers to be in a dependent, and dominated employment relation (Sections 4 and 5).

2.2 Policy Goals of TFW Schemes

Before entering institutional details, it helps to take a glance at the backgrounds to, and policy goals of, the schemes, which are explained with the basic logic of institutional design in the next section: the programme has contradictory pursuits and prioritises the interests of the employer and of local workers over foreigners'.

During the 1980s, by threatening to withdraw investment from Taiwan, businesses constantly urged the government to introduce a foreign labour force in response to the alleged labour shortage.[30] It was argued that the labour shortage was severe, which hampered the manufacturing and construction industries particularly.[31] The official figures suggested that the construction and manufacturing industries had a shortage of about 210,000 workers.[32] Moreover, unauthorised migrant workers were claimed to be a serious social problem that had been left uncontrolled.[33] A legal channel and the effective administration of foreign workers were therefore urgently needed.

On the other hand, foreign workers were perceived to be a problem as much as they were a solution in the policy discourses during the late 1980s. As explained, foreign workers were said to incur 'social costs', since they were unfoundedly related with crimes, social unrest, diseases and ethnic conflicts. In addition, opponents to the labour and economic policies pointed out that the lower-end foreign labour force would (1) worsen the working conditions of nationals (2) delay industry upgrading (3) substitute for vulnerable workers (for instance,

[30] Tseng (n 11) 16–17.

[31] Wei-yi Zhang, 'The Essence of the Taiwan Labour Regime-A Historical Institutionalism Review (臺灣勞動體制的剝削本質-歷史制度主義的觀點)' (Master's Thesis, Institute of Political Science, National Sun Yat-sen University 2012) 54.

[32] 'Wei Yuan Hui Ji Lu [Records of Committees] (委員會記錄)' (1990) 2435 Legislative Yuan Gazette 68, 74.

[33] Tzong-Shian Yu and Jin-Li Wang, *Tai Wan Ren Kou Bian Dong Yu Jing Ji Fa Zhan [Demographic Transition and Economic Development of Taiwan] (臺灣人口變動與經濟發展)* (Linking Publishing 2009) 200. However, it is not clear how severe the situation of unauthorised foreign workers was. The government estimated that the undocumented foreign workers in Taiwan numbered about 20,000 on the eve of the introduction of the TFW programme. 'Records of Committees' (n 32) 73.

indigenous people), [34] (4) enlarge the income gap, and (5) increase the burden on the infrastructure and social welfare system. [35]

Noticeably, the complaint about labour shortages in the late 1980s was emerging amid enhanced labour right protections. The LSA took effect in 1984, and it regulated the basic work conditions in the manufacturing industry. The Taiwanese labour force was super flexible before the LSA,[36] it has now gradually become less convenient for businesses to manoeuvre at will. Labour movements and protests started to break out more frequently during the loosened political atmosphere around the end of the half-century Martial-law era in 1987. Businesses considered the raised awareness of labour rights among workers and labour movements to be a threat to investments and economic growth.[37] Against this backdrop, the plea that there was a labour shortage was, in fact, a demand for flexible, inexpensive and submissive workers, rather than for capable workers. Guest workers appeared to be an apt solution to answer the demand. It can be similarly observed that there was a labour shortage in the Canadian context, studied in the next chapter, and that only foreign workers could meet the shortage, because they are immobile and unorganised (Section 5).

Pilot Programme

In 1989, Taiwan first allowed the introduction of temporary blue-collar migrant workers to respond to the mass labour demands of public infrastructure construction projects, under the

[34] Yu and Wang (n 33) 201.

[35] Hui-Lin Wu and Su-Wan Wang, 'The Trend in Foreign Workers, Economic Linkage and Policy in Taiwan (外籍勞工在臺灣的趨勢、經濟關聯與政策) [2001] Journal of Population Studies 49, 60.

[36] Shieh GS, 'Manufacturing Consent Under Market Despotism: The Piece-Rate System and the Formation of the Subjectivity of Taiwanese Workers (勞動力是什麼樣的商品？計件制與臺灣勞動者主體性之形塑)' (1994) 17 Taiwan: A Radical Quarterly in Social Studies 83, 93–10. Shieh's research provides a showcase for Taiwan's labour institutions before and around the 1990s. He points out that under the pervasive piece-rate system, workers were almost unprotected by the basic wage, paid days off and severance pay. And yet, workers accepted this unprotected condition because, among others, they thought that they were self-employed. They were 'free' to work or to take a rest; but it was simply nature that one did not get paid without production. They were independent, meaning not reliant on bosses to take care of their livelihood.
In other words, the piece-rate system planted the idea of ultra-flexibility into the collective mindset of Taiwanese workers before the 1990s.

[37] Zhang (n 31) 74; Cheng (n 9) 33.
Before democratization, the authoritarian KMT government had tightly controlled union or labour activities by infiltrating the unions, limiting union development through legal hurdles, and incorporating unions into its own political network. Hsueh-Yu Shara Peng, 'Study of the Labor Regime Controlled by Taiwan's KMT Government: Historical & Structural Factors Analysis during the Years 1949~1987 (國民黨政府勞動控制體制之探討：1949~1987 年間歷史與結構的因素)' [2006] Thought and Words: Journal of the Humanities and Social Science 179, 209–215.

pressure that the infrastructure might not be able to keep pace due to the labour shortage.[38] This pilot programme was an *ad hoc* measure. It allowed eligible contractors for the Fourteen Major Construction Projects to recruit foreign, male workers of or above twenty years old. Notice that the concerns of border and immigration control permeated the programme: Workers had to pass medical examinations and to be free from 'bad habits' or criminal records. Migrant workers under the programme were granted a work permit that was valid for one year, renewable for another. The work permit would be immediately invalidated, and the holder deported, if the permit holder got married, brought over their family to Taiwan, or became sick for more than one month, disturbed public order or morals, or worked for an employer who was not listed on the permit.[39] Many features of this experimental scheme were later transplanted to the formal foreign worker programmes, such as extra-territorial hiring, deprivation of employment mobility and no family reunions. Large-scale investments were also favoured in applying for TMWs.

Policy Guidelines

It was amidst these debates that the government established four major policy guidelines for Taiwan's foreign worker programmes: (1) the introduction of *Wai Lao* shall not have adverse impacts on nationals' rights to, and interests in, employment; (2) foreign workers shall not become permanent immigrants; (3) foreign workers shall not cause social unrest; and (4) the introduction of foreign workers shall not slow down industrial upgrading and economic development.[40] The guidelines were meant to respond to concerns relating to the introduction of *Wai Lao*; consequently, they incorporated the pervasive biases against the *Wai Lao*, and

[38] Mei-Chun Liu, 'A Critique from Marxist Political Economy on the "Cheap Foreign Labor" Discourse' (2000) 38 Taiwan: A Radical Quarterly in Social Studies 59, 63.

[39] Shi Si Xiang Zhong Yao Jian She Gong Cheng Ren Li Xu Qiu Yin Ying Cuo Shi Fang An [The Measures Responding to the Labour Demands of the Fourteen Major Construction Projects] (十四項重要建設工程人力需求因應措施方案) 1990 (Taiwan Provincial Government Gazette 89 Nian Chun Zi Issue 9) 9 art 2, para 4, subparas 5, 11, 12.

[40] From the available data I cannot trace the original source and date of the official announcement of the four major policy guidelines. However, they are often cited word-by-word as justifications for the TFW scheme in literature, in official documents, and in courts judgments over the past two decades. E.g. Ching-lung Tsay, 'Wai Ji Lao Gong Zheng Ce Zhong De Lao Gong Kao Liang [Labour Considerations in Foreign Worker Policies] (外籍勞工政策中的勞工考量)' in Joan C Lo (ed), *Tai Wan Wai Ji Lao Gong Yan Jiu [Studies on Foreign Workers in Taiwan] (臺灣外籍勞工研究)* (Institute of Economics, Academia Sinica 2007) 164; 'Hang Zheng Yuan Lao Gong Wei Yuan Hui Zhen Dui Wai Lao Yin Jin Xian Kuang Ji Ji Yan Sheng Wen Ti Wai Lao Yin Jin Dui Tai Wan Shi Ye Zhi Ying Xiang Ji Wai Lao Zheng Ce Zhi Wei Lai Fang Xiang Zhuan An Bao Gao [CLA's Report on the Introduction of Foreign Worker: the Current State, Problems, Impacts on Unemployment and Outlooks]行政院勞工委員會針對外勞引進現況及其衍生問題、外勞引進對臺灣失業之影響及外勞政策之未來方向專案報告' [2000] Legislative Yuan Gazette 311, 311–12.

expected that the *Wai Lao*'s rights be compromised.[41] Ideally, *Wai Lao* should be confined in the secondary labour market, taking on jobs that are not attractive to nationals.[42] They have to be healthy, well behaved and free from the costs of reproduction. Most importantly, *Wai Lao* have to be kept away from the immigration ladder. Notice that the foreign worker's protection and their needs are not among the overt concerns of the foreign worker policy.[43] Section 3 will trace the complex regulations established to follow the guidelines.

These policy guidelines are not entirely political, but they also assume legal formation functions. In 1992, the Employment Service Act (ESA) was enacted, which formally institutionalised the recruitment of both blue-collar foreign workers and white-collar foreign professionals.[44] Article 42 of the ESA (then Article 41) codifies most of the guidelines above, except for the second point, which precludes foreign workers from immigration.[45] This does

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[41] Chu Chen, 'Zhi Ji Yu Lao Dong Ren Quan Yu Lao Dong Jing Zheng Li Zhi Taiwan Wai Lao Zheng Ce [Migrant Worker Policies in Taiwan: Stemming from Labour Rights and Labour Competitiveness](植基於勞動人權與勞動競爭力之台灣外勞政策)' (Master's Thesis, National Sun Yat-sen University 2001) 35–43 <http://ndltd.ncl.edu.tw/cgi-bin/gs32/gsweb.cgi/ccd=btckx./record?r1=1&h1=0> accessed 29 April 2016.The author Chu Chen was the President of the Council of Labour Affairs. This thesis was completed during her office role as the Head of labour affairs. Her thesis showed that she was aware of the human rights infringements against migrant workers. Nevertheless, it was also under her lead that the government allowed employers to deduct board and catering fees from the wages of foreign workers, which substantially undermines the protection of the minimum wage.

[42] However, it was suggested that since 2000 relieving labour shortages has stopped being the primary aim. The focuses of the policy shifted towards the provision of inexpensive labour, which would lead to the replacement of domestic workers by foreign workers. In fact, access to foreign labour forces has been instrumental in various policy pursuits, such as encouraging investments, improving diplomatic relations with neighbouring countries, encouraging female employment, establishing a long-term care system. The goal of preventing domestic workers from being replaced is thus not always prioritised. Joseph S Lee, 'Wai Lao Zai Tai Wan Jing Ji Fa Zhan Guo Cheng Zhong Suo Ban Yan De Jiao Se [The Role of Foreign Workers in Economic Development of Taiwan] (外勞在臺灣經濟發展過程中所扮演的角色)' in Joan C Lo (ed), *Tai Wan Wai Ji Lao Gong Yan Jiu [Studies on Foreign Workers in Taiwan] (臺灣外籍勞工研究)* (Institute of Economics, Academia Sinica 2007) 34.

[43] Chu Chen reviewed 124 news reports about *Wai Lao* between 1997 and January 2001 in two of the major press outlets, finding that (1) 24 of them mentioned that *Wai Lao* had committed crimes, transmitted diseases and/or worked illegally; (2) 16 discussed unemployment and the negative economic impacts caused by *Wai Lao*; (3) 11 advocated the benefits of introducing *Wai Lao* for businesses; (5) 15 talked about administrative and cost issues, and, finally, (6) 11 of them touched upon *Wai Lao's* rights and legal protection. This review, despite not being comprehensive, showed that during the first decade of ESA, foreign workers' protection was an issue that was, relatively, outside of public concern. Chen (n 41) 2.

[44] ESA Chapter 5. The English translation of the latest ESA (as amended on 3 November 2016) is available at 'Employment Service Act' (*Laws & Regulations Database of the Republic of China*) <http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=N0090001> accessed 12 December 2017.

[45] ESA art 42. It states: 'For the purpose of protecting nationals' right to work, no employment of foreign worker may jeopardize nationals' opportunity in employment, their employment terms, economic development or social stability.' Translation is from 'Employment Service Act' (n 44).

not mean that the government has softened its stance on *Wai Lao's* immigration. To the contrary, throughout the legislative history and discourses surrounding these foreign workers, the significance of keeping the *Wai Lao* permanently temporary could not have been more emphasised. Article 42 does not mention it only because the law also regulates those higher-end international professionals, whose prolonged stay is welcomed. This slight, but deliberate, twist in legal formation foresees entrenched unequal treatment between the higher- and the lower-end of the migrants' scales.

Legally Required to Disfavour Foreign Workers

Article 42 of ESA enshrines the policies, 'nationals first': foreign workers to be supplementary to the local labour shortage. Their employment shall not adversely affect the prospects and conditions of domestic workers' employment. Courts and the government then take this to mean that foreign workers' prospects and working conditions must be compromised to favour those of the locals, if the employer cannot sustain both. According to the Supreme Court (SCt), the employer is therefore liable for cases of unfair dismissal if it dismisses local workers due to a recession without prior enquiry as to whether the workers are willing to take over the jobs of foreign workers with reasonable wages and conditions.[46] The employer does not have the discretion to keep foreign workers while dismissing nationals, provided that nationals hope to transfer. Moreover, the Council of Labor Affairs (CLA, the predecessor of the MOL)[47] suggested that it is an offence to pay foreign workers while owing wages to nationals during economic downturns. The employer is considered to have hired foreign workers at the cost of lower working conditions of the nationals, which will result in the rejection of future applications for employment permits.[48] The CLA opinion ignores that foreign workers earn their legal claims to wages, just as the local workers do. They should be equally treated in terms of payment, if not prioritised due to their weaker position in pursuing their employer

[46] *Zui Gao Fa Yuan Min Shi Pan Jue 94 Nian Du Tai Shang Zi Di 2339 Hao [2005 Tai-Shang-Zi No 2339 Civil Judgment] (最高法院民事判決 94 年度台上字第 2339 號)* (SCt) lines 100-110. The pinpointing refers to the line numbers shown on the web page of the legal database of the Judicial Yuan, available at 'The Judicial Yuan Law and Regulations Retrieving System (司法院法學資料檢索系統)' <http://jirs.judicial.gov.tw/Index.htm> accessed 14 January 2018 (Chinese only). The database collects decisions of SACt since 1998, and decisions of HACts since July 2000.

[47] The CLA has been restructured as the Ministry of Labour (MOL) since 17 February 2014. Xing Zheng Yuan Zu Zhi Fa [Organizational Act of the Executive Yuan] （行政院組織法） 2010 art 3. The English translation is available at <http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=A0010032> accessed 13 December 2017.

[48] CLA, 'Lao Zhi Xu Zi Di 0970503915 Hao Han [CLA Letter Lao-Zhi-Xu-Zi No. 0970503915] (勞職許字第 0970503915 號函)' (*Law Source Retrieving System of Labor Laws and Regulations*, 6 December 2008) <https://goo.gl/ZJtzZn> accessed 15 January 2018.

through legal means. However, under the law of nationals-always-being first, even the legally-earned wages of foreign workers may be compromised.

Finally, these guidelines also serve to justify the rules of the TFW scheme, particularly the disparity in relation to freedom of employment between foreigners and nationals. The Supreme Administrative Court (SACt) cited the guidelines to uphold a decision which denied work permits to foreigners outside the TFW scheme.[49] In the High Administrative Courts (HACt)[50] cases where employers were fined for hiring unauthorised foreign workers, these guidelines were cited to support the ruling that strict liability should apply to the offence.[51] In these cases, the guidelines are not essential to the Courts' legal reasoning, but their 'decorative' presence in the reasonings indicates that their legitimacy is widely acknowledged and systemically upheld. This represents the prevalent mind-set that foreign workers must be guest workers, whose interests will always be secondary to those of nationals. This appears natural and logical, but it also fundamentally contradicts, and outweighs, the legal formal equality between workers.[52]

Current State

Over the years, regulatory measures that aim to achieve these contradictory and discriminatory ends have developed into a hyper-regulatory regime over migrant workers' bodies, their mobility and labour. Despite complex administrative controls, the scale of the TMW schemes continues to grow. Starting from the 1992 small-scale pioneer project, the scheme now brings in approximately 671,000 workers as at October, 2017,[53] which is equal to

[49] This case involves a national of the United States applying for an 'open work permit' in order to seek employment in restaurants or KTVs. The plaintiff argued that he should be treated equally in terms of the right to work in Taiwan. *Zui Gao Hang Zheng Fa Yuan Pan Jue 92 Nian Du Pan Zi Di 1399 Hao [2003 Pan-Zi No 1399 Judgment] (最高行政法院判決 92 年度判字第 1399 號)* (SACt) line 119-32.

[50] Taiwan has a two-level administrative court system, with the Supreme Administrative Court as the highest Court, and the High Administrative Courts as the lower courts.

[51] *Tai Bei Gao Deng Hang Zheng Fa Yuan Pan Jue 105 Nian Du Su Zi Di 432 Hao [2016 Su-Zi No 432 Judgment] (臺北高等行政法院判決 105 年度訴字第 432 號) (Taipei HACt) line 130-38; Tai Bei Gao Deng Hang Zheng Fa Yuan Pan Jue 95 Nian Du Su Zi Di 3224 Hao [2006 Su-Zi No 3224 Judgment] (臺北高等行政法院判決 95 年度訴字第 3224 號) (Taipei HACt) line 325-33; Tai Bei Gao Deng Hang Zheng Fa Yuan Pan Jue 95 Nian Du Su Zi Di 151 Hao [2006 Su-Zi No 151 Judgment] (臺北高等行政法院判決 95 年度訴字第 151 號) (Taipei HACt) line 194-201; Gao Xiong Gao Deng Hang Zheng Fa Yuan Jian Yi Pan Jue 94 Nian Du Jian Zi Di 350 Hao [2005 Summary Judgment Jian-Zi No 350](高雄高等行政法院簡易判決 94 年度簡字第 350 號) (Kaohsiung HACt) line 160-69.*

[52] TMWs who are protected by LSA enjoy formal equal labour protection. See further discussion in Subsection 3.2.

[53] The total number of blue-collar foreign workers is available at MOL, 'Foreign Workers in Productive Industries and Social Welfare by Industry' (n 24).

5.6% of the Taiwanese labour force.[54] Foreign workers have become an indispensable part. of the labour force in two and half decades. Details of the regulatory mechanism will be spelled out in the next section.

3 Controlling Valves for Foreign Workers

This section traces the regulatory mechanisms controlling the influx of foreign workers. Subsection 3.1 focuses on strict limits on employers' access to the foreign labour force, while Subsection 3.2 follows up on the TFWs' route of border-crossing. Taken together, they present a picture of the power of dense immigration control and its privatisation to the hands of the employers, who control TFWs' daily life, both in- and outside work. As the flow of TFWs is over-regulated, TFWs' privacy, freedom and equality are under-protected.

Immigration control for TFWs is shown through administrative papers: recruitment permits, employment permits, visas, management plans, medical examinations, certified employment contracts, etc. These artefacts[55] appear to be dull, but they are the very apparatus of state power manoeuvred over foreign workers' mobility, bodies and labour. They are built, layer over layer, around mixed anxieties relating to foreign workers. TFWs are perceived to be a disturbance to the labour market, alien invaders of an otherwise 'healthy' body politics, potentially illegal immigrants seeking 'lucrative' opportunities, and also victims, vulnerable to abuse, exploitation and trafficking. It should be observed that the whole institution places much emphasis on preventing 'running-away', namely, foreign workers unilaterally leaving the job and losing contact, and yet running-away is the very product of this highly oppressive regime of unfree labour.

All participants in the TFW scheme must apply for permits, via their employer, to enter Taiwan and to work legally.[56] The lengthy process of labour migration starts with Taiwanese

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[54] The labour force of Taiwan in October, 2017, numbered about 11,825,000. 'National Statistics, Republic of China (Taiwan) - Labor Force' <http://eng.stat.gov.tw/np.asp?ctNode=1543> accessed 12 December 2017.

[55] By artifacts I refer to 'things intentionally made or produced for a particular purpose by individuals or groups, through social interaction.' Although artifacts are materials, their attributed and acknowledged meaning is more critical for them to be functional. Leah F Vosko and others, 'Introduction: liberating temporariness? Imaging alternatives to permanence as a Pathway for social inclusion' in Leah F Vosko, Valerie Preston and Robert Latham (eds), *Liberating temporariness?: migration, work, and citizenship in an age of insecurity* (McGill-Queen's University Press 2014) 11.

[56] ESA arts 43 and 68. Violating foreign workers will be fined between thirty and one hundred and fifty thousand NT dollars and will be deported. It is a serious administrative or even criminal offence for an employer to hire foreigners without a permit. The offender will be fined between one hundred

employers obtaining a recruitment permit and hiring workers extraterritorially, mostly through intermediaries. The hired TFW must then apply for a visa with a signed employment contract and proof of medical examination. Upon arrival, the TFWs are met with the requirement for employment and residence permits and more medical examinations. Meanwhile, the employer is entrusted with the responsibility of controlling the physical presence of the TFWs.

3.1 Access to Foreign Labour

Subsection 3.1 shows how strictly the intake of foreign labour is regulated. The flow of TMWs is controlled by restricting the occupations and industries which can access the TFW scheme.[57] The strict restriction, allegedly, are in place to prevent TMWs from replacing local workers and dragging down working conditions. However, in actuality, the quota of TMWs does not necessarily reflect the real labour shortage situation, but puts more emphasis on the poor conditions of the position and economic policy considerations.

Recruitment Permits: Eligible Applicants

The ESA prescribes two eligible categories and authorises the MOL to designate other qualified sectors for hiring TFWs.[58] Currently, eligible sectors include marine fishing, construction, manufacturing, animal slaughtering and caregiving.[59] Only positions with difficult working

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and fifty thousand and half a million NTD, and may even be imprisoned for up to three years if they have committed the same offence within five years. ibid arts 44 and 63.

[57] In the earlier decade, the influx of blue-collar TFWs was mainly controlled by upper caps on recruitment permits. The CLA would announce *ad hoc* schemes from time to time. These one-time schemes specify the eligible occupations, the deadline for applying for permits, and, most importantly, the total number of available permits. Permits were then distributed on a first-come-first-served basis to eligible applicants. The cap might rise or fall, depending on the political atmosphere, the government's economic strategies and diplomatic considerations. Gee San, 'A Study on Taiwan's Alien Worker Policy' (the National Science Council 2000) 3–7 <https://srda.sinica.edu.tw/group/sciitem/3/473> accessed 22 April 2016; Lan (n 15) 66–68.

[58] ESA art 46, para 1, subparas 8-11.

[59] Wai Guo Ren Cong Shi Jiu Ye Fu Wu Fa Di Si Shi Liu Tiao Di Yi Xiang Di Ba Kuan Zhi Di Shi Yi Kuan Gong Zuo Zi Ge Ji Shen Cha Biao Zhun [The Reviewing Standards and Employment Qualifications for Foreigners Engaging in the Jobs Specified in Subparagraphs 8 to 11, Paragraph 1 to Article 46 of the Employment Service Act] (外國人從事就業服務法第四十六條第一項第八款至第十一款工作資格及審查標準) 2017 art 3. Hereafter 'Reviewing Standards for Type-B Foreign Workers'. The English translation of the latest version is available at MOL, 'The Reviewing Standards and Employment Qualifications for Foreigners Engaging in the Jobs Specified in Items 8 to 11, Paragraph 1 to Article 46 of the Employment Service Act' (*Law Source Retrieving System of Labor Laws and Regulations*, 1 October 2007) <https://laws.mol.gov.tw/eng/EngContent.aspx?msgid=110> accessed 14 January 2017.

conditions can be filled by foreign labour. Taking the manufacturing industry, for instance, only jobs involving special production procedures (e.g., operations with abnormal temperatures, dust or toxic gas) or night shifts (between 10 pm and 6 am) are eligible to apply.[60] Another example, to hire a foreign live-in caregiver, the eligible employer has to be the spouse or close relatives of (1) patients who have grave mental or physical conditions, (2) patients being dependent on all-day care, or (3) the elderly who require nursing care as a result of medical assessment.[61]

Upper Limits of Recruitment Permits

The MOL sets different upper limits for the ratio of foreign to total workers on different industries, depending on factors such as the scale of the labour shortage, and the arduousness of the work. However, there has been criticism that the ratio is not set to reflect the true labour shortage situation. At best, it reflects how unpleasant, dirty and demanding the working conditions are.[62] Taking the manufacturing industries as an example, eligible industries are categorised into five classes; each is set a maximum foreign worker ratio, of 35%, 25%, 20%, 15%, and 10% respectively.[63] The more difficult the work conditions are, the higher the ratio is set.

Since the number of employed Taiwanese workers is the baseline from which to calculate the quota for hiring foreign workers, employers will need to acquire a larger body of local workers if they wish to enlarge the foreign labour force.[64] This is meant to protect the employment opportunities for nationals, but this design also necessarily favours large-scale manufacturers in acquiring a larger quota for foreign workers. It will be indicated below that TFWs are much less expensive, as they are not protected by equal pay. Large-scale employers are thus *de facto* 'subsidised' through easier access to inexpensive labour. The quota setting has also gradually turned into a policy tool for attracting investments. For instance, as part of the government's

[60] ibid art 13. For the detailed list of designated occupations, see annex 6 to the Reviewing Standards for Type-B Foreign Workers.

[61] Reviewing Standards for Type-B Foreign Workers art 22.

[62] Chih-Yu Cheng and Kuo-Jung Lin, 'Shi Shi 3K Chan Ye Wai Lao 5 Ji Zhi De Ying Xiang [Impacts of 3K-Industries-5-Classes Foreign Worker Scheme] (實施 3K 產業外勞 5 級制的影響)' Employment Security 102, 107.

[63] Reviewing Standards for Type-B Foreign Workers art 15-7 and annex 6.
Examples for each class are: Class A+ e.g. printing and dying or metal forging; Class A, e.g., shoes, clothes, rubber, frozen meats; Class B, e.g., textiles, leather, concrete products, automobile parts, recycling; Class C, e.g., meat processing, cooking oil, dairy products, basic chemical materials, medicine; Class D, e.g., integrated circuit manufacturing, computers, lighting equipment.

[64] ibid art 14-2.

effort to boost the economy by establishing free-trade ports, the cap on foreign workers in factories in the free-trade port areas is raised to 40% of the *anticipated* labour force.[65] That is, investors can hire foreign workers prior to, or simultaneously with, nationals, as long as the ratio of nationals and foreigners is maintained in the end. This development leads the scheme further astray from the alleged goal of avoiding nationals losing jobs

Additional Conditions for Recruitment Permits

In addition to quota setting, the MOL further makes detailed regulations regarding the eligibility of employers for recruitment permits.[66] To apply, the prospective employers of industrial foreign workers[67] first need to show that they have attempted, without success, to recruit nationals with fair and reasonable terms.[68] This aims to ensure that foreign workers are supplementary, but its execution is easily reduced to mere formality.[69]

Another important condition for applying for recruitment permits is that prospective employers must show good records of labour law compliance, including the setting up of sufficient pension funds, holding regular management-labour meetings, paying off outstanding Labour Insurance premiums or fines, being free from labour disputes or industrial actions. In addition, there should be no sign suggesting that the business is shirking. Finally, being part of efforts to protect foreign domestics, the first-time employer of a home assistant or caregiver is required to attend training sessions that are provided by the MOL or by non-governmental organizations, to enhance the employer's awareness of lawful practices.[70]

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[65] ibid art 14-1.

[66] Wai Guo Ren Pin Gu Xu Ke Ji Guan Li Ban Fa [Measures for Employment Permission and Supervision of Foreign Persons] (外國人聘僱許可及管理辦法) 1992.
The English translation of the Measures before their abolition (as amended on November 7 2001) is available at MOL, 'Measures for Employment Permission and Supervision of Foreign Persons' (*Law Source Retrieving System of Labor Laws and Regulations*, 27 July 1992) <https://laws.mol.gov.tw/Eng/FLAWDAT01.aspx?lsid=FL015130> accessed 13 December 2017.
The Measures were later replaced by the Regulations on the Permission and Administration of the Employment of Foreign Workers. The English translation of the latest Regulations (as amended on 06 July 2017) is available at 'Regulations on the Permission and Administration of the Employment of Foreign Workers' <http://laws.mol.gov.tw/Eng/FLAW/FLAWDAT0201.asp> accessed 19 November 2015.

[67] The term 'industrial foreign workers' refers to workers in economic sectors other than the caregiving sectors.

[68] Regulations on the Permission and Administration of the Employment of Foreign Workers art 12.

[69] Chen (n 41) 43.

[70] ESA art 48-1. This is also part of the anti-human trafficking efforts.

After Recruitment Permits

Obtaining a recruitment permit is the first step in the long procedure of recruiting foreign workers. The employer should facilitate foreign workers' entry within six months of obtaining the recruitment permit; otherwise, the permit will be void.[71]

3.2 Entry and Management of Foreign Workers

Subsection 3.2 follows the TMWs' route, showing how workers are subjected to the neo-liberalism-styled privatised power of compressive border control throughout the process of migration. Most administrative requirements are designed to control the whereabouts of workers. The institution *de facto* penalises employers if they fail to closely hold on to TMWs. Although some of the paperwork is created to protect TMWs from exploitation, these measures do little to adjust the power imbalances among workers, employers and intermediaries, say, by requiring employers to pay for transportation or to avoid using intermediaries. Rather, the paperwork re-confirms that the workers are disadvantaged, but with the appearance of the workers having given informed consent.

Visas: Reaffirming Financial Burdens of TMWs

In principle, foreign workers must be recruited extra-territorially.[72] This is a critical requirement which institutionalises intermediaries. It is not legally required that workers are recruited through brokers.[73] However, to fulfil extra-territorial hiring, employers and workers are institutionally driven to rely on intermediaries in order to seal the contract before foreign workers can touch Taiwanese soil and both parties can come into contact directly.

To obtain the entry visa, foreign workers must pass a medical examination and provide a police clearance certificate from their home country.[74] To confirm the existence of

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[71] Regulations on the Permission and Administration of the Employment of Foreign Workers art 25, para 2.

[72] ibid art 26.

[73] Since 2008, the MOL has propelled direct hiring in order to undermine the role of intermediaries, but in 2016 only about 10% of foreign workers were hired directly. Chiung-Li Sun, 'Zhi Pin Yi Cheng Chuan Xi Fu Wu Shi Ban Hai Mei Ying Yi Gong Quan Yi Bao Zhang Lao Tuan Pi Niu Bu [Direct Hiring: 10%, Respite Care Service: Not Yet, Unions Criticising Slow Progress of Migrant Worker Protection] (直聘一成 喘息服務試辦還沒影 移工權益保障 勞團批牛步)' *Events in Focus* (Taipei, 30 April 2017) <http://www.eventsinfocus.org/news/1724> accessed 17 January 2018.
Direct hiring is not comprehensively available to all foreign workers. This relies on the sending countries' policies and cooperation. For instance, in the case of Indonesian workers, only non-first-time home assistants and caregivers can be directly hired. On the other hand, direct hiring is available to all Vietnamese workers.

[74] Literally, the original language reads 'the certificate of good-mannered behaviour'.

employment, applicants must have a signed and verified copy of their employment contract.[75] In addition, to avoid intermediaries overcharging or misinforming foreign workers, it is mandatory to submit (1) a confirmation/acknowledgement of the wages and entry of the worker ('Wage Confirmation' hereafter), and, (2) an acknowledgement of the relevant provisions.[76] The Wage Confirmation is signed by the worker, the broker and the employer, and must be verified by officials in the worker's country of origin. The effort is to make the costs and expected income transparent to the foreign workers, which is a good step forward. Nevertheless, the Wage Confirmation[77] (further discussed, below) hardly addresses, but does recognise, that foreign workers are structurally made to bear the burden of administrative fees, intermediary charges, board and lodging[78] and international transportation, and to take out a loan for the expenses.

Post-Entry Inspection: Extensive Border Control

After foreign workers attain the visa and enter Taiwan, the employer must inform the local authority. This is meant to ensure that workers only work for the designated employer in the designated position. Both the employer and the foreign worker are obliged to report changes of address. The authority should then conduct an on-site inspection within three days of the workers' arrival. The inspection will require, among other things, (1) the Wage Confirmation, which enables the local authority to check the employer's payments, (2) the entry notification, which keeps trace of places where foreign workers live and work, and (3) the care and service plan, which maintain the minimum standard during the foreign workers' stay.[79] The employer

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[75] Foreign workers' employment contract must be a fixed-term contract. Otherwise, the contract would be due as the employer's recruitment permit expires. ESA art 46, para 3 as amended on 17 June 2015.

[76] Regulations on the Permission and Administration of the Employment of Foreign Workers art 27.

[77] The Wage Confirmation lists the amounts of the following items: (1) costs incurred before entering Taiwan, such as placement fees for the broker and administrative fees, (2) loans borrowed to pay for the fees and the interest on the loan, (3) the agreed wage, (4) the service fees chargeable by the broker/employment agency, (5) the mandatory deduction of the wage, including fees for the residence permit, premiums for National Health Insurance, Labour Insurance, and income tax, (6) agreed deductions, such as board and lodging fees, and (7) flight tickets. 'Wai Guo Ren Ru Guo Gong Zuo Fei Yong Ji Gong Zi Qie Jie Shu [Foreign Worker's Affidavit for Wage / Salary and Expenses Incurred before Entering the Republic of China for Employment] (外國人入國工作費用及工資切結書)' (*Workforce Development Agency, MOL*, 29 August 2016) <https://www.wda.gov.tw/News_Content.aspx?n=7FAD35606C219599&sms=C61580640A6257EF&s=E409F138644D5E24&Create=1> accessed 24 January 2018.

[78] See *infra* note 112 and surrounding texts for disputes about board and lodging fees.

[79] Regulations on the Permission and Administration of the Employment of Foreign Workers art 27-1.

should make arrangement for foreign workers to have a medical examination within three working days of entry (discussed below in Subsection 5.1).

Both the state and the employer have shown significant concern in overseeing the whereabouts of foreign workers. The employer is required to promptly report 'runaway' foreign workers,[80] namely, foreign workers who leave the job designated on the employment permit without permission. As soon as a foreign worker fails to show up for work without a cause and without being in touch, the employer may notify the police and the border control agency to look for the worker. In a case where a foreign worker is absent from work for three working days in a row, the employer must report this to the local government, the police and the border control agency within three days of the incident.[81] Failing the duty of prompt report will incur a fine.[82] The employment permit for the missing foreign worker will be cancelled immediately.[83] Nevertheless, note that reporting losing-contact foreign workers does not

[80] Foreign workers who leave the job and 'lose contacts' are derogatively called 'runaway *Wai Lao*' in the media. The Director-General of the National Immigration Agency, Jeff J.J. Yang, recently suggested that 'run-away' or 'illegal *Wai-Lao'* are unfriendly terms. Yang suggested that run-away *Wai-Lao* should be replaced by 'lost-contact migrant workers'. Hung-Ta Cheng, 'Bie Shui Tao Yi Wai Lao Le Yi Min Shu Chang Ying Chen Shi Lian Yi Gong ['Losing-Contact Migrant Worker' Should Replace 'Run-Away *Wai Lao*', Director-General of NIA Suggests] (別說「逃逸外勞」了 移民署長：應稱「失聯移工」)' *Liberty Times Net* (Taipei, 19 September 2017) <http://news.ltn.com.tw/news/life/breakingnews/2197919> accessed 23 January 2018.

Yang's comment was initiated by an unfortunate homicide incident: On 31st August, 2017, a 27-year-old Vietnamese, Nguyen Quoc Phi, was shot dead by a police officer, who fired nine times, leaving eighteen bullet holes in Nguyen's body. According to the press, the video provided by the police showed that an ambulance came to drive a civilian who was slightly injured in the incident to the hospital, while leaving Nguyen dying in a pool of blood. Nguyen was accused of attempting to steal a car. However, Nguyen's father said that Nguyen could not even drive. The police also suggested that Nguyen was attacking the officer. Yet, Nguyen was totally unarmed and nude when he was shot dead. Nguyen was an unauthorised foreign worker, who arrived Taiwan in 2013 to work for a screw manufacturer and left the workplace without permission two years later. This shocking incident was still under investigation in January 2018. However, the reaction such as 'a run-away *Wai Lao* deserved to be shot dead' was commonplace in the social media and in public discussions. Tseng Chih-Yun, 'Yi Xiang An Hun Qu Yue Nan Yi Gong Nguyen Quoc Phi Zhi Si [Requiem under a Foreign Sky: the Death of Vietnam Worker Nguyen Quoc Phi] (異鄉安魂曲越南移工阮國非之死)' *Mirror Media* (10 October 2017) <https://www.mirrormedia.mg/story/20171006pol009/> accessed 22 January 2018.

On the other hand, the term 'running away' better depicts the straitened circumstances under which foreign workers are 'squeezed out' of legal status. They are in the state of escaping from the debt, the employer, the broker and the state. 'Losing-contact' in a sense neutralises the oppressive structure behind running-away. Here I use both running away and lost contact because I tend to emphasise that the decision is made out of personal agency under structural pressure.

[81] ESA art 56 as promogulated on 25 December 2013.

[82] ibid art 68 as amended on 25 December 2013. The fine is between NTD 30,000 and 150,000 (approximately between USD 1,013 and 5,066).

[83] ibid art 73, para 1, subpara 3 as promulgated on 21 January 2002.

require supporting evidence; and a false report takes months to clear. The loose reporting procedure creates a loophole for deliberate false reporting by the employer or the employment agency in a rocky work relationship.[84]

The phenomenon of runaway workers is a consequence of the ban on the foreign worker's freedom to change employers.[85] Although no formal penalty is imposed on the employer when a foreign worker leaves the job without permission, the TFW scheme is so designed that employers and the broker/employment agency are keen to prevent TFWs from running-away. Until 2007, the employer was liable to pay the Employment Security Fee[86] even when the foreign worker lost contact. Now the liability of the Fee ceases as soon as the report of lost-contact foreigners is made.[87] However, the employer has to wait for six-months of police searching before being permitted to hire a replacement.[88] The waiting period is intentionally designed to urge the employer to prevent runaways.[89] It has *de focto* punitive effects on

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[84] The Taiwan International Workers Association (TIWA), one of the major advocacy NGOs for migrant workers in Taiwan, reports that several clients of TIWA were arrested by the police during disputes with their employer, because the employer falsely reported them as losing contact. Despite being an ill-intentioned false report, this cannot be written off unless the worker can prove that he/she did not lose touch for three consecutive working days. The foreign worker is not allowed to work or transfer to another employer before the record is cleared. However, the TIWA, an MOL official, responded that intentional false reports are minority cases, because 'most employers would not lie about it'. Chia Wei Liang, 'Yi Zhang Shen Qing Bu Yong Zheng Ju Gu Zhu Tong Bao Yi Gong Jiu Cheng Tao Pao Wai Lao [A Notice by Employer without Evidence, Migrant Workers Turned to 'Run-Away Wai Lao'] (一張申請、不用證據 雇主通報 移工就成「逃跑外勞」)' *Events in Focus* (Taipei, 17 January 2017) <http://www.eventsinfocus.org/news/1408> accessed 22 January 2018.

[85] See further discussion Subsection 5.2.

[86] The Employment Security Fee is the administrative fee levied by the employer for each foreign worker hired. The idea is that hiring foreign workers destabilises the domestic labour market. The employers of foreign workers should thus compensate for the related costs incurred to the society. The fee also increases the employer's hiring costs, which may discourage demands for TMWs. ESA art 55 as amended on 18 September 2015; see also legislative reasons of art 51 of ESA 1992, available at 'Jiu Ye Fu Wu Fa Tiao Wen Yi Dong Ji Li You [ESA 1992 Legislative Reasons] (就業服務法條文異動及理由)' (*Legislative Yuan Legal System*, 17 April 1992) <https://goo.gl/syUn4F> accessed 16 January 2018. For industrial foreign workers, the monthly fee is between NTD 1,900 and 3,000 (approximately 65-100 US$) per person. Purchasing extra quota will increase the monthly fee to NTD 5,000-9,400 (approximately 168-316 US$) per person. MOL, 'Lao Dong Fa Guan Zi Di 10505025441 Hao Ling [MOL Decree Lao-Dong-Fa-Guan-Zi No. 10505025441] (勞動發管字第 10505025441 號令)' (*Law Source Retrieving System of Labor Laws and Regulations*, 15 March 2016) <https://goo.gl/aE8JoR> accessed 16 January 2018.

[87] ESA art 55.

[88] Regulations on the Permission and Administration of the Employment of Foreign Workers art 17-1 as promulgated on 24 December 2007. The locking period for the employer of home caregiver is reduced to three months.

[89] See discussion in the text that accompanies note 227.

employers who heavily rely on a foreign labour force, especially the employers of home caregivers. For the private employment agents, the number of lost-contact foreign workers who are under their management[90] is part of their performance assessment. The number affects the renewal of the agency's licence, [91] not to mention its market reputation.

Employers and employment agencies are thus institutionally motivated to avoid runaways. Ideally, this should be achieved through improving their working conditions; and yet, in reality, closely monitoring the physical presence of a foreign worker is the typical approach, e.g., through disciplining foreign workers' daily activities, isolating them from contacting other foreign workers, etc.[92] In fact, the entire society is encouraged to mind the legal status of the foreign worker and to turn runaways in. Monetary rewards are granted to people who report lot-contact or unauthorised foreign workers, their hirers and brokers.[93] The rewards stimulate unfounded reports and encourage racial profiling.[94]

Passport Detention and Forced Saving

Two common practices used to control foreign workers are the detention of foreign workers' important documents, such as their passports and permits, and compulsory 'saving', namely, withholding part of their wage until the contract term expires. In 1994, during the earlier decade of the TFW scheme, the Bureau of Employment and Vocational Training[95] even publicly

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[90] Employment agencies also provide foreign worker management services, see discussion around the text of note 107.

[91] Regulations on the Permission and Administration of the Employment of Foreign Workers art 15-1 as amended on 8 October 2014.

[92] These measures are possible particularly because most employers provide accommodation for foreign workers, which will be further discussed in texts around note 107.

[93] The rewards are paid from the fund arising from the Employment Security Fee. A successful case of reporting lost-contact with foreign workers will be rewarded with between NTD 5,000 and NTD 20,000. Reporting the hirer or broker of runaways will result in a reward of between NTD 20,000 and 70,000. Rewards vary depending on the number of unauthorised foreign workers. Min Zhong Jian Ju Wei Fan Jiu Ye Fu Wu Fa Xiang Guan Gui Ding Jiang Li Jin Zhi Gei Yao Dian [Guidelines for Issuing Reward for Whistleblowing against Violation of the Employment Services Act] (民眾檢舉違反就業服務法相關規定獎勵金支給要點) 2015 Table.

[94] Cases of runaway reports increased by 15% after the rewards were raised in 2015. Places where more new immigrants gather are particularly targeted by anonymous reporters. Wu Hsiang Yuen, 'Ju Fa Tao Pao Wai Lao Jiang Li Da Wan Yuan Zao Jiu Yi Qun Luan Qiang Da Niao De Zhi Ye Jian Ju Ren [Turinng in Runaways as a Vocation: Rewards of up to NTD 70,000 Cause Shots in the Dark] (舉發逃跑外勞獎勵達 7 萬元 造就一群「亂槍打鳥」的職業檢舉人)' *The News Lens* (17 October 2015) <https://www.thenewslens.com/article/26702> accessed 25 January 2018.

[95] The predecessor of the WDA, MOL. It is the major agency in charge of foreign worker affairs.

advocated passport detention and compulsory saving[96] as means to deter TFWs from running-away.

The ESA prohibits the employer or employment agent from detaining passports, residence permits and the property of foreign workers against foreign workers' will.[97] However, this rule can easily be circumvented by making TMWs sign a written consent in advance, entrusting the employer or agency to hold the documents on their behalf.[98]

[96] Ku Yu-Ling, 'The Condition of Freedom： A Case Study of a Homicidal Vietnamese and An Inquiry into The Situation of Migrant Domestics in Taiwan (自由的條件：從越傭殺人案看台灣家務移工的處境)' (Thesis, National Chiao Tung University 2009) 140–41.
In addition to the forced saving and the detention of passports, the Bureau also proposed collecting a deposit of NTD 20,000 from foreign workers. Should the foreign worker run away, the deposit would be used to compensate for the employer's 'loss'. This suggestion has never been implemented.
Even now, as late as 2017, collecting an entry deposit from foreign workers to deter their running away is still proposed by a WDA commissioned research report. The report is not an official MOL policy stance. However, this example shows that the idea of binding foreign workers with financial stress and debts as an antidote against runaways has never been dispelled. Sandy Yu-Lan Yeh, 'Fang Zhi Wai Ji Lao Gong Hang Zong Bu Ming Dui Ce Yan Jiu Ji Hua [Study on Preventing Foreign Workers from Losing Contact] (防制外籍勞工行蹤不明對策研究計劃)' (the WDA, MOL 2017) 169 <https://goo.gl/PbAoeS> accessed 21 January 2018.

[97] ESA arts 54, 57. The penalty is the abolition of the employer's recruitment and hiring permits. ibid art 72.

[98] CLA, 'Lao Zhi Wai Zi Di 0930204260 Hao Han [CLA Letter Lao-Zhi-Wai-Zi No. 0930204260] (勞職外字第 0930204260 號函)' (*Law Source Retrieving System of Labor Laws and Regulations*, 16 May 2003) <https://goo.gl/xXoEJu> accessed 23 January 2018.
Workers are entitled to withdraw consent at any time, and the employer or agent is liable to return the document immediately. It is an offence for the employer to refuse its return without justifiable grounds. Nevertheless, raising a request usually alerts the employer or agent and makes the relationship tense. CLA, 'Lao Zhi Guan Zi Di 0990510138 Hao Ling [CLA Decree Lao-Zhi-Guan-Zi No. 0990510138] (勞職管字第 0990510138 號令)' (*Law Source Retrieving System of Labor Laws and Regulations*, 30 July 2010) <https://goo.gl/DXFUoU> accessed 23 January 2018.

In September 2017, the MOL proposed to make the detention of foreign workers' passport and documents illegal, except for legitimate grounds; but as of January, 2018, the proposal has not yet been passed. Hsiao-Han Yu, 'Gu Zhu Wu Zheng Dang Li You Wei Lai Bu De Liu Zhi Wai Lao Hu Zhao [An Employer Can No Longer Detain the Passport of Foreign Workers Without Legitimate Grounds] (雇主無正當理由 未來不得留置外勞護照)' (*CNA*, 1 September 2017) <http://www.cna.com.tw/news/asoc/201709010194-1.aspx> accessed 24 January 2018.

As to forced saving, the employer used to be allowed to compulsorily withhold up to 30% of foreign workers' wage.[99] To be clear, the LSA requires that wages must be paid in full.[100] However, in the TMWs' case, the concern of immigration control had outweighed labour protection. Only since 2008 has explicit forced saving been banned. The employer is required to pay the *full* wage in cash *directly* to foreign workers, with a pay slip written in the foreign worker's language.[101] However, according to the 2016 MOL survey, about 48% of industrial foreign workers and 23% of home domestics are paid via bank transfer; but 12% and 29% of them, respectively, do not have access to a bank book.[102] The bank book not only keeps records of transactions, but it is also a document that is necessary in order to withdraw money at the bank counter. In other words, 5.7% of industrial foreign workers and 4.3% of foreign home domestics may have no direct control over their wage bank account. As in the case of passports, holding a foreign workers' bankbook is legal if the employer obtains the workers' consent.

Care and Service Plan: Disciplinary Power over Personal Time and Space

Another major administrative measure used after the entry of foreign workers is the Care and Service Plan. This concerns the basic supply and assistance that the employer is legally required to provide, including water, food, personal space, fire equipment, toilets, worship facilities, life counsellors and translators, etc.[103] The local authority is in charge of monitoring the compliance of the plan. In a case where the actual living conditions fall short of legal standards, the local authority should serve notice on the employer to improve them. Violating

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[99] Measures for Employment Permission and Supervision of Foreign Persons art 30.
Compulsory saving attracted the attention of the Trafficking in Persons Report of the US Department of State. It is indicated that while up to 30% of wages were withheld by the employer, foreign workers have no access to a bank account, which raised the risk of human trafficking. The Office to Monitor and Combat Trafficking in Persons, 'Trafficking in Persons Report 2009' (US Department of State 2009) 275 <https://www.state.gov/j/tip/rls/tiprpt/2009/index.htm> accessed 23 January 2018. The TIP report is one of the major dynamics which is driving the Taiwan government to enhance foreign workers' conditions.

[100] Lao Dong Ji Zhun Fa [L] (勞動基準法) 1984 art 22, para 2 (LSA).

[101] Regulations on the Permission and Administration of the Employment of Foreign Workers art 43, para 4.

[102] '105 Nian Wai Ji Lao Gong Guan Li Ji Yun Yong Diao Cha Diao Cha Tong Ji Jie Guo Shi Yao Fen Xi [Survey on Management and Utilization of Foreign Workers: Summary of Statistic Analysis] (105 年外籍勞工管理及運用調查：調查統計結果提要分析)' (MOL 2016) 13, 35 <http://statdb.mol.gov.tw/html/svy05/0542analyze.pdf> accessed 27 December 2017.
The Survey is conducted by the government. The, figures relating to illegal or unfair practices are thus likely to be lower than those in the actual situations.

[103] Wai Guo Ren Sheng Huo Zhao Gu Fu Wu Ji Hua Shu Cai Liang Ji Zhun [Judgment Standards for the Foreigner Care and Service Plan] (外國人生活照顧服務計畫書裁量基準) 2018.

the notice may result in the revocation of employment permits (discussed below) or refusal of future applications. However, this also means that protection measures for foreign workers may lead to undermining their employment opportunities.

Before 2009, the care and service plan was called the 'life management plan'. 'Life management' is associated with a disciplinary image that the employer dictates the foreign worker's daily routines, while 'care and service' appears to be a service-orientated approach. However, the altered title does not affect the contents or practical management power that are enjoyed by the employer. The TFW scheme is designed in such a way that the employer is responsible for the foreign workers' discipline. For instance, the employer's employment permits would be revoked if its foreign workers disturbed the local community by violating the Social Order Maintenance Act.[104] The offence could be as minor as 'being drunk and rowdy, swearing or making noises in public places'.[105] The scheme thus clearly presumes that the employer enjoys around-the-clock, disciplinary power over the foreign workers' daily routines, private spaces, individual behaviours and interpersonal relations.

It is not legally compulsory for foreign workers to take the housing and meals offered by the employer. Nevertheless, most foreign workers are compelled to accept the employer's arrangement, either due to economic considerations or to contractual consent. For home caregivers, living-in is necessarily required. For industrial foreign workers, the model contracts officially provided by the sending countries all include a clause asking foreign workers not to live outside the place assigned by the employer.[106] The desire to prevent workers from running-away, and the need to manage a large number of workers living in high density accommodation usually leads to a military style of life management, which nourishes an industry of 'dormitory management services'.[107] For the employer's convenience, unilateral

[104] Gu Zhu Wei Fan Jiu Ye Fu Wu Fa Di Wu Shi Si Tiao Gui Ding Bu Yu Xu Ke Ji Zhong Zhi Yin Jin Cai Liang Ji Zhun [Discretion Criteria Regarding the Penalty for Violation under ESA Article 54] (雇主違反就業服務法第五十四條規定不予許可及中止引進裁量基準) 2014 art 7.

[105] She Hui Zhi Xu Wei Hu Fa [Social Order Maintenance Act] (社會秩序維護法) 1991 art 72.

[106] For instance, article V of the model contract no. LBR 03-C-IW for Filipino industrial workers states that the 'Employee shall live in the housing with the group and not live outside'. 'MECO Labor Center-Download' (*Manila Economic and Cultural Office,Labor Center*) <http://60.250.72.250/download.php> accessed 25 January 2018.

[107] It is often the case that the employer outsources the task of dormitory management to employment agencies/brokers; the management then becomes an important service of these employment agencies. Below is a sample of dorm rules which I have extracted and translated from the 'dormitory service' section of an employment agency. It is an example of military style management, which is, I believe, not exceptionally strict within the industry:

- Selecting a squad leader for each dorm room

rules are imposed on TMWs about times when workers are permitted to go out, and when they must come back, the hours designated for the worker to get up and to go to bed, the limited place and time to meet visitors and to make phone calls, the allowed religious activities and arranged entertainments, etc. Live-in foreign domestics are even more closely monitored, since they enjoy less private space and time. No mandatory rest day for home domestics is available under the law. Nor is a private room required. Each family member of the employer is entitled to give a command.[108] The employer of home domestics is thus able to prevent the worker from going out for most of the time.[109] Relying on board and lodging provided by the employer would also discourage foreign workers from raising labour disputes, or charges of sexual harassment, abuse and violence, because workers may be concerned about losing housing and food during the proceedings.[110]

Board and lodging are far from a service for the benefit of foreign employees, they are but part of their wages,[111] since the employer is allowed to deduct boarding fees from wages, up to about one fourth of the monthly minimum wage.[112] This deduction substantially deprives

- Work days: washing up and breakfast between 7:10-7:40, cleaning up the environment before work, group transportation to work, roll call at 22:00
- Checking beds every two hours throughout the night
- Rest days: collective cleaning through before 8:00, free time from 8:00 to 22:00
- New workers who have not yet received the residence permit are barred from going out.
- Open to visitors every Sunday between 8:00 and 17:00 (limited to open areas)
- Group fighting, violence or threats against the dorm manager, using drugs, etc., are causes for deportation.
- Disobedience to the dorm manager is a serious major offence.
- Absence at work or during the night, quarrels in the dorm, climbing the wall, etc., are a major offence.
- Untidiness, opting out of group activities or trips, etc., are a minor offence.

'Su She Guan Li [Dormitory Management] (宿舍管理)' (*Kei Lai International Manpower Co., Ltd*, 2007) <http://www.kailei.com.tw/dormitory-management.php> accessed 19 January 2018.

[108] Ku, 'The Condition of Freedom' (n 96) 119.

[109] ibid 136.

[110] Temporary replacement for foreign workers who are in dispute with the employer is available. However, foreign workers might not know that they are entitled to this replacement service. Shou Pin Gu Cong Shi Jiu Ye Fu Wu Fa Di Si Shi Liu Tiao Di Yi Xiang Di Ba Kuan Zhi Di Shi Yi Kuan Gui Ding Gong Zuo Zhi Wai Guo Ren Lin Shi An Zhi Zuo Ye Yao Dian [Guidance for Temporary Replacement of Type B Foreigner] (受聘僱從事就業服務法第四十六條第一項第八款至第十一款規定工作之外國人臨時安置作業要點) 2008.

[111] LSA art 22. According to art 22, wages may be agreed to be paid partly in kind, provided that the payment in kind is fair and reasonable and meets the needs of the workers and the workers' families.

[112] Regulations on the Permission and Administration of the Employment of Foreign Workers art 43 as amended on 24 December 2008.
Brokers complain that the Thai, Vietnamese and Indonesian governments all set an upper limit for the boarding fee in the model contract for overseas workers in Taiwan, and these limits are lower than the

foreign workers of the protection of a statutory minimum wage, although the nominal income of TMWs appears to meet the legal term. The compelled 'dorm life' or living-in arrangement is, in fact, a useful means for the employer to control foreign workers' labour and physical presence, and to intensify the workers' productivity.[113] Ironically, the control is financed by the TMWs themselves.

In short, the employment relation of TMWs is shaped by the employers' comprehensive disciplinary power disguised as care and service. By imposing duties of management of the TMWs' whereabouts and daily life on the employer, the state utilises the private hands of the employer as a mechanism for immigration control. The employer's management prerogative over foreign workers' private time and space is hence the extension of state power. It is

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maximum amount allowed by the MOL, NTD 5,000 (approximately 168 US$). The upper limit set by the Vietnamese and Indonesian governments is NTD 3,500. The Thai government sets the maximum allowed at NTD 2,500. South East Asian Group, 'Bian Li Wai Lao Guan Li Gu Zhu Tong Yi Shan Su Fei Jin E [Employers Unify the Boarding Fee to Facilitate Management of Foreign Workers] (便利外勞管理雇主統一膳宿費金額)' (*Latest News of South East Asia Group*, 3 April 2009) <https://goo.gl/N6nuhR> accessed 21 January 2018.

On the other hand, the model contract for overseas Filipino workers requires the employer to provide free board and lodging. Model contracts can be downloaded at 'MECO Labor Center-Download' (n 106) e.g. art V of contract no. LBR-03-C-IW. Despite the clause, in practice, employers still deduct fees from wages; and they can do this legally. The key is that in the Filipino workers' situation, usually the Wage Confirmation and the contract are not consistent. Both documents are verified, and yet they are verified by different Filipino government agencies. While the contract contains a free-board-and-lodging clause, the Wage Confirmation recognises the monthly deductible amount for board and lodging. 'Fei Lu Bin Yi Gong Shan Su Zheng Yi An Xin Wen Gao [Press Release concerning the Board and Lodging Fees of Filipino Migrant Workers] (菲律賓移工膳宿爭議案新聞稿)' (*Taoyuan City Government*, 11th April, 2017) <https://goo.gl/4D2pcV> accessed 24th January, 2018.

How does one deal with the inconsistency, then? Since 2008, it has been provided that the Wage Confirmation cannot be amended against the benefits of foreign workers. In principle, a wage audit should be conducted that is based on the Wage Confirmation. However, should there exist an inconsistency between the contract and the Wage Confirmation, the MOL hold that the document which is most favourable to the foreign worker should prevail for the purposes of a wage audit. Regulations on the Permission and Administration of the Employment of Foreign Workers art 27-2; 'Lao Dong Fa Guan Zi Di 1040514001 Hao Han [MOL Letter Lao-Dong-Fa-Guan No. 1040514001] (勞動發管字第1040514001 號函)' (*Labor Affairs Bureau, Taichung City Government*, 9th December, 2015) <https://goo.gl/xD2F5G> accessed 25th January, 2018.

Nevertheless, none of the efforts, above, can maintain the free-board-and-lodging clause in Filipino workers' contracts, because the contract can be altered against the benefits of workers. The clause is therefore easily circumscribed by asking workers to sign a written consent for deductions after they arrive in Taiwan, or simply by asking workers to confirm the wage after deductions. Most importantly, courts affirm that it is valid to cancel the free-board-and-lodging-clause by the agreement of both parties. *Tai Wan Yi Lan Di Fang Fa Yuan Min Shi Pan Jue 99 Lao Su 8 Hao [2010 Civil Judgment Lao-Su No 8] (臺灣宜蘭地方法院民事判決 99 勞訴 8 號)* (Taiwan Yilan District Court) line 35-61; *Ji Long Jian Yi Ting Xiao E Min Shi Pan Jue 99 Ji Lao Xiao 11 Hao [2010 Small-Claim Civil Judgment Ji-Lao-Xiao No 11] (基隆簡易庭小額民事判決 99 基勞小 11 號)* (Summary Division, Taiwan Keelung District Court) line 85-123.

[113] Hong-Zen Wang and Hong-Nhung Nguyen, 'Gong Chang Wai Ji Lao Gong De Sheng Huo Guan Li Yu Lao Dong Ren Quan [Life Management and Labour Human Rights of Factory Foreign Worker] (工廠外籍勞工的生活管理與勞動人權)' [2007] Employment Security 27, 28–29.

justified exactly because it bears tasks of border control and policing; and the comprehensive power is made possible through the 'negotiable' contractual arrangement. The employers' power is the transferred state power and responsibility in disguise. Moreover, the apparatus of control over foreign workers' private realm is partially funded by the workers themselves, which is feasible, since overseas workers have little choice but to rely on the employer's board and lodging arrangements in a strange land.

Employment Permits and Residence Permits

Following the inspection, within fifteen days of foreign workers' entry, the employer must apply for the employment permit by submitting, among other things, the certificate issued by the local authority after the inspection (explained above), and the report of the post-entry medical examination.[114] The employment permit (i.e., the work permit) [115] not only supports the worker status allowing him/her to work, but also their legal stay status. Upon expiry or the abolition of the employment permit, foreign workers can no longer work legally, and must exit the territory immediately.[116] Currently, the employment permit is valid for up to three years. Subject to legal conditions, the foreign worker's employment permit is renewable for up to twelve years, or for fourteen years for industry foreign workers and home domestics, respectively.[117]

Finally, foreign workers should apply for residence certificates with the evidence of employment and the employer's recruitment permit. [118] For the first-time applicant, the foreign worker has to apply in person, so that their finger prints can be taken. Any change in the employer or working address necessitates the registration of the change.[119] All foreigners older than fourteen are required to carry a passport or residence permit, and government officials may ask foreigners to show ID documents under the legal authority given to them.[120]

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[114] Regulations on the Permission and Administration of the Employment of Foreign Workers art 28. The health examination will be discussed below in subsection 5.

[115] The employment permit may be more aptly called the work permit. However, I keep to the term 'employment permit' because it is the literal translation of the legal language used in the ESA.

[116] ESA art 74.

[117] See discussion in subsection 4.2.

[118] Ru Chu Guo Ji Yi Min Fa [Immigration Act] (入出國及移民法) 1999 art 22 as amended on 26 December 2014.

[119] Application form for Resident Permit, available from the National Immigration Agency, 'Ru He Shen Qing Ban Li Huo Zhan Yan Wai Lao Ju Liu Zheng [How to Apply or Extend Resident Permits for Migrant Workers](如何申請辦理或展延外勞居留證)' (1 October 2014) <https://www.immigration.gov.tw/ct_cert.asp?xItem=1089254&ctNode=32598&mp=1> accessed 18 May 2016.

[120] Immigration Act art 28.

This rule, despite not just targeting TMWs but being applicable to all foreigners, obviously could lead to the racial profiling of TMWs.

Termination: Prior-Exit Verification

It used to be the case that employers could terminate the contracts of foreign workers at will by sending them back home (sometimes by use of deceit or force). To ease the problem of sending back workers unilaterally, a verification proceeding is required prior to the worker's exit.[121] If employment is terminated earlier than fourteen days before the expiry of the employment permit, the employer must notify the local authority of the reason for termination. The authority should verify that termination is not against the will of the foreign worker by examining the termination notice, which is written both in Chinese and in the foreign worker's language, signed by both parties. It should also interview the foreign worker and check their pay slip.[122] A certificate of verification will be issued, if no dispute is raised, and the authority is satisfied that termination does not violate the worker's will, or that there is a legal ground for terminating the foreign worker's contract unilaterally.[123] The certificate is a document that is necessary in order for the employer to recruit a new foreign worker to fill the position left by the one who has exited due to contract termination.

The above picture of regulation devices shows that the route to fulfilling the policy goals of the TFW scheme is to keep the worker unfree under a fixed-term contract. In the following, it will be further observed that the design of this unfree labour scheme relies on the legal techniques of temporariness and alienage to maintain and justify it.

4 Temporariness of TFW schemes in Taiwan

The temporariness of foreign workers is a legal fiction made through forced rotation. Its fictional nature is particularly salient in Taiwan's case, since foreign workers' term of stay are

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[121] MOL, 'Wai Ji Lao Gong Quan Yi Wei Hu Bao Gao Shu [Report on Protecting Rights of Foreign Workers] (外籍勞工權益維護報告書)' (2014) 6 <https://goo.gl/1dWoDf> accessed 25 December 2017.

[122] Gu Zhu Ban Li Yu Suo Pin Gu Di Er Lei Wai Guo Ren Zhong Zhi Pin Gu Guan Xi Zhi Yan Zheng Cheng Xu [Verification Proceedings for Termination of Employment with Type B Foreigner] (雇主辦理與所聘僱第二類外國人終止聘僱關係之驗證程序) 2006 art 3, paras 1, 3.

[123] ibid art 3, para 3. On the other hand, should disputes be raised, the local authority should initiate labour dispute proceedings, or arrange for the placement for the foreign worker if necessary. ibid arts 4, 5.

ever extending in the employer's interest, to the degree that TMWs can hardly be descripted as temporary. Although the temporariness of TMWs is mythical and fictional, it nevertheless has real usefulness: frequent forced rotation of TMWs creates illusionary safety for the host society, enhances the employers' assessment powers over the worker, cheapens workers' seniority and justifies the convenient deprivation of the TMWs' rights. I will elaborate on the point by tracing the legislative history of two regulations relating to foreign works' time: the maximum term of stay in Subsection 4.1 and the compulsory exit (now eliminated) in Subsection 4.2.

4.1 Ever Extending Term Limit

The term of an employment permit and the total allowable length of work in Taiwan is a decision made amongst diverse concerns: the worry is the prevention of unwanted immigration, the calculation of the minimising of the reproduction costs of workers, and the need to acquire a steady low-cost labour supply. The effort to keep foreign workers in frequent rotation contradicts the demand for a steady labour force. The forced rotation mechanism started from a design of 'genuine' temporary workers, and ends up as being a non-temporary state. This trajectory of legal changes on the term of TMWs' stay shows that the employers' concerns to minimise training and introduction costs takes the lead.

1992-1997: Two- to Three-Year Permit

When foreign workers were first introduced in 1992, the working permit was only valid for one year, extendible for up to another year.[124] There was no permission for re-entry. The extension at the end of the one-year employment permit was supposedly to be a case-by-case assessment about labour shortages. However, in practice, the CLA approved all applications. Hence, permit extensions mostly depended on whether the employer was satisfied enough with workers to continue to hire them. It became a *de facto* annual assessment of workers' performances, legally supported by the state's immigration power to remove workers.

However, two years of disposable labour and the rapid rotation of TMWs proved not to be economically optimal for the employers. Despite being categorised as non-skilled workers, it was argued, they needed three to six months to train. However, they were compelled to leave

[124] ESA art 49 as promulgated on 8 May 1992.
Compared to the rule for foreign professionals, the term of the employment permit was two years, renewable for one year. However, there is no upper limit on renewal times. ESA art 49 as promulgated on 8 May 1992.

soon after familiarising themselves with the tasks at hand.[125] As a result, in 1997 the valid term of the employment permit was altered to two years, extendible for another year.[126]

2001-2015: Constant Expansion to the Verge of Annual Pension

In the following decades, the total term of the foreign workers' stay was extended four times: In 2001, the total period for foreign workers' working in Taiwan was extended to six years; for the first time re-entry in order to work was permitted after the initial employment permit expired.[127]. However, foreign workers must exit the territory for at least forty days by the end of their third year in Taiwan (discussed in Subsection 4.2).[128] The upper limit was further prolonged from six to nine years in 2007,[129] and to twelve years in 2011,[130] and the term of a single employment permit was raised to three years.[131] Finally, the upper limit for home

[125] Legislative Yuan, 'Jiu Ye Fu Wu Fa Fa Tiao Yan Ge [Legislative History of ESA] (就業服務法法條沿革)' (*Legislative Yuan Legal System*) <https://lis.ly.gov.tw/lglawc/lglawkm> accessed 27 January 2018 *ratio legis* of art 49 as amended in 1997. A note on my using *ratio legis* as the material for analysis: *ratio legis* was prepared by the proponents of Bills. They were not binding, but sometimes could shed light on legal application. However, they did not necessarily reflect the 'true intent' of legislators, if there is ever such a thing as the true intent of a collective body of legislators.
Here, I do no approach *ratio legis* in order to discover the real motivation of the law as such. I take it to be the rhetoric which legislators consider to be the most presentable grounds for the law, addressing their peers and the general public. They respond to the conventional understanding of public interest. *Ratio legis* is therefore the showcase of what counts as being legitimate considerations in a society.

[126] ESA art 49 as amended on 9 May 1997.

[127] The employment permit remained valid for two years, and extendible for another one year.

[128] ESA art 52 as amended on 21 December 2001.
If compared to the rule for foreign professionals, the validity period of the employment permit for foreign professionals was extended to three years, with no limit on the number of renewals. Most importantly, after five years of work in Taiwan, foreign professionals gain the right to work there. They no longer need to apply for an employment permit. ibid art 51 as amended on 21 December 2001.

[129] ESA art 52 as amended on 14 June 2007.

[130] ibid art 52 as amended on 19 January 2012.

[131] That is, the formality to apply for a permit extension by the end of the second year was cancelled. Since the CLA had not rejected the employer's application for the extension of employment permits, except for flaws in the paperwork, e.g., an overdue application, and the administrative procedure was regarded as redundant. Legislative Yuan (n 125) *ratio legis* of art 52 as amended on 19 January 2012.

caregivers' stays was raised to fourteen years in 2015, [132] subject to the employer's application and the government's approval of the caregiver's outstanding performance. [133]

Exploitation through Controlling the Time of Stay

A prolonged stay under the guise of temporariness deepens the exploitation of TMWs. As foreign workers became indispensable in some industries, the policy rhetoric started to justify the TMWs' longer stay by portraying them as skilful workers, not merely as fungible labour units.[134] It is a welcome sign. Nevertheless, underlying the affirmative message is the implicit extra economic value of the experienced TMWs: their wages do not need to increase as their skills and experience grow.[135] Most industrial TMWs' wages are tied to the statutory minimum wage, while the wage of foreign home domestics is fixed by official announcement.[136] Praise for skilled TMWs is therefore also a clue to their cheapened experience.

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[132] ESA art 52, paras 4, 5.
The Bills of the 2015 Amendment sought to extend to fifteen years, or even remove, the term limit. However, these bills were rejected during the (closed-door) party caucuses' negotiations. 'Yuan Hui Ji Lu [Records of Yuan Sittings] (院會記錄)' (2015) 2458 Legislative Yuan Gazette 66, 69.

[133] Accordingly, the MOL established a point system to decide if a home caregiver can stay until the fourteenth year, including items such as caregiving skills, language skills, professional certificates, and years of service, etc. Reviewing Standards for Type-B Foreign Workers annex 9.

[134] During the 2007 amendment, it was claimed that the six-year upper limit imposed unnecessary training costs on the employer, because foreign workers were forced to return when their skills, abilities and efficiency were at their peak. Legislative Yuan (n 125) *ratio legis* of art 52 as amended on 14 June 2007.
Again, in 2011, the *ratio legis* started to emphasise the valuable skills that were possessed by foreign workers who had nine years of experience. If Taiwan drove them away, Korean and Singaporean employers would be happy to hire these well-trained foreigners. Moreover, the longer work period would lower charges levied by intermediaries from foreign workers, which could help to reduce the risk of runaways. This is the first time that foreign workers' interests appear in the rhetoric of the extension term. The CLA pointed out that the longer the foreign workers stayed, the lower the rate of running-away. The figures between 2008 and 2010 show that the rates of lost-contact foreign workers at the end of the third, sixth and ninth year are 4.6%, 1.4 and 0.1%, respectively. Keeping experienced foreign workers therefore helps to ease the concerns relating to undocumented migrant workers. 'Wei Yuan Hui Ji Lu [Records of Committees] (委員會記錄)' (2010) 3851 Legislative Yuan Gazette 354, 371 speaking of the President of CLA, Ju-Hsuan Wang. P.371
Although the term of an extension is reasoned in the language of gaining an edge in global economic competition, the central concern behind the extension of the term limit from nine to fourteen years was at the urging of the employers of domestic caregivers. This long-term personal need and relationship made legislators more inclined to consider the possibility of cancelling the term limit altogether. In 2015, legislators started to argue that foreign workers should be allowed to immigrate, given their long-term contribution and stays. Although the discussion was only echoed by a few, the policy of no immigration appears to be under reconsideration. E.g., ibid 359 speaking of legislator Chieh-Ju Chen.

[135] 'Records of Committees' (n 134) 381 speaking of legislator Sue-Ying Huang.

[136] The only economic rewards which will grow with foreign workers' seniority is the old-age benefit under the Labour Insurance. The amount to which the worker is entitled partly depends on their

Exploitation of foreign workers cuts deeper when it concerns retirement. A plausible concern for stopping the maximum term at the fourteenth year, [137] rather than the fifteenth, as originally proposed in the Bill,[138] is to avoid foreign workers reaching the threshold for a pension under the Labour Insurance (LI).[139] The threshold for the pension is fifteen years of seniority,[140] while workers who join the LI for less than fifteen years can only receive one-off old-age benefits.[141] This policy concern is probably pre-emptive, since the majority of foreign domestics do not join the LI.[142] It is optional, rather than legally mandatory, for the employer to register home domestics for the LI.[143] The official survey showed that about four fifths of home domestics have not joined the Insurance in the most recent decade.[144] The uninsured majority do not even have an entitlement to the one-off old-age benefits, not to mention the

seniority in joining the Insurance. See discussion, below, about the Labour Insurance and the Labour Pension Scheme.

[137] Since the decision was made in closed-door negotiations, no record is available to confirm the underlying concerns. I construe that the fourteen-year term is meant to avoid pensions for foreign workers, and this is based on records of the public discussion of legislators. 'Wei Yuan Hui Ji Lu [Records of Committees] (委員會記錄)' (2015) 4235 Legislative Yuan Gazette 238, 342 speaking of legislator Tan-Lin Chao.

[138] See *supra* note 132.

[139] The consideration of avoiding pension payments for foreign workers is not entirely financial, but also administrative, namely, the costs and paperwork required to verify the identity of oversea pensioners, and to ensure pensions are delivered regularly. 'Records of Committees' (n 137) 343 speaking of Minister of MOL, Hsiung-Wen Chen.

[140] Labor Insurance Act art 58.

[141] The old-age benefit under the LI should be distinguished from the labour pension scheme under the Labour Pension Act. While the majority of industrial foreign workers are compelled to join the LI, and home domestics can join the LI voluntarily, the Labour Pension scheme excludes all foreigners from participation. Lao Gong Tui Xiu Jin Tiao Li [Labor Pension Act] (勞工退休金條例) 2004 art 7, para 1.

[142] Labor Insurance Act art 6.

[143] The Labour Insurance provides benefits for maternity, injury, sickness, disability, occupational accidents and seniority. It is mandated for workers who are between 15 and 65 years old and who are hired by an employer with five or more employees, to join, nationals and non-nationals alike. The great majority of industrial foreign workers are thus compelled to be covered by the LI, but the Insurance is not legally required for home domestics, since the private household does not reach the threshold of hiring five employees. ibid arts 2, 6.

[144] MOL, 'Summary of Statistic Analysis of Survey in 2016' (n 26) 38.
To enlist the employee for the LI, the employer has to share a partial burden of the premiums. This extra burden discourages the insured rate for foreign domestics. Labour Insurance is composed of two sub-types, ordinary and occupational accident insurance. The employer bears 70% and 100% of the premiums of the ordinary and occupational accident insurances, respectively. The employee shoulders 20% of the premium of the ordinary insurance, and the remaining 10% is subsidised by the government. Labor Insurance Act art 15.

pension. Nevertheless, this example shows that the state can easily prevent benefits for TMWs by managing their time of stay without imposing explicit unequal labour treatment on them.

Non-temporary Foreign Workers

The employment which lasts up to twelve or fourteen years can hardly be described as temporary, which intensifies the problematic treatment of foreign workers under the scheme. The government was far from unaware of this. The CLA used it to oppose the term extension in 2007. It pointed out that a nine-year stay was long enough to make the deprivation of family reunions a human rights concern. In addition, nine-year employment is no longer appropriately treated as a fixed-term contract. Yet where foreign workers hold a non-fixed-term contract, they may need to be treated equally to nationals. However, family reunions and totally equal treatment would draw with them unacceptable costs for the employers, the CLA argued.[145] These opposing grounds, political rhetoric as they may be,[146] aptly revealed the function of keeping foreign workers on short, fixed-term contracts: Temporariness is essential to normalise those working conditions which otherwise would be unacceptable. The longer they stay, the harder it is to justify the legal design which makes them exploitable. This logic will be seen again in the exit requirement, below (Subsection 4.2). The CLA also pointed out that a shorter term for foreign workers does not help to reduce the total number of foreign workers. Quick rotation of foreign workers may increase the employer's training costs, but it would not discourage the employer from hiring the next employee.[147] This is an official recognition of the impossibility of temporary reliance, and hence the unavoidability of 'non-temporary' foreign workers.

In the next Subsection, I will look at another mechanism of temporariness, restriction on compulsory exit, which was recently repealed. However, the debate surrounding its removal once again demonstrates that temporariness is meant to render foreign workers' employment more precarious, and making them more exploitable, rather than ensuring short-term relief of the labour shortage.

4.2 The Rise and Fall of Compulsory Intervals

As mentioned, a compulsory exit of at least forty days was added in 2001, when the upper limit of the aggregated period of work in Taiwan was extended to six years. The forty-day exit was

[145] 'Wei Yuan Hui Ji Lu [Records of Committees] (委員會記錄)' (2007) 96 (50) Legislative Yuan Gazette 197, 202–03 speaking of Vice President of the CLA, Ai-Lan Cao.

[146] Later, when the length of stay became longer than a decade, the government had never considered foreign workers' family reunions and equal treatment serious policy goals. The arguments of CLA therefore seem to only have been raised to make a political gesture.

[147] 'Records of Committees' (n 134) 356 speaking of President of CLA, Ju-Hsuan Wang.

soon simplified to one day, in 2003, at the request of employers of in-home caregivers, who complained about the inconvenient absence of caregivers during the interval period.[148] The requirement for a one-day exit in every three years was eventually deleted in 2016.[149]

Circle of Exploitation

The compulsory intervals caused severe financial burdens to the foreign workers, since all of the paperwork had to be redone; and intermediaries of both the sending and receiving states charge workers high fees for re-entry. Intermediary charges are not a problem that is unique to re-entry. However, the exit requirement allows this exploitation to be repeated once every three years.

It has been illegal for Taiwanese intermediaries (employment agencies/brokers) to charge TMWs commission since 2004. The law only permits a fixed monthly service charge to be collected from TMWs.[150] However, in reality, brokers in Taiwan may collect fees indirectly via under-the-table deals with brokers in the sending countries. Taking Vietnam, the priciest case, as an example, the 2016 figures from the MOL showed that it cost a Vietnamese worker more than US$4,400 to re-enter.[151] This figure only reflects the fees that are legally collectable under Vietnamese and Taiwanese laws, but this amount is already more than the 2016 GDP per capita income of Vietnam.[152]

Misconceived Functions of Compulsory Exits

What was the purpose of this costly requirement for compulsory exit, then? The conventional view was that the interval was needed to prevent TMWs from turning themselves into landed

[148] ESA art 52 as amended on 29 April 2003. Although the compulsory exit day was simplified to one day, it did not mean that foreign workers could exit and re-enter in one day. Sending countries also imposed administrative controls before workers could re-enter Taiwan. It can sometimes take months to re-enter.

[149] By then, the total length of work was extended to twelve and fourteen years for industrial foreign workers and home caregivers, respectively (see above).

[150] The charge is NTD 1,800 (about US$61) per month for the first year, NTD 1,700 (about US$58) for the second, and NTD 1,500 (about US$52) for the third and subsequent years. then. Si Li Jiu Ye Fu Wu Ji Gou Shou Fei Xiang Mu Ji Jin E Biao Zhun [Standards for Fee-charging Items and Amounts of the Private Employment Services Institution] (私立就業服務機構收費項目及金額標準) 2004 art 6. The sum was thus NTD 60,000 for a three-year period. That amounts to three to four months of the foreign workers' wages.

[151] 'Wei Yuan Hui Ji Lu [Records of Committees] (委員會記錄)' (2016) 4335 Legislative Yuan Gazette 44, 46. It was reported that actual charges for re-entry could be as high as US$7,000. ibid 73 speaking of legislator Shu-Fen Lin.

[152] 'GDP per Capita (Current US$)' (*The World Bank Data*) <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=VN> accessed 29 January 2018.

immigrants.[153] This rationale, however, could hardly be sustained under closer scrutiny. Back in 2001, when the requirement was amended, the cap on terms of work in Taiwan was six years, while permanent residency required seven years of continuous residence.[154] Foreign workers would not therefore be eligible for permanent residency, with or without the compulsory interval. On the other hand, the eligibility for naturalisation was lower. It required only a stay of five consecutive years of more than 183 days per year.[155] In that case, foreign workers could satisfy the residency requirement for naturalisation, even with the forty-day compulsory exit by the end of the third year, i.e., the compulsory exit had no impact on the legal qualification of foreign workers for a permanent status.

Moreover, the 'loophole' that foreign workers could qualify for naturalisation was soon closed by an administrative regulation.[156] Similarly, in 2007, the Immigration Act disqualified foreign workers' period of residence from being counted for the purpose of applying for permanent residency.[157] By these measures, the TMWs' temporary status is explicitly encoded. Their duration of stay, no matter how long, is legally irrelevant for permanent status.

It is more likely that the compulsory exit was designed to avoid TMWs obtaining an open work permit.[158] This was a discriminatory treatment in regard to workers in the TFW scheme and foreign professionals. Article 51 of ESA, as amended on 21st December, 2001, granted an open work permit to foreigners who legally work continuously, and stay for five consecutive years, and who also have a domicile in Taiwan. The original intention underlying the compulsory exit of TMWs was to interrupt their stay, so that they could not be considered to have worked and

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[153] The *ratio legis* pointed out that the original design of the exit requirement was to prevent foreign workers from becoming immigration. However, the concern that foreign workers would be eligible to apply for permanent residency and naturalisation was solved after proper amendment of the Immigration Act and the Nationality Act. Therefore, the exit requirement can be removed. Legislative Yuan (n 125) the *ratio legis* of art 52 as amended on 21 October 2016.

[154] Immigration Act art 23 as amended on 20 June 2002.
Paradoxically, this was the Immigration Act used to set up stricter conditions of residence for permanent residency (seven years) than those for naturalisation (five years).

[155] Guo Ji Fa [Nationality Act] (國籍法) 1929 art 3, para 1, subpara 1 as amended on 20 June 2001.

[156] Guo Ji Fa Shi Hang Xi Ze [Enforcement Rules of the Nationality Act] (國籍法施行細則) 2001 art 5, para 2, subpara 1 as amended on 8 April 2004.
I doubt whether such a severe restriction could be imposed simply by an administrative regulation. In my view, the administrative regulation is unconstitutional, since it is the exclusive power of the Legislative Yuan (i.e. the congress) to make laws which significantly affect people's rights to apply for naturalisation.

[157] Immigration Act art 25 as amended on 30 November 2007.

[158] Legislative Yuan (n 125) *ratio legis* of art 52 as amended on 21 December 2001.

stayed continuously for five years. However, the same effect could have been directly achieved by simply excluding foreign workers from the eligibility to an open work permit.[159] This policy caused foreign workers to bear heavy financial burdens without a necessary administrative aim.

Compulsory Exits as a Filter and Motivator?

Curiously, the real legal function of the compulsory exit was seemingly not noticed during the debate on repealing the rule. Three commonly seen defences for the compulsory exit, however, reveal the deeply harmful reality of the TFW scheme. First, the compulsory exit was said to be a *de facto* filter to remove unwanted workers 'safely'. Allegedly, it allows the employer to discontinue the hiring of unsatisfactory workers during their exit, without alerting foreign workers to run away within the prior notice to terminate their employment. Second, it was said that the three-year expiry day 'motivates' workers to work harder. Contrarily, were TMWs allowed to work for twelve to fourteen years, they might become less adoptive to working overtime.[160]

The 'filter' view is simply another restatement of why TMWs are attractive and convenient: they can be sent back, in the name of the law, for whatever reasons, to the employer's dismay: too old, too slow, too unhealthy, too disobedient, etc. The reality is that the employer has enjoyed the absolute power to renew their employment, or not, either with or without the compulsory exit. The difference is only that the employer's power not to renew is at its strongest when it accompanies the state's authority to send workers out of the territory. As to the argument that TMWs are more diligent under the exit requirement, this implies that the TFW scheme is a forced-labour regime with a legal façade. Workers are kept obedient and expected to work unreasonably long hours due to the heavy debt on their backs. The compulsory exit further intensified the 'hardworking effect', because workers' financial burdens were made heavier.

Compulsory Exit as the Right to Return?

The third defence for the rule, most harmfully, argued that the three-year compulsory exit was the foreign worker's 'right to return home'. Deleting the compulsory exit was thus 'inhuman',

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[159] The ESA now does exactly this. Article 52 of ESA was amended to exclude foreign workers from applying for the open work permit when the three-year exit requirement was deleted.

[160] These two points were raised by the employment agency industry. Yen-Tzu Lu, 'Yi Gong 3 Nian Chu Guo 1 Ri Xiu Fa Shan Chu Tong Guo Zhong Jie Gu Zhu Zi Ren Shou Hai [Removing One-Day Exit in Three Years of Migrant Workers , Brokers and Employers Claim Harmed] (「移工 3 年出國 1 日」修法刪除通過 仲介雇主自認受害)' *Civil Media* (21 October 2016) <https://www.civilmedia.tw/archives/55655> accessed 14 February 2018.

since it took away the regular 'leave' every three years.[161] This reading draws the concern that foreign workers are weaker and might hesitate to request a long leave to go home. However, the forced exit has no feature relating to rights or benefits: Foreign workers have no choice about whether to exercise it, or when to exercise it. The employer has no obligation to pay for the international flight for their return. The worker loses income during the period. In fact, the employment relationship was terminated; and re-employment would not be guaranteed. The length of the 'leave' is outside the worker's control.

Taking the compulsory exit as a right to go home suggests that legal or contractual rest days for foreign workers are so poorly implemented that the employment relation contained elements of forced labour. Compulsory temporariness, then, became 'liberation' from forced labour. Currently, as mentioned, domestics are not protected by the minimum working standards under the LSA.[162] The working hours of domestics are thus subject to contracts. The model contract provides one rest day in every seven days, and seven days of paid annual leave for workers after one year. However, rest days and annual leaves can both be cancelled with overtime pay at the daily rate, NTD 576 (about US$20).[163] No paid sick leave is offered in the contract. It only costs the employer about US$270 to buy the worker's annual leaves for the second and third years. A worker without one single day-off for three years only costs overtime of US$3,330. It is perfectly legal to purchase all of the rest and leave days of foreign domestics during the three-year employment. The MOL survey indicates that 40.2%, 36.2% and 34.5% of foreign domestics never had days-off in 2013, 2014 and 2015, respectively.[164] It was against this context that the idea of compulsory exit as 'the right to return' had its rhetorical purchase. Yet the idea of 'compulsory exit as a right to return' leaves untouched the

[161] E.g. 'Wei Yuan Hui Ji Lu [Records of Committees] (委員會記錄)' (2013) 4091 Legislative Yuan Gazette 324, 442 speaking of legislator Tan-Lin Chao.

[162] For the sake of comparison, I briefly summarise the basic LSA provisions for working hours, overtime rates, and annual leave as follows: The normal working hours are eight hours a day, forty hours a week. There should be two days-off within seven days. One is holiday, the other a rest day. There must be one holiday in every seven days. The total working hours in one single day cannot exceed twelve hours including overtime; the total overtime hours in a month cannot exceed 46 hours. The overtime pay rates are (1) 1.34 hourly rate for the first two hours in the working day or in the first four hours of the rest day, (2) 1.67 hourly rate for the third and fourth hours in the working day, or between the fifth and eighth hours of the rest day; (3) twice the daily wage on holidays. Finally, annual paid leave is granted depending on seniority: e.g., six months to one year of seniority: three days of annual leave; one to two years: seven days; three to four years: fourteen days; six to seven years: fifteen days; nine to ten years: fifteen days; twelve to thirteen years: eighteen days.

[163] For example, the model contract of Filipino home domestics is available at 'MECO Labor Center-Download' (n 106).

[164] Survey on Management and Utilization of Foreign Workers: Summary of Statistic Analysis (n 102) 37.

structure leading to the deprivation of rest time. It accepts that TMWs could be made restless for three years before the law forced them to go home, and then compels TMWs to buy back another course of a restless three years at a high price.

The poor working conditions of foreign domestics is one of the symptoms of insufficient public investment in a long-term care service. The responsibility for care giving mainly falls on family members. To respond to the call for support for those in need of care, introducing foreign workers to share the burden of private households is the government's main approach.[165] Efforts to raise the working conditions of foreign home caregivers are often portrayed as being in deep conflict with the interests of families in need, dragging the already fragile families to the brink of ruin.[166] The tension is sharpened by the rule disqualifying the employer of foreign domestics from the publicly-funded respite care service, because they are deemed to be more resourceful and less needy.[167] Employers, hence, have a strong incentive to deprive foreign domestics of their rest if they are unwilling or unable to take over caregiving during the caregivers' days-off.[168]

After Deletion of Compulsory Exit: Regained Paid Leaves

As mentioned, the compulsory exit was deleted in 2016. Foreign worker's employment remains a three-year fixed-term contract. However, they are granted a choice to stay at the end of the term, if the employer also agrees to renew, or the worker can find a new employer, and the upper limit of stay has not yet been exceeded. If the foreign worker seeks to stay, but the employer refuses to renew, then the foreign worker can then proceed to the transfer procedure to seek a new employer (see 5.2, below, for the transfer procedure).[169] However, if

[165] Chen-Fen Chen, 'Management or Exploitation? The Survival Strategy of Employer of Family Foreign Care Workers (管理或剝削？家庭外籍看護工雇主的生存之道)' (2011) 85 Taiwan: A Radical Quarterly in Social Studies 89, 96; Hsiu-lien Chen, 'The Double Binding of Public and Private- The Labor Condition of Migrant Domestic Workers in Taiwan (公私雙綁：外籍家務勞動者的勞動處境)' (2012) 1 <https://goo.gl/x7VDcf> accessed 1 February 2018.

[166] Yu-Ling Ku, 'The Construction of Migrant Workers Movement Subjects: An Example in Advocating the Household Service Act (移工運動的主體形塑以「家事服務法」推動過程為例)' (2009) 74 Taiwan: A Radical Quarterly in Social Studies 343, 358.
Ku has observed that social welfare NGOs strongly opposed t the Bill of the Household Service Act and the incorporating of home domestics into the LSA.

[167] Juan Xin Zhang Ai Zhe Jia Ting Zhao Gu Zhe Fu Wu Ban Fa [Regulations on Service for Home Caregivers of the Disabled] (身心障礙者家庭照顧者服務辦法) 2015 art 9.

[168] Ku, 'The Condition of Freedom' (n 96) 57–58.

[169] Wai Guo Ren Shou Pin Gu Cong Shi Jiu Ye Fu Wu Fa Di Si Shi Liu Tiao Di Yi Xiang Di Ba Kuan Zhi Di Shi Yi Kuan Gui Ding Gong Zuo Zhi Zhuan Huan Gu Zhu Huo Gong Zuo Cheng Xu Zhun Ze [Directions of the Employment Transfer Regulations and Employment Qualifications for Foreigners Engaging in the Jobs Specified in Items 8 to 11,Paragraph 1,Article 46 of the Employment Services Act] (外國人受聘僱

the worker fails to find a new employer by the end of their employment, s/he would be required to return to his/her country of origin.

More time is needed to observe whether the exploitation of foreign workers has been eased after the abolition of the compulsory exit. However, theoretically, it may help in regaining legal paid leaves. Legally, TMWs covered by the LSA are entitled to paid marriage, funeral, maternity and sick leaves, and unpaid leaves for personal affairs. [170] In addition, the Act of Gender Equality in Employment (AGEE) provides paid leaves for child birth, miscarriage, and the spouse's labour.[171] Although domestics are not covered by the LSA, they are still covered by the AGEE.

However, before the repeal of the compulsory exit regulations, even if TMWs were entitled to legal paid leaves, they were not expected to take leaves to go home for matters which could be postponed until the end of the employment, given costly international transportation. Foreign workers' need to visit home, to get married, or to mourn for loved ones, were squeezed into intervals between contracts, the periods when they were unemployed. The employer easily avoided the costs of paid leaves for the TMWs' life events. Now, taking paid leaves for personal needs becomes more practical. For instance, with the prospect of twelve years of employment,[172] foreign workers could consider taking the marriage leave allowed by the LSA, or the annual leave to return home at a time of their choice. It would be facile to assume that the legal leaves can be easily realised. TMWs' decisions to take long leaves are always overshadowed by rejection of the renewal of their contract for the next term, or of being terminated. However, relieved from the imposed, three-year temporariness, TMWs' needs to have time off for life events could at least be seen within the legal and contractual framework.

Concluding Remarks

從事就業服務法第四十六條第一項第八款至第十一款規定工作之轉換雇主或工作程序準則) 2003 art 23. Hereafter 'Directions of the Employment Transfer of Foreign Workers'.

[170] Lao Gong Qing Jia Gui Ze [Regulations of Leave-Taking of Workers] (勞工請假規則) 1985 arts 2, 3, 4, 7; LSA art 50. The Act provides e.g., eight days of paid marriage leave, eight days of paid funeral leave for the deaths of parents and the spouse, eight weeks of paid maternity leave for child birth, thirty days of half-paid sick leave and fourteen days of unpaid leave for personal matters.

[171] Xing Bie Gong Zuo Ping Deng Fa [Act of Gender Equality in Employment] (性別工作平等法) 2002 art 15. This provides, e.g., eight weeks of paid maternity leave for child birth, between four weeks and five days of paid leave for miscarriage, and five days of paid paternity leave for the spouse's labour.

[172] More precisely, the twelve years of terms are not made up of one single continuous employment, but of four consecutive three-year employments.

The compulsory exit was believed to serve the aim that it could not possibly serve: to exclude unwanted immigrants. It also ensured imaginary security: protecting employers by sending back bad workers within three years. The short term and high cost of compulsory exit guaranteed dependent, vulnerable and, hence, deferent workers. The more workers are made unstable, the more austere they are about personal needs during their employment.

Temporariness and harsh work conditions justify and nourish each other. Harsh work appears less harmful when it is merely a temporary state. The other side of the same coin is that temporariness appears to be necessary, even benevolent, when working conditions are difficult. The exit requirement demonstrated the trick. Under the three years of legally restless employment, the compulsory exit could be beautified as being the right to unpaid leave and a right to go home. This legal fiction is thus an essential justification for the TFW scheme.

Temporariness is also a tool that ultimately maintains alienage, to which I now turn.

5 The Alienage of TFW Schemes in Taiwan

Keeping foreign workers permanently foreign is the primary goal of the TFW scheme. It is commonly suggested that the limited territory and high population density of Taiwan make it impossible to accept foreign workers as immigrants. Foreign workers must always be guest workers.[173]

Being alien means that TMWs are subject to immigration regulations. They are perceived as being citizens' Others and as alien threats. Prejudices against TMWs, as seen in Section 2, are institutionalised through border control. They are thus deprived of those rights and that equality which could not be taken away were they citizens. In this section, I focus on the restrictions that are only feasible on the basis of foreign workers' alien status, including health examinations (Subsection 5.1), unequal treatment and benefits (Subsection 5.2), and employment mobility (Subsection 5.3). I also indicate that this deprivation is justified by a trichotomy theory of rights which assumes a fictionally enclosed democratic community.

5.1 Frequent Health Checks

To cross the border, foreign workers are subject to a strict requirement for a health check, and this continues throughout the course of their employment. Although the check is claimed to be an anti-epidemic measure, its design hosts multiple biases that are coated with the

[173] For instance, MOL, 'Report on Protecting Rights of Foreign Workers' (n 121) 2.

languages of public health. The checks were operated to screen out and send back unqualified TMWs with expenses paid for by the workers themselves.

Frequency

As mentioned in Section 2.2, foreign workers were perceived as being a challenge to national health. The policy, in reply, was to have frequent medical checks to ensure that only healthy workers were in the country, and that they were always healthy. The checks were required before applying for visas, within three days of arrival and three times during the employment. These checks were scheduled in the sixth, eighteenth and thirtieth months of their stay.[174] A foreign worker must endure five health checks in the three-years of employment. This frequency has already been reduced. Before 2004, health checks were required every six months. [175]

Items: Beyond Epidemic Concerns

The current list of health checks consists of tuberculosis, Hansen's disease, syphilis, parasites, measles, general physical examination with examination of mental conditions.[176] Extra items may be applied to workers from specific countries.[177] Although the current list appears to be more anti-epidemic orientated, it has been used as a tool to respond to diverse social concerns from time to time. For instance, between 1992 and 2004, narcotics in urine, e.g., amphetamines, morphine and marijuana reactions, were included in the test list.[178] A general physical examination including a mental status examination, became part of the list in 1997. The mental condition check is no more than the government's pretext that something is done

[174] Shou Pin Gu Wai Guo Ren Jian Kang Jian Cha Guan Li Ban Fa [Regulations Governing Management of the Health Examination of Employed Foreigners] (受聘僱外國人健康檢查管理辦法) 2004 art 5.

[175] Measures for Employment Permission and Supervision of Foreign Persons art 22.

[176] Regulations Governing Management of the Health Examination of Employed Foreigners art 6.

[177] ibid art 6, para 1, subpara 7.
For instance, Indonesian workers should have extra tests for typhoid, paratyphoid and bacillary dysentery. MOH, 'Bu Shou Ji Zi Di 10421000259 Hao Gong Gao [MOH Decree Bu-Shou-Ji-Zi No.10421000259] (部授疾字第 10421000259 號公告)' (*Centers for Disease Control*, 18 September 2015) <https://goo.gl/sqbJ4z> accessed 15 February 2018.

[178] Measures for Employment Permission and Supervision of Foreign Persons art 15.
The drug test were removed partly because the number of medical institutions which were officially approved to conduct a urine test for drug abuse was too few. Yu-Ching Chang and others, '1989-2015 Nian Tai Wan Shou Pin Gu Wai Guo Ren Jian Kang Jian Cha Zhi Du De Yan Jin Yu Ge Xin [Evolution of Health Examination for Employed Foreigners in Taiwan, 1989-2015] (1989–2015 年臺灣受聘僱外國人健康檢查制度的演進與革新)' (2017) 33 Taiwan Epidemiology Bulletin 9, 14.

to exclude 'unsafe' workers.[179] In fact, the mental check only requires that the doctor observes signs of mental health conditions through simple dialogues; statistics show that no cases of unqualified results as a result of the mental check were ever reported.[180]

Pregnancy is by no means an illness, but a pregnancy test has been requested for female workers since the start of the TFW scheme. The pregnancy test after entry was removed in 2007, but it remained a condition for visa application until 2015.[181] Underlying the pregnancy test is the double anxiety about unwanted immigrants and undesirable workers. Women's capacity to become pregnant was deemed particularly threatening to the immigration regime.[182]

The initial Bill of the ESA contained the pregnancy test, which raised heated debates in the review committee, of the Legislative Yuan. Supporters argued that female workers should be deported as soon as they became pregnant, to avoid their putting down roots with the new born child.[183] It was even suggested that deportation during pregnancy was more humane than deportation after the child's birth, because birth father had not yet had the chance to develop a connection with the child.[184] The Legislative Yuan finally rejected the pregnancy test by a majority vote, due to concerns relating to sexual and occupational discrimination.[185] Nonetheless, after the ESA was enacted, the CLA restored the pregnancy test through the back door of making executive regulations for the ESA.[186] It was plainly unconstitutional by

[179] The mental examination attracts public concerns whenever incidents involving foreign workers with mental health conditions appear in the media. For instance, in 2003, Liu Hsia, a writer who needed long-term care for her condition of rheumatoid arthritis, was seriously injured and soon passed away because she was pushed to the floor by her foreign home caregiver. The caregiver was later diagnosed with a mental illness. The CLA President, Chu Chen, suggested that the mental examination should be more rigorously implemented to prevent future tragedies. Ku, 'The Condition of Freedom' (n 96) 5.

[180] Centers for Disease Control, 'Wai Lao Jian Jian Tong Ji Zi Liao [Statistics of Foreign Worker Health Check] (外勞健檢統計資料)' (*Centers for Disease Control*) <http://www.cdc.gov.tw/professional/> accessed 8 February 2018.

[181] Regulations Governing Management of the Health Examination of Employed Foreigners art 5, para 1, subpara 5 as promulgated on 13 January 2004, art 6, para 1 and art 7, para 1 as amended on 2 October 2007.

[182] Tseng (n 11) 37.

[183] 'Wei Yuan Hui Ji Lu [Records of Committees] (委員會記錄)' (1991) 2543 Legislative Yuan Gazette 86, 88 speaking of legislator You-Chi Li; 'Records of Yuan Sittings' (n 23) 242–43 speaking of legislator Yung-Hsiung Wu; 'Yuan Hui Ji Lu [Records of Yuan Sitting] (院會記錄)' (1992) 2559 Legislative Yuan Gazette 42, 67–68 speaking of legislator You-Chi Li.

[184]'Yuan Hui Ji Lu [Records of Yuan Sitting] (院會記錄)' (1992) 2560 Legislative Yuan Gazette 26, 27–28 speaking of legislator Ching-Hsing Li. On the other hand, opponents of the pregnancy test argued that the test was a measure of severe sexual and class discrimination, e.g. 'Records of Yuan Sitting' (n 183) 45, 65–66 speaking of legislators Gau-Jeng Ju and Cheng-Chieh Lin.

[185] The pregnancy test was rejected by a vote of 34 vs. 24. 'Records of Yuan Sitting' (n 184) 29.

[186] Measures for Employment Permission and Supervision of Foreign Persons art 15, para 1, subpara 8.

violating the explicit will of the legislator, but, in practice, this was never challenged in court, until it was eventually repealed in 2015.[187]

Finally, even for transmittable diseases, doubts could still be cast as to what extent the health check policy is based on pure anti-epidemic assessment. Hepatitis B, syphilis, and HIV/AIDS have similar routes of infection: through contact with infected blood, semen, or other body fluids. All were listed on the health check list when the TFW scheme was established but were later treated differently. The hepatitis B test was entirely removed in 2009, on the basis that infected foreign workers are not likely to spread hepatitis B. [188]

The same rationale might have been applicable to syphilis and HIV/AIDS. However, the syphilis test remains on the list today. The infected foreign workers outside the territory will have their visa applications rejected, while publicly funded treatment and the chance of a re-test were provided for infected foreign workers in the territory after 2007.[189] On the other hand, Taiwan used to impose a ban on all foreigners with HIV infection either entering or staying.[190] The ban appeared to be general, but it disproportionally affected TMWs and immigrants, because only they were subject to compulsory health checks.[191] The general HIV/AIDS ban of immigration regime was eventually eliminated in 2015;[192] accordingly the HIV/AIDS test was removed from the check list for foreign workers. However, immediately after that, HIV could not be the grounds for rejecting foreign workers' entry, though foreign workers are 'strongly advised' by the Taiwanese government to take the test in their own interests.[193]

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[187] Regulations Governing Management of the Health Examination of Employed Foreigners art 6, para 1.
[188] Chang and others (n 178) 13.
[189] Regulations Governing Management of the Health Examination of Employed Foreigners art 6, para 1, subpara 2 as amended on 2 October 2007.

[190] Hou Tian Mian YiQue Fa Zheng Hou Qun Fang Zhi Tiao Li [AIDS Prevention and Control Act] (後天免疫缺乏症候群防治條例) 1990 art 14.
[191] Immigration Act art 11, para 1, subpara 8 and art 24, para 1, subpara 8.

[192] Ren Lei Mian Yi Que Fa Bing Du Chuan Ran Fang Zhi Ji Gan Ran Zhe Quan Yi Bao Zhang Tiao Li [HIV Infection Control and Patient Rights Protection Act] (人類免疫缺乏病毒傳染防治及感染者權益保障條例) 2007 as amended on 4 February 2015, deleting arts 18-20.

[193] This advice is a special notice attached to the health examination form for the foreign worker. Foreign workers are informed that free AIDS treatments under the National Health Insurance are not available to them, and the estimated medical cost per year is around US$10,000. The notice reads that '[i]t is strongly advised that non-ROC nationals undergo HIV screening in their homeland…Persons infected with HIV are strongly advised to stay in their homeland for treatment.' MOH, 'Health Certificate for Foreign Labor (外籍勞工健康檢查項目表)' (*Centers for Disease Control*, 18 May 2017) <https://goo.gl/UXzS8u> accessed 1 February 2018.

In short, items on the health check list could not be explained by the rationale that cross-border migration increases the risk of the spread of illness. They were partly a function of the imagined 'social costs' incurred by foreign workers: pervasive drug abuses, uninvited immigration, undesirable children, mental illness, lowered hygienic conditions, eroded sexual morals. It was also partly shaped by the desire to economise on medical resources' spending on outsiders.

Consequence of Test Failure

As a border control measure, the health examination result is tied to foreign workers' rights to a presence and staying in the territory. Visa applications by TMWs could only be successful under a qualified result.[194] After the foreign workers' entry, it used to be the case that any unqualified result would lead to the invalidation of permits and deportation, including minor symptoms of parasitic infestation.[195]

Sending back those who fail the health check appears to be a reasonable measure of public health management by isolating the sources of disease from the healthy, just like infected cells necessitate their removal. The deportation approach implies that the source of infection invades from the outside, while this land is clean. However, to the contrary, the diseases on the list are no more epidemic among the population of TMWs than in the local population. Lin et al.'s study, for instance, shows that the epidemic rate of TB is lower among TMWs than among the locals.[196] TMWs could well be infected after entry and in the workplace. Yet, by virtue of alienage, the state could just deport the threat, and the employer remove a sick worker. The health check system, plus the deportation regime, reinforces and visualises alienage: foreign workers are deemed to be an alien invasion into the otherwise healthy and clean body politic.

Legally speaking, the deportation approach contradicts the labour law safeguard regarding the termination of sick workers. Under the LSA, sickness can be the legal ground for dismissing

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Curiously, HIV/AIDS is the only disease which necessitates such advice. The notice once again relates the stigma of HIV/AIDS with systematic discrimination against foreign workers.

[194] Regulations on the Permission and Administration of the Employment of Foreign Workers art 27; Regulations Governing Management of the Health Examination of Employed Foreigners art 5, para 2.

[195] Chang and others (n 178) 12.

[196] Hsin-I Lin and others, 'Wai Ji Lao Gong Jie He Bing Zhen Duan Ji Qian Fan Zuo Ye Zhi Hui Gu Yi Zhong Bu Di Qu Wei Li [Review of the Diagnosis and Deportation of Foreign Workers with TB: a Case Study of the Central Taiwan Area] (外籍勞工結核病診斷及遣返作業之回顧－以中部地區為例)' (2013) 29 Taiwan Epidemiology Bulletin 94, 194.

workers unilaterally, provided that that the disease cannot be cured after the worker has taken all legal leaves, both paid and unpaid, for treatment. The unpaid leave is as long as one year within two years of work.[197] In addition, to the extent that the infected worker would not transmit disease with appropriate preventive measures, the employer cannot dismiss the worker solely on the ground of infection.[198] The diseases on the TMWs' test list are mostly curable, and their transmission is controllable. The employer is legally obliged to grant leaves for treatment in the case of nationals. However, the deportation regime ignored the TMWs status as workers under the labour law, interrupting their employment through the immigration regime. After deportation, the employer could simply recruit new TMWs, while the deported TMW was left alone to acquire treatment and to pay back any remaining debts. The deportation approach thus unjustly sharpens the unequal termination power between the employer and TMWs. It has also enhanced the stigma suffered by workers living with these diseases.

In addition, the deportation regime affects the process of medical diagnosis and treatment. The deportation procedure is triggered by a legally defined, black-and-white test result.[199] However, the test results have grey areas; they do not necessarily equate with a confirmation of diagnosis and take time and further examination to confirm. However, the legal timeframe of deportation and the TMWs' limited economic resources usually do not allow for further medical probing.[200] The deportation approach also tends to drive TMWs with a disqualified test result to run away, which is counter-productive to anti-epidemic concerns.[201] After

[197] Regulations of Leave-Taking of Workers arts 4, 5.

[198] CLA, '88 Tai Lao Zi Er Zi Di 0047143 Hao Han [CLA Letter Tai-Lao-Zi-Er-Zi No. 007143] (88 台勞資二字第 0047143 號函)' (*Law Source Retrieving System of Labor Laws and Regulations*, 1 November 1999) <https://goo.gl/vCcxbY> accessed 23 January 2018.

[199] Attachment to Regulations Governing Management of the Health Examination of Employed Foreigners.

[200] Taking TB as an example, the acid fact stain test is the standard procedure for chest radiography abnormalities. Positive results are legally defined as being disqualified. Nevertheless, the acid fact stain test alone cannot confirm a diagnosis of TB, because non-tuberculosis mycobacterium may also lead to a positive result. It takes a mycobacteria culture or a pathological examination to confirm, but the former takes several weeks to complete, while the latter is invasive, requiring surgery. Consequently, foreign workers with a positive result from the acid fact stain test would be deported well before the diagnosis is finally confirmed. Yu-Hui Huang, 'The Silent Body of Migrant Works: Analyzing The Implications of Authority in Taiwan's Medical Policy for Repatriation of Foreign Workers Infected Tuberculosis (移工沉默的身體：分析台灣遣返結核病移工之醫療政策的權力意涵)' (Nanhua University 2013) 40 <https://goo.gl/G1ZqwD> accessed 16 February 2018; Hsin-I Lin and others (n 196) 98.

[201] Foreign workers with a positive test result for TB were legally required to take fourteen days of treatment before deportation. However, Lin and others have pointed out that, in their study, more than

deportation, the TMWs are barred from re-entry, unless with medical evidence of being cured.[202] However, for the TMWs who lack medical resources in their local areas, it is difficult to obtain such evidence.

Positively, the deportation approach has been gradually replaced by proper treatment and chances for retest. After October, 2015, except for multiple drug resistant tuberculosis, in general, an unqualified test result would not directly lead to the invalidation of a permit, unless the TMW fails to take treatment regularly or fails the retest after treatment in the designated period.[203] For instance, workers failing the parasite test need to accept treatment and pass the test within 65 days of treatment to avoid deportation.[204] These measures alleviate the vulnerability of TMWs before the health check regime.

Discriminatory Health Check Regime

Despite significant improvements, the health check regime is overt class discrimination against nationals of the sending countries. The Department of Health (DOH, the predecessor of the Ministry of Health and Welfare) consciously took a disparity in the anti-epidemic approach which was 'strict on the blue-collar, lenient on the white-collar'.[205] The only category of foreign professionals which is required to take the medical check to apply for an employment permit is language teachers in short-term supplementary schools.[206] However, the examined items have never involved the kind of social concerns shown in the case of TMWs. Only tuberculosis, syphilis, physical examination (including mental status) and measles are on the test list.[207] More importantly, for language teachers, the health check is not part of the

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70% of foreign workers with a positive result from a TB test were deported without taking the two weeks of treatment. One part of the reason was the concern that they would run away during the fourteen days of the treatment period. However, taking a flight without completing the two weeks of treatment would greatly increase the risk of TB transmission. Hsin-I Lin and others (n 196) 98.

[202] Jin Zhi Wai Guo Ren Ru Guo Zuo Ye Gui Ding [Rules Regarding Entry Bans on Foreigners] (禁止外國人入國作業規定) 2000 art 2, para 1, subpara 6.

[203] Regulations Governing Management of the Health Examination of Employed Foreigners art 10.

[204] ibid art 7, para 2, subpara 4.

[205] The disparity was justified on the low opinions of the medical and living standards of the sending countries. To the contrary, foreign professionals coming from advanced countries were said to pose fewer epidemic risks. Hsu Mei Hsu, 'Wai Lao Yu Guo Nei Fang Yi Wen Ti [Foreign Workers and Epidemic Problems] (外勞與國內防疫問題)' (1994) 12 Taiwan Epidemiology Bulletin 339, 340.

[206] Regulations Governing Management of the Health Examination of Employed Foreigners art 4.

[207] The pregnancy and drug tests never appeared on the list. If compared to the current list of foreign workers, Hansen's disease and parasites are not required for foreign language teachers. ibid art 4.
The HIV/AIDS test was included for the health checks for foreign language teachers, but was later removed. ibid art 4 as promulgated on 13 January 2004.

conditions for entry and stay. Foreign professionals do not have to be hired extra-territorially. The health check is not a required document prior to visa application, upon arrival, or during employment. It is only needed to apply or renew the employment permit.

It is reasonable to adjust the items of health checks according to the original geographical area, the work content and the period of stay of the foreigners in question. However, the health check regime and its legal effects are solely divided along the line of occupation. A Filipino who is a home-caregiver, a Filipino language teacher and a Filipino athlete are all from the same country, but the health check regime takes the first a constant epidemic concern, while considers the other two just fine. It either assumes that only the poor spreads diseases, or that professionals could not come from the same sending countries as TMWs. Either way, the health check regime is built on the basis of class and nationality discrimination.

Concluding Remarks

The health check is less malicious after the checked items put more focus on anti-epidemic considerations, and after failed results would no longer lead to deportation for most diseases. These reforms are significant, but they do not change the discriminatory and irrational nature embedded in the checks. In reality, a sick or pregnant foreign worker immediately faces uncertainty in employment and of stay, regardless of their legal rights, since the employer might seek to terminate the worker's employment, despite weak legal grounds. Regular medical checks thus always enhance the precarious status of TMWs.

5.2 Deprivation of Employment Mobility

The previous subsection shows that alienage enables the state to make the TMWs' right to enter and stay contingent on imagined threats of alienage. This subsection further demonstrates that alienage enables workers' rights to presence to be tied to a particular job. It creates a valuable feature among the TMWs for the employer, that is, a lack of freedom.[208]

The general principle of the Taiwanese TFW scheme is that TMWs are banned from changing both their employer and their job.[209] Once a TMW is hired by an eligible employer, the workers' permit to work is tied to the employer's permit to hire. Under this strict tie between the parties, the worker is not allowed to be hired by someone else; and the employer can only recruit new

[208] Yu-ling Ku, 'A Distorted "Semi-Liberal Market of Migrant Workers" in Taiwan' (2013) 2 Taiwan Human Rights Journal 93, 94.

[209] ESA art 53.

TMWs after the previous workers *exit the territory*—due to death, permit expiry, or deportation.[210] The idea is that the total number of imported labour units are capped; one must leave before another can enter, like a revolving door. This is once again a border control mechanism which operates through the employer (by constraining the employer's use of their hiring quota) and motivates the employer to avoid a prolonged-stay by the TMWs whenever the workers cannot fulfil the job, including entering into labour disputes.

Transfer System

It used to be the case that whenever the employment was terminated, the worker had to exit, even if the permit had not yet expired. The limit was loosened after the introduction of the transfer system, which allows TMWs to change employers in exceptional circumstances.[211] There are generally two categories of grounds for transfer. Firstly, TMWs' contracts are terminated before the expiry of employment for reasons for which those workers cannot be held responsible. Their service is no longer needed due to significant changes in the employer's circumstances, or the employer grossly breaches his/her contractual or legal duties. For instance, the person receiving care has passed away; the employer emigrates; the boat sinks; the plant is closed; the employer fails to pay wages in due course;[212] or the foreign worker is physically assaulted, mentally abused or sexually harassed.[213] Secondly, parties may agree that foreign workers transfer.[214] Consensual transfer is particularly critical for home domestics. Caregiving is an individualised relationship, which may not work out, with nobody at fault. Without consensual transfer, an unsuccessful relationship can only lead to early termination and the immediate exit of foreign workers.

Limits of Transfer

The transfer system, however, is far from being the freedom to change employment, since neither ground for transfer allows TMWs to quit their job unilaterally. They are either affected by an early termination or they have to depend on the employer's goodwill.[215] Without the

[210] The tie is loosened a little by allowing the employer to hire a new foreign worker after three or six months of time when the previous foreign worker losing contact. ibid art 58, para 1.

[211] Transfer was added to the ESA in 2001. However, in reality, foreign workers could not transfer until 2003, when the regulation details of the transfer system were finally available. See Directions of the Employment Transfer of Foreign Workers.

[212] ESA art 59.

[213] Directions of the Employment Transfer of Foreign Workers art 8, para 1.

[214] ibid art 17, para 1, subpara 6.

[215] Ku, 'A Distorted "Semi-Liberal Market of Migrant Workers" in Taiwan' (n 208) 97–98.

employer's consent, the options for TMWs are as limited as they were before: either to continue with the employment, to quit and return, or simply to run away.

Jobs available to TMWs seeking transfer are limited and the time allowed for transfer is tight. TMWs can only find the same type of job in the same economic sector, unless in exceptional circumstances, such the worker being a victim of sexual violence or trafficking.[216] The transfer procedure is a centralised matching process. TMWs seeking transfer must register with the MOL. Then they will be matched by the MOL system with qualified employers who are willing to hire transferred TMWs. The MOL holds a weekly meeting to which parties may come to decide whether to agree with the matching and finalise the transfer.[217] In principle, TMWs are allowed 60 days for transfer.[218] If all efforts are met without success in 60 days, the TMW will need to return home.[219]

There are institutional reasons for which the employer tends not to agree TMWs to transfer out. First, the employer of industrial TMWs would lose their quota to recruit a new TMW after the worker transfers out. That is, it is not allowed to hire a new foreign worker to take over the remaining post in the case of transfer.[220] Second, an employer of foreign domestics is allowed to hire a replacement after the worker's transfer, but the employer needs to wait until the transfer procedure ends before recruiting a new foreign domestic.[221] This causes a gap in labour. Some employers are therefore motivated to avoid transfer. Instead, they may seek fault in the worker so as to terminate the work relationship unilaterally if they are dissatisfied with that worker.[222]

During the transfer procedure, TMWs have no economic support. They cannot work while seeking transfer; nor are they entitled to unemployment benefits, because they are excluded from the Employment Insurance.[223] At best, TMWs are protected by the LSA and they may be

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[216] Directions of the Employment Transfer of Foreign Workers art 8.

[217] ibid arts 9, 10.

[218] In exceptional cases, the MOL may approve a 60-day extension. The victim of sexual violence in the work place is not subject to the 60-day limit. ibid art 11, paras 1, 2.

[219] ibid art 11, para 3.

[220] ESA art 58, para 1.

[221] ibid art 58, para 2, subpara 2.

[222] Ku, 'A Distorted "Semi-Liberal Market of Migrant Workers" in Taiwan' (n 208) 98.

[223] Jiu Ye Bao Xian Fa [Employment Insurance Act] (就業保險法) 2002 art 5, para 1.

qualified for a severance payment [224] although, in reality, it may be hard for TMWs to pursue this. Finally, the transfer procedure would not stop the clock ticking towards the expiry of the employment permit.[225] The longer the transfer takes, the shorter the remaining valid period for the new employment, and the harder it is to find a willing employer to hire the worker. Uncertainty and the lack of income make the transfer procedure a stressful process for TMWs.

Running Away as Resistance in an Unfree Labour Market

By making the consent of the employer essential in order for TMWs to change their job, the transfer procedure guarantees the employer a labour force that is tied to the job, unless the worker decides to return or to become undocumented, giving up their hard-earned permits. In fact, running away is often the only means left to TMWs to resist the institutional power of employers; and the design of the TWF scheme recognises this effect at resistance. The employer has to endure a three-month (in the case of foreign domestics) or six-month (in the case of industrial TMWs) waiting period before hiring a replacement if the previous TMW loses contact.[226] The minimum three months of the waiting period is decided according to the average time required for TMWs to transfer. The government points out that the waiting period is to prevent the moral hazard that the employer is indifferent to improving the work relationship to prevent the TMWs running-away. Without the compulsory waiting period, employers may have considered that letting the foreign worker run away is simpler and quicker than the trouble of undergoing a consensual transfer, which could take months.[227]

In other words, in an unfree labour market where foreign workers cannot unilaterally and legally leave their jobs, the alleged institutional design to motivate the employer to improve working conditions is the workers' agency to run, with the considerable personal sacrifices and the inconvenience of the waiting period that are involved. However, the punitive waiting period also makes TMWs even less free, because the employers are motivated to monitor the TMWs closely, as discussed in 3.2.

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[224] LSA art 11.

[225] Directions of the Employment Transfer of Foreign Workers art 14.

[226] ESA art 58, para 1 and para 2, subpara 2. See also the *infra* note 210 and surrounding texts. The original design of ESA did not allow for the hiring replacement of foreign worker who lose contact, unless the lost- contact worker were found and deported.

[227] 'Records of Committees' (n 161) 414 speaking of the Deputy Director General of Bureau of Employment and Vocational Training, Wei-Ren Liao.

Running away is the product of the TFW scheme which allows for no employment mobility. The lack of freedom tends to nourish exploitation, [228] which drives workers to run away. This vicious circle is a product of the alienage of TMWs, since a similar ban cannot be imposed on nationals. In what follows, I summarise further unequal treatment of foreign workers.

5.3 Unequal Labour Standards

The MOL claims that, in principal, TMWs enjoy national treatment in relation to labour protection, especially under the LSA.[229] The LSA applies to certain sectors of industrial foreign workers (fishing, construction and manufacturing), but does not apply to domestics, either foreign or national. However, even when the LSA is applicable, alienage still generates inequality. Two aspects of unequal treatment are analysed here: unequal pay under the formal equal minimum standards and explicit exclusion from social insurance. I would like to end this section by pointing out that the disparity in treatment is implicitly supported by a theory of a trichotomy of rights. The theory is established on a specific view of democratic political community, which I will revisit in Chapter 6.

Equal Minimum Labour Standards, Unequal Pay

The minimum wage under the LSA requires only a minimum standard, rather than equal pay. The statutory 'minimum' wage is thus the ceiling for foreign workers across industries; and their pay normally does not increase with seniority. For instance, the statutory minimum wage wasNTD 20,008 (about US$688) in 2016. The average regular earnings (wages plus overtime) of industrial foreign worker was NTD 20,848 (about US$717) in June, 2016, which is about 95% of the average entry level regular earnings of the manufacturing and construction sectors.[230] The employer must also try to recruit nationals with reasonable pay before turning

[228] For instance, a large pay gap exists between legal and undocumented foreign workers, even if they are doing the same job. In 2014, Chang reported that while a legal foreign caregiver in the TFW scheme was paid NTD 15,840 per month, a legal foreign caregiver outside the TFW scheme (usually the foreign spouse of nationals) was paid NTD 19,237, an unauthorised foreign caregiver hired directly by the employer cost NTD 22,000; an unauthorised foreign caregiver hired through the broker cost NTD 36,000; and a local caregiver costs NTD 66,000. Chin-fen Chang, 'Dang Zhi Du Sha Ren Wai Ji Kan Hu Zai Tai Wan De Chu Jing [When the Institution Kills: The Circumstances of Foreign Caregivers in Taiwan] (當制度「殺人」：外籍看護在台灣的處境)' (*Sociology at Street Corner*, 21 April 2014) <https://twstreetcorner.org/2014/04/21/changchinfen-2/> accessed 12 February 2018.

[229] MOL, 'Report on Protecting Rights of Foreign Workers' (n 121) 2–3.

[230] The average monthly income of foreign workers is NTD 25,440 in June 2016, including overtime for industrial foreign workers. Their income structure showed that the average regular earning is about the minimum wage. MOL, 'Summary of Statistic Analysis of Survey in 2016' (n 26) 10, 35.

to a foreign labour force, as mentioned. The minimally reasonable pay with which to recruit nationals, as announced by the MOL are, in general, well beyond the minimum wage, as opposed to the fact that foreign workers are paid the minimum wage to do the same job. For instance, while the minimum monthly wage is NTD 22,000, as of 2018,[231] the reasonable wage for the slaughtering industry to recruit nationals should be above NTD 26,000, or 30,000 for antisocial hours.[232]

Substantially, the real income of TMWs does not even reach the statutory minimum wage. As indicated in various places, the wage of foreign workers is further subject to deductions and expenses which are incurred due to their special circumstances of crossing the border: including the board and lodging fees,[233] the monthly service fee of the broker/employment agency,[234] the fee for the health checks[235] and other administrative documents. These fees are, in fact, the management costs of the employer bypassed to the TMWs; the workers, however, have no say in the quality of services, the food and the living environments for which they are required to pay. For instance, most employment agencies do not charge the employer commission for recruiting and managing TMWs, but they rely on fees levied from workers.[236] Although the monthly service charge of the employment agents is legally capped,[237] they are still allowed to collect extra charges for individual service which is claimed not to be included in the routine, such as driving TMWs to see a doctor.[238]

On the other hand, as mentioned, the working conditions of domestics are mainly subject to private contracts. In practice, a *de facto* minimum pay rate is maintained by the sending countries of foreign domestics. The government agents reject verifying whether the

[231] MOL, 'Lao Dong Tiao 2 Zi Di 1060131805 Hao Gong Gao [MOL Decree Lao-Dong-Tiao-2-Zi No. 1060131805] (勞動條 2 字第 1060131805 號公告)' (*Law Source Retrieving System of Labor Laws and Regulations*, 2 September 2017) <https://goo.gl/nrnJ24> accessed 12 February 2018.

[232] MOL Letter Lao-Dong-Fa-Guan No. 1040514001.

[233] See discussion in 3.1.

[234] See discussion in 4.2, especially note 150 and related texts.

[235] See discussion in 5.1.

[236] This phenomenon is pointed out by many researchers, e.g. Ku, 'A Distorted "Semi-Liberal Market of Migrant Workers" in Taiwan' (n 208) 101–02; Lan (n 15) 79–82. Employment agencies sometimes even pay rebates to the employer so as to secure agency contracts.

[237] Standards for Fee-charging Items and Amounts of the Private Employment Services Institution art 6.

[238] ibid art 2, para 1, subpara 5.

employment contract fails to reach the recognised standard of pay. However, even with official assistance, the pay is considerably lower than the statutory minimum wage, which was locked at NTD 15, 840 for almost two decades,[239] and then was slightly raised to NTD 17,000 (about US$552) in 2015, via inter-governmental negotiations.[240] Comparatively, the reasonable monthly wage to recruit nationals for jobs as a home-caregiver/domestic is announced to be above NTD 30,000.[241] In practice, caregiving performed by nationals in the hospital would cost more than NTD 60,000 per month,[242] higher than the monthly *per capita* income in Taiwan.[243] That is, most people cannot afford to hire nationals for 24-hour caregiving. Although all in-home caregivers/domestics are not protected by the LSA, only foreign workers are thus affected by the absence of a minimum statutory wage.

The MOL constantly defends the low wages of foreign domestics on the basis that they obtain 'free' board and lodging. It claims that the real wage is approximately up to the level of the statutory minimum wage if the value of board and lodging are considered.[244] However, the living conditions can hardly be a benefit, but are a particularly harsh working environment. It is well-documented that living-in leads to unreasonably long working hours, increased workloads, the deprivation of privacy and an increased danger of sexual harassment.[245] The MOL's defence adds insult to injury.

[239] Home domestics fall into a subcategory of the economic sector for personal service. Personal service has been covered by the LSA, therefore home domestics were once covered by the LSA. However, home domestics were later eschewed by the LSA in 1999. Since then, the wages of the foreign home domestic have been frozen at the minimum wage that applied at the time of this eschewal, NTD 15, 840, for eighteen years. Ku, 'The Construction of Migrant Workers Movement Subjects' (n 166) 20.

[240] In 2015, the sending countries requested a raise in pay and refused to verify contracts with a wage lower than NTD 17,500. The inter-governmental negotiation finally reached agreement at the current amount. 'Jia Shi Wai Lao He Li Diao Xin Shi Yong Wei Lai Xin Shen Qing An Yue Di Qian Xie Shang Diao Xin Fang Shi [Higher Wage of Foreign Home Domestics Negotiated by End of August] (家事外勞合理調薪適用未來新申請案 8 月底前協商調薪方式)' (*MOL*, 17 August 2015) <https://www.mol.gov.tw/announcement/27179/23544/> accessed 12 February 2018.

[241] MOL Letter Lao-Dong-Fa-Guan No. 1040514001.

[242] See *supra* note 228. I also visited the websites of hospitals and caregiving centres for the market rates. In general, the daily rates are between NTD 2000-2500 for a 24-hour shift.

[243] 'National Statistics, Republic of China (Taiwan) - Labor Force' (n 54).

[244] See *supra* note 240.

[245] See discussion in *supra* note 26.

Explicit Exclusion: Labour Pension and Unemployment Benefits

In addition to minimum labour standards, TMWs are also partially excluded from social security schemes, mainly the Labour Pension Scheme (PS)[246] and the Employment Insurance (EI),[247] due to their status as non-citizens.[248] Exclusion from social insurance makes TMWs cheaper labour for employers, since the employer is exempted from the compulsory contribution. For every eligible worker, the employer is obliged to pay 70% of the employee's premium of EI[249] and to contribute at least 6% of the employee's monthly wage to the PS fund.[250] Once again, the exclusion is closely connected to the logic of alienage. TMWs are deemed to be outsiders from a social security community in which members take collective responsibility to help each other. They are not expected to be a liability to the host state when they are not productive workers.

Excluding TMWs from the social insurance appears not to violate constitutional equal protection and is further supported by the theory of the trichotomy of rights. The relevant constitutional case, JY Interpretation No. 560,[251] concerns the refusal of the benefits of LI for a foreigner's spouse, children and parents who were sick, had passed away, who had given birth outside the territory, although foreigners paid the same premium rate as nationals did.[252] The petitioner[253] argued that, among others, the provision constituted discrimination that was based on nationality. This should be reviewed under strict scrutiny, since nationality is an

[246] Labor Pension Act art 7, para 1.

[247] Employment Insurance Act art 5, para 1. The Employment Insurance provides unemployment benefits, vocational training living allowances, parental leave allowances and National Health insurance premium subsidies. ibid art 10.

[248] Note that this is discrimination based on nationality, rather than employment. Both foreign professionals and foreign workers are excluded.

[249] Employment Insurance Act art 40.

[250] Labor Pension Act art 14, para 1.

[251] *Shih Tzu [Interpretations of Judicial Yuan] (司法院解釋釋字) No 560* (Justices of the Constitutional Court, Judicial Yuan). English translation of the Interpretation is available at Raymond T Chu (tr), 'JY Interpretation No. 560' (*Justices of Constitutional Court, Judicial Yuan*, 4 July 2003) <http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=560> accessed 16 December 2017.

[252] ESA art 43, para 5 (repealed on 21 January 2002).

[253] The petitioner, Wiedenbuch, was a white-collar worker of German nationality. His mother passed away in Germany; he was refused the burial compensation for family members under the LI. *Wei Zu An Sheng Qing Shu [Wiedenbuch's Petition to the Constitutional Court] (魏祖安聲請書)* (2003) 45: 8 *Judicial Yuan Gazette,* 2, 2.

immutable trait.[254] However, the Court upheld the constitutionality of the provision[255] and it rejected the argument of strict scrutiny, but went for a rational review. The Court held that the legislator is granted a wider margin of discretion when the social benefit is partially funded by the government with public funds and is either an aid or a condolence in nature, rather than a social insurance, such as funeral benefits, in this case.[256] The Court also suggested that the scrutiny of the review might be stricter if foreigners paid the same premium but rejected equal benefits for insured incidents occurring directly to workers, rather than to family members.

Under the Court's approach, totally excluding TMWs from the EI and Labour Pensions is likely to be constitutional, since total exclusion also means that TMWs need not pay the premium. That is, it does not involve the problematic situation in which TMWs are compelled to join the social insurance, to pay the same premium and yet receive unequal benefits.

Trichotomy of Rights-Human, National and Citizen's Rights

Commentators have pointed out that the tolerant approach of the Court towards unequal social benefits for foreigners is influenced by the theory of a trichotomy of rights, which divides constitutional rights into three categories: (1) human rights, (2) the rights of nationals, and (3) the rights of citizens.[257] Rights, which are not differentiated on the basis of nationality, belong to the category of human rights, such as the right to a fair trial or freedom of belief. Rights related to distribution of resources, such as the rights to social welfare, the rights to employment, the right to entry, etc., are attributed exclusively to nationals. Finally, rights of political participation, such as voting or standing in elections, are exclusively reserved for citizens.[258] Under the trichotomy, foreigners can be, or even should be, disfavoured in terms of receiving social welfare, joining the labour market, or casting votes.

Moreover, the trichotomy theory also supports the constitutionality of the TFW scheme, which deprives TMWs of freedom of employment. The Court takes heightened scrutiny in reviewing 'objective restrictions' on the freedom to choose employment. An objective restriction on occupation refers to conditions beyond human control or personal efforts, such as banning

[254] ibid 16–17.

[255] *JY Interpretation No. 560* (n 251) para 1 of Holding.

[256] ibid para 1 of Reasoning.

[257] E.g. Bruce Yuan-Hao Liao, 'The Alien Sovereign?- On the Citizenship of Non-Citizens (外人做頭家？——論外國人的公民權)' [2010] Chengchi Law Review 245, 272.

[258] ibid 258–59.

people without vision impairment from engaging in the massage business.[259] To be constitutional, the law should be the least restrictive means to achieve the critical public interest.[260] Arguably, foreign workers face objective restrictions on their choices of occupation, since their deprivation of employment freedom is based on their nationality, a feature generally beyond human control. Deprivation of TMWs' freedom of employment may not sustain this constitutional scrutiny, if the constitutional doctrine might have been applicable. However, under the theory of the trichotomy of rights, the right to employment belongs to nationals. The Court could simply justify the limits on TMWs' freedom of employment on the basis of their alienage.

The theory of trichotomy is said to protect a reasonable margin of discretion for the democratic mechanism.[261] It is virtually a theory of allocating decisional power between the judicial and the political branches in relation to different constitutional subjects. The legislator should have a large policy space in which to allocate limited resources, and to protect nationals from foreign competitors in the domestic labour market. Reserving the right to employment for nationals lowers the degree of judicial intervention into the political decisions relating to foreigners' access to the domestic labour market. Moreover, the democratic mechanism should be reserved for citizens because, allegedly, there exists a steady, long-term, not-easily-separable tie between citizens and the state. To maintain popular sovereignty and to avoid foreign power from intervening in domestic politics, foreigners should thus be excluded from the right to political participation.[262]

The trichotomy of constitutional rights is premised on an enclosed democratic community exclusively composed of people with a status of legal citizenship. A similar democratic citizenship model will be shown in Chapter 4 when we discuss the theory of non-domination. For now, however, it is important to notice that the trichotomy theory makes explicit the

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[259] *Shih Tzu [Interpretations of Judicial Yuan] (司法院解釋釋字) No 649* (Justices of the Constitutional Court, Judicial Yuan). English translation is available at Andy Y. Sun (tr), 'JY Interpretation No. 649' (*Justices of Constitutional Court, Judicial Yuan*) <http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=649> accessed 18 February 2018.

[260] ibid para 4 of reasoning.

[261] Tung-Ying Lee, 'On the Basic Rights of Foreigners: From the Perspective of German Law' (2017) 42 The Constitutional Review 235, 246. The theory of the trichotomy of rights is transplanted from the doctrines and literature of the Basic Law of Germany. Lee thus borrows from the German literature to justify the rationale underlying the trichotomy.

[262] ibid 254.

underlying linkage between the domain of economic participation (national rights) and the domain of political participation (citizens' rights). Foreigners are deliberately prevented from constitutional guarantees of equal access in both domains, i.e., economic and political participation, to satisfy a specific normative conception of democracy legitimacy and popular sovereignty. The TFW scheme establishes the double exclusion from constitutional protection of TMWs.

There are multiple approaches with which to challenge this double exclusion. To enhance foreigners' marginalised status in the domain of economic participation, one may seek to expand the scope of human rights to incorporate some economic rights. Alternatively, one may seek to loosen the tie between legal citizenship and democratic participation and legitimacy, so that foreigners may enter the arena of political decision making in order to change the rules for economic affairs. In the following chapters, I will pursue the latter approach.

6 Moving on

In this chapter, I have pointed out that the TFW scheme in Taiwan was designed to fulfil the contradictory policy goals which emerged in the context of class, nationality/racial and gender biases. It internalised the biases in the institutional design and in the handover of the extensive immigration power to the private hands of employers. Over the decades, the TFW scheme has improved in many aspects so as to enhance labour protection. Nevertheless, the fundamental goal is still to keep foreign workers as a disposable, economic and unfree labour force, and this remains intact. The techniques of temporariness, despite being fictional, justify TMWs as being subordinated, super-flexible workers. The status of the alienage of TMWs, on the other hand, embodies anxieties about TMWs through border control, and it constitutionally sustains the TFW scheme as a regime of unfree labour. This corresponds with the trichotomy of rights theory, which envisions a specific understanding of democratic legitimacy and community.

The TFW scheme in Taiwan is a dense, oppressive immigration regime. In the next chapter, I will show that although the Canadian scheme avoids many of the faults of its Taiwanese counterpart, it nevertheless cannot avoid the suspicion of its racial motivation, fictional temporariness and perpetual alienage.

Chapter 3

The Temporary Foreign Worker Programmes in Canada

1. Introduction

In the previous chapter, I argue that the Taiwanese Temporary Foreign Worker (TFW) scheme is subject to conflicting policy goals, temporariness and alienage. However, these institutional settings, which lead to an extremely precarious status for TFWs are not unique to Taiwan. It will soon be observed that Canada's TFW scheme shares similar structures which constrain the degree to which the TFWs' interests can be well-guarded.

In comparison, on its surface, the Canadian scheme is a friendlier model: it grants less privatised border control power to the employer over workers, involves less complicated administrative procedures, grants some opportunities for permanent status and is founded on more rationalised immigration regulations. However, at a closer look, the conflicting goals, the legal fiction of temporariness and the techniques used similarly condition the structure of the TFW scheme in Canada. These commonalities between the two cases demonstrate the fundamental limitations as to how far TMWs can be protected while they are purposely confined to an insecure status that is intentionally designed into TFW schemes.

Subsection 2.1 places the emerging TFW scheme against the background of a changing immigration and labour market structure in Canada. The Canadian scheme, although it does not show overt racial discrimination, as the Taiwanese TFW scheme does, still raises doubts as to a possible hidden racial and ethnic preference. Subsection 2.2 points out that the scheme similarly has contradictory policy goals, which can hardly be satisfied simultaneously: a TFW scheme aiming to protect TFWs would be deemed insensitive to employers' interests, while a scheme which prioritises local workers and system integrity usually has indirect adverse impacts on foreign workers.

Section 3 focuses on two immigration policy tools which govern low-waged TMWs to show that the Canadian scheme is not as suffocating as the Taiwanese scheme. However, Section 4 suggests that the Canadian scheme still relies on fictional temporariness to achieve a successful guest worker programme. Yet, a more stringent temporariness is executed, the more precarious, flexible, and hence useful, TMWs are (Subsection 4.1). Meanwhile, successful

maintenance of temporariness depends on the perpetual hope on the part of the workers that they will come back. (Subsection 4.2). On the other, TMWs' perpetual status of alienage means that their opportunities for employment mobility and family reunion are severely constrained by border control, without the law explicitly banning these rights. Alienage also makes the deprivation of the rights of TFWs, and the lack of democratic voices, invisible before the constitutional law (Section 5).

The commonalities that are observed in these two chapters have set out the challenge for the theoretical part of this thesis. As argued, TFW programmes are a site of essentially conflicting interests and rights. Yet, temporariness and alienage not only render TMWs particularly deferential to the employers' control, but also ensure that they are absent from the democratic struggles that decide the priority of their rights. This absence will lead to the core issues in the next three chapters: the link between economic deprivation and political silence, the connection between freedom and democracy, and, finally, the transcendence of alienage and temporariness.

2. Overview

Similarly to my approach to the Taiwan TFW scheme, before entering into institutional details, it might be helpful to have an overview of the backgrounds against which the Canadian TFW scheme emerged. It will be shown that although the current Canadian TFW scheme, unlike its Taiwanese counterpart, does not reveal racial and class biases through explicit language, the Canadian scheme is hardly immune from the criticisms of reinforcing racial and class biases. The rise of the contemporary TFW scheme in Canada is understood as a conservative response towards the liberation of immigration law, which is further stimulated by the neo-liberal turn of labour market deregulation. Meanwhile, the Canadian scheme has experienced rapid growth and a policy U-turn in the last decade, which demonstrates the struggle between competing policy goals. Perhaps unsurprisingly, maintaining the integrity of the scheme is often prioritised over TMWs' interests.

2.1 Backgrounds: Anxiety and Flexibility

It is first noteworthy that introducing guest workers does not raise a crisis of self-identity in societies like Taiwan. Similarly to other East Asian countries, Taiwan self-identifies as an ethnically homogenous community. Traditionally, it prioritises *sui sanguinis* as the constitutional principle of the polity and only allows a narrow door for new comers to acquire permanent status. Excluding TFWs is thus in line with the traditional approach. Contrarily, landed immigrants have been welcomed and encouraged in Canada, and this is considered a

project of nation building and expansion and an integral part of labour market policies. In this context, introducing temporary migration to ease labour shortages, without the route to permanent status, raises doubt about whether the TFW schemes deviate from the Canadian vision of a tolerant immigration-based society.[1]

The idea of introducing foreign guest workers without access to permanent status is not confined to the modern era; but the historical experience is entangled with troubling racial motivations. For instance, during the years between 1881 and 1885, more than 15,000 male Chinese workers were admitted to work on building train tracks. Many were expelled after the work was completed. Those who managed to stay were subjected to the excessive, racist head tax and the anti-Chinese immigration acts.[2]

While the historical precedents of guest worker programmes functioned in the general context of racialised immigration laws and policies, the contemporary TFW programmes are distinctive in that they were introduced under racially- and ethnically- neutral immigration laws. Until the 1960s, Canadian immigration laws included explicit racial and ethnic preferences for immigrants.[3] The points system was adopted in 1967,[4] and was designed to bring in newcomers who could best integrate into Canadian society and who possessed the talents and skills that Canada most needed. The selective criteria shifted from ethnic or racial preference to race-neutral attributes, including age, education, language skills, and employment skills.[5] The reform denoted the liberation and rationalisation of immigration policies whereby racial and ethnic biases faded, giving way to economic considerations.[6]

Guest Worker Programme as an Institution of Immigration Selection

However, the reform also caused ethnic and economic anxiety. Immigrants of West Indian and Asian ethnicity benefited most from the reform. The anticipation of an increased influx of non-

[1] Patti Tamara Lenard and Christine Straehle, 'Introduction' in Patti Tamara Lenard and Christine Straehle (eds), *Legislated inequality: temporary labour migration in Canada* (McGill-Queen's University Press 2012) 4–5.

[2] Nupur Gogia and Bonnie Slade, *About Canada Immigration* (Fernwood Pub 2011) 20–21.

[3] For examples of discrimination and exclusion based on racial, ethnic and other grounds in 19th century Canadian immigration laws and policies, see Janet Dench, 'A Hundred Years of Immigration to Canada 1900-1999' (*Canadian Council for Refugees*, 2000) <http://ccrweb.ca/en/hundred-years-immigration-canada-1900-1999> accessed 21 August 2017.

[4] The points system was later incorporated into the Immigration Act of 1976, which was replaced by the Immigration and Refugee Protection Act (S.C. 2001, c. 27).

[5] Current criteria: Immigration and Refugee Protection Regulations (SOR/2002-227) ss 78–81 (IRPR).

[6] Lenard and Straehle (n 1) 5; Catherine Dauvergne and others, *Immigration and Refugee Law: Cases, Materials, and Commentary* (Second edition, Emond Publishing 2015) 26.

white immigrants, who might have previously been rejected from permanent status, sparked discourses in Parliament which put forward the notion that control was being lost over the border.[7] Based on parliamentary records, Sharma argued that the modern TFW scheme, begun in the 1970s, was a response to societal anxiety about the racial identity of new migrants, in the aftermath of the de-racialisation reform of the immigration system. Soon after the reform, the guest worker program, the Non-Immigrant Employment Authorization Program (NIEAP), was introduced, in 1973, as a strategy through which to reclaim control of the border.[8] The bridge between the permanent and temporary tracks of migration was removed. Participants in the NIEAP were not allowed to shift from the temporary track to the permanent one within the territory after they were admitted with temporary status. They were also required to exit upon expiry of the work permit. The permit could only be renewed extra-territorially.[9] In this regard, the NIEAP undermines the progressive effects of the 1967-reform without readopting explicitly racialised means.[10] It hinders undesired immigrants from landing permanently, while maintaining the 'white fantasy'[11] of a tolerant society and a racially-neutral immigration regime.[12]

In addition to the anxiety over the immigration system, the guest worker programme was further stimulated by the trend of the labour market transformation towards flexibility. From the 1980s onwards, Canada experienced the neoliberal turn of labour market reconstruction—loosening labour regulations, the declining collective bargaining power of unions, increased atypical employment and labour influx under free trade agreements.[13] Expansion of the scheme was advocated as part of the strategy to further deregulate the labour market and to craft a flexible labour force, since foreigners without a secure immigration status could be tied to a specific employer when they are needed and could easily be sent back

[7] Nandita Sharma, *Home Economics: Nationalism and the Making of 'Migrant Workers' in Canada* (University of Toronto Press 2006) 89.

[8] ibid 91.

[9] Judy Fudge and Fiona MacPhail, 'The Temporary Foreign Worker Program in Canada: Low-Skilled Workers as an Extreme Form of Flexible Labour' (2009) 31 Comparative Labour Law and Policy Journal 5, 7.

[10] Sharma (n 7) 92.

[11] Ghassan Hage, *White Nation: Fantasies of White Supremacy in a Multicultural Society* (Pluto Press 1998) 78 (analysing the Australian context).

[12] Sharma (n 7) 94.

[13] Salimah Valiani, 'The Shifting Landscape of Contemporary Canadian Immigration Policy: The Rise of Temporary Migration and Employer-Driven Immigration' in Luin Goldring and Patricia Landolt (eds), *Producing and Negotiating Non-Citizenship: Precarious Legal Status in Canada* (University of Toronto Press 2013) 60.

when redundant. This economic pursuit eventually places considerable power over immigration selection in the hands of private businesses.[14]

To be fair, with the current low-wage[15] TFW scheme is less exclusive than the NIEAP, since the current scheme allows work permits to be applied for or renewed from within the territory.[16] It also offers limited channels for low-wage TFWs to acquire permanent status.[17] However, the scheme still has racial/ethnic implications because the low-skill stream predominantly has participants from Asia, the Pacific, and Middle and South America countries, although most streams of the Canadian TFW scheme are open to participants from around the world.[18] Meanwhile, the offer of permanent status might be similarly exclusive against migrants from less developed countries. This can be observed in the case of the caregiver programme.

Caregiver programme—an exception?

The foreign caregivers/domestic programme distinctively offers the opportunity to apply for citizenship after two years of service.[19] Nonetheless, observed against the historical backdrop, the two-stage immigration of caregivers was more accurately described as a regression from

[14] ibid 62–63. For a general theory of the privatisation of immigration admission, see Audrey Macklin, 'Public Entrance/Private Member: Privatisation, Immigration Law and Women' in Brenda Cossman and Judy Fudge (eds), *Privatization, Law, and the Challenge to Feminism* (University of Toronto Press 2002).

[15] Before 2014, the Canadian TFW scheme was organised around the skill levels of the job. After 2014, the scheme has been categorised according to the wage level. See Subsection 2.3.

[16] See discussion in Section 3.

[17] Caregivers (discussed below) and nominees under the Provincial Nominees Programmes (PNPs) might gain permanent status. PNPs are agreement between federal and province/territory governments. This allows provinces and territories to name individuals who wish to settle in the particular province or territory and to facilitate their immigration. Each province/territory has its own programme criteria. CIC, 'Provincial Nominees' (31 March 2007) <http://www.cic.gc.ca/english/immigrate/provincial/> accessed 5 March 2016.

[18] Since the published statistics do not break down the numbers of the lower-wage LMIA (explained in Subsection 3.1) by the citizenship of workers, I cannot check the trends without applying for the original data for further analysis. I thus rely on commentators' observations on this point. Ricardo Trumper and Lloyd L Wong, 'Canada's Guest Workers: Racialized, Gender, and Flexible' in Sean P Hier and B Singh Bolaria (eds), *Race and racism in 21st-century Canada: continuity, complexity, and change* (Broadview Press 2007) 155–57.The available figures, however, suggest that Mexican and Caribbean citizens represent a high proportion of all TFWs participants (including all wage levels). ESDC, 'Temporary Foreign Worker Program 2018Q2' (*Open Government Portal*, 8 August 2018) <https://open.canada.ca/data/dataset/e8745429-21e7-4a73-b3f5-90a779b78d1e> accessed 12 August 2018.

[19] For the latest programmes providing permanent residence to caregivers, see IRCC, 'Permanent Residence for Caregivers' (*Canada.Ca*, 30 November 2014) <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/caregivers.html> accessed 26 April 2019.
Only a few receiving countries grant domestic workers permanent residency through the migrant worker scheme. In addition to Canada, two exceptions where the citizenship bonus for domestic workers are available are Spain and Italy. Rhacel Salazar Parreñas and Rhacel Parreñas, *Servants of Globalization: Migration and Domestic Work, Second Edition* (Stanford University Press 2015) 2.

the historical acceptance of caregivers as landed immigrants. The regressive development of the caregiver programmes systematically devalues domestic workers' labour and skills, denoting them to be less desirable future members. [20]

Canada has a long history of receiving overseas domestic workers. In the 19th century, white British women were the preferred source of domestics. Not only did they fill the vacuum in domestic jobs, but also they were expected to assume the role of the wives and mothers of white settlers.[21] Since they were deemed 'daughters of the Empire' and 'mothers of the race', British domestic workers arrived as nation builders and entered as citizens.[22] However, East European, Caribbean and Filipino women gradually took over the market after the 1940s, since fewer British women were willing to join. As more non-white women were recruited into the domestic worker programme, their working conditions and opportunities for immigration worsened.[23]

The contemporary caregiver programme started to grant the opportunity for permanent status from the Foreign Domestic Worker Programme (FDWP) in 1981. However, as if it were a trade-off for the permanent status, FDWP also formally institutionalised the compulsory living-in requirement for foreign domestics, which seriously lowered their conditions.[24] In

[20] Ninette Kelley and Michael J Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy* (University of Toronto Press 2010) 392.

[21] Sedef Arat-Koc, 'From "Mother of the Nation" to Migrant Workers' in Abigail Bess Bakan and Daiva K Stasiulis (eds), *Not One of the Family: Foreign Domestic Workers in Canada* (University of Toronto Press 1997) 54–55.

[22] ibid 55.

[23] Patricia M Daenzer, 'An Affair between Nations: International Relations and the Movement of Household Service Workers' in Abigail Bess Bakan and Daiva K Stasiulis (eds), *Not One of the Family: Foreign Domestic Workers in Canada* (University of Toronto Press 1997) 81.
For instance, in 1955, Canada entered into a domestic worker programme with Jamaica and Barbados. Participants in the programme had to be unmarried young women (between 18 and 35) who passed extensive medical tests and endured gynaecological examinations upon arrival. They had to undertake the employment in domestic work for at least one year. Those who quitted before finishing the one-year period without the prior permission of the Canadian immigrant authority would be deported. Upon completion of the one-year domestic contract, participants gained the status of a landed immigrant, under which they were free to take other employment and sponsor their family to stay in Canada. They were further eligible to apply for naturalisation if they resided in Canada for five continuous years. Vic Satzewich, 'Racism and Canadian Immigration Policy: The Government's View of Caribbean Migration, 1962-1966' (1989) 21 Canadian Ethnic Studies 77, 82.

[24] Ping-Chun Hsiung and Katherine Nichol, 'Policies on and Experiences of Foreign Domestic Workers in Canada' (2010) 4 Sociology Compass 766, 768.
The requisite living-in arrangement blurs the line between on and off duty. It further isolates the worker, restricts their privacy, causes barriers to the implementation of labour regulations and has worsened the problems of unpaid overtime. Live-in caregivers are also exposed to higher risks of sexual harassment, sexual and other forms of abuse.

1992, the Live-in Caregiver Programme (LCP) replaced FDWP. It further raised the criteria for the formal education and language skills of admitted caregivers, including grade-twelve education, at least six months of formal training related to caregiving and French or English-language skills to enable them to communicate independently.[25] The compulsory living-in requirement was removed in 2014. However, along with the repeal of the living-in requirement, an annual cap of 5,500 was set for the entry of caregivers.[26] Half of the quota is attributed to caregivers for persons with high medical needs. The stream requires higher language qualifications and professional working experience, such as being a registered or licensed nurse, etc.[27] These measures effectively constrain the number of low-waged foreign caregivers and their channel for permanent status. In short, the development of caregiver programmes shows a constant heightened qualification set to limit the growth and 'quality' of those foreign domestics who seek to go in Canada. The trend corresponds to the observation that the TFW programme has been an institutional exclusion against undesired foreign workers, despite their labour being indispensable to the host state.

2.2 Policy Goals: Labour Shortage, System Integrity and Labour Protection

Similarly to Taiwan's case, the Canadian TFW scheme also constantly swings between conflicting concerns. While the scheme is expected to offer timely relief to labour shortages, it is also tasked with preventing local workers from being replaced and with safeguarding foreign workers from abuse.[28] TMWs are perceived as the competitive edge for businesses, and as a downward drag on the employment rate, wage standards and working conditions for local workers.[29] These goals do not reconcile easily; and different priorities would lead to different institutional designs. Maintaining the integrity of the system, namely, ensuring that

[25] IRPR s 203 (1.01). Kelley and Trebilcock (n 20) 393. The criteria of formal training were later loosened, partly to meet the unfilled demand for caregivers. The six-month formal occupational training could be replaced by one-year experience of related jobs.

[26] That is a sharp drop if compared to figures in previous years. Immigration Government of Canada, 'Canada News Centre - Archived - Improving Canada's Caregiver Program' (31 October 2014) <http://news.gc.ca/web/article-en.do?nid=898729> accessed 19 April 2016.

[27] ibid.

[28] Standing Committee on Citizenship and Immigration, House of Commons Canada, 'Temporary Foreign Workers and Non-Status Workers' (2009) 2 <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=3866154> accessed 25 March 2016.

[29] Dominique M Gross, 'Temporary Foreign Workers in Canada: Are They Really Filling Labour Shortages?' (Social Science Research Network 2014) SSRN Scholarly Paper ID 2428817 2 <http://papers.ssrn.com/abstract=2428817> accessed 23 March 2016.

relevant regulations are well followed, could be prioritised over TMWs' protection and interests.

It is useful to illustrate the tension between policy goals through the policy shift in 2014. In the previous decade, businesses were strongly urged to catch up with the economic boom,[30] the Canadian government took measures to facilitate the hiring of TFWs, especially in the low-skilled stream. Measures included implementing the employer-driven new programmes,[31] extending the length of work permits and speeding up the administrative process.[32] The number of foreign workers hired increased dramatically after the change.[33] Between 2002 and 2013, the average growth rate of the number of TMWs was 13 %.[34] The number of participants in the TFWP reached its historical height of a 117,996 intake in 2013, five years after the 2008 global financial crisis.[35]

In the meantime, the concern about the abuse of the programme started to attract public attention. During 2012 and 2014, the media reported a series of allegations that business inappropriately favoured foreign workers over Canadians in order to gain marginal profits.[36]

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[30] For a good overview of the political background to expanding the TFW scheme, see Fudge and MacPhail (n 9) 25–27.

[31] Canada started the Low Skilled Pilot Project in 2002. In 2007, the programme was renamed The Pilot Project for Occupations Requiring Lower Levels of Formal Training (National Occupational Certification (NOC) C and D). This programme started to make temporary migrant workers available outside the agriculture sector. For a good overview, see Fay Faraday, 'Made in Canada: How the Law Constructs Migrant Workers' Insecurity' (Metcalf Foundation 2012) 41–45 <http://metcalffoundation.com/publications-resources/view/made-in-canada/> accessed 8 January 2015.

[32] The validity of lower-skilled workers' work permits was increased from one year to a maximum period of two years in February, 2007. Between September, 2007, and April, 2010, Canada introduced the Expedited Labour Market Opinion (E-LMO) Pilot Project for employers of certain high-demand occupations in Alberta and B.C. in order to relieve administrative backlogs.
CIC, 'Backgrounders-Improvements to the Temporary Foreign Worker Program' (18 August 2010) <http://www.cic.gc.ca/english/department/media/backgrounders/2010/2010-08-18.asp> accessed 5th February, 2016.
[33] Gogia and Slade (n 2) 88.
[34] Sandra Elgersma, 'Temporary Foreign Workers' (Library of Parliament 2014) Publication No. 2014-79-E 1 <www.parl.gc.ca/Content/LOP/ResearchPublications/2014-79-e.pdf> accessed 10 October 2015.
The figure includes all categories of temporary foreign programs, not only those for the lower-paid or lesser skilled.

[35] Citizenship and Immigration Canada, Government of Canada, 'Quarterly Administrative Data Release' (1 June 2015) <http://www.cic.gc.ca/english/resources/statistics/data-release/2015-Q1/index.asp> accessed 23 January 2016.

[36] E.g. The Huffington Post Alberta, 'The Ugly, Shady Side Of Foreign Workers Program In Alberta' *The Huffington Post* (5 May 2013) <http://www.huffingtonpost.ca/2013/05/05/temporary-foreign-workers-alberta-report_n_3220017.html> accessed 28 March 2016.

This was observed in sectors including information technology,[37] mining,[38] farming,[39] oil and gas,[40] and fast-food.[41] For instance, a mining company in British Columbia was criticised for hiring Chinese temporary workers at the expense of local workers, by requesting from otherwise qualified local job seekers the ability to speak Mandarin Chinese.[42]

Responding to the mounting political pressure, the Canadian government launched a sweeping overhaul plan of TFWPs in 2014. It implemented restrictive measures to enhance the 'integrity' of the programme—namely, avoiding local workers being replaced—and they reversed the trend of rapid growth. Measures included assessing the labour shortage more rigorously, collecting higher application fees, requiring more recruiting efforts for local workers, shortening the term of permits, limiting the maximum length stay of foreign workers, capping the quota for foreign workers, etc. It also seeks to strengthen labour law implementation through measures such as inspection and setting up a blacklist of offenders.[43] However, these efforts, which aimed to ensure 'Canadian workers come first',[44] echoing the 1960 Canadian-first discourses,[45] unsurprisingly, tend to make the immigration status of

[37] E.g. Kathy Tomlinson, 'RBC Replaces Canadian Staff with Foreign Workers' *CBC News* (6 April 2013) <http://www.cbc.ca/news/canada/british-columbia/rbc-replaces-canadian-staff-with-foreign-workers-1.1315008> accessed 28 March 2016.

[38] E.g. Diana Mehta, 'Temporary Foreign Worker Program May Be Distorting Labour Market Needs: Study' *Huffingtonpost Canada* (7 May 2013) <http://www.huffingtonpost.ca/2013/05/07/temporary-foreign-worker-distorting-labour-market_n_3230597.html> accessed 28 March 2016.

[39] E.g. John Cotter, 'Saskatoon Company Helping Farmers Hire Temporary Foreign Workers - Saskatoon | Globalnews.Ca' *Global News* (23 October 2013) <http://globalnews.ca/news/920783/saskatoon-company-helping-farmers-hire-temporary-foreign-workers/> accessed 28 March 2016.

[40] E.g. The Canadian Press, 'Temporary Foreign Workers In Fort McMurray Shutting Out Canadian Labour: Alberta Federation Of Labour' *Huffingtonpost Canada* (10 October 2013) <http://www.huffingtonpost.ca/2013/10/10/temporary-foreign-workers-fort-mcmurray_n_4081204.html> accessed 28 March 2016.

[41] E.g. Kathy Tomlinson, 'McDonald's Accused of Favouring Foreign Workers' *CBC News* (14 April 2014) <http://www.cbc.ca/news/canada/british-columbia/mcdonald-s-accused-of-favouring-foreign-workers-1.2598684> accessed 28 March 2016.

[42] Cecilia Jamasmie, 'Chinese Coal Firms in Canada Favour Foreign Labour' *MINING.com* (18 October 2012) <http://www.mining.com/chinese-coal-mining-firms-settling-in-canada-favour-foreign-workers-report-65544/> accessed 29 March 2016.

[43] ESDC, 'Overhauling the Temporary Foreign Worker Program' (2014) 17, 22 <http://www.esdc.gc.ca/eng/jobs/foreign_workers/reform/index.shtml> accessed 7 April 2016. (Hereinafter 'Overhauling the TFWP')

[44] ibid 7.

[45] Amid the economic downturn of the 1970s, the economically-oriented immigration system also raised the concern that it would heighten the unemployment rate among local workers, which leads to

TMWs more precarious (discussed in Subsection 4.1) and render it harder for them to exit a non-ideal work relation (discussed in Section 5). Meanwhile, enhancing legal compliance by employers usually means that the TMWs may bear the consequences of the employer's offence (discussed in Section 3).

2.3 Programme Structure: IMP and TFWP

Before entering into detail, it should be helpful to clarify the scope of discussion in the whole picture of the federal TFW scheme.[46] Under the Immigration and Refugee Protection Regulations (IRPR), temporary foreign workers are foreign nationals who are authorised to enter Canada as worker-class temporary residents for the duration of an authorised period of time.[47] However, not all foreign workers with temporary status are low-waged or low-skilled, nor are they required to have permits to work.

Depending on whether the Labor Market Impact Assessment (LMIA, explained in Section 3) is needed, the Canadian programmes for foreign workers are organised into two major categories: All streams, in principle, require that LMIAs belong to the umbrella scheme, the Temporary Foreign Worker Programme (TFWP). In contrast, the International Mobility Programme (IMP) contains migrant worker programmes which are free from the LMIA requirement. IMP is not meant to ease labour shortages but instead to foster Canada's 'national economic and cultural interests' based on principles of reciprocity with other countries.[48] Participants include foreign students graduated from Canadian schools, people working under free trade agreements (e.g., NAFTA), etc. Workers under the IMPs and their spouses/partners will be granted an open work permit.[49] Since my focus is on less privileged TMWs, I will not look into details of IMP.

On the other hand, the TFWP consists of several streams and subcategories in order to address labour shortages in different economic sectors. Each differs in the criteria for admission,

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the 'Canadian first' policy in 1978. The employer was required to prioritise Canadian job seekers. They must show that no qualified citizen or permanent resident was available to fill the job offer before hiring foreigners. This measure leaves its trace in today's guest worker programme (further discussed below). Kelley and Trebilcock (n 20) 391–92.

[46] Discussion below will only concern the federal programme, leaving the independent programme of the province of Quebec aside.

[47] IRPR ss 194, 195.

[48] ESDC, 'Overhauling the TFWP' (n 43) 1.

[49] ibid.

conditions of the permit and participants' prospect of shifting to the permanent status track. Currently, there are four main streams in the TFWP. the High-wage Stream, the Low-wage Stream, the Primary Agriculture Stream, and the Stream Dedicated to Supporting Permanent Residency.[50] I will only consider the common requirements of TFWP workers and the special requirements for the low-wage stream (Section 3). In addition, I will take the Seasonal Agricultural Worker Programme (SAWP), a subcategory under the agriculture stream, as an example through which to consider temporariness (Subsection 4.2). Below, I briefly explain the features of the programmes so as to facilitate the discussion in the following three sections.

The line between high-wage and low-wage is drawn via the hourly median wage rate of the province/territory. A position with a wage rate under the median wage rate is low-waged; at or above the median wage rate is high-wage.[51] The employer bears different responsibilities towards low- and high-waged foreign workers.

The SAWP is a circular migration programme based on the memorandum of understanding between participant states (Mexico and some Caribbean countries) and the state of Canada. It is therefore only open to citizens of the participating states, as opposed to other TFWP programmes, which are open to all. The SAWP work permit allows workers to work in Canada up to eight months per year between January and mid-December.[52] Comparatively, TFWs in other agriculture programmes in the agricultural stream will be granted permits valid for up to two years.[53]

As mentioned, caregivers used to enter the Canadian labour market through an independent program, LCP, before 2014.[54] After the living-in rule was no longer a compulsory requirement

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[50] Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities, 'Temporary Foreign Program' (HC 2016) 3 <https://www.ourcommons.ca/Committees/en/HUMA/StudyActivity?studyActivityId=8845433> accessed 23 August 2017.

[51] ESDC, 'Hire a Temporary Foreign Worker in a High-Wage or Low-Wage Position' (*Canada.Ca*, April 2018) <https://www.canada.ca/en/employment-social-development/services/foreign-workers/median-wage.html> accessed 23 July 2018.

[52] ESDC, 'Hire a Temporary Worker through the Seasonal Agricultural Program - Overview' (*Canada.Ca*, 12 April 2017) <https://www.canada.ca/en/employment-social-development/services/foreign-workers/agricultural/seasonal-agricultural.html> accessed 24 July 2018.

[53] ESDC, 'Hire a Temporary Foreign Worker through the Agricultural Stream - Program Requirements' (*Canada.Ca*, 2017) <https://www.canada.ca/en/employment-social-development/services/foreign-workers/agricultural/agricultural/requirements.html> accessed 24 July 2018.

[54] IRCC, 'Live-in Caregiver Program' (*Canada.Ca*, 19 May 2017) <https://www.canada.ca/en/immigration-refugees-citizenship/services/work-

for caregivers, the LCP was cancelled. The parties can still agree on the living-in condition, however, provided that the employer can satisfy the housing requirements.[55] The employer now should hire caregivers through either the high-waged or low-waged stream, according to the wage rate.

Finally, it is worth noticing that the majority of Canada's TMWs enter through the IMP, which is exempted from the LMIA, rather than through the TFWP. Although much policy emphasis has been placed on reforming the TFWP, in fact, it governs less than one fifth of the annual intake of temporary foreign workers.[56] At the end of 2016, for example, the number of IMP participants was 288,325, as opposed to the number of TFWP permit holders, which was 51,170.[57] The great effort placing on TFWP illustrates that only low skilled/waged workers are more likely to be considered a problem, such as a threat to local workers and a distortion of the labour market.

With this general structure in mind, it is now appropriate to have a closer view of the control of the influx of TMWs.

3. Controlling Valves of Foreign Workers

This section concerns two major artefacts in the Canadian scheme which will provide a glimpse the common requirements and function of the low-wage stream of the Canadian scheme, the work permit and the LMIA. A positive or neutral LMIA is one of the preconditions for applying for the work permit.[58] However, the aim here is not a comprehensive analysis of the border regime. Rather, it is meant to point out that the Canada TFWP avoids many harmful features which weaken the workers' positions, as seen Taiwan's model.

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canada/permit/caregiver-program.html> accessed 24 July 2018; Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities (n 50) 4–5.

[55] ESDC, 'Hire a Temporary Worker as an In-Home Caregiver-Program Requirements' (*Canada.Ca*, April 2017) <https://www.canada.ca/en/employment-social-development/services/foreign-workers/caregiver/requirements.html> accessed 24 July 2018.

[56] Delphine Nakache and Leanne Dixon-Perera, 'Temporary or Transitional? Migrant Workers' Experiences with Permanent Residence in Canada' (The Institute for Research on Public Policy 2015) No. 55 4 <http://irpp.org/research-studies/study-no55/> accessed 24 March 2016.

[57] 'Facts and Figures 2016: Immigration Overview -Temporary Residents – Annual IRCC Updates - Open Government Portal' (*Canada.Ca*, 13 April 2018) <https://open.canada.ca/data/dataset/6609320b-ac9e-4737-8e9c-304e6e843c17> accessed 24 July 2018.

[58] IRPR s 203(1)b.

Given the predominant concern, in its design, is to control borders, the Taiwanese model is an ultra-unfree regime for TMWs. It motivates the employer to closely monitor foreign workers from entry to exit through the one-in-one-out recruitment permits of the employer: just like a revolving door, a new foreign worker could be let in if one who was previously hired is out of the territory. However, when TMWs leave the job without exiting the territory, such as 'running-away', entering labour disputes or seeking to transfer to a new employer, the recruitment permit of the employer will be suspended for a period of time, like a stocked revolving door. In addition, the employer is expected to manage foreign workers beyond work. The duty to arrange for accommodation for workers is deployed as a mechanism of total control over a worker's life outside the workplace.

In comparison, Canadian employers are not institutionally driven by the necessity to fulfil the task of border control over TMWs. The administrative rules are more focused on structuring the labour market to meet wider policy goals. Like the Taiwanese scheme, the application procedure of the Canada programme incorporates protective measures for foreign workers, including checking the employment contract and strengthening the enforcement of applicable labour standards. However, similarly to the Taiwanese scheme, TMWs may be adversely affected by the legal consequences of the employer's violation of labour or immigration rules, because their application for a work permit, and for permanent status, if applicable, could be rejected by reason of the employer's non-compliance.

Below, I explain the work permit and the LMIA in turn.

3.1 Work Permit

A foreigner must obtain a work permit in order to work legally in Canada.[59] In general, foreign workers should apply for the work permit before entry.[60] However, if they are already in the territory for study or work, they could exceptionally apply within Canada.[61] This reduces the precariousness of workers. The applicant needs to submit a favourable LMIA (discussed in Subsection 3.2), proof of the job offer, and evidence of their qualifications for the job, such as certification of education or work experience.[62] In addition, applicants for work permits need

[59] Immigration and Refugee Protection Act (SC 2001, c 27) s 30(1) (IRPA); IRPR ss 183(1)(b), 196.

[60] IRPR s 197.

[61] ibid ss 198, 199.

[62] ibid s 200.
IRCC, 'Guide 5487 - Applying for a Work Permit Outside Canada' (*Canada.Ca*, 30 July 2018) <http://www.cic.gc.ca/english/information/applications/guides/5487ETOC.asp#5487E3> accessed 24 August 2016.

to prove that they (a) will leave by the expiry of the permit, (b) have sufficient funds to support their stay and return, (c) have clean criminal records, (d) will not be dangerous to the security of Canada, (e) are in good health, taking the required medical examinations (explained below), if any, (f) do not intend to work for employers who are blacklisted for non-compliance[63] or who are in the business of striptease, erotic dance, escort or erotic massages.[64] The ministerial instruction requests that officials refuse to process an application for the work permit if the employer operates in the sex industry.[65] Participants of TFWP are granted a closed work permit which imposes specific conditions of work, including its duration, the occupation, employer and location. The permit thus ties workers to a specific employer, ensuring a constant supply of labour[66] (further discussed in Section 5).

The requirements for the work permit, once again, reflect the dual consideration which is seen in the case of Taiwan: foreign workers should not be a threat to the host society, while they also should show that they are not prone to mistreatment. They should prove that they are healthy, law-abiding, financially self-sustaining, and further demonstrate that they have found a law-abiding employer and are not a victim of human trafficking or working in the sex industry. Although it is desirable to hold employers accountable for their legal obligations, and to protect migrant workers from becoming the victims of human trafficking, denying the work permit application is letting the weakest bear the burden of law enforcement.

Medical Examination

On the other hand, I argue that the medical examination requirement, in the case of Taiwan, is an example of overt racial discrimination. It also allows the employer to dismiss sick workers, which would have violated labour regulations if it had not involved border crossing. Contrarily, the medical examination requirement imposed by Canadian border control is relatively race-

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[63] ESDC has constantly named employers who violate the regulations of the TFWP and disqualifies them from the programme. For an example of such a list, see 'Ineligible Employers' (*Canada.Ca*, 18 November 2015) <http://www.esdc.gc.ca/en/foreign_workers/employers/ineligible_employers.page> accessed 6 April 2016.

[64] The Canadian government used to allow the sex industry to apply for foreign workers, which was cancelled due to severe criticism. Audrey Macklin, 'Dancing Across Borders: "Exotic Dancers," Trafficking, and Canadian Immigration Policy' (2003) 37 International Migration Review 464, 65–67.

[65] 'Temporary Foreign Worker Program and International Mobility Program: Protecting Workers from Abuse and Exploitation' (*Canada.Ca*, 16 September 2014) <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/foreign-workers/protecting-workers-abuse-exploitation.html> accessed 25 July 2018.

[66] Lynn Fournier-Ruggles, *Canadian Immigration and Refugee Law for Legal Professionals* (3rd edn, Emond Publishing 2016) 139.

and class-neutral. Not all foreigners are required to have a medical examination. Nor is the requirement targeting low-waged workers. Rather, it depends on the nature of the occupation and duration of the foreigners' stay. The examination is required for jobs in medical institutions or those involving frequent contact with medical patients, the elderly and the young, e.g., clinical laboratory workers, medical electives and physicians, school teachers and nursery employees, and in-home caregivers.[67] Agricultural workers from designated countries or territories are also asked to undergo the examination.[68] At the time of writing, none of the participating countries of the SAWP fall into the category requiring a compulsory medical examination. Furthermore, a foreigner from a designated country or territory who intends to stay in Canada for six months or longer will also be asked to take the examination.[69] This geographically-related medical scrutiny is generally applicable to all classes of visa applicants, not only to temporary workers. [70]

A visa or permit applicant is inadmissible if s/he will represent a risk or danger to public health[71] or cause danger to public safety,[72] or place excessive demands on health or social services.[73] Active tuberculosis and untreated syphilis are considered a risk to public health which will make their victims generally inadmissible.[74] Public safety dangers generally involve mental health problems that may cause harm to others, such as brain syndromes causing violence, or antisocial, hostile behaviours.[75] Finally, the term 'excessive demand' refers to costing more than the service cost to Canadian *per capita,* or it refers to delaying the service available to Canadians.[76] This threshold could make people living with HIV inadmissible.[77]

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[67] IRPR s 30(1)(a)(ii).

[68] Citizenship and Immigration Canada Government of Canada, 'Who Must Submit to an Immigration Medical Examination?' (11 March 2013) <http://www.cic.gc.ca/english/resources/tools/medic/exam/who.asp> accessed 12 January 2016.

[69] IRPR s 30(1)(a)(iii)(A) and (B).

[70] Among the top fifteen source countries/territories of temporary work permit holders in Canada by the end of 2013, the following are on the list of designated countries: Philippines (no. 1, also the primary source country of in-home caregivers), India (no. 2), Republic of Korea (no. 6), Guatemala (no. 8), People's Republic of China (no. 11), Thailand (no.12), Portugal (no. 13), and Ukraine (no. 15).Citizenship and Immigration Canada, 'Facts and Figures 2013 – Immigration Overview: Temporary Residents' (31 December 2014) <http://www.cic.gc.ca/english/resources/statistics/facts2013/temporary/1-5.asp> accessed 19 May 2016.

[71] IRPR s 31.

[72] ibid s 33(b).

[73] IRPA s 38-1(c); IRPR s 34(b).

[74] Citizenship and Immigration Canada, 'Danger to Public Health or Public Safety' (17 April 2013) <http://www.cic.gc.ca/english/resources/tools/medic/admiss/health.asp> accessed 22 January 2016.

[75] ibid.

[76] IRPR s 1(1).

[77] The liberal government plans to eliminate the excessive-demand rule as a ground for inadmissibility. IRCC, 'Government of Canada Brings Medical Inadmissibility Policy in Line with

These standards are not uncontroversial, but they affect landed immigrants and temporary residents alike.

3.2 Labour Market Impact Assessment ('LMIA')

The LMIA is a set of tests designed to assess the market impacts of hiring foreign workers, verifying the existence of the asserted labour shortage and ensuring that foreign labour will not harm the economic prospects of Canadian citizens or permanent residents.[78] A neutral or positive LMIA is a hire permit, allowing the employer to hire a selected foreign worker. In determining the merit of the LMIA application, Employment and Social Development Canada (ESDC), [79] the Ministry charged with the LMIA, should consider factors including: the genuineness of the job offer, the employer's effort to recruit underrepresented Canadian workers, the opinions of the relevant unions or professional associations, the positive effect in creating more jobs, the possibility to transfer skills, the conditions and wages of the job.[80]

The idea that foreign workers should only be admitted when no qualified Canadian worker is available is mainly embodied through the requirement that the employer should make sufficient efforts to recruit Canadian workers. The minimum requirements differ, depending on streams of the TFWP and policy considerations, from time to time. Employers are also not allowed to require skills in a non-official language, unless it is a *bona fide* qualification.[81] Taking the rules of the agriculture stream as an example, within three months prior to submitting the LMIA application, the employer should post detailed job information on the national job bank for at least fourteen days. The employer should also take additional recruitment efforts suitable to the occupation, such as advertising on private internet

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Inclusivity for Persons with Disabilities' (*Canada.Ca*, 16 April 2018) <https://www.canada.ca/en/immigration-refugees-citizenship/news/2018/04/government-of-canada-brings-medical-inadmissibility-policyin-line-with-inclusivity-for-persons-with-disabilities.html> accessed 25 July 2018.

[78] Gross (n 29) 4.
LMIA was previously known as the Labor Market Opinion. It is claimed that the LMIA is a more rigorous test than its predecessor. ESDC, 'Overhauling the TFWP' (n 43) 9.

[79] Previously, Human Resources and Skills Development Canada.

[80] IRPR s 203 (1).

[81] IRPR s 203 (1.01). ESDC, 'Program Requirements for Low-Wage Positions' (*Canada.Ca*, 27 June 2018) <https://www.canada.ca/en/employment-social-development/services/foreign-workers/median-wage/low/requirements.html#h2.2> accessed 24 July 2018. This is a response to the concern about the abuse of the language requirement in order to deter local workers, as mentioned in Subsection 2.2.

recruitment sites, in local stores, community centres or places of religious gathering, or in local or ethnic newspapers.[82]

Labour Protection: Legal Compliance and Model Employment Contract

The LMIA is also a means for the federal government to protect foreign workers. Techniques include verifying the genuineness of the job offer; checking the business operation or the income of the employer to ensure that the employer could afford the relevant costs; reviewing the labour law compliance records of the employer, etc.

The employer is required to submit a signed employment contract for the LMIA application. The contract should include model provisions, *inter alia*, on pay, working conditions, overtime, holidays, leave, medical insurance cover.[83] Notice that, unlike the Taiwanese scheme where the statutory minimum wage becomes the *de facto* cap of the TMWs' wage, the Canadian scheme has required that the wage offered to TMWs should not be lower than the regional prevailing wage for the position.[84]

Through the model contract, employers of low-wage posts are required to pay upfront for the roundtrip transportation from the worker's location to the workplace in Canada. This lowers the financial burden on TMWs, as opposed to the Taiwanese scheme, which confirms and allows that workers to incur debts to pay for the transportation. The Canadian employer is also responsible for recruitment fees, especially the fee to the intermediary,[85] and for private health insurance, before the worker is eligible for the provincial health insurance.[86]

The employer should also ensure that affordable and sufficient housing is available in the local area. Affordable housing means that the cost of rent and utilities does not exceed 30% of the untaxed income of the worker.[87] For low-waged agricultural workers, the employer should

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[82] ESDC, 'Hire a Temporary Foreign Worker through the Agricultural Stream - Program Requirements' (n 53).

[83] E.g., the model employment contract for the in home caregiver: 'Schedule I - In-Home Caregiver Employer/Employee Contract' (*Canada.Ca*, 6 February 2018) <https://catalogue.servicecanada.gc.ca/content/EForms/en/Detail.html?Form=EMP5604> accessed 25 August 2018.

[84] ESDC, 'Program Requirements for Low-Wage Positions' (n 81).

[85] 'Schedule I - In-Home Caregiver Employer/Employee Contract' (n 83) article 6.

[86] ESDC, 'Temporary Foreign Worker Program Annex 2 Instruction Sheet to Accompany Employment Contract' (*Canada.Ca*, 25 April 2018) <https://www.canada.ca/content/dam/esdc-edsc/documents/services/foreign-workers/median-wage/low/employment_contract.pdf> accessed 25 July 2018 article 16.

[87] ESDC, 'Program Requirements for Low-Wage Positions' (n 81).

provide on-farm or off-site housing, with the charge being deductible from the wage, but not exceeding CAD $30 per week.[88] For in-home caregivers, the employer should provide housing and lodging without costs. In addition, the accommodation should be a private and furnished bedroom with a lock and safety bolt at the employer's place.[89] This is a stark difference to the conditions for foreign domestics in Taiwan, which are that accommodation with privacy is not required; the officials constantly defend the exploitative wage on the basis that the 'free' housing and food are part of the income of live-in domestics.

The SAWP model contract is the product of intergovernmental negotiation between the participating country and Canada. Taking Mexican workers' model contract as an example, it requires the employer to provide free board and lodging in most provinces/territories. The accommodation should meet the specified criteria and sustain the inspection of either the Canada government or the Mexican government's agent.[90]

The more flexible housing arrangements in the Canadian scheme is important in order to maintain the workers' privacy and a proper distinction between life on- and off-duty, which is unavailable in the Taiwanese scheme. However, for workers who must take employer-provided housing, it is also reported that the employer would seek to control the workers' overall life and impede workers' association.[91]

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[88] ESDC, 'Hire a Temporary Foreign Worker through the Agricultural Stream - Program Requirements' (n 53).

[89] ESDC, 'Hire a Temporary Worker as an In-Home Caregiver-Program Requirements' (n 55).

[90] 'Contract for the Employment in Canada of Seasonal Agricultural Workers from Mexico' (*Canada.Ca*, 2018) <https://www.canada.ca/content/dam/canada/employment-social-development/migration/documents/assets/portfolio/docs/en/foreign_workers/hire/seasonal_agricultural/documents/contract-mexic-2018.pdf> accessed 25 July 2018 Section II.

[91] The Canadian Labor Congress reported that Guatemalan farm workers were requited to deposit CAD$ 400, namely 17% of Guatemalan average annual income, and to sign the following agreement, drafted by the employer group FERME, in order to work in Canadian farms:

> '• During your stay in Canada, you should only do the activities you are assigned to and should not distract yourself with any group or association.
> • Reasons to exclude you from the program that will force you to pay your plane ticket: alcoholism, theft, lack of respect, and sexual relations.
> • Upon arrival at the farm, the employer will keep your passport for the duration of your stay in Canada.
> • Use deodorant before the flight and every day you stay in Canada.
> • Beware of having relations with women.
> • In case you needed to go back to Guatemala before ending your contract, you will have to prove that you have a good reason. Even then, the employer can choose whether to hire you the next season.
> • You should keep your hair short to avoid lice.'

Employment and Social Development Canada also conducts employer compliance inspections to ensure that the conditions of LMIA are followed, that is, checking that foreign workers are taking the same employment, under conditions and wages that are 'substantially the same-but not less favourable', as specified in the LMIA.[92] Employers found to be non-compliant will be subject to warnings, fines and/or suspension from the programme. They will also be blacklisted and have their details published.[93] The current LMIA will be withdrawn. If the employer cannot demonstrate that it has followed previous LMIA requirements, the application will be rejected.[94] Note that when the LMIA is withdrawn due to non-compliance, the work permit sponsored by the LMIA will also be revoked.[95] In this regard, foreign workers are forced to bear the harsh consequences, through losing their job, for an employer's' failure to follow the LMIA, even if the foreign workers themselves are mistreated (such as their being paid less than the LMIA condition states).

Although it is important to have the model employment contract signed, TFWs' shorter term of stay, precarious legal status, and lack of information and resources make it hard to pursue legal rights under the contract.[96] Further difficulty is related to the federal system: the power to control immigration belongs to the federal government; and the province/territory government is in charge of labour regulation. While the better resourced federal government is not directly involved in enforcing employers' contractual obligations,[97] the provincial labour

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Karl Flecker, 'Canada's Temporary Foreign Worker Program: Model Program or Mistake?' (Canadian Labor Congress 2011) 11 <http://ccrweb.ca/files/clc_model-program-or-mistake-2011.pdf> accessed 25 July 2016.

[92] 'Employer Compliance' (*Canada.Ca*, 18 November 2015) <http://www.esdc.gc.ca/en/foreign_workers/employers/employer_compliance.page#h2.1-h3.4> accessed 19 April 2016.

[93] IRPR s 209.95. For the blacklist, see IRCC, 'Employers Who Have Been Non-Compliant' (*Canada.ca*, 31 March 2007) <https://www.canada.ca/en/immigration-refugees-citizenship/services/work-canada/employers-non-compliant.html> accessed 26 April 2019.

[94] 'Employer Compliance' (n 92).

[95] IRPR s 209.2(1)(a)(ii).

[96] Delphine Nakache and Paula J Kinoshita, 'The Canadian Temporary Foreign Worker Program: Do Short-Term Economic Needs Prevail over Human Rights Concerns?' (Institute for Research on Public Policy 2010) 5 23 <http://irpp.org/research-studies/study-no5/> accessed 11 December 2015.

[97] Fudge and MacPhail (n 9) 30.

regulations tend to assume that all workers enjoy employment mobility and permanent status.[98]

Concluding Remarks

This section spells out the way that border control operates, through the work permit and the LMIA, to fulfil, usually conflicting, policy goals. This indicates that the Canadian TFWP, if compared to the Taiwanese TFW scheme, is less hostile to TFWs. This shows in that, among others, the programme distributes a fairer share of migration cost to the employer, is less prone to privatising border control power, avoids irrational medical examinations, and it enhances the choices and privacy relating to accommodation.

However, the next two sections will illustrate that, better model as it may be, the Canadian TFWPs cannot avoid the legal techniques of temporariness and alienage. This commonality demonstrates the fundamental logic of TFW schemes and sets limits on the extent to which legal rights can protect TFWs.

4. Temporariness

In the literature which advocates the TMW programme as a strategy against world poverty, the strict execution of temporariness is one of the linchpins of a successful programme.[99] However, as already shown in the case of Taiwan, a scheme which has temporariness as its central goal easily becomes a regime for the comprehensive monitoring of the presence of foreign workers. Management measures which aim to ensure the timely return of foreign workers usually impose great personal costs on workers' freedom.

Temporariness in Taiwan and Canada is manifested in distinct ways. While temporariness in Taiwan serves to place an (eventual) limit to the scope to return to temporary worker status, the nature of temporariness in Canada is marked by a form of circular migration. More specifically, the Taiwanese scheme ensures TFWs are temporary through compulsory exits (now eliminated), fixed-term permits and employment, and a cap on the accumulated length of stay. By virtue of forced rotation, TMWs' seniority is constantly interrupted, work experience is cheapened, the connection with the host state cut off, and below-standard working conditions tolerated. In comparison, the Canadian scheme, for most of the time, has not limited the maximum total length that TMWs can work in Canada. Temporariness mainly

[98] Sarah Marsden, 'Silence Means Yes Here in Canada: Precarious Migrants, Work and the Law' (2014) 18 CLELJ 1, 11.

[99] E.g. Martin Ruhs, 'Migrant Rights, Immigration Policy and Human Development' (2010) 11 Journal of Human Development and Capabilities 259.

operates through exclusion from the track of permanent status, circular migration, and the short-term LMIA. It is thus even more salient in the Canadian case that the TFW scheme may lead to permanently temporary and dependent workers. The case of SAWP also vividly demonstrates, I shall argue, that successful execution of temporariness could hinge on foreign workers' long-term prospects of returning. In this sense, temporariness is only desirable and feasible when it is designed to be perpetuated. Temporariness and permanence are mutually dependent.

In Subsection 4.1 I will look into the techniques of temporariness in the Canadian scheme, including the unsuccessful four-in-four-out rule. Subsection 4.2 further examines the interdependence of temporariness and permanence.

4.1 Stringent Temporariness

When the host state aims to enforce temporariness more stringently, whatever other policy goals it might serve, often TMWs' status is made more precarious. One example is the term of the LMIA. As mentioned, the LMIA was introduced in 2014 and is valid for one year, contrary to the two-year term of its predecessor, the Labor Market Opinion. It is claimed to be a timelier, annual assessment; and yet, it also grants the employer the power to decide sponsorship for TMWs every year. Another example is the cumulative duration rule, which was announced in 2011 but was soon repealed, in December, 2016, after had taken effect in 2015.

Cumulative Duration Rule

Canada had not limited the maximum length of the permissible period of stay for foreign workers. However, in 2011, the Canadian government started to set up a four-year cap, limiting the time that low-skilled foreign workers could work in Canada. Foreign workers who have accumulatively worked in Canada for four years either have to leave Canada for another four years, or stay without working for four-years, before they are eligible to work in Canada again.[100] This rule did not apply to foreigners who did not need a work permit, were exempted from the LMO, or who took high-skilled positions.

The government claimed that the four-year rule was designed to prevent TMWs 'from losing ties with their country of origin due to prolonged periods of stay in Canada, and to encourage workers and employers to explore appropriate pathways to permanent residence.'[101] It is also

[100] IRPR s 200(3)(g). IRCC, 'Archived-Operational Bulletin 523 – May 22, 2013' (*Canada.Ca*, 21 May 2013) <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/bulletins-2013/523-may-22-2013.html> accessed 8 April 2016.

[101] IRCC, 'Archived-Operational Bulletin 523 – May 22, 2013' (n 100).

suggested that shortening cumulative duration is a strategy to ensure employers only have access to the TFWP as the last resort.[102]

However, the four-year rule is more about excluding foreign workers who are deemed less desirable, and less about limiting employers' reliance on the foreign labour force. Setting up a maximum duration that each foreign worker is allowed to work in Canada only forces foreign workers to rotate more often. This rule alone does not necessarily downsize the numbers f those who are admitted under the TFWP. To respond to the concern that foreign workers may displace Canadian workers, it seems more logical to limit how long the employer is allowed to rely on the TFWP, rather than to place a temporal cap on migrants.[103]

In practical terms, rather than preserving the tie between foreign workers and their country of origin, the four-year rule first cut off those who already had substantial ties with Canada. The first group of foreign workers who were affected by the rule began to emerge from 1st April, 2015, four years after the rule took effect. These workers might have entered Canada to work for more than a decade and have managed to build a family in Canada, or to bring over their children from overseas. However, these workers and their dependent children born outside Canada must return to their country of origin or they could be subjected to deportation, if they could not obtain permanent status before the due day of the rule.[104] Yet, except for in-home caregivers, all federal immigration streams that allow temporary foreign workers to apply for permanent status from within Canada are only available to skilled workers (namely, National Occupational Classification 0, A and B).[105] Low-skilled/waged workers may seek to change from temporary to permanent status through becoming the nominees of provinces/territories. Nevertheless, their prospects of transiting from temporary to permanent status vary, depending on the policies and practices of each province/territory.[106]

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[102] ESDC, 'Overhauling the TFWP' (n 43) 12.

[103] Stephanie J. Silverman, 'At Any Cost: The Injustice of the "4 and 4 Rule" in Canada' (*openDemocracy*, 26 May 2015) <https://www.opendemocracy.net/beyondslavery/stephanie-j-silverman/at-any-cost-injustice-of-%E2%80%9C4-and-4-rule%E2%80%9D-in-canada> accessed 8 April 2016.

[104] IRPR s 24.6(1).

[105] Nakache and Dixon-Perera (n 56) 5. The streams include the Canadian Experience Class, the Federal skilled Trades Programme and the Federal Skilled Worker Programme.

[106] ibid 6. The authors reported that in the period between 2009 and 2013, nominees of low-skill (National Occupation Classification C and D jobs) foreign workers accounted for 53%, 30.5% and 0% of the total nominees in Manitoba, Alberta and Ontario respectively.

The rule was repealed[107] soon after the recommendation of the Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities, since the rule was reported to harm foreign workers who had integrated into Canadian society, to cause uncertainty for foreign workers who sought permanent status, and to worsen labour shortages in some sectors.[108] This is a positive development. However, importantly, it once again demonstrates the difficulty in executing temporariness without rendering TMWs more vulnerable.

The next subsection shows another dimension that, arguably, temporariness is merely a legal fiction.

4.2 Mutual Reliance of Temporariness and Permanence

Temporariness, perhaps ironically, is most effectively achieved through mechanisms which perpetuate temporariness. It is saliently observed through the seasonal circulation of the SAWP, in which the possibility of coming back next year becomes an effective disciplinary tool to ensure workers' timely exit.

Seasonal circulation of SAWP

The SAWP is often regarded as a successful model, since few agricultural foreign workers exceed the temporal limit of their eight-month work permit.[109] Participants in SAWP are granted an eight-month work permits in a year to meet the seasonal surge in labour demand. The trick to achieving the policy goal lies in the design of this circular migration: whether a foreign worker can continue participating in SAWP in the future is contingent on their abiding by the term-limit of the permit.[110] This is because workers are offered the possibility to return

[107] IRCC, 'Temporary Foreign Worker Program: Cumulative Duration (Four-Year Maximum Eliminated)' (*Canada.Ca*, 15 May 2015) <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/foreign-workers/cumulative-duration-four-year-maximum-eliminated.html> accessed 27 July 2018.

[108] Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities (n 50) 21–23, 33.

[109] Jenna L Hennebry and Kerry Preibisch, 'A Model for Managed Migration? Re-Examining Best Practices in Canada's Seasonal Agricultural Worker Program: A Model for Managed Migration?' (2012) 50 International Migration e19, e20.

[110] Emily Gilbert, 'The Permanence of Temporary Labour Mobility: Migrant Worker Programs across Australia, Canada, and New Zealand' in Leah F Vosko, Robert Latham and Valerie Preston (eds), *Liberating Temporariness?: Migration, Work, and Citizenship in an Age of Insecurity* (McGill-Queen's University Press 2014) 157.

year after year (provided that they play by the rules) for an indefinite period of time, the short-term contract does not generate a desire to seek jobs outside the programme. A high percentage of workers are returning participants. According to the 2010 governmental figure, three quarters of all SAWP participants had been in the programme for four years or more. Among them, those who have participated for six years or longer accounted for fifty-seven percent; workers with more than ten years' participation accounted for twenty-two percent. [111]

The government agents of the sending country further enhance the unfree nature of the programme, especially via administrating contract renewal. In the case of Mexican workers, they cannot select the employer, but are assigned an employer by officials of the Mexican Ministry of Labour; the continuous participation of workers depends on satisfying the employer. At the end of the contract, workers who wish to renew the SAWP contract for the next year are required to hand in an evaluation completed by their employer in Canada. The employer may invite specific workers to return in the evaluation; workers who are named will work for the same employer in the following year. Workers who are positively evaluated, but not named, will be transferred to another eligible grower. Finally, workers receiving negative evaluations will be suspended for one or two years, or expelled permanently.[112] Meanwhile, the sending countries are competing with each other, aiming at having the highest number of workers hired. To ensure the satisfaction of the employer, the Mexican agency recruits 'good' workers—who are willing to work overtime, do not complain about conditions, nor question the employer,[113] by targeting poor rural agriculture workers with no or little land, aged around 22-45, with three to ten years of schooling, married with children or other dependents.[114] Notice that family separation has become a means to control workers, given that most TFWs cannot afford family reunion.

In short, the intervals between seasonal temporary contracts and the end-of-year evaluation ensure the SAWP workers' compliance; and the government agency of the sending state helps

[111] This is the figure provided by Secretaria del Trabajo y Previsión Social. Jenna L Hennebry, 'Permanently Temporary? Agricultural Migrant Workers and Their Integration in Canada' (Institute on Research on Public Policy 2012) 13 <http://irpp.org/research-studies/study-no26/> accessed 1 August 2015.

[112] Leigh Binford, *Tomorrow We're All Going to the Harvest: Temporary Foreign Worker Programs and Neoliberal Political Economy* (1st ed., University of Texas Press 2013) 49–50; Tanya Basok, *Tortillas and Tomatoes: Transmigrant Mexican Harvesters in Canada* (McGill-Queen's Press 2003) 120–121.

[113] Binford (n 112) 103–04.

[114] ibid 49; Flecker (n 91) 18.

to enhance the employer's power of evaluation. Both the employer's power and the workers' compliance rely on the institution of constant circular migration. Those who are most determined to join SAWP as a long-term career plan are most susceptible to the disciplinary power of the annually temporary contract. Successful temporariness is thus the result of workers' long-term commitment to the TFW programme.

The next section proceeds to the idea of alienage and its implementation in the Canada TFW programmes.

5 Alienage

Alienage refers to the precarious immigration status. By virtue of the status, TMWs are subject to border and immigration control through the course of migration, from entry to exit. Alienage of TMWs inevitably functions as a mechanism of exclusion which keeps away 'undesirable' potential members of the polity and recalls troubling racial, ethical, sex and class prejudices.

Alienage, however, is a useful trait, since it allows the state and employers to select, discriminate among and control workers through the border regime, which cannot possibly be done to citizens and permanent residents. Since TMWs can be treated in a way that citizens cannot, they can thus fulfil a role that citizens cannot in some working relations. Unlike the Taiwanese scheme, which contains explicit disparity in treatment between foreign workers and nationals, alienage functions in a more nuanced and tacit way in the Canadian TFW scheme: the effects of the deprivation of rights are manifested when people cross the state border. Border control permits the employer to select workers on a basis that would not have been allowed when a border is not involved: countries of origin, family status, etc. The immigration status also generates a lack of mobility in employment, family separation and ineligibility for Employment Insurance.

This section looks into two often mentioned forms of unfavourable treatment against TMWs ,that do not occur through explicit discrimination in law but, indirectly, through the function of the immigration regime: the deprivation of employment mobility and a lack of family reunification.

Unfree labour

Guest worker programmes are often criticised as an institution of unfree labour. In this context, unfree labour refers to workers who have no employment mobility due to legal constraints.[115]

[115] E.g. Vic Satzewich, *Racism and the Incorporation of Foreign Labour: Farm Labour Migration to Canada Since 1945* (Routledge 1991) 42; Robert Miles, *Capitalism and Unfree Labour: Anomaly Or Necessity?* (Tavistock Publications 1987) 32–33.

However, under the Canadian TFWP, it is more accurate to describe the employment mobility of foreign workers as being limited, rather than entirely denied. Compared to the strict constraints of the transfer system in Taiwan, foreign workers in the Canadian TFWP are relatively free in the labour market: they can resign and stay in Canada to find a new job until the work permit expires.[116] It is rather the precarious immigration status of TMWs that leads to retention effects and generates unfree labour. First, time is the enemy. For foreigners whose authorisation to work is tied to a specific employer, the formidable challenge is to find an employer who is able and willing to go through the applications for LMIA and a work permit before the current permit expires. It is reported that it might take eighteen months for caregivers to go through the process to find an eligible employer and obtain authorisation to work again.[117] To the extent that the very employer's sponsorship is necessary for the foreign worker's legal presence, the employer gains extra power of control over the employee, backed by the compulsory force of the thorough immigration regulations.[118]

Second, TMWs usually lack the financial resources to go job hunting. A problem often reported but hardly solved yet is that 'closed' work permit holders are not eligible for unemployment benefit under the federal Employment Insurance (EI), despite the fact they are compelled to join this Insurance scheme. The key is that workers must be 'available to work' to be eligible for the unemployment benefit.[119] However, foreign workers under an employment-specific work permit are legally deemed to be unavailable to work when they are unemployed.[120] In addition, TMWs' access to various benefits under the EI (e.g., sickness benefit) could be denied, given their relatively short term of stay, especially SAWP workers,[121] because workers have to accumulate sufficient amounts of working hours before being eligible to claim benefit.[122]

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[116] IRPR s 209.

[117] Caregiver's Action Centre, 'Let's WIN Open Work Permits for Caregivers NOW!' <http://caregiversactioncentre.org/lets-win-open-work-permits-for-caregivers-now/> accessed 19 July 2018.

[118] Bridget Anderson, 'Migration, Immigration Controls and the Fashioning of Precarious Workers' (2010) 24 Work, Employment & Society 300, 310.

[119] Employment Insurance Act (SC 1996, c 23) s 18.

[120] Marsden (n 98) 4; Nakache and Kinoshita (n 96) 19; Fudge and MacPhail (n 9) 31; Tanya Basok, 'Post-national Citizenship, Social Exclusion and Migrants Rights: Mexican Seasonal Workers in Canada' (2004) 8 Citizenship Studies 47, 54. However, Nakache and Kinoshita also report that EI officials in some provinces may decide to grant the benefits to TMWs anyway. Nakache and Kinoshita (n 96) 21.

[121] Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities (n 50) 20.

[122] EIA ss 21(1), 22(1). Currently the threshold for sickness and parental benefits is 600 insured working hours within 52 weeks before making the claim.

Third, measures that aim to protect local workers from being replaced by foreigners usually further impair the employment mobility of TMWs. After the 2014 Overhaul, the LMIA was made more rigorous, including putting stricter obligations on employers to recruit local workers. The LMIA review will be suspended if the regional unemployment rate is higher than 6%.[123] A cap on the maximum percentage of foreign workers that the employer may hire (currently under 20%) is set.[124] The validity period of the LMIA is reduced from two years to one.[125] The application fee for the LMIA was increased from zero, before April, 2013, to CAD $1,000 per LMIA after June, 2014.[126] As these rules make the procedure to hire TMWs more burdensome, they also discourage TMWs from changing jobs and they also strengthen the employer's power over the worker.

Fourth, SAWP participants face further obstacles from officials in their home countries. They do not need to apply for a new work permit if they transfer to a new employer during the season. However, taking the case of Mexican workers' as an example, the transfer requires the approval of the Mexican officials in charge of the SWAP.[127] In practice, the officials set unwritten rules to limit workers' requests to transfer. Mexican workers are only allowed to change employers if they have worked for the initial employer for three seasons.[128] The institutional hurdles, including the short work permit, unsupportive officials, and economic hardship, lead to the retention effect under which TMWs become a particularly reliable and stable labour force. Basok thus argues that TMWs are 'structurally necessary' for Canadian growers. The viability of the agriculture sector depends on the availability of migrant workers.[129] The vital role of unfree migrant workers cannot be replaced by workers with

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[123] ESDC, 'Overhauling the TFWP' (n 43) 11.

[124] ibid 10. This rule applies only to employers hiring more than ten employees.

[125] ibid 12.

[126] ibid 25.

[127] 'Contract for the Employment in Canada of Seasonal Agricultural Workers from Mexico' (n 90) VIII 1.

[128] Binford (n 112) 51.

[129] Basok (n 112) 4. Tracy Lemieux and Jean-Francois Nadeau, 'Temporary Foreign Workers in Canada: A Look at Regions and Occupational Skill' (Office of the Parliamentary Budget Officer 2015) 15–16 <http://www.pbo-dpb.gc.ca/web/default/files/files/files/TFW_EN.pdf> accessed 3 March 2016.

permanent status, no matter how willing they are to accept working conditions that are below standard, because citizens and permanent residents cannot be made unfree.

Finally, the small proportion of TMWs who have the privilege to apply for permanent residence report a common experience of becoming a 'hostage' to substandard employment.[130] The province nominee programmes are employer-driven. Foreign workers need to secure employers' sponsorship throughout the process to succeed with the application. Some employers do exploit the vulnerability of foreign workers during the transitional period.[131] As mentioned, the employer's violation of employment standards, such as the failure to pay overtime or a proper wage, will result in the rejection of the nominee's application, since the violation indicates that the work permit is not being followed. Consequently, TMWs are forced to endure substandard conditions and are also penalised for their employer's wrongdoing.[132] In the case of caregivers, since caregivers are required to complete two years of full time work, or 3,900 hours of work, within four years to be eligible for permanent residence, changing jobs will delay the day that caregivers fulfil the requirement.[133] Choosing to endure mistreatment until permanent status is secured is a common strategy.[134] However, the period of the application takes up to twenty-two months on average, or even longer.[135]

In addition, the precarious legal status of TMWs has long-term economic impacts; the precarious status is 'sticky'.[136] Even if the workers successfully acquire permanent status later on, they are more likely to be confined to low-paid employment for an extensive period of time.[137] The Employers of foreign workers who undergo two-step immigration (i.e., arriving

[130] Nakache and Dixon-Perera (n 56) 9.

[131] ibid 23–24.

[132] ibid 25.

[133] Denise L Spitzer and Sara Torres, 'Gender-Based Barriers to Settlement and Integration for Live-In-Caregivers: A Review of the Literature' (CERIS - The Ontario Metropolis Centre 2008) 17 <http://s3.amazonaws.com/migrants_heroku_production/datas/255/Spitzer%20&%20Torres%202008_original.pdf?1314109366> accessed 17 March 2016.

[134] Audrey Macklin, 'Foreign Domestic Worker: Surrogate Housewife or Mail Order Servant?' (1992) 37 McGill Law Journal 681, 728.

[135] Ethel Tungohan, 'From "Migrant" to "Citizen": Learning from the Experiences of Former Caregivers Transitioning out of the Live-in Caregiver Program' (The Gabriela Transitions Experiences Survey 2014) 7 <http://www.gatesurvey.com/> accessed 17 March 2016.

[136] Luin Goldring and Patricia Landolt, 'The Impact of Precarious Legal Status on Immigrants' Economic Outcomes' (the Institute for Research on Public Policy 2012) IRPP Study No. 35 30 <http://irpp.org/research-studies/study-no35/> accessed 9 April 2016.

[137] ibid 28–29.

with temporary status and then shifting to a permanent one) not only enjoy disproportionate power over the workers throughout the immigration process, but also influence their wellbeing in the long run.

Family Reunion

Another right of which TMWs are *de facto* deprived is family reunion. Participants in the Canadian TFWPs are usually separated from their family, not because they are legally banned from bringing over family members, as in the case of the ban imposed on TMWs in Taiwan. Rather, they leave their families behind because of discouraging immigration regulations and working environments. The spouse/partner of a TFWP worker is not granted an open work permit. They either have to depend on the income of the foreign worker, or must seek employment of their own from outside Canada and apply for an employment-specific work permit. Foreign workers who would like to bring over dependents have to prove that they have sufficient funds to support themselves and their dependents.[138] Considering the income level of most TFWP participants, this is a formidable impediment. Contrarily, the spouses/partners of foreign workers who are exempted from the LMIA (i.e., IMP workers) are generally entitled to an open work permit.[139] IMP participants are encouraged to bring family and to pursue permanent status.

For those TFWs who also depend on employers for housing arrangements (in particular, SAWP participants and in-home caregivers), it is not practical to prepare housing for family members. Recall that many SAWP participants are selected to join the programme because they have a family to be left behind. Perpetual alienage under SAWP thus actively enforces a policy of family separation, in order to have deferential workers who are sufficiently flexible to cope with frequent overtime or antisocial working hours.[140]

Unfree Labour under a Liberal State

In sum, the TFWP creates unfree labour and 'family-hassle-free' workers, not by direct deprivation of freedom but through limits that are attached to immigration papers under the border regime. Sharma contends that guest worker programmes reveals the meaning of 'Canadianness'; alienage naturalises such deprivation:[141] 'Having the ability to work within a

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[138] Citizenship and Immigration Canada, 'Temporary Residents: Proof of Funds / Financial Support' (10 April 2014) <http://www.cic.gc.ca/english/resources/tools/temp/visa/intake/proof.asp> accessed 23 January 2016.
[139] IRPR s 205(c)(ii).
[140] Anderson (n 118) 308.

[141] Donna Baines and Nandita Sharma, 'Migrant Workers as Non-Citizens: The Case against Citizenship as a Social Policy Concept' (2002) 69 Studies in Political Economy 75, 81–82.

free employment relationship becomes a characteristic of being Canadian: the opposite applies to those categorized as migrant workers.' [142] TFWP allows indentured labour which exists in parallel with free labour market and 'the Self-defined liberal, tolerant Canada.'[143] The common-sense idea that Canadians cannot be forced to take a job that they do not want strengthens the underlying principle of the TFWP, that foreign workers can be bound to specific work. In this sense, foreign workers are citizens' Others. The meaning of citizenship is unthinkable without the Others.[144]

Just as unfree labour is tacitly supported by the theory of trichotomy in the Taiwanese case, the unfree labour of the Canadian TFWP is arguably sustainable under the Charter, in particular, because the limit on employment mobility is tied to the ordinary function of border control. The first leading Supreme Court case on equal protection in the Charter era, *Andrews v Law Society of British Columbia*, [145] protects the equality of employment for permanent residents. Justice Wilson reasoned that non-citizenship is an analogous category to the grounds of discrimination enlisted in Section 15, particularly because non-citizens are vulnerable since they have no political power. [146] Some commentators suggest that jurisprudence cases like *Andrews* denote the declining relevance of legal citizenship as the basis for rights protection and the emergence of a human-rights order.[147] However, this is prematurely optimistic, since *Andrews* tells us little about the disparity of treatment due to border-crossing and insecure immigration status. [148] Rather, equal protection is almost meaningless in the context of the doctrine that 'non-citizens do not have an unqualified right to enter or remain in the country.' [149] The rationale of vulnerability under democratic exclusion,

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[142] Sharma (n 7) 98.

[143] ibid 99.

[144] Sunera Thobani, 'Nationalizing Canadians: Bordering Immigrant Women in the Late Twentieth Century' (2000) 12 Canadian Journal of Women and the Law 279, 283.

[145] *Andrews v Law Society of British Columbia* (1989) 1 SCR 143 (involving a British citizen, a Canadian permanent resident, who was barred from practicing law for being a non-citizen).

[146] ibid 152.

[147] E.g. Saskia Sassen, *Losing Control?: Sovereignty in the Age of Globalization* (Columbia University Press 1996) ch 3.

[148] Catherine Dauvergne, 'How the Charter Has Failed Non-Citizens in Canada: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence' (2013) 58 McGill Law Journal 663, 673.

[149] *Canada (Minister of Employment and Immigration) v Chiarelli* (1992) 1 SCR 711, 733 (upholding deportation of a permeant resident committing criminal offence).

which supports the extension of equal protection to non-citizens in *Andrews*, appears to have no bearing on the border regime. To the extent that indentured labour is the product of border management, legal citizenship makes all the difference. Alienage conceals subordination under the liberal constitutional order.

6 Moving On

This chapter uses Canadian TFWP to supplement and deepen the understanding of the basic organisational logic of TFW schemes. It is indicated that, like Taiwan's scheme, the Canadian TFWP is operated under conflicted policy goals which tend to prioritise system integrity over TFWs' interests. It also relies on temporariness and alienage to 'craft' the desired labour force—flexible and deferential, and to reconcile the deprivation of the fundamental rights of TFWs with the liberal democratic constitutional order. Although the Canadian scheme is more lenient in its administration towards TFWs, the commonalities besetting both schemes demonstrate that the difference between the two are in degree rather in kind. It reveals the general, basic institutional limitations of a guest worker programme which can hardly be transcended while it maintains the basic logic of temporariness and alienage.

TFWs are sometimes described as 'economically included, politically excluded'.[150] However, in both the cases, Taiwan and Canada, it has been shown that, even in the economic realm, TFWs are isolated and excluded from the free[151] labour market, but they are only allowed to work for the designated employer. In this regard, TFWs are economically excluded too. TFW schemes are thus a regime of dual exclusion.

Both the economic exclusion (deprivation of employment mobility), and the political exclusion (deprivation of democratic voices) are legitimised under the constitutional order through the function of the immigration regime and workers' foreign status. To the extent that the right deprivations are achieved through the function of border control and immigration documents, and the state enjoys wide discretion. The doctrine of equal protection fades, and the absence of foreigners' political voices over the border regime is not a concern.

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[150] Daniel Attas, 'The Case of Guest Workers: Exploitation, Citizenship and Economic Rights' (2000) 6 Res Publica 73, 79.

[151] 'Free' here merely refers to employment mobility. The next chapter will reflect on the question of whether the labor market is free from the neo-republican perception of freedom.

Despite the deprivation, the fact that TFWs are voluntary economic migrants adds to the legitimacy of the scheme. They are said to come for lucrative earnings. The substandard working conditions thus enhance the impression that TFWs are much more willing to come, even under such conditions. They are said to be 'lucky to be here'.[152] Under this narrative, TFW schemes become a form of 'charity' or foreign aid—by giving them jobs that most nationals consider undesirable - rather than a recruitment mechanism.[153] This narrative gives TFWs an appearance of consent and renders the deprivation of TFWs' rights easier, whereas challenges against deprivation are harder. Indeed, TFWs not only consent to the substandard treatment, but give their consent twice: once by signing the employment contract, the second time by crossing the border. By entering into the contract, TFWs willingly accept subordination to the employer; whereas by entering the territory, TFWs voluntarily subject themselves to the legal authority of the host state. In short, the dual exclusion of TFWs under a TFW scheme is legitimised by the double consent of TFWs. In this picture, democratic inclusion of TFWs cannot be more irrelevant.

In the next three chapters, I will challenge dual exclusion and argue for the rights to equal the democratic participation of TFWs through the republican theory of freedom. Chapters 4 and 5 will restore the relevance of democratic participation in the context of severe economic deprivation. Chapter 6 will develop a non-denominational citizenship model o in order to transcend temporariness and alienage.

[152] Sharma (n 7) 136.

[153] Binford (n 112) 9.

Chapter 4

Domination, the Market and Work

1. Introduction

Chapters 2 and 3 analysed the logic of the legal construction of temporary migrant workers (TMWs) by comparing the temporary foreign worker (TFW) schemes in Taiwan and Canada. It was suggested that the TFW schemes are established on the double denial of TMW's equal participation in both the political and the economic spheres; and yet the deprivation of equal status is said to be doubly consented to by TMWs, by their voluntary entry to the host state, on the one hand, and by their willing entry into the employment contract, on the other.

To challenge this double denial, this thesis argues for equal democratic inclusion of TMWs in the host state, on the basis that political emancipation is necessary, although insufficient, to realise less exploitative economic relations. In other words, the double denial of TMWs' equal status in the political and economic spheres has to be rejected on both fronts at the same time. I make the case for TMWs' right to democracy mainly, but not exclusively, by engaging with the republican theory of freedom as non-domination. The theoretical contentions will proceed in three main steps. First, it is suggested that private domination, if properly understood, is conceptually connected with public domination, in the sense that the latter constitutes the former. Second, equal democratic participation is necessary in order to achieve non-domination in the public realm. Third, the democratic boundary of the state should be drawn to include all who are present in the state's territory and who are subject to the entire legal system, regardless of their legal citizenship.

This chapter works on the first thesis of the trilogy, critically examining the conception of domination and the connection between public and private domination. It takes Phillip Pettit's work on freedom as non-domination as its starting point (Section 2), because his view is the most fully articulated and debated. However, Pettit's conception of domination is insufficient in that it fails to fully recognise structural, systemic and extractive power. This insufficiency is shown most vividly in his treatment of the market. In replying to the criticism that the theory of freedom as non-domination is anti-market, Pettit concludes that the market is, in principle, a free realm. Yet, this conclusion cannot be upheld in a theoretically coherent way. This further leads to a limited account of domination in work relations (Section 3).

Section 4 proceeds to the relationship between domination in the public and private spheres. Importantly, it focuses on the structural, systemic and extractive power imbalance among private agents, and this will shed light on the conceptual link between public and private domination: pervasive private domination necessarily has legal and institutional origins that are framed through political struggle. In this light, the state has a significant role in shaping or relieving private domination. It is also for the essential link between public and private domination that I argue, from the republican perspective, that one cannot be a free worker without being a free citizen (Section 4).

2. Freedom as Non-Domination

This section briefly introduces elements of freedom as non-domination, primarily as Pettit articulates them, which is essential for the discussion and criticism in the next section. It draws attention to two points: first, freedom as non-domination should mainly focus on the objective features of arbitrary power, rather than on the subjective intention of powerholders. Second, the theory of republican freedom is ambiguous about the relationship between public and private domination, which requires further clarification below.

Freedom as Absence of Alien Will

Neo-republican theorists argue that an agent is free to the extent that s/he is immune from domination. Domination involves being subject to alien will. An agent suffers domination if another agent has the power or capacities to *interfere* with his/her choices 'on an *arbitrary* basis', 'in certain choices that the other is in a position to make'.[1] In this account, domination is a relational idea, signalling the asymmetry of power between the dominator and the dominated.

Interference refers to a wide range of *intentional* behaviours which worsens the choice of the situation of those whose lives are interfered with.

[2] These behaviours include coercing, threatening, or deceiving people or manipulating their preferences, which results in the alteration, devaluation, cancellation or replacement of the options that are otherwise available to the interfered with agents.[3] Intention is a key element in this formulation of domination. However, in Section 3 I will argue that too much emphasis

[1] Philip Pettit, *Republicanism: A Theory of Freedom and Government* (OUP 1997) 52.

[2] ibid.

[3] ibid 53.

on the intentional actions of the dominators leads to the insufficient recognition of systemic and structural domination. Notice also that although this formulation of freedom as non-domination expresses freedom in terms of the options available to people, republican freedom should be a theory that is focused on people's status as free persons as a whole, rather than on the numbers of options that people have. Option sets available to people are merely a useful angle of observation and a technique that can be used in debates on people's state of freedom.

The idea of arbitrary power sparks considerable academic discussion. The next chapter will engage with the debate so as to clarify the relationship between freedom and democracy. For now, it suffices to take the arbitrary power in the relationships of private individuals to mean power wielded at the powerholder's will with impunity and for the powerholder's benefits.[4] The powerholder is not forced to take into consideration the interests or opinions of the interferee.[5]

Power, here, is understood in a Hobbesian sense, namely, various resources which an individual can utilise to reach their intended goals, for example 'physical strength, technical advantage, financial clout, political authority, social connections, communal standing, informational access, ideological position, cultural legitimation'. [6] The extensive understanding of power implies that sources of domination may be wide-ranging, running from the political sphere to the economic, cultural, social, religious realms, etc.

The paradigm of domination is that of the master and slave, or the absolute monarchy and its subjects.[7] Examples in modern contexts include people under totalitarian or colonial political regimes, wives and daughters in a patriarchal society in relation to the male household head, a foreigner facing an immigration official, etc.[8] These examples all involve the imposition of external mastery and alien will on the dominated.[9] Among the examples, the most relevant

[4] Philip Pettit, 'Freedom as Antipower' (1996) 106 Ethics 576, 578.

[5] Pettit, *Republicanism* (n 1) 55.

[6] Pettit, 'Freedom as Antipower' (n 4) 583; Pettit, *Republicanism* (n 1) 79.
Hobbes suggests 'The power of a man, to take it universally, is his present means to obtain some future apparent good.' Thomas Hobbes, *Leviathan* (EM Curley ed, Hackett Pub Co 1994) 50.

[7] Philip Pettit, 'Republican Freedom and Contestatory Democratization' in Ian Shapiro and Casiano Hacker-Cordsn (eds), *Democracy's Values* (CUP 1999) 165.

[8] Pettit, *Republicanism* (n 1) 5; Philip Pettit, *Just Freedom: A Moral Compass for a Complex World* (W W Norton & Company 2014) XVI.

[9] Henry S Richardson, *Democratic Autonomy: Public Reasoning about the Ends of Policy* (OUP 2002) 34.

case in the current context is that employment[10] is considered by neo-republican theorists to be a typical relation of domination.[11] In particular, the power of the employer to dismiss workers at will is said to lead to domination.[12] Work relations will be used to test Pettit's view on the free market and to expose the insufficiency of his theory (discussed in Subsection 3.3).

Domination and Interference

The neo-republican theory of freedom distances itself from the rival theory of pure negative liberty. The latter defines freedom as the absence of interference: a person 'is unfree to perform some action if, and only if, some other person renders that action *physically impossible*'.[13] Contrarily, the theory of freedom as non-domination argues that interference is not necessary nor sufficient to deprive a subject of freedom.[14] It is domination that negates freedom, but domination may occur with or without interference, and vice versa.[15]

The slave-master relation illustrates why domination does not require interference. The unfreedom of slaves subsists on their status: being subjected to the arbitrary power of a slaveholder. Slaves would not be set free, even if the slaveholder does not actually interfere.[16] This idea that domination causes unfreedom, regardless of interference, has profound implications. It means that mere exposure to arbitrary power suffices for domination, hence

[10] To legal ears the term 'employment' has a specific legal definition, of which political theorists may not be fully aware. I take the term 'employment', in Pettit and Lovett's work, generally to mean wage labour or a standard employment relation. Bogg points out that Pettit's view on employment domination appears to ignore domination that is manifest through extreme flexibility, with which I agree. Alan Bogg, 'Republican Non-Domination and Labour Law: New Normativity or Trojan Horse?' (2017) 33 International Journal of Comparative Labour Law and Industrial Relations 391, 406–08.

However, this does not mean that the theory of domination necessarily ignores atypical employment relations. It should be able to identify a wider range of work relations as domination without over-stretching the concept.

[11] Frank Lovett, *A General Theory of Domination and Justice* (OUP 2010) 1. Pettit 1997, 142.

[12] Pettit, *Republicanism* (n 1) 142.

[13] Ian Carter, 'How Are Power and Unfreedom Related' in Cécile Laborde and John W Maynor (eds), *Republicanism and Political Theory* (Blackwell 2008) 61 (Emphasis mine). See also, e.g., Matthew H Kramer, *The Quality of Freedom* (OUP 2003) 15; Isaiah Berlin, *Liberty* (Edited by Henry Hardy ed, OUP 2002) 166.

[14] Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (CUP 2012) 49.

[15] The latter feature—interference without domination—is more relevant to the topic of the next chapter, which concerns how the state may interfere in people's lives without domination.

[16] Pettit, *Republicanism* (n 1) 23.

unfreedom. The powerholder who can exercise power arbitrarily dominates those who are subject to that power, regardless of the powerholder's intention, disposition or their probability of intervening. A master who only intends to do good and who, in fact, only does good with his/her arbitrary power, is nevertheless a dominator. In this regard, the theory of non-domination should be more focused on the objective features of power, rather than on the actual consequences of power.

The claim that domination requires no interference will be relevant to the discussion of the anti-market challenge below. It will also foresee that the notion of domination will more focus on the structural and systemic aspects of domination (Subsection 4.1).

Public and Private Domination

People can suffer from the arbitrary powers of private persons (*dominium*) or that of the state (*imperium*). The neo-republican theory of freedom claims that, to be a free person, an individual has to be independent in both the private and public spheres, free from *dominium* and *imperium* altogether.[17] However, here lies a recurring ambiguity in the neo-republican theory: how is freedom from pubic domination related to freedom from private domination? Schink points out that, for Pettit, 'the republican state *constitutes* freedom'.[18] Skinner also starkly claims: 'it is only possible to be free in a free state.'[19] This not only means that the existence of a free state—a state not dominating its people—is instrumentally useful for, but also conceptually connected with, maintaining freedom among people. Yet it is worth asking further why the free relations between individuals should depend on the freedom of the relations between individuals and the state.[20] Could people who are politically dominated still be free in the private sphere? In our current context, can TMWs be free workers if they are not free citizens? Section 4 will argue that an individual has to be free *vis-à-vis* the state in order to be free *vis-à-vis* private individuals. It is in this sense that public freedom constitutes private freedom.

However, although Pettit suggests the close connection between private and public domination, the asserted connection is not necessarily sustainable under his formulation of

[17] Pettit, *Just Freedom* (n 8) 77.

[18] Philipp Schink, 'Freedom, Control and the State' in Andreas Niederberger and Philipp Schink (eds), *Republican Democracy: Liberty, Law and Politics* (Edinburgh University Press 2013) 227. (*Emphasis* original.)

[19] Quentin Skinner, *Liberty Before Liberalism* (CUP 1998) 60.

[20] Schink (n 18) 227.

domination. Domination, as he defines it, is more individualist than institutional, systemic and structural. Understood in this way, public domination would only be contingently related to private domination, rather than to the essential link that is implicit in the republican theory of freedom. The next section critically examines the insufficiency of Pettit's conception of domination through the anti-market challenge.

3. Market and Domination

Freedom as non-domination is criticised as being deeply anti-market. This is an important challenge that is not limited to the economic realm or the market. Rather, it concerns whether the conception of domination may provide a desirable conception of freedom. (Subsection 3.1), whereas the anti-market challenge is meant to highlight that Pettit's domination is too sweeping an idea of unfreedom to be plausible, I, rather, argue that Pettit's response to the challenge renders domination to be both too narrow and too wide to be theoretically consistent and inspirational.

Pettit claims that the market is generally free and compatible with republican theory of non-domination; and yet it is doubtful whether the claim of the free market can be consistently supported by the theory of non-domination. He draws the conclusion by confirming unequal private wealth and the distinction between offers and threats. I reject both rationales in Subsections 3.2 and 3.3.1. Subsection 3.3.2 further wrestles with the question as to whether competition is non-dominating. I suggest that there may not be a coherent way to argue for the conclusion by relying on theoretical resources that are internal to Pettit's theory of non-domination, and hence the claim that the market is free is hasty. The discussion shows that Pettit's treatment of domination in the market and private property is hardly sufficient, which further leads to a limited view of domination in work relations.

The importance of this exercise, rather than confirming the compatibility between the market and republican freedom, is to probe the possible theoretical limitations of freedom as non-domination. I shall conclude this section by proposing three amendments to the conception: structural, systemic and extraction domination. This is based on the revised view of domination that we can proceed to consider the relationship between public and private domination.

3.1 Anti-Market Challenge

Pettit's understanding of republican freedom is criticised by theorists of pure negative freedom as anti-market since domination is so defined to include voluntary exchanges and competition in the market. As a result, mere participation in the market is exposure to domination; no one is ever free.

Recall that, according to Pettit, *B* is dominated by *A* whenever *A* has the power to interfere with *B* arbitrarily. Interference involves changing the options available to *B* so that *B* will act in accordance with *A*'s will.[21] This formulation is allegedly too expansive. Consequently, domination could occur in both market exchanges and competition. In the case of market exchanges, since the options available to a market participant are constantly changed according to other participants' offers, it appears that, by virtue of joining in the market, an agent is exposed to other people's power to interfere, and hence is dominated during market exchanges with a counterparty.[22] Likewise, interference may also be observed among market competitors. If competitor *A* has the funds to win over a customer from competitor *B* by offering a more favourable price, it appears that *A* has the ability to interfere with *B* at will, and hence s/he dominates *B*.[23] Gaus thus concludes that, 'for Pettit all market competition is a form of interference.'[24] 'The market is much closer to a realm of domination than it is to one of freedom'.[25]

One of the points in Gaus's criticism concerns the republican stance towards property inequality, which will be discussed in Subsection 3.3. In addition, the anti-market criticism has wider implication than property inequality or market context. Inequality in various capacities may raise similar doubts: creativity, skills, languages, efficiency, knowledge, personal charm, etc, could all be a leverage to dominate others, if all it requires for domination is the ability to defeat others in competition. It then reaches the ridiculous conclusion that a society of non-domination requires the cancellation of private wealth, the inequality of capacities and all forms of competition. Understood in this way, the anti-market challenge is a version of the

[21] Pettit, *Republicanism* (n 1) 53.

[22] Carter (n 13) 77.

[23] Gerald F Gaus, 'Backwards into the Future: Neorepublicanism as a Postsocialist Critique of Market Society' (2003) 20 Social Philosophy and Policy 59, 68.

[24] ibid.

[25] ibid.

'cheap domination' problem.[26] That is, a sweeping definition of domination categorises otherwise blameless human interactions as domination. This then dilutes the moral seriousness of domination.

In response, Pettit confirms that the market is, in general, a free realm, and defends the conclusion that inequality in wealth and market exchanges would not be considered domination if some assumptions hold. Overall, I argue that Pettit cannot consistently uphold the above conclusion. His insufficient treatment of the market, if tested with the example of work relations, would lead to the paradoxical view that workers in stable, standard employment are prone to domination by their employer, while unemployed workers in a highly flexible and precarious labour market are free. Pettit's response to the anti-market challenge surprisingly leans towards a libertarian stance over private property and the labour market. It does not address the concern that non-domination might be too expansively defined, either.

What follows first looks at the issues of inequality of wealth (Subsection 3.2) and market exchange (Subsection 3.3.1). As Pettit does not directly respond to the criticism that competition may lead to domination, I explore the possible resources that are internal to neo-republican theory to see how Pettit's conclusion that the market is generally unproblematic might be supported (Subsection 3.3.2). The discussion may appear to be technical, but it highlights the potential limitation of the formulation of non-domination, and points to possible directions for adjustment.

3.2 Inequality in Wealth

Republicans are not hostile to private property, although they do not hold a celebratory attitude to it either.[27] On the one hand, republicanism advocates the inclusive political participation of free citizens.[28] Active citizenship, however, requires a material basis. To the

[26] Christopher McCammon, 'Domination: A Rethinking' (2015) 125 Ethics 1028, 1033.

[27] *But see* Robert S Taylor, 'Market Freedom as Antipower' (2013) 107 American Political Science Review 593 (claiming that the republican attitude towards market competition should be celebratory); Robert S Taylor, *Exit Left: Markets and Mobility in Republican Thought* (OUP 2017) ch 3. Taylor does not share with other contemporary neo-republicans (cited below) their wariness towards the market and the accumulation of wealth. He proposes a perfectly competitive market as the means to push back domination in the market, demonstrating that the rationales of non-domination could be used to support deregulation policies. I will discuss more of Taylor's thoughts in Subsection 4.3

[28] Stuart White, 'The Emerging Politics of Republican Democracy' in Stuart White and Daniel Leighton (eds), *Building a Citizen Society: The Emerging Politics of Republican Democracy* (Lawrence & Wishart 2008) 9–11.

extent that private property enables individual economic independence and security, it helps to maintain an active, equal and free citizenry.[29] On the other hand, republicans are concerned about the effects of wealth on civic virtue,[30] political participation and people's independence. [31] The power of money could easily spill out of the economic regime, entrenching itself into aspects of life and corrupting political equality.[32]

However, contrary to the cautious attitude in the republican tradition, Pettit's approach towards wealth inequality is that property inequality *per se* does not constitute domination. He distinguishes human-made hindrance of freedom, and non-human factors which affect the enjoyment of freedom. While the former limits freedom and hence becomes domination, the latter only 'conditions' freedom. For instance, gravity constrains the maximum height that people can jump; but it is only a condition under which people jump, rather than an infringement on people's freedom to jump.[33]

In analogy, Pettit argues, the private property regime and consequent property inequality are mere conditions, rather than hindrances to freedom. Inequality of wealth 'needs not compromise anyone's status as an undominated member of the society, any more than natural differences of physic or intelligence or geography do so.'[34]

The assertion that unequal wealth is merely a natural condition for freedom is premised on the 'private property regime' starting from a peaceful, pre-political origin of the state of nature. In this imagined scenario, it is presumed that property acquisition and accumulation are not a result of domination, nor does it cause further domination.[35] Under this premise, Pettit rejects that property rights are the creature of the government and subject to its continued

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[29] Richard Dagger, 'Neo-Republicanism and the Civic Economy' (2006) 5 Politics, Philosophy & Economics 151, 160.

[30] Adam Fusco, 'Freedom, the Market, and Citizenship: A Republican Sketch of the Civic Economy', *Justice in the Economic Sphere* (2013) 9–10 <https://philevents.org/event/fileDownload/3710?fileId=318> accessed 7 July 2017.

[31] Stuart White, 'The Republican Critique of Capitalism' (2011) 14 Critical Review of International Social and Political Philosophy 561, 565–66.

[32] ibid 571.

[33] Philip Pettit, 'Freedom in the Market' (2006) 5 Politics, Philosophy & Economics 131, 138.

[34] ibid 139.

[35] ibid 140.

subsistence. However, the government should maintain the (nature of) property status and prevent anyone from interfering with others' property arbitrarily. This appears to be a surprising Nozickian gesture to private property.

However, it is doubtful how relevant the justification of private property, which is based on assumptions so remote from the historical and political reality, is. We can hardly imagine any private property regime that is not related to the systemic domination and legal affirmation of the negative historical legacy: slavery, wage slavery, monarchy, colonialism, the patriarchal family, the feudal system, authoritarianism, etc. It thus appears to be unable to justify any *status quo* of wealth inequality.

On the other hand, Pettit admits that impoverished people would be vulnerable to the domination of others, but poverty itself is not domination. To avoid domination due to poverty, he suggests that redistributive measures could be taken to even up private wealth to some degree.[36] However, if the private property regime is as unproblematic as a natural fact, some might wonder whether redistribution could ever be justified. Saying that being poor under the private property regime is natural; is also saying that we cannot, or need not, do much about the regime.

This view may imply the paradoxical conclusion that leaving people in poverty is fine, while helping people in poverty may generate domination. The poor are only *prone to* domination but *are not dominated* simply for being poor. Now, if a Good Samarian gives a hand to the poor in need, s/he makes the poor dependent on her good will and creates a possible scenario of domination: the Good Samarian could withdraw his/her help at will; and the situation of the poor is made worse than the situation before her withdrawal was. Theoretically, we can thus lower the degree of domination that the poor experience by banning 'Good Samaritan' acts in the first place. However, if we could have imposed such a ban, which, in theory, is less intrusive on the property of the rich than is redistribution, then are we allowed to skip the less harmful measure and turn to the more intrusive measure, redistribution? This appears to be a troubling implication that underlies Pettit's confirmation of inequality in wealth.

3.3 Insufficient Treatment of the Market

Further to unequal private property, this subsection examines the case that market exchanges (3.3.1) and competition (3.3.2) are non-dominating and argues that Pettit's position is theoretically inconsistent.

[36] ibid.

3.3.1 Free Market Exchanges

Pettit suggests that market exchanges are voluntary, 'reciprocal offers of rewards',[37] and he relies on the distinction between offers and threats or coercion to argue that the market is, in general, compatible with freedom as non-domination.[38] Offers, unlike threats, (1), add on or improve options that are available to the counter party, and (2) are open to rejection. Market participants are not interfered with by market offers, thus they are not dominated due to market exchanges. For instance, suppose *A* offers *B* a ride at £10 to a destination. Although *A's* offer changes the options that are available to *B*, it does not worsen *B's* choice position, because it adds a new possibility for *B* without removing, replacing or manipulating *B*'s existing options. *B* is also in a position in which s/he can take or reject offers.[39] Contrarily, if an agent, *E,* threatens to beat *B* up, should *B* walk to the destination, the threat removes *B*'s original option to walk without being beaten up, replacing it with the new option of walking and being beaten up. The option set available to *B* is thus worsened by the threat. A threat forecloses a previously available option, imposing alien will on the person threatened.[40]

It is doubtful whether the distinction between offers and threats is neat and sustainable.[41] Even if the distinction does hold, it does not support the conclusion that the market is generally free. Making offers is one way to influence others, just like persuasion or charm. I recognise

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[37] ibid 142–143.

[38] To be clear, the market is compatible with republican freedom if the following conditions hold:

> 'Assume that the imbalances of property and power that shape the exchange of goods and services do not have the effect of allowing domination within market exchange. There are no possibilities of arbitrary interference…that they are allowed to facilitate: no predatory pricing, insider trading, market manipulation, and so on. Assume, further that market exchanges are subject to a discipline of non-discrimination…. Parties are not disposed or allowed to ignore and marginalize some particular other, thereby depriving them of normal options…Assume, finally, that market exchanges in which one or another accepts or risks domination by the other in return for some good (this, as in the slave contract) are prohibited.' ibid 142.

[39] ibid 143.

[40] Pettit, *Just Freedom* (n 8) 39; Philip Pettit, 'Republican Freedom: Three Axioms, Four Theorems' in Cécile Laborde and John W Maynor (eds), *Republicanism and Political Theory* (Blackwell Publishing 2008) 121–22.

[41] See e.g., Carter (n 13) 75–78 (providing a detailed critique against Pettit's distinction between offers and threats).
My view is that the distinction does not necessarily hold. The distinction relies on the assumption that threats always worsen an agent's circumstances to make a choice and imposes an alien will, whereas offers never do. However, we can easily imagine an offer with burdensome conditions, or an irresistible offer as opposed to a trivial, ignorable threat. Imagine a life-saving medicine offered at a sky-high price. While this offer is adding an option for patients, the situation also signals immense power imbalance that should alert neo-republicans.

Pettit's point that offers, compared with some means, such as coercion, are a relatively indirect method to make others follow the will of the offer maker. In this sense, offers could be less inimical, or perhaps non-inimical, to the agency and freedom of the offeree. However, this does not mean that offers can never be a means of domination. More importantly, the judgment about whether domination exists between agents does not entirely depend on the moral credential of the method to exercise power, because domination does not even require the actual exercise of power. Freedom as non-domination should be more concerned with the relative power positions of agents, and less about what agents do with power. A dictator could offer a reward for those who turn in anti-government suspects; but the dictator does not cease to dominate the people by making the offer instead of making a threat, even for those who voluntarily take the offer. In other words, the binary of offers and threats is not the hallmark of the dominating and non-dominating power exercise. Consequently, even if the market is a sphere of exchanges of offers, it is not necessarily a sphere of non-domination.

3.3.2 Free Market Competition: Three Responses

On the other hand, Pettit does not systematically deal with Gaus's challenge that market competition must lead to domination under the neo-republican theory of freedom. I suggest three possible rationales which might support the view that market competition generally does not involve domination and therefore the market is, in general, free: (1) the absence of intention (to interfere) (2) the absence of social relationship, and (3) the absence of interference. However, all three are problematic. This failure to consistently support the conclusion of the free market should cast serious doubt on Pettit's approach to the market and to economic inequality. Reflecting on its limitations would help to propose the revision in the next subsection.

Absence of Intention

The first rationale, following the way that Pettit justifies private property, is that competition does not constitute *intentional* hindrance to competitors' freedom. Recall that freedom as non-domination only concerns intentional human-made obstacles.[42] An act with unintentional effects that obstructs others' options does not count as domination.[43] A market participant who fails to make transactions at a higher price due to competition has not therefore

[42] Pettit, *Republicanism* (n 1) 52.

[43] M Victoria Costa, 'Freedom as Non-Domination, Normativity, and Indeterminacy' (2007) 41 The Journal of Value Inquiry 291, 298; Pettit, 'Freedom in the Market' (n 33) 135.

intentionally interfered with the competitor, but is only contingently affected by other's market exchanges, which does not count as domination.

Another way to put this is Pettit's classification between two kinds of hindrance to people's free choices: vitiators and invaders. Vitiators are factors that 'impair or impede your capacity to use your resources for satisfying your will but without deriving from the intrusive will' of others.[44] On the other hand, invaders are 'hindrances that reflect the will of another as to what you should do.'[45] Only invaders lead to domination. Now, it can be argued that competition is only a form of vitiators, not of invaders because competitors could not directly impose their will on others. Competitors might try to impede others' market plans, but they generally have no control over how others react. For example, when a competitor sets the prices lower, others could respond by also lowering their price, by improving their service, or by finding a niche market, etc. To the extent that competitors cannot directly impose their will on other competitors, competition is not domination.

Absence of Social Relations

Another approach is denying the social relationship that exists between competitors. According to Lovett, people are dominated if they are dependent on a social relation in which others exercise arbitrary power over them.[46] To form a social relation, people have to interact strategically, taking each other's actions into consideration and responding accordingly.[47] Under Lovett's definition, domination only occurs in a social relation between agents who are aware of each other and respond according to the other's acts.[48] This view might suggest that,

[44] Pettit, *On the People's Terms* (n 14) 39.

[45] ibid 38.

[46] ibid 2.
There are alternative rationales in Lovett's theory to support the view that competition is not domination. It may be argued, firstly, that the weaker competitors are not *dependent* on the stronger. Dependency is understood by exit costs to the weaker party. Secondly, it may be suggested that the market competition is not wielding *arbitrary* power. Arbitrariness refers to the absence of rules that are known to all parties. Competition, contrarily, requires known rules to be possible. However, both dependency and arbitrariness, in Lovett's account, are an unsatisfactory definition of domination, in my view. They will be discussed in relevant sections.

[47] Lovett (n 11) 35.

[48] I am sceptical about Lovett's view that domination can only happen if agents interact strategically. For those who enjoy absolute authority over others, they may exercise power in an ignorant way. For instance, the most secured monopoly can run their business without any strategic considerations about customers or potential competitors. However, this does not mean that a monopoly is not domination. See also Bogg (n 10) 396–97 (criticising Lovett's view that domination occurs exclusively in social relationships).

in a case where market competitors set their price independently without corresponding to each other's actions, they do not relate to each other as members of a social relationship. Consequently, domination does not occur between competitors. Typically, this is the case in a market with perfect competition.

Absence of Interference

The third approach is to argue that competition does not take away the options of other market participants, and is hence not an interference. The challenge that competition leads to domination presumes that if *A*'s offer is not accepted by *B* due to the more favourable offer of *C*, then *C* interferes with *A* by removing one of the options of *A*. However, this presumption is incorrect; no option of *A* is ever taken away by *C's* offer. In the taxi example, above, the driver *A* never has an option to seal the deal at £10 with *B*, since it also involves *B's* freedom to decide whether to take that offer. The option available to *A* is, rather, to put forward an offer at the price that s/he sees fits. *C*'s favourable offer to *B* does not therefore replace, remove or manipulate any of *A*'s options to make offers. The market competition is thus not domination and is compatible with republican freedom.

Unsatisfactory Reasoning

However, each of the three responses has limits. The common problem of all three is that they are insensitive to the relative power positions of market participants and therefore miss the point of the theory of domination.

To begin, portraying market competition as non-intentional or non-social-relational resonates with the idea that the market is spontaneous coordination governed by an invisible hand. However, the portrait is not always accurate. Some competitors do have the specific intention to squeeze targeted competitors out of the market and have the ability to do so effectively. It is hard to say that the intention to interfere is absent, or that the social relationship does not exist between competitors. More importantly, however, it is questionable to what extent *intention* should be decisive in observing domination. There exists an internal tension between (1) intentional arbitrary interference constitutes domination, and (2) domination does not require actual interference.[49] As emphasised above, the theory of non-domination

[49] *See also* Sharon R Krause, 'Beyond Non-Domination: Agency, Inequality and the Meaning of Freedom' (2013) 39 Philosophy & Social Criticism 187, 192.
Krause proposes a wider reading of intention. However, she also believes that many forms of domination are unconscious and unintentional, which will be ignored by Pettit's formulation.

focuses on *the kind of power* that the powerholder has,[50] rather than on the kind of action that the powerholder takes. To the extent that the focus should be on power, the intention of the powerholder must be secondary. A lenient slaveholder who has no intention to interfere still dominates the slaves. Similarly, suppose that a competitor has the ability to achieve monopoly, and, further, that monopoly is domination, then the competitor dominates, regardless of their intention. In other words, intention and strategic social relationship cannot distinguish competition from domination.

On the other hand, the third view: that competition does not interfere in others' opportunities to put forward an offer, and hence is not domination, appears to be a better defence against the anti-market criticism of Gaus. It denies that non-domination should guarantee success in the market, but, instead, emphasises competitors' fair opportunity to participate in the market. This approach would correspond to Pettit's premise for the free market, that market manipulation and monopolisation are objectionable, because they exclude fair participation, affecting the competitors' options to join the market.

However, saying that competition is not, in general, interference would contradict Pettit's explicit view elsewhere. He recognises that competition is interference, but not necessarily arbitrary,[51] provided that competitors have roughly equal means to resist others' interference. Power is offset by 'anti-power'.[52]

This argument of anti-power finally shifts the focus of discussion to the relative power position of competitors, which, I believe, is the right track. However, if the balance between power and anti-power is the key, then could it still be concluded that competition is generally not domination and that the market is generally free? After all, the power imbalance is pervasive

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[50] Christopher McCammon, 'Re(Public)an Reasons: A Republican Theory of Legitimacy and Justification' (PhD Dissertation, University of Nebraska-Lincoln 2015) 15 <http://digitalcommons.unl.edu/philosophydiss/9> accessed 30 May 2018.

[51] Pettit suggests:

> 'Do republicans have to oppose the free market…? No, they don't. It is true that in the free market…individuals face one another as the bears of naked preference and try each to do as well as they can in satisfying those preferences. But short of *great differences of bargaining power*, this arrangement does not mean that anyone is exposed to the possibility or arbitrary interference by any other… One seller may be able to interfere with another by undercutting the other's price, but the second should be free, above the level of the competitive price, to undercut that price in turn; thus there is no question of permanent exposure to interference by another.'

Republicanism (n 1) 205. (*Emphasis* mine)

[52] 'Anti-power is what comes into being as the power of some over others…is actively reduced or eliminated'. Pettit, 'Freedom as Antipower' (n 4) 588.

in the market, and thus so is domination. Indeed, Section 4.1, below, will suggest that, generally, the market may not be free.

The Case of the Labour Market[53]

Overall, the neo-republican theory of freedom cannot consistently support the claim of a free market. Pettit's method of approaching property and the market naturalises and overlooks unequal economic power. If the reasoning is tested against the case of wage labour and the labour market, it would further lead to a limited view of domination: Workers are unfree when employed, but are generally free when unemployed, when they are a job seeker in the labour market.

Employment is one of the typical examples of private domination. Workers are 'under permanent exposure to the interference' of the employer, even if the employer is lenient.[54] According to Pettit, the arbitrary power of employers is enhanced if they can dismiss workers at will,[55] or if the market's prospect is pessimistic.[56] Domination is also manifested if the working conditions are so poor as to be wage slavery [57] or offer wages that are too low to allow people to 'function properly in society'.[58] Yet unemployed workers in the labour market appear to be in a 'free' realm. They are not dominated if their offer to commodify labour is rejected by potential employers; if their offer is outcompeted by cheaper labour; if they receive a zero-hour contract instead of standard employment; and, finally, if they fall into poverty due to constant unemployment.

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[53] By the term 'the labour market', I do not imply that I am joining the scholars who consider labour law to be the 'law of the labour market' like, e.g., Deakin and Wilkinson. Simon F Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (OUP 2005). Dukes offers a strong critique of the 'labour market' approach. Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (OUP 2014) ch 8.

Here, I use the term 'the labour market' to refer to the mediating institutions for labour power commodification. Robert Miles, *Capitalism and Unfree Labour: Anomaly Or Necessity?* (Tavistock Publications 1987) 171.

[54] Pettit, *Republicanism* (n 1) 141.

[55] ibid 142.

[56] Philip Pettit, 'A Republican Right to Basic Income?' (2007) 2 Basic Income Studies 1, 5.

[57] Pettit, 'Freedom in the Market' (n 33) 142.

[58] 'Suppose there are just a few employers and many available employees, and that times are hard. In those conditions I and those who, like me, will not be able to command a decent wage…. And in those conditions it will be equally true that we would be defenseless against our employers' petty abuse or their power to arbitrarily dismiss us'. Pettit, 'A Republican Right to Basic Income?' (n 56) 5.

In other words, domination, in this view, is only recognised after the employment is established. It is only embodied in the governance privilege of the employer and their superior power to end the employment. Consequently, the limited view of domination cannot explain precariousness in the labour market. Moreover, it also fails to explain the force of the employers' power to dismiss, because if the labour market is simply a free domain, then it should not be a threat at all to re-enter it.

3.4 Concluding Remarks

The market relationship is 'free and moral, but not fully so' in neo-republican eyes,[59] with which I concur. Market exchanges may help to realise self-rule by allowing people to make economic decisions according to their own will,[60] and yet it could also generate vulnerability. Against the generally cautious attitude of republicans, Pettit's affirmation about the compatibility of wealth inequality and the market with republican freedom appears to be hasty.

This approach would lead to a narrow view of domination, particularly shown in the case of wage labour. It cannot capture workers' vulnerability in the process of commodifying labour through the 'free' market. On the other hand, if the theory of non-domination seeks to make sense of such vulnerability, it must first recognise that domination could be manifested through voluntary market offers and exchanges. This nevertheless shows that the distinctions between 'free' offers and unfree threats, and between vitiators and invaders, are not sufficient to uphold the claim that the market is generally free. Moreover, Pettit eventually fails to respond to the anti-market challenge, as the proposition of the free market is not well-supported.

The discussion also hints that the formulation of domination requires supplements. The next section suggests directions for modification: domination is constituted by arbitrary power which is structural, systemic and extractive. The theory of domination should focus on systemic deprivation and a power imbalance rooted in legal, social and political structures, while being less concerned about individual intention and interference. It is also in light of the idea of structural and systemic domination that private and public domination are not only contingently related but are also conceptually connected.

[59] Dagger (n 29) 157.

[60] ibid 158.

4. Public and Private Domination

This section begins with a suggested modification of the formulation of domination and revisits the anti-market challenge (Subsection 4.1). Based on the revised view of domination, Subsection 4.2 demonstrates the link between private and public domination in light of the example of work relations. Subsection 4.3 rejects the exit approaches of Taylor and Lovett, because they hold an implausible view of domination under which the link between public and private domination is dismantled. This section is concluded with a reflection on three layers of domination over TMWs: 'consented' deprivation of control, legalised structural power imbalance and limited resorts to resist.

4.1 Revisiting Domination

The idea of domination captures problematic power. Based on the above discussion, I propose three features of power which should alert us to the trace of domination: structural, systemic and extractive. Compared to Pettit's formulation, they both extend and constrain the conception of domination.

By the structural dimension of domination, I emphasise that the power relationship between the dominated and the dominator is not individualistic and is detached from personal intention. By the systemic dimension of domination, I highlight the fact that the power of the dominators has deep institutional roots and is usually manifested through positive laws and social norms. The dominator also often enjoys ruling-making power over the dominated. Finally, by the extractive dimension of domination, I underline the observation that domination usually accompanies the large-scale deprivation by which the dominator reaps surplus from the dominated for his/her own benefits.

Structural Power

Domination is supported and conditioned by a mixture of economic and social structures, the patterned behaviours of actors and institutionalised norms. However, the paradigm example of domination, slavery, is often depicted as a person-to-person relationship, between a single master and the slave.[61] However, this interpersonal and individualist reading ignores that the power enjoyed by slaveholders was conditioned under legal and institutional designs and was supported by the patterned behaviours of groups of participants. Slavery was upheld by a wide range of people with different roles: the locals who reported runaway slaves, the police and

[61] *See also* Michael J Thompson, 'Reconstructing Republican Freedom: A Critique of the Neo-Republican Concept of Freedom as Non-Domination' (2013) 39 Philosophy & Social Criticism 277, 282 (criticising Pettit's idea of domination as being limited to 'the act of one agent upon another).

military who supressed slave rebellions, the judge who ruled according to the slavery code, the priest who cited religious canons to encourage obedience, etc. The labour of slaves was also incorporated into the society's production model and economic system. Political institutions were designed to perpetuate slavery. Laws in different fields: property, cooperation, commerce, family, etc., were consistently formulated under the premise of the existence of slavery, and they worked together to enable its operation.[62] Domination therefore not only existed between a single slave and a master, but also existed between the caste of slaves and all masters, along with participants who supported the operation of slavery and shared the power of the slave system. 'In the real world, dominators usually go in packs.'[63] The idea of domination should remind us to identify the 'pact' of the dominators and recognise the structure underneath.

Pettit's formulation of domination is less well posited in identifying the structural dimension of domination, partly because of its individualist tendency to focus on interpersonal relationships. In addition, as mentioned, he emphasises that intentional human-made impediments on freedom should be the central concern of a theory of freedom, as opposed to 'the impersonal restrictions that arise non-intentionally from the natural order or from the way things are socially organized.'[64] The theory also excludes random, anonymous social interdependence as a source of domination.[65]

However, structural domination is not the same as agentless domination, natural obstacles or random human interdependence. As Shapiro points out, domination is a particular kind of unfreedom that contains considerable human elements. The fact that domination is human-made implies that such unfreedom could, and should, be eliminated by humans, aptly, by those who contribute to it.[66] That said, it should not be ignored that domination is a result of human acts under structures. Social, economic and political structures are not self-sustained. Their subsistence involves numerous deliberative acts; but structures are not reducible to the sum

[62] *See generally* Peter Kolchin, *American Slavery: 1619-1877* (Farrar, Straus and Giroux 2003) ch 3.

[63] McCammon, 'Domination: A Rethinking' (n 26) 1048.

[64] Philip Pettit, *A Theory of Freedom: From the Psychology to the Politics of Agency* (Polity 2001) 142.

[65] Pettit, *Republicanism* (n 1) 159.

[66] Ian Shapiro, 'On Non-Domination' (2012) 62 University of Toronto Law Journal 293, 307. Although Shapiro, like Pettit, emphasises human elements, he, unlike Pettit, further points out that domination is not always a result of conscious actions. ibid.

of conscious human actions either.[67] In this regard, to identity structural domination, the intention of the dominator should be understood in a thinner sense. It should be sufficient to demonstrate that an agent participates in the structures with agency, recognising 'his hands behind the deeds', perhaps out of limited personal perspectives, rather than as a conscious, vicious desire to harm the dominated.[68]

Systemic Power

As indicated, domination has institutional roots. The power of domination is concretised through positive laws and social norms. Moreover, the dominator usually enjoys the rule-making power over the relationship with the dominated. In analytical terms, the dominator enjoys Hohfeldian power against the dominated. Kirby thus suggests that the necessary and sufficient condition of domination is that the dominator possesses arbitrary higher-order power to set rules about interference, rather than merely possessing the arbitrary power to interfere.[69] Richardson further indicates that at the core of dominating relationship is the dominator's claim of authority over the dominated. The enormous power that slaveholders, colonisers, monarchy, etc., enjoy over the dominated is particularly manifested through their capacity to impose new duties unilaterally and arbitrarily.[70]

Contrarily to Kirby and Richardson, I take arbitrary higher-order, rule-making power or the illegitimate claim of authority as a sufficient, but not necessary, condition of domination. This is to avoid denying that power other than the law, such as brutal violence or money, can be a means to impose an alien will on others too. It should also not be ignored that some forms of domination, such as racial supremacy, may proliferate *de facto*, despite equal status *de jure*.

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[67] GA Cohen, 'The Structure of Proletarian Unfreedom' (1983) 12 Philosophy & Public Affairs 3, 6–7.

[68] *See also* Krause (n 49) 196. Krause distinguishes intention from agency: 'What establishes his agency here is not strictly his intentions but the fact that he can recognize himself in the actions, can see his hands behind the deeds.'

[69] E.g., Nikolas Kirby, 'Revising Republican Liberty: What Is the Difference Between a Disinterested Gentle Giant and a Deterred Criminal?' (2016) 22 Res Publica 369, 380.

[70] Richardson (n 9) 34. This is one of the reasons why Richardson suggests that freedom as non-domination should only be a normative idea of freedom. It is normative in the sense that it is only constituted when one has the (legal) authority to impose duties on another. In Richardson's view, a kidnapper has tremendous power over her/his victim, but the kidnapper does not dominate the victim, since s/he does not enjoy the legal authority to impose duty on the victim. In this regard, Richardson's notion of domination diverges from those of Pettit and Lovett, who insist that domination should be a descriptive, factual notion of freedom.

However, the claim of authority and of unilateral rule-making power are still significant features of domination, which indicate its institutional and systemic dimension. It is also worth noticing that the paradigmatic examples of domination are all established in the legal setting which grants authority to the dominator: masters vs. slaves, monarch vs. the subject, patriarchal household heads vs. the household, etc.[71] The rule-making power of dominators exemplifies the essential role of legal institutions in supporting domination.

Extractive Power

Finally, domination often involves the large-scale extraction of benefits from the dominated. In Thompson's term, dominators have 'extractive power' when they can cast the dominated into a source of surplus benefits and reap the surplus.[72] Sometimes, the relationship of extraction appears to be voluntary and rational to the dominated, and yet it is a relationship of subjection. Extraction transfers disproportionate benefits to the dominator, ensuring that the dominated are kept in an impoverished place which limits their development, capacities and the scope of their choices.[73]

Extractive domination can be seen in colonialism and slavery. Thompson further takes wage labour under capitalism as a typical case of extraction domination. Again, extraction domination cannot be reduced into individual will. It is, rather, driven by the logic of the structure. For instance, a factory is closed to relocate it to a cheaper place. In Pettit's formulation, this might be taken as an example where the factory owner exercises the arbitrary power to jeopardise workers' livelihoods. However, more likely, the factory closure is also mandated by the functional logic of capitalism and globalisation, which always demand lower wages, less union involvement, more flexible labour regulations, etc. Workers are more dependent on the mandate of the structure of extraction, rather than on the individual will of the employer.[74]

Anti-Market Challenge Revisited

In short, domination should include the elements of structural, systemic and extractive dimensions. In this reading, domination involves systemic power that is embedded in the

[71] Fabian Wendt, 'Slaves, Prisoners, and Republican Freedom' (2011) 17 Res Publica 175, 181.

[72] Thompson (n 61) 287.

[73] ibid 287–88.

[74] ibid 288.

social, political, economic and legal structures which enable the powerholder to, *inter alia*, arbitrarily impose rules and duties over others and to reap disproportionate benefits from those who are subjected to the power.[75] Compared to Pettit's view, the modified conception of domination is more extensive in that it includes structural, pervasive and institutionalised power imbalances. However, at the same time, it is also more limited, in that it excludes a mere individual abuse of power which has no institutionalised support.

Revisiting the anti-market challenge in Subsection 3.1, unfree under the above notion of domination, the market is, to the extent that it is founded on the private property system which legalises the fruits of domination and allows for an unequal power of wealth, to be a tool for further domination.

In this light, the labour market is hardly free; and wage labour is subject to domination both in and outside the employment or other flexible forms of work relationship. Inside the employment, workers are governed by the management prerogative of the employer under the logic of economic efficacy.[76] Since numerous tasks have to be coordinated during the course of production which cannot be explicated in contracts in advance, a hierarchical structure and management authority help to lower the transaction costs and the costs of coordination,[77] and workers agree to *'obey managerial orders, whatever they may be'*.[78] This essential feature of employment cannot be negotiated and is usually legally supported.

Outside employment, wage labour is further subject to the structural and extractive logic of capitalism. On the one hand, the majority of people are driven to work to survive. On the other, work is constantly dissolved into more insecure, precarious forms that are beyond the

[75] My modification would appear to be close to Laborde's view of domination: 'Domination refers to the relatively unrestrained and systematic (even if unexercised) ability of a group or individuals to exert power over others in pursuit of their own interests at the expense of those subordinate to them.' Cécile Laborde, 'Republicanism and Global Justice: A Sketch' in Andreas Niederberger and Philipp Schink (eds), *Republican Democracy: Liberty, Law and Politics* (Edinburgh University Press 2013) 283.

[76] E.g.,Guy Davidov, *A Purposive Approach to Labour Law* (OUP 2016) 36–37; Hugh Collins, KD Ewing and Aileen McColgan, *Labour Law* (CUP 2012) 132–133; Hugh Collins, *Employment Law* (Second Edition, OUP 2010) 10; Otto Kahn-Freund, *Kahn-Freund's Labour and the Law* (Paul Lyndon Davies and Mark Robert Freedland eds, Stevens 1983) 14.

[77] Elizabeth Anderson, 'Equality and Freedom in the Workplace: Recovering Republican Insights' (2015) 31 Social Philosophy and Policy 48, 61. (*Emphasis* original.)

[78] Nien-hê Hsieh, 'Freedom in the Workplace' in Stuart White and Daniel Leighton (eds), *Building a Citizen Society: The Emerging Politics of Republican Democracy* (Lawrence & Wishart 2008) 61.

workers' control.[79] It was based on the phenomenon that wealth was unequally distributed and most people must sell their labour to others to survive,[80] following the insights of nineteenth-century US labour republicans, Gourevitch argues that wage labour is structural domination,[81] and has a trace of forced labour, since capital was able to compel people to work just as harshly as slave masters did.[82]

4.2 Connecting Public and Private Domination

In light of the structural, systemic and extractive domination, the conceptual connection between private and public domination becomes clear: since private domination has its root in legal and political institutions, and the law constitutes the parameters of systemic power imbalance in the private realm, it is necessary, despite not always being sufficient, to control the law and institutional settings via the state and democratic politics. To have such control is to be free citizens in relation to the state.[83]

Applying the above general thesis in the context of work, to ask about the relationship between public and private domination is to examine how the status of free citizens is related to the status of free workers. The relationship between work and democracy is a traditional focus of republicanism. In this tradition, to be a free citizen, one has to be a free worker, in the sense that democracy requires the democratisation of work to thrive. Here, I supplement the traditional view with the other half of the story: namely, to be a free worker, one has to be a free citizen, in the sense that domination in work requires democratic citizenship to resist it. Each half of the contention will be briefly explained below.

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[79] Bogg (n 10) 406 (commenting that Pettit's understanding of patterns of domination in work relations is limited by a reductive view of the employment contract).

[80] Michael J Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Harvard University Press 1998) 177; Cohen (n 67) 16–17.

[81] Alex Gourevitch, 'Labor Republicanism and the Transformation of Work' (2013) 41 Political Theory 591, 593.

[82] Sandel (n 80) 176.

[83] In the next chapter, I will argue that the minimum condition for being a free citizen in relation to the state is equal democratic participation. For now, I only assume that the democratic proposition is accepted.

Free Workers and Free Citizens

Traditionally, republicanism emphasises the connection between democratic politics and work based on three observations. Firstly, economic dependency allegedly affects independence in the political arena. People are likely to give up opportunities for political participation if they are economically vulnerable.[84] Next, authoritarian working environments are said to be harmful to people's skills for active citizenship.[85] In the contemporary context, this line of thought inspires the cry for workplace democracy.[86] The workplace is said to be the school of civic virtue and democratic citizenship.[87] Thirdly, the ever expanding demands of work presumably make it difficult for people to engage in public affairs. [88] This concern becomes more acute than ever when the idea of flexibility blurs the boundary of the space and time of work. While people might appear to gain control of working hours under flexibility schemes, this also, ironically, means that they are never off duty,[89] which, in turn, undermines democratic citizenship.

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[84] White, 'The Republican Critique of Capitalism' (n 31) 571.
Labour republicans a century ago pushed the connection between economic dependency and political dependency further, arguing that relying on the wage system would corrupt independent political judgments. As employees rely on the employer for their bread and butter, they might curry favour with the employer in terms of public affairs. If employees' ingratiating themselves with the employer does not please him/her, then at least it avoids offending him/her. Sandel (n 80) 187. Sandel quotes Edwin Lawrence Godkin: 'when a man agrees to sell his labor, he agrees by implication to surrender his moral and social independence'.

Godlin's argument, however, severely undermines workers' agency. I think the focus should be more appropriately placed on how the authoritative nature of work can easily interfere with the workers' lives beyond work. Hsieh (n 78) 59; Virginia Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71 The Modern Law Review 912, 925.

[85] White, 'The Republican Critique of Capitalism' (n 31) 572; Sandel (n 80) 185.

[86] *See generally* Carole Pateman, *Participation and Democratic Theory* (CUP 1970).

[87] Some empirical research casts doubts on whether undemocratic workplaces will result in inactive democratic participation, E.g., Robert A Dahl, *A Preface to Economic Democracy* (Polity 1985) 96–98. Nevertheless, advocating workplace democracy does not have to rely on the hypothesis that it is instrumental in good democratic education. It can be a means for other values, such as non-alienation, resisting domination, fair working conditions, enhancing productivity, or it can be recognised as a goal in its own right.

[88] White, 'The Emerging Politics of Republican Democracy' (n 28) 127. Again, the contention that long working hours will reduce the time and quality of democratic participation relies on empirical assumptions which are yet to be proven by empirical research. There is primary evidence in the US context showing that the amount of free time saliently correlates to the amount of public participation. Sidney Verba, Kay Lehman Schlozman and Henry E Brady, *Voice and Equality: Civic Voluntarism in American Politics* (Harvard University Press 1995) 202–213.

[89] James A Chamberlain, 'Bending over Backwards: Flexibility, Freedom, and Domination in Contemporary Work' 22 Constellations 91, 98.

The above three observations are empirically orientated and mainly focus on how the free workers would constitute the free citizenry. To see the reverse side of the story—how the free citizenry could anticipate free workers—in the conceptual sense, it requires the identification of structural, systemic and extractive domination in work relations, wage labour and the labour market. As articulated, the work relation is an architect of governance that is based on the logic of economic efficacy. Similar logic could drive work relations to morph into precarious modes that are beyond the workers' control. The dominating economic power functions partly within the parameter of legal institutions. 'Markets have a "normative base"',[90] so does domination in markets. Laws of property, corporations and employment constitute the institutional infrastructure of capitalism. Labour regulations distribute the residual power of workplace governance to the employer.[91]The legal foundation of work relations and the labour market thus should be democratically debated, monitored and justifiable, [92] and workers must join the debate as equal citizens. Conversely, should workers be excluded from the democratic citizenry, they lose the channel through which to shape and reshape the legal framework of private domination. In short, free workers must be free citizens. Only when democratic citizenship is available to all does non-domination in work start to become attainable to all.

4.3 Exit Approach

Some commentators argue that non-domination in work relations can be cured through the exit approach alone. I seek to challenge this view, because the exit approach presumes an individualistic conception of domination, and because it would loosen the conceptual connection between free workers and free citizens. Moreover, in the context of TMWs, the exit approach is sometimes a pretext for not improving TMWs' status, either in the public or private spheres, because supposedly they can go home, i.e., exiting the territory, if they are

White also points out that work hours are not a decision that individuals can take their liberty to optimize the income-leisure trade-off as text book examples assume. Individuals are affected by how co-workers decide. This interpersonal competition may lead to longer hours. White, 'The Republican Critique of Capitalism' (n 31) 574.

[90] Dukes (n 53) 204.

[91] Gourevitch (n 81) 608.

[92] Anderson (n 77) 64.

unsatisfied with the host state.[93] I will first summarise Taylor and Lovett's views and raise four oppositional points to their exit approaches.

Taylor's Exit Approach

Based on Pettit's theory of freedom as anti-power,[94] Taylor develops an 'exit-oriented republican economic policy' as *the* means to achieve 'market freedom'.[95] Just as the institution of the rule of law is essential to tame the arbitrary power of the state, he argues, effectively competitive markets are essential to constrain arbitrary economic power, because all market patricians are price takers rather than price makers.[96] A competitive market prevents exploitation, since the wage will be driven to reflect workers' marginal contribution to the employer. The employer is not able to set the salary arbitrarily or discriminatively on a basis that is irrelevant to productivity, or the workers will just leave.[97] In addition, in a perfectly competitive market, participants' market activities track the interests of others in the sense that such a market brings about optimum welfare.[98]

In terms of policy, Taylor advocates a *flexicurity* model in the labour market where employees enjoy generous social security for easy exits, whereas individual labour rights (e.g., for-cause dismissal) and collective actions (e.g., closed-shop unionism) are limited.[99] Taylor argues that workers in a competitive labour market are not vulnerable to dismissal without cause because they can just go to a new employer.[100] Limiting at-will dismissals is the key to Pettit's view of non-domination in employment, but, interestingly, Taylor reaches an opposite policy recommendation that is based on Pettit's theory of freedom.[101]

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[93] See also discussion in Subsection 3.2.1 of Chapter 6.

[94] Anti-power is the earlier term for non-domination adopted by Pettit. Pettit, 'Freedom as Antipower' (n 4).

[95] Taylor, 'Market Freedom as Antipower' (n 27) 600; Taylor, *Exit Left* (n 27) ch 3.

[96] Taylor, 'Market Freedom as Antipower' (n 27) 594.

[97] ibid 596.

[98] ibid 597.

[99] ibid 594, 597.

[100] ibid 595 n 5.

[101] Comments on Taylor's policy, Pettit considers that it suits 'in more ideal circumstances'. Pettit, *Just Freedom* (n 8) 218 n 44.

Lovett's Exit Approach

Similarly, in Lovett's theory of domination, dependency is a necessary condition of domination, and its intensity is measured through the costs incurred in leaving the relationship.[102] In theory, domination does not exist in a perfect free-market, because if workers can leave a job and enter a new one without cost, Lovett argues, they will not be dependent on any particular employer. In that case, no employer can dominate workers.[103] Although a perfect free-market hardly exists in reality, the point is that lowering the exit costs for workers (e.g., unemployment benefits) can remedy dependency, and therefore reduce domination.[104]

Four Oppositions

The exit approach is initially appealing. Indeed, if people can leave a dominating environment easily, they are less likely to be exposed to the risk of arbitrary power. However, it is also problematic from several aspects. Firstly, it is pointed out that, while lowering dependency, the exit approach does not change the dominating structure of the workplace. The employer's management prerogatives will not disappear by virtue of easy exits.[105]

This criticism is to the point, but it does not entirely undermine the purchase of the exit approach. The exit approach does not deny that that power imbalance will remain in the workplace, but, rather, it holds that power simply cannot be deconstructed directly. Power has to be dissolved indirectly by restructuring the background environments which generate power.[106] Lowering exit costs will change the dynamics of power relations in the workplace without directly constraining management prerogatives. Allegedly, the exit approach maybe a superior strategy through which to combat domination rather than direct legal intervention, since all rules aiming to control arbitrary management power directly are susceptible to circumvention or side effects.[107]

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[102] Lovett (n 11) 49.

[103] ibid 53.

[104] ibid 54.

[105] Bogg (n 10) 400; Guy Davidov, 'Subordination vs Domination: Exploring the Differences' (2017) 33 International Journal of Comparative Labour Law and Industrial Relations 365, 382.

[106] David Watkins, 'Republicanism at Work: Strategies for Supporting Resistance to Domination in the Workplace' (2015) 4 Spectra ss 3, texts accompanying note XXV <https://spectrajournal.org/article/10.21061/spectra.v4i2.239/> accessed 29 June 2018.

[107] ibid section 3, texts after n XXV.

The second criticism is whether an easy exit is always desirable, because it potentially undermines communal ties and wastes workers' skills. Neither can be compensated through universal basic income or generous welfare schemes. People may be held to a position by intangible connections. Work provides identity, friendship and sense of meaning for many, in addition to economic support. People can also have an attachment to the local community. Reducing exit costs, from this communal aspect, implies detachment or indifference to work, interpersonal relationships, and the local communities. For republicans, it is at least lamentable that they would weaken communal belonging for lower exit costs.

In addition, jobs without exit costs tend to be low-end positions. During workers' careers in a firm, they develop firm-specific skills which will increase productivity but which are not transferable to a new environment. Personal investment in firm-specific capital also adds to the worker's bargaining chips against the employer, because the employer's costs are increased if the worker leaves. It is hard to avoid developing firm-specific capabilities to suit the uniqueness of each position, unless the job is rather unskilled, and the workers fungible.[108] According to efficient wage theory, the employer would be willing to pay more than the market wage to hold the worker in place.[109] While exit costs are higher in these scenarios, these jobs are also more valuable for workers.

Thirdly, the unified measurement of exit costs blurs vulnerability under domination and reflects an implausible conception of domination. Lovett does not distinguish 'iron chains' from 'golden chains' imposed on workers.[110] One could be held in a job either due to poverty or to high wages. What matters is only the person's feelings that there is a bond, not his/her relative wellbeing. However, for workers whose dependency stems from lucrative earnings, they do not suffer the same kind of vulnerability, nor are they similarly dominated, compared to those who cannot leave because they earn too little. Defining dependency universally as exit costs, without paying attention to their relative welfare fails to identify vulnerability that should really concern us, such as extraction.

Finally, my major discontent in regard to the exit approach is conceptual, not empirical. I am less concerned about the effectiveness of the exit approach, since it remains an open question whether the exit approach alone, including generous unemployment benefits, welfare

[108] Nien-he Hsieh, 'Rawlsian Justice and Workplace Republicanism' (2005) 31 Social Theory and Practice 115, 128.

[109] ibid 129.

[110] Lovett (n 11) 50.

schemes and basic income, is more effective than labour regulations and collective labour rights in enhancing working conditions. However, conceptually, the exit approach tends to cancel altogether the option to stay without being dominated. It assumes that people will leave a relationship of domination if they can. If an individual is thus able to leave a relationship of arbitrary power but instead chooses to stay, by definition the relationship is not one of domination.[111]

However, even if the exit cost is sufficiently low, it should not be assumed that the only rational and meaningful choice, thus the only choice worth protecting, is to quit. A worker sexually harassed in the workplace will be better off if costless exits are available than if they are not; but it is equally important that the worker has the option to stay in the same position without being harassed. Lovett's definition of domination, and Taylor's single-sided emphasis on exits, will lead to the conclusion that workers are not dominated if they stay to resist when they could leave. Staying thus legitimises domination: If one remains in a relationship despite available exits, then the situation cannot be truly bad.

Freedom as non-domination ultimately concerns a status by which an agent is confident that s/he is shielded against structural, systemic and extractive arbitrary power to interfere with his/her significant choices. Low-cost exits should be part of the package available to maintain that status. However, staying at, or leaving, a job should be equally meaningful options. Both possibilities should remain open without significant personal compromise in order that an agent can enjoy the status of non-domination.

Should the proper goal of non-domination be that both exit and stay remain viable options, tackling power imbalance in work directly cannot be avoided after all. Taylor's starting point that power cannot be destroyed head-on is not sufficient to justify cancelling labour regulations as a means of support for workers to allow them to stay without domination. Workers must enjoy anti-power to contest, or to control, the management prerogatives of employers, through individual and collective labour rights and the struggles of democratic politics.[112]

[111] Mahoney similarly points out: 'Once exit is defined as the appropriate response to abuse, then staying can be treated as evidence that the abuse never happened. If abuse is asserted, "failure" to exit must then be explained.' Martha R Mahoney, 'Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings' (1992) 65 S. Cal. L. Rev. 1283, 1285.
[112] Davidov, 'Subordination vs Domination: Exploring the Differences' (n 105) 373; Davidov, *A Purposive Approach to Labour Law* (n 76) 38–40.

In sum, both Taylor and Lovett tend to perceive domination in work too narrowly so that the exit approach appears to be a sufficient remedy. While Taylor is prone to conflate domination with exploitation, Lovett equates dependency with domination. Exploitation and dependency are still useful signals for domination. However, the exit approach ultimately presents a limited view of domination which I oppose.

4.4 Domination and TMWs

Finally, it is helpful to conclude this chapter by revisiting the status of TMWs in light of the theory of domination. Many of the working conditions of TMWs are saliently substandard. It, perhaps, requires no abstract theories to recognise this troubling aspect of the work relations of TMWs. However, the neo-republican theory of non-domination is distinctive in that it would focus on the intersections of labour and immigration laws, the parties' asymmetry of power rooted in legal institutions, the connection between public and private domination, and the role of the state and politics in resisting domination.

Without reiterating too much of the detail seen in the two previous chapters, domination, in the case of TMWs, could be observed from three angles. First, the economic and legal structures which drive TMWs to migrate are coated with the appearance of consent, and they are hence legitimised, and yet TMWs have little control over the migration process and the extraction which occurs therein. Second, the superior power of the employer over the TMWs is a compound of stronger economic status and privatised border control, a power that is backed up by the state. Third, the channels of resistance for TMWs in both the public and the private spheres are either absent or insufficient. They are not an exhaustive list, but they are features worth recapitulating.

Uncontrolled but 'Consented' Structure

To begin, the TMW scheme is a labour migration flow primarily created by global economic power imbalance and poverty, which is partly the product of the international order set by the developed countries.[113] However, economic migrants are driven by global development difference under such global order, and they are said to be coming voluntarily and to be 'lucky' to be here.[114] This narrative shift the focus from how much the host state needs the foreign,

[113] Thomas W Pogge, *World Poverty and Human Rights* (Polity 2008) 20.

[114] Nandita Sharma, *Home Economics: Nationalism and the Making of 'Migrant Workers' in Canada* (University of Toronto Press 2006) 136.

young, inexpensive labour to how much TMWs want to come.[115] International labour migration nourishes an industry to which TMWs financially contribute. However, under the narrative of charity, the extractive aspect of the migration industry is blurred. This narrative also gives TFWs an appearance of consent and renders the deprivation of TMWs' rights easier, whereas challenges against deprivation are harder.

TMWs are disadvantaged in the international migration process. Some disadvantages appear to be merely factual and unavoidable, such as inferior language abilities, information disparities and costly international transportation. However, the Taiwanese case has shown that the host state could deliberatively choose to introduce workers speaking different languages in order to isolate TMWs in a foreign land. The design of TFW schemes could also largely affect the transparency of information, the role of intermediaries and the distribution of the burdens of international transportation. While migration is always expensive and arduous, the precariousness experienced by TMWs in the process cannot all be attributed to natural obstacles. Indeed, the more expensive the journey is, the more TMWs invest for migration, the more deferential and committed to the job TMWs become.

Institutionalised Imbalance of Power

Institutionalised power imbalance is manifold. It is firstly a logical legal consequence of the immigration regime. The state enjoys wide discretionary power over the policy of border admission. With the power, it could conveniently select desirable workers on behalf of employers. As indicated in the sections on alienage, the precarious immigration status of TMWs profoundly affects their status in the work relationship. The employer enjoys privatised border control power which turns into comprehensive controlling power over TMWs, both in and outside the workplace. While Mantouvalou is right to argue that the management prerogative of the employer exercised outside the workplace is arbitrary power and constitutes domination,[116] such arbitrariness is deliberately institutionalised in TFW schemes.

TMWs are also a form of labour flexibility. Frequent rotation and fixed-term contracts destabilise the work relationship, devalues work experience and seniority, exempts the employers from the costs of the compulsory contribution to pensions, and obstructs worker

[115] Sedef Arat-Koc, 'Immigration Policies, Migrant Domestic Workers and the Definition of Citizenship in Canada' in Vic Satzewich (ed), *Deconstructing a nation: immigration, multiculturalism and racism in '90s Canada* (Fernwood Publishing 1992) 238.

[116] Mantouvalou (n 84) 926. Mantouvalou takes domination to mean excessive, extreme subordination. I disagree with this reading of domination though.

organisations and collective actions. TMWs can be introduced or sent away according to business cycles; workers are thus made to bear some part of the business risks. Davidov points out that subordination to the management authority of the employer is the price that workers pay for economic security,[117] and yet, the codified norm for TFWs are institutionalised, submissive and insecure.

TMWs are usually met with biases of race, ethnicity, class and gender. Racial supremacy is itself a severe form of domination. TFW schemes could unconsciously reinforce and consolidate this. For local workers, they are unwelcomed competitors. For local communities, they are health risks and cause social unrest. Both in the Taiwanese and Canadian contexts, regulations for TMWs which are said to avoid practical problems may have the hidden motivation of racial anxieties.

The immigration control over TMWs might not be designed with a conscious intention to create exploitable, or even forced, labour. However, merely its ordinary, daily function could have such an effect. The most critical example is employment freedom. TMWs are usually deemed to be modern-day indentured labour, because they are directly or indirectly deprived of employment mobility by their immigration papers. The lack of exit is the unambivalent feature of domination for neo-republican thinkers, but the retention effect could be as strong as forced labour[118] if TMWs are driven by severe financial burdens due to labour migration. Moreover, since the TMWs' right to stay is tied to the employment contract, breaching the contract has dramatically different consequences for the employer and for the TMWs. Whereas the employer of the TMWs is less likely to be pursued by TMWs for violating their contract, breach of contract by the TMWs could quickly lead to termination and possible deportation. Similarly, while it is convenient for the employer to terminate TMWs, TMWs who seek to walk away from the contract readily face uncertain immigration status. The asymmetrical consequences remind us of the nineteenth century master-servant laws against only the contract breaching by servants, not by their masters.

Insufficient Channels of Resistance

Finally, TMWs might be *de jure* protected by both individual and collective labour rights equally, but the *de facto* effects are hardly equal. As mentioned, the short-term stay, insufficient employment insurance, frequently long working hours, and their employer-

[117] Davidov, *A Purposive Approach to Labour Law* (n 76) 104.

[118] Cathryn Costello, 'Migrants and Forced Labour: A Labour Law Response' in Alan Bogg and others (eds), *The Autonomy of Labour Law* (Bloomsbury Publishing 2015) 194–95; Gourevitch (n 81) 593.

provided accommodation, could all thwart the pursuit of rights through legal means and the workers' collective actions.

TMWs are, by definition, excluded from formal rights to political participation, such as voting. This does not mean that TMWs could not undergo political resistance, or contestation, in Pettit's words, in the workplace or in politics outside the official channels of political participation. However, the fact that TMWs are formally excluded from the democratic community denotes their alien status and makes TFW schemes even more attractive, because the state can gain a labour force without gaining (undesired) new citizens.

The multi-layered domination of TMWs portrayed here may convey the impression that TMWs are passive victims. However, this is the impression that I seek to avoid. Agency is never absent in the TMWs' journey. It is rather that the theory of domination should focus on objective power, and TFW schemes establish a systemic and extractive power structure in which TMWs are attributed a position with institutionalised powerlessness.

5. Moving On

In this chapter I argue that Pettit cannot successfully respond to the anti-market challenge. His hasty confirmation of property inequality and free exchanges will lead to insufficient recognition of domination in work relations. I supplement the conception of domination from three aspects, structural, systemic and extraction. Understood in such a way, *dominium* and *imperium* are conceptually connected. Applied in the context of work, the republican theory of domination anticipates that the statuses of free workers and citizens should mutually support each other.

Davidov helpfully questions whether the theory of domination might contribute to the field of labour law.[119] He comments that domination is not fit to capture the vulnerability of employment relations, compared to the nuanced idea of subordination, partly because it is too broad, covering phenomena outside employment.[120] Indeed, the ambition of the theory of domination is to be a general theory of freedom which includes power structures that cross the public and private spheres. The usefulness of domination theory, I suggest in this chapter,

[119] Davidov, 'Subordination vs Domination: Exploring the Differences' (n 105) 366.

[120] ibid 388.

is that it cuts through the boundaries of legal fields,[121] and insists on the conceptual connection between public and private domination, emphasising the roles of the state and politics in maintaining non-domination in the private sphere. It might thus anticipate specific remedies,[122] including vibrant democratic engagement, specific labour regulations, unionism and workplace democracy.

This view has profound implications for TMWs. It first indicates that the domination experienced by TMWs in work relations has its roots partly in their political exclusion, lacking democratic control over the legal framework of the workplace to which they are subject. Their exclusion will, in turn, undermine the legitimacy of a polity. Moreover, it recognises that work occupies a central place in the republican view of democracy. In this right, political citizenship is no longer a reward for time, i.e., only reachable after a long-term stay, but is the precondition for one's freedom from domination in work, hence political inclusion should immediately follow economic inclusion.

However, it has to be emphasised that, at this moment, I only assume that democracy is a necessary condition in order to be free from public domination; and that to be a free citizen, one should have equal democratic control over the law. Yet there are many plausible grounds to oppose this democratic assumption, questing for the exact relationship between democracy and freedom. If democracy were not necessary for a free state of non-domination, then my suggestion that freedom in the economic realm requires democracy could not be upheld either. The next chapter thus proceeds to the challenge in order to establish the relationship between democracy and freedom as non-domination.

[121] E.g. Costello (n 118) 195 (arguing that the theory of domination reveals that dependency and vulnerability of migrants in employment have roots in immigration regulations).

[122] E.g. Bogg and Estlund suggest remedies such as freedom to exit and enter employment relation of their choice, the right to express, the right to contest the employer's discretion without facing discipline, the liberty to associate with those who are willing to, and the right to stop work on one's own or with others. Alan Bogg and Cynthia Estlund, 'Freedom of Association and the Right to Contest' in Alan Bogg and Tonia Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (OUP 2014) 153–58.

Chapter 5

Public Domination, Non-Arbitrariness and Democracy

1. Introduction

As suggested, this thesis seeks to establish a theoretical basis for temporary migrant workers' (TMWs) equal democratic inclusion in three main arguments. First, domination in the public realm is constitutive of domination in the private realm; second, democracy is necessary to maintain non-domination in the public realm. Third, the boundary of the democratic community should include all who are subjected to domination of the state in the territory. The last chapter argued for the first main point that there exist conceptual and factual connections between private and public domination, *dominium* and *imperium*, under the neo-republican conception of freedom. This chapter proceeds to the second argument.

In neo-republican thought, state intervention is required to protect individuals from private domination.[1] However, thus far an account of a free state has yet to be presented. That is, how could the state which intervenes in private relations with coercive power to remedy private domination not itself become a source of domination? Is democratic participation a necessary condition for obtaining freedom in relation to state power and why? These are two questions that I aim to answer in this chapter.

I approach the questions by engaging with the debate surrounding the concept of non-arbitrary state power. Neo-republican thought suggests that state power does not constitute domination when it is exercised non-arbitrarily. In general, there are two approaches for understanding non-arbitrary state power: power exercised to track objectively-defined public interests (Section 3) and power exercised to track subjectively-defined public interests (Subsection 4.1). I dispute both since they are susceptible to the paternalist tendency and conceptual difficulties respectively. Opposing them, I write in favour of Pettit's control approach, which suggests that state power does not dominate the people if, *inter alia*, its exercise tracks interests acceptable to all, discovered in a deliberative, communitarian way.

[1] Philip Pettit, *Just Freedom: A Moral Compass for a Complex World* (W W Norton & Company 2014) 84–98; Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (CUP 2012) 110–122.

(Subsection 4.2). It provides the most plausible account for non-arbitrary, hence non-dominating, state power.

And yet, the control approach, as a theory of the free state, is problematic in two respects. It takes an instrumentalist view of the relationship between democracy and freedom and anticipates an enclosed citizenship model which rejects democratic membership to non-citizens. The instrumentalist view would fail to explain why suffrage or other forms of democratic participation are necessary to freedom. Instead, I suggest democracy should perform an epistemic function in the control approach and constitute freedom in the public realm in this sense. The enclosed citizenship model will be further challenged in the next chapter.

The argument of this chapter is that equal democratic participation of all is the minimum condition for a free state. This may appear to be reinventing the wheel. After all, in a liberal democratic constitutional state, the assumption that the political legitimacy of the state is established on democracy, at least partly, is seldom challenged. However, when foreigners are involved, it is commonly assumed that they need not be included in the democratic community to make coercive power of the state legitimate to them. Instead, the legitimacy of state power lies elsewhere. For instance, the state is legitimate if foreigners enter the state voluntarily since they give their implicit consent to the legal order by virtue of their entry; or if rights and interests of foreigners are well protected, say, under the rule of law, equal access to the court and human rights regimes; or if the social order is just etc. Each of these arguments stands for a specific view of political legitimacy of the state or non-dominating state power. My argument contrasts directly with them by insisting that equal democratic participation is a necessary, irreplaceable institution for maintaining non-arbitrary (hence legitimate) state power. Although the claim is admittedly not a novel or progressive one, it will have critical implications when applied to foreigners, which is the core task of the next chapter and the thesis as a whole.

Before entering into the main discussion, the next section starts with the theoretical context of the issue at hand, explaining why a proper notion of non-arbitrariness is not merely a semantic concern. Rather, it occupies a site where freedom, legitimacy and democracy meet. Arbitrariness should be understood in light of the debate regarding political legitimacy and the proper place of democracy in republican freedom (Subsection 2.1). Subsection 2.2 provides a simple categorisation of the approaches currently found in the literature to facilitate further discussion.

2. Conceptions of Arbitrariness

2.1 Backgrounds: Political Legitimacy, Democracy and Non-arbitrariness

Defining arbitrariness is far from mere semantics.[2] It occupies the site where three normative conceptions converge: freedom as non-domination, political legitimacy and democracy. I first consider the relationship between the idea of arbitrariness and legitimacy, and then the relationship between democracy and freedom.

Legitimacy and Arbitrariness

To begin, what is at stake in defining arbitrariness is whether freedom as non-domination can ever be a plausible description of freedom and serve as a desirable political ideal. The theory of freedom as non-domination suggests that there could be state interference without compromising individual freedom.[3] The state may impose severe limitations on people's range of actions, but such limitations do not necessarily constitute domination, as long as power is not exercised arbitrarily.[4] This feature of republican freedom strikes many as counter-intuitive and implausible, because it suggests that a prisoner convicted under non-arbitrary laws is free, despite being confined to a cell.[5]

However, for the theory of non-domination, imprisonment is not abduction; taxation is not theft.[6] While liberty and property are similarly confined in all scenarios, the power involved in imprisonment and taxation is of a distinct character from that involved in abduction and theft—the non-arbitrary law does not infringe the rights of people in the same sense as criminal offenders impose alien will on their victims. To tell the former from the later, however, the theory of non-domination depends on a case for non-arbitrary exercise of state power

[2] *But see* Frank Lovett, 'What Counts as Arbitrary Power?' (2012) 5 Journal of Political Power 137, 138 (suggesting that the dispute about arbitrary power is 'an internal and somewhat technical one').

[3] Philip Pettit, 'Republican Freedom: Three Axioms, Four Theorems' in Cécile Laborde and John W Maynor (eds), *Republicanism and Political Theory* (Blackwell Publishing 2008) 116–17.

[4] Pettit, *On the People's Terms* (n 1) 56–58.

[5] E.g. Fabian Wendt, 'Slaves, Prisoners, and Republican Freedom' (2011) 17 Res Publica 175, 190; Ian Carter, 'How Are Power and Unfreedom Related' in Cécile Laborde and John W Maynor (eds), *Republicanism and Political Theory* (Blackwell 2008) 64. It is also alleged that freedom as non-domination is a moralised notion of freedom in this regard. John Christman, 'Review of Pettit's Republicanism' (1998) 109 Ethics 202, 203–04.

[6] Philip Pettit, 'Law and Liberty' in Samantha Besson and José Luis Martí (eds), *Legal Republicanism: National and International Perspectives* (OUP Oxford 2009) 45.

being successfully made. We thus need a useful portrayal of arbitrariness to better sustain the idea that the coercive power of the state can be compatible with freedom.[7]

Exactly the same concern lies at the core of normative political legitimacy.[8] Theories of legitimacy involve the moral evaluation of coercive political power of a political body, usually a state.[9] As Bernard Williams points out, the state exists to alleviate brutal forces among people in an apolitical situation, it therefore owes its subjects an explanation of 'what the difference is between the solution and the problem.'[10] This resonate with the inquiry into arbitrariness. Any reading of non-arbitrary state power in the theory of republican freedom necessarily points towards a view of normative political legitimacy, initiating the discussion of political justification for unavoidable coercion in the political community. Thus, conceptions of arbitrariness should also be tested against the debates about political legitimacy beyond the theory of non-domination. In the sections to follow, 'legitimate state' and 'non-dominating state' are used interchangeably.

Any theory of political legitimacy or interpretation of non-arbitrary state power can hardly avoid the condition of contemporary democratic pluralist society, or 'the circumstances of politics' in Waldron's words.[11] People hold profoundly irreconcilable views about legal and

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[7] *But see* Robin Douglass, 'Control, Consent and Political Legitimacy' (2016) 19 Critical Review of International Social and Political Philosophy 121, 137 (giving a negative assessment about compatibility between non-arbitrary law and freedom).

[8] There are empirical and normative approaches to analyse political legitimacy. Socio-scientific or empirical approaches of legitimacy observe and describe people's acceptance of a political body. For instance, do the relevant people accept the state's rule, considering the state is worthy of support? A state empirically legitimate is *de facto* effective and accepted by the ruled. In this chapter, I will only focus on debates surrounding normative theories of political legitimacy. David Beetham, *The Legitimation of Power* (2nd edition, Palgrave Macmillan 2013) 5–6; Richard H Fallon, 'Legitimacy and the Constitution' (2005) 118 Harvard Law Review 1787, 1795–96.

[9] Amanda Greene, 'Consent and Political Legitimacy' in David Sobel, Peter Vallentyne and Steven Wall (eds), *Oxford Studies in Political Philosophy, Volume 2* (OUP 2016) 72; John Horton, 'Political Legitimacy, Justice and Consent' (2012) 15 Critical Review of International Social and Political Philosophy 129, 130; A John Simmons, 'Justification and Legitimacy' (1999) 109 Ethics 739, 751; David Copp, 'The Idea of a Legitimate State' (1999) 28 Philosophy & Public Affairs 3, 4.

Authority of laws and people's political obligation to obey the law are questions closely related to legitimacy. Indeed, traditionally, they are deemed as one question. For clarity, however, here I separate the idea of political legitimacy (justification for coercive power or the state's right to rule) from questions of legal authority and political obligation (people's obligation to obey). I will focus on legitimacy alone, without addressing to authority or obligation.

[10] Bernard Arthur Owen Williams, *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Geoffrey Hawthorn ed, Princeton University Press 2005) 5.

[11] Jeremy Waldron, *Law and Disagreement* (Clarendon 1999) 101.

moral issues. As Rawls famously points out, 'the diversity of comprehensive religious, philosophical, and moral doctrines' is 'a permanent feature of the public culture of democracy'.[12] Confronted by deep conflicts and disagreements, people nevertheless recognise the pressing need to take collective actions, coordinating with each other.[13] The circumstances of politics anticipate the dilemma between objective and subjective formulation of non-dominating state power, which will be discussed in Subsections 3.2 and 4.1 below.

Democracy and Freedom: are they related?

Defining non-arbitrary state power also involves the role of democracy in republican freedom. The question of whether and how democracy is related to freedom is contested. In the tradition of negative freedom, democracy is perceived as not necessarily relevant for individual liberty. Hobbes famously wrote: 'Whether a commonwealth be monarchical, or popular, the freedom is still the same.'[14] Berlin also points out that (negative) freedom is compatible with autocracy, while a democratic polity may significantly infringe personal freedom.[15] Although personal liberty may fare better under self-government, the relationship between the two is not conceptually or normatively connected. In the debate below about arbitrariness, commentators also contest that democratic participation is neither necessary nor sufficient to keep the state non-arbitrary.[16] We will see that some readings of non-arbitrariness are detached from democratic perspectives.[17] Likewise, in the context of political legitimacy, democracy is not necessarily the corner stone. Coercive state power may be justified without taking the democratic credentials of the polity into consideration.[18]

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[12] John Rawls, 'The Domain of the Political and Overlapping Consensus' in Samuel Freeman (ed), *Collected Papers* (Harvard University Press 1999) 474.

[13] Waldron (n 11) 105–07.

[14] Thomas Hobbes, *Leviathan* (JCA Gaskin ed, OUP 1998) 143.

[15] Isaiah Berlin, 'Two Concepts of Liberty' in Henry Hardy (ed), *Liberty* (OUP 2002) 176.

[16] See discussion in Subsection 4.2.

[17] See discussion Section 3.

[18] Theories based on the beneficial consequence of coercive power need not presume types of government, such as Benthamian utilitarianism and Wellman's Samaritan approach. Avner Ben-Ner and Louis Putterman (eds), 'A Utilitarian Theory of Legitimacy', *Economics, Values, and Organization* (CUP 1999); Christopher H Wellman, 'Liberalism, Samaritanism, and Political Legitimacy' (1996) 25 Philosophy & Public Affairs 211.

On the other hand, republicanism is historically so closely entangled with thoughts of democracy[19] that it might first appear redundant, if not obsolete, to clarify how the status of equal political participation relates to republican freedom. Republicanism grew out of opposition to monarchy and alien-mastery with the idea of self-government as the alternative.[20] Skinner is clear about the direct link between democracy and freedom by defining them as synonymous: 'A free state is a community in which the actions of the body politic are determined by the will of the members as a whole.'[21] Thus, a free state is a democratic state; and freedom in the public realm refers to democratic participation. However, by literally equating the two, the contribution of democratic participation to freedom is trivialised.[22] Freedom requires democracy only because it is so formulated. This argument would also downplay the demand of political inclusion for TMWs in the next chapter, since the main reason for the demand is the bare proposition that an individual is, *by definition*, unfree when democratic participation is absent.

Another vein of republican thought, sometimes labelled as neo-Athenian or strong republican,[23] holds that democracy is intrinsically valuable and normatively connected to freedom on various grounds, such as forming the general will,[24] offering the only possibility to exercise

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Also, in the context of constitutional legitimacy, Fallon suggests that a legal regime could enjoy minimum moral legitimacy if it is reasonably just and no better alternative is available. This view is applicable to democratic or non-democratic regimes alike. It basically justifies most *status quo* since 'nearly any legal regime is better than none'. Fallon (n 8) 1792, 1809.

[19] Having said that, I do not mean to ignore the elitist, exclusive and male-centric origin of republicanism. Also, Pettit's neo-republicanism is confronted with the criticism of lacking confidence in deep democracy and inadequate recognition of conflicts and changes in politics. John P McCormick, 'Republicanism and Democracy' in Andreas Niederberger and Philipp Schink (eds), *Republican Democracy: Liberty, Law and Politics* (Edinburgh University Press 2013) 93–102 (a critique of participation and democratic institutions in Pettit's theory); Marco Geuna, 'The Tension between Law and Politics in the Modern Repbulican Tradition' in Andreas Niederberger and Philipp Schink (eds), *Republican Democracy: Liberty, Law and Politics* (Edinburgh University Press 2013) 13 (arguing that neo-republicanism is inadequately equipped to conceptualise democratic politics).

[20] See generally Quentin Skinner, *Liberty Before Liberalism* (CUP 1998) 1–57.

[21] ibid 26.

[22] Lovett, 'What Counts as Arbitrary Power?' (n 2) 144.

[23] Cécile Laborde and John W Maynor, 'The Republican Contribution to Contemporary Political Theory' in Cécile Laborde and John W Maynor (eds), *Republicanism and Political Theory* (Blackwell 2008) 3–4; Iseult Honohan, *Civic Republicanism* (Routledge 2003) 8–9. This label may cover a wide range of theorists such as Jean Jacque Rousseau, Hannah Arendt, J.G.A. Pocock, Michael Sandel, Charles Taylor, but they in fact hold rather different conceptions of (positive) freedom.

[24] Jean-Jacques Rousseau, *Rousseau: 'The Social Contract' and Other Later Political Writings* (CUP 1997) s 1.4.4.

true freedom,[25] or being the highest good.[26] However, since the strong republican tradition usually involves a positive conception of freedom, it is therefore vulnerable to common criticisms against positive freedom. For example, people can be 'forced to be free';[27] or viewing political participation as the highest good fails to recognise the pluralistic nature of modern society.[28]

In short, the connection between democracy and freedom is far from settled. We do need a more nuanced account for the exact relationship between (republican) freedom and democracy. Any reading of arbitrariness must imply a stance on the wide spectrum about the proper relationship between democracy and freedom. In Subsection 4.2, I will seek to confirm the intrinsic value of democratic procedures without relying on the neo-Athenian approach.

2.2 Arbitrariness and Public Interests

In neo-republican literature, the idea of non-arbitrary state power is mostly developed and contested around the idea of public interests. Recall that in private domination, an agent is subject to domination if she is under arbitrary interference of another agent. Interference is arbitrary if it is 'chosen or rejected without reference to the interests, or the opinions, of those affected'[29] or 'not forced to track the avowable interests of the interfered.'[30]

In the context of private domination, the interfered agents are relatively specified. It is also relatively easy to determine their interests. However, when it comes to public domination, the task becomes dramatically complex. The number of people who are subjected to interference of state power is large, and their diverse interests can conflict. Theorists thus rely on the idea

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[25] Hannah Arendt, *Between Past and Future* (Jerome Kohn ed, Penguin 2006) 263–68. Arendt conceives freedom as the ability to create or begin something new. Political participation is the only route to create new things in the public space and to realise 'public happiness'.

[26] JGA Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton classic edition, Princeton University Press 2016). Pocock traces from Arendt, Machiavelli to the American revolution to revive the focus on political participation and civic virtue.

[27] E.g. Matthew H Kramer, *The Quality of Freedom* (OUP 2008) 97–98.

[28] Philip Pettit, *Republicanism: A Theory of Freedom and Government* (OUP 1997) 8.

[29] ibid 55.

[30] ibid; Philip Pettit, *A Theory of Freedom: From the Psychology to the Politics of Agency* (Polity 2001) 138–39.

of public interests, that is interests of all, to identify whether state power properly tracks the interests of the people, and hence is non-arbitrary.

There are ample accounts of public interests and interpretations of non-arbitrary power in the neo-republican literature. To facilitate the discussion, I suggest categorising them into two major groups in accordance with the source from which public interests and standards of arbitrariness are informed: objective formulation and subjective formulation. For the sake of clarity, below I shall only briefly explain the categorisation and reserve my criticism of both approaches for Sections 3 and 4.

Objective vs. Subjective Formulation

An objective formulation of public interests and non-arbitrary state power does not require input from the people who are subjected to the state power ('the Subjected' hereinafter), while a subjective formulation does. Any view which relies on a set of pre-determined public goals to constrain state power are objective approaches in my view, such as the basic capacities approach, the common good approach or the hypothetical consent approach (discussed in Subsection 3.2). I will indicate that they are generally vulnerable to the problem of epistocracy and the paternalist tendency. On the other hand, most neo-publican commentators suggest a version of the subjective approach, including Skinner,[31] Forst,[32] Young,[33] Laborde,[34] Moynor,[35] Bellamy,[36] Richardson,[37] and Friedman.[38] They identify public interests, or the standard of non-arbitrary power, in the reference opinions, participation or preferences of the Subjective. Obviously, I cannot discuss them all. Instead, in Subsection 4.2, I focus on the preference and consent approaches to demonstrate common challenges faced by taking the subjective

[31] See discussion in Subsection 4.1.

[32] Rainer Forst, 'A Kantian Republican Conception of Justice as Nondomination' in Andreas Niederberger and Philipp Schink (eds), *Republican Democracy: Liberty, Law and Politics* (Edinburgh University Press 2013) 155.

[33] Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press 1990) 37–38.

[34] Cécile Laborde, *Critical Republicanism: The Hijab Controversy and Political Philosophy* (OUP 2008) 152–56.

[35] John Maynor, *Republicanism in the Modern World* (Wiley 2003) 37.

[36] Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2007) 58.

[37] Henry S Richardson, *Democratic Autonomy: Public Reasoning about the Ends of Policy* (OUP 2002) 47.

[38] Marilyn Friedman, 'Pettit's Civic Republicanism and Male Domination' in Cécile Laborde and John W Maynor (eds), *Republicanism and Political Theory* (Blackwell 2008) 264–65.

opinions of the Subjected as public interests. Difficulties that plague objective and subjective formulations of public interests call for a third way. I suggest that Pettit's control approach could respond to this call, while also inviting new challenges.

Lovett's proceduralist interpretation of arbitrary power is a special case. He argues that state power is non-dominating as long as it is rule-bounded. Lovett explicitly distances himself from other commentators by insisting that his view of arbitrariness is neutral to any conception of public interests, either formulated objectively and subjectively. However, he is probably mistaken. His view in fact prioritises one single interest, namely predictability, and belongs to the vein of the objective approach. Below I will discuss Lovett's view first and proceed to other objective positions to explore their common difficulties.

3. Objective Formulation of Arbitrariness

Lovett defines non-arbitrariness as pure rule-boundedness. This interpretation of arbitrariness is implausible because it will result in an utterly thin conception of domination which fails to capture institutionalised domination supported by laws. On the other hand, other objective approaches raise the concern of a paternalist state, which is conceptually contradictory to the idea of freedom as non-domination.

3.1 Procedural Arbitrariness

Lovett suggests a (self-labelled) procedural reading of arbitrariness.[39] Power is arbitrary if it is 'not externally constrained by effective and reliable[40] rules, procedures, or goals that are common knowledge to all persons or groups concerned'.[41] Importantly, Lovett sets no substantive qualifications about the contents or rule-making process. For instance, rules need not protect rights or equality of the Subject or be products of the democratic system. Supposedly, criteria of political legitimacy in this view would refer to formal legality and the rule of law. To the extent that state power is rule-constrained, people are not dominated.

[39] 'Procedural' in Lovett's sense refers to 'content-neutralness' or 'interest-neutralness', rather than the process of public decision-making. Lovett calls any approach attending to interests of the Subjected 'substantive' approaches. Lovett, 'What Counts as Arbitrary Power?' (n 2) 140.

[40] ibid 139. Effective constraints refers to constrains which are commonly known that they are likely to be followed. Reliable constraints refer to constrains which are commonly known that they are likely to be maintained in various situations.

[41] Frank Lovett, *A General Theory of Domination and Justice* (OUP 2010) 96.

The procedural conception of arbitrariness is thin, since it only concerns the existence of rules and enhancing predictability. The downside is that effective, reliable laws can be used to oppresses people without being arbitrary under Lovett's criteria. Lovett is well aware of the theoretical thinness. For instance, he admits that the historical anti-Semitic laws which excluded European Jews from some occupations were not arbitrary in the procedural sense.[42] He also makes a hypothetical case about a society in which dominant and subordinate social groups coexist. Since the subordinated could not challenge the arbitrary power of the predominant, alternatively they desire to codify privileges of the predominant and to make the law enforceable by an impartial judiciary. The predominant group agreed since the law would be in their favour. Lovett claims that the new law reduces domination experienced by the subordinated, even if it codifies the privileges of the powerful, since the subordinated 'can now at least know exactly where they stand: they can develop plans of life based on reliable expectations.'[43] The law could be bad on other grounds; but a bad law could be non-arbitrary.

Lovett believes that thinness is an asset, rather than a liability. Detached from substantive values, his procedural idea of arbitrariness draws support from people with irreconcilable, comprehensive views. This is important, because Lovett takes minimising domination to be the primary political ideal. That is, it should be attained first before we turn to other goals such as equality, justice etc in designing social and political institutions. To be accepted as a primary political ideal, the idea of domination must be relatively uncontroversial in two senses: it should be clear enough that most people can readily identify it, and basic enough that they can agree on the significance of minimising it. If domination is defined with substantive standards, which are essentially controversial, then people cannot agree on whether domination occurs, much less whether minimising it should be the priority.[44] In short, Lovett argues that procedural arbitrariness suits a pluralistic society well as a straightforward and fundament goal.

Too Thin to Be Uncontroversial

However, the procedural approach is unsatisfactory, even measured by the standard of Lovett's purpose—namely, avoiding controversy and gaining priority status. First, rule-boundedness is simply too thin. Rather than always minimising controversies, bareness could

[42] ibid 118.

[43] Lovett, 'What Counts as Arbitrary Power?' (n 2) 147.

[44] ibid 148.

also spark deep disagreements. It is noteworthy at the outset that the procedural approach is not value-free. Instead, it is laden with one single value, predictability, and seeks to prioritise it over everything else.[45] People might reasonably disagree about whether predictability should be the first thing to take care of; whether it should underwrite the concept of freedom and whether it has unduly replaced freedom.

Lovett is right that predictability is basic, and yet it is but one basic value among many others. Being basic does not mean it will be automatically prioritised. Comparing Lovett and Pettit's strategies to make the case for primary value will illuminate this. Pettit also sees republican freedom as the primary political value, but his case is made on opposite grounds: freedom as non-domination should be prioritised not because it is bare and thin, but rich and robust. If freedom is properly realised, it tends to bring about realisation of other values, e.g. justice and democracy.[46] Therefore, it is argued, people holding different ultimate values could all have good (though different) reasons to accept republican freedom as a priority. Plausible or not, Pettit's strategy demonstrates that basicness is not always worth prioritising.

Secondly, formal rule-boundedness would fail to capture many forms of domination. As noted in the last chapter, paradigm cases of domination have an institutional, legal and structural basis. Rather than being rule-less, these cases are mainly the products of rules. If only writing down privileges of masters were sufficient to neutralise domination, as Lovett's example suggests, then any slavery system with codified slave laws could not be a case of domination.

Moreover, as Young points out, modern domination under welfare capitalist society usually takes the form of rationalised bureaucratisation.[47] It does not operate on the personal sovereignty of officials, but functions on impersonal, explicit laws and procedures. Bureaucratic administration nevertheless could constitute alien will because the end of administration is depoliticalised, beyond the reach of those whom it is supposed to serve.[48] Young's criticism of bureaucracy should remind us how often modern-day domination could be experienced with a rational, impersonal, professional and rule-bounded force.[49] This casts

[45] Samuel Arnold and John R Harris, 'What Is Arbitrary Power?' (2017) 10 Journal of Political Power 55, 7.

[46] Pettit, *Just Freedom* (n 1) XXV; Pettit, *Republicanism* (n 28) 90–92, 120–126, 130–50.

[47] Young, *Justice and the Politics of Difference* (n 33) 76.

[48] ibid 77.

[49] Similarly, following the Weberian insight, Laborde suggests that modern domination is hardly arbitrary in the sense of rule-less. Laborde (n 34) 153.

doubt on the usefulness of Lovett's formulation of domination if it fails to capture a pervasive phenomenon which strikes most people intuitively as domination. In case thinness of non-arbitrariness leads to a rather narrow understanding of freedom (leaving out many common understandings of domination), arguably, many people would reasonably disagree whether domination so defined was worth the effort to be prioritised as a primary value.

3.2 Objective Public Interest

Lovett's proceduralist view is single-sided and unfit to capture the wide phenomenon which intuitively strikes many as domination. Other objective formulations of arbitrariness, however, usually involve presuming a version of the good life. As indicated, state power executing public interests so defined would runs into the danger of paternalism. I take the common-good reading of Pettit's theory[50] and the basic capacity approach as two examples to illustrate this point.

Common Good Reading

Some words of Pettit give the impression that non-arbitrary state power refers to state acts guided by objectively defined, pre-determined, rationalised interests of the general public, or 'the common good' for shorthand.[51] For instance, he suggests that the exercise of state power is not arbitrary if it tracks 'the welfare and world-view of the public;'[52] and the interests and ideas are 'those that are shared in common with others'[53] or 'commonly avowable interests.'[54] As Markell points out, the qualifiers 'common' and 'avowable' set the threshold for fickle personal desires to enter political consideration. Interests, just like power, are prone to arbitrariness and need to be validated to be taken seriously.[55] Thus, the commonly avowable interests are not contingent, subjective personal desires, but an idealised, hypothetical good shared by all.

[50] To be clear, Pettit does not argue for the common good reading of public interests. I only take this reading as an example to highlight the general methodological difficulty of this approach.

[51] Richardson (n 37) 40. I borrow the term of the 'common good' reading from Richardson.

[52] Pettit, *Republicanism* (n 28) 56.

[53] ibid 55.

[54] Pettit, *A Theory of Freedom* (n 30) 156.

[55] Patchen Markell, 'The Insufficiency of Non-Domination' (2008) 36 Political Theory 9, 15.

There are different proposals for how the objectively defined common good in Pettit's formulation might look. For instance, the common good might mean basic liberties as Pettit defines them. He accounts for a domain which satisfies the criteria of co-exercisable and co-satisfying and should be secured so that free citizens could have 'full and meaningful life'.[56] Thus, allegedly, state power is non-arbitrary or legitimate when it is guided by the goal of securing basic liberties, say, protecting private ownership of property. Alternatively, Brennan and Lomasky take Pettit to mean any interests determined by the state in the name of (or on behalf of) the public.[57]

Basic Capacities

On the other hand, in light of the Sen-Nussbaum capacity approach, Laborde argues that domination occurs when individuals' basic capabilities are threatened or denied by the basic structure of power.[58] Basic capabilities, however defined, could be read as a set of objectively-defined public interests. In Sen's view, they refer to the real opportunities for survival, avoiding poverty or serious deprivation and reaching a threshold level of wellbeing.[59] Nussbaum, instead, suggests an extended list of central human capacities, including life, bodily health, bodily integrity, senses, imagination and thought, emotions, practical reason, affiliation, other species, play, and control over one's environment.[60] Under the idea of non-domination informed by the capacity-approach, state power is not exercised arbitrarily when it is guided by the goal of preventing deprivation of basic capabilities.

Problems of Objective Formulation of Interests

The common good reading is not without merits. It fits well with the traditional republican theme of promoting civic virtue, solidarity and the interests of the commonwealth.[61]

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[56] Pettit, *On the People's Terms* (n 1) 102. His list of basic liberties include the freedom to think, express, practice the religion, associate, own goods and trade, change occupation, travel and settle. ibid 103.

[57] Geoffrey Brennan and Loren Lomasky, 'Against Reviving Republicanism' (2006) 5 Politics, Philosophy & Economics 221, 141. See also Jason Brennan, 'Democracy and Freedom' in David Schmidtz and Carmen E Pavel (eds), *The Oxford Handbook of Freedom* (OUP 2018) 345 (concurring Brennan and Lomasky's on Pettit's view about public interests).

[58] Cécile Laborde, 'Republicanism and Global Justice: A Sketch' in Andreas Niederberger and Philipp Schink (eds), *Republican Democracy: Liberty, Law and Politics* (Edinburgh University Press 2013) 284.

[59] Amartya Kumar Sen, *Inequality Reexamined* (OUP 1992) 44–45.

[60] Martha C Nussbaum, *Creating Capabilities* (Harvard University Press 2011) 33–34.

[61] Thomas W Simpson, 'The Impossibility of Republican Freedom' (2017) 45 Philosophy & Public Affairs 27 (arguing significance of civic virtue; criticising that Pettit's republican freedom fails to attribute a proper role to civic virtue).

Potentially, a well-defined common good could serve to protect minorities, since the common good is not susceptible to manipulation by the majority or the mighty at the expense of the minority or the weak.

However, on the other hand, what these proposals have in common is that public interests are identified through abstract reasoning, either by philosophers or by the state bureaucracy. All must presuppose a particular vison of the good life, 'a comprehensive doctrine of the human good'[62] and a unified set of practical reasons, and then define a set of privileged interests in accordance with that vision. This reasoning process tends to trivialise or obliterate differences, categorising the perspectives of the minority or the oppressed as 'special' interests.[63] Meanwhile, if the non-domination state power means tracking public interests so defined, then the ultimate concern of the theory of non-domination is no longer freedom but replaced by the specific vision of the good life. It also leads to a moralised idea of freedom, a consequence that both Lovett and Pettit strive to avoid.[64]

Moreover, the presumption of the good life could be problematic against the backdrop of a pluralistic society in which people hold deeply divided beliefs about good. It further raises the concern of a paternalistic tendency: if people remain free from interference for the sake of objectively defined, idealised public interests, then the idea of republican freedom is prone to be paternalistic or even authoritative, since the state could override individual preference for their best interest.[65] Brennan and Lomasky also warn that the state under the common good approach is likely to slide into a utilitarianism project, which aims at maximising expert-defined welfare for the public at the expense of some.[66] If this is the case, then the objective pubic interest approach is also susceptible to liberal criticisms against utilitarianism.[67]

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[62] Lovett, 'What Counts as Arbitrary Power?' (n 2) 12.

[63] Iris Marion Young, *Inclusion and Democracy* (OUP 2002) 83–84.

[64] As discussed in Chapter 4, I do not consider moralised idea of freedom necessarily a problem. However, I mention this concern because it conflicts with Lovett and Pettit's intent.

[65] Brennan and Lomasky (n 57) 241.

[66] ibid 242.

[67] But this is not necessarily the case, because public interests might be defined negatively (as Pettit's basic interests show) and, accordingly, do not mandate maximisation of welfare. However, their warming rather points out that utilitarianism could be a sub-category of the objective interest approach, because it shares the objective method to define welfare.

The thinner the common good is defined, the weaker the presumption of human good is needed. Thus, arguably, narrower and shallower versions of the common good could alleviate or avoid the criticism of paternalistic tendencies. Thus, in the examples above, Pettit's basic interests only need a minimum presumption about the good life, while Nussbaum's capacity approach relies on a much thicker vision. However, a thin definition of the common good also implies that it would be a weak constraint against power and less able to capture domination Therefore, Pettit's basic interests do not give much guidance to check state power and overlook the sphere of material sufficiency, while Nussbaum's view is far more inspirational but could fall into a controversial presumption about human development.

Concluding Remarks

To sum up, objective formulations of arbitrary state power face common drawbacks. Under Lovett's procedural approach, which seeks to define non-arbitrariness by single-dimensioned, formalistic rules on state power, the notion of non-domination turns out to be too thin. Lovett pays the high price of thinness to avoid presuming universal human good. However, it proves that defining arbitrariness unavoidably involves prioritising certain values or interests over others. Thus, Lovett ends up taking predictability as the primary value.

The shared problem of other objective approaches, however, is omitting the epistemic source regarding how interests are known. Interests are usually informed by Platonic guidance, expert opinions, or bureaucratic rationality.[68] No matter how well interests are objectively defined, the definition is hardly reconcilable with the pluralistic contemporary society. It is also vulnerable to the objection of epistocracy.[69] To avoid the pitfall, we need to explore how interests could be identified through the perspectives of people under power.

4. Non-objective Formulation of Public Interests

By non-objective formulation, I mean two general lines of defining public interests. The first line sums up preferences of people under power, which may be called subjective approaches. The second line, Pettit's control approach, strives to find the middle ground between the objective and subjective formulation of interests, which may be said to be an intersubjective attempt.

Subjective approaches take people's preferences, desires, opinions etc. as they are and straightforwardly aggregates them to guide state power. They however face institutional and

[68] Richardson (n 37) 41; Young, *Justice and the Politics of Difference* (n 33) 77.

[69] Brennan (n 57) 347.

conceptual difficulties. Given the dilemma between the paternalistic tendency under objective approaches (as articulated in the last Section) and unavoidable conflicts of interests under subjective approaches (Subsection 4.1), Pettit's control approach explores a third way to define public interests (Subsection 4.2). It avoids the pitfalls of objective and subjective formulations but is met with new doubts about the alleged link between democracy and freedom and the conservative tendency. I shall argue that the control approach should be supplemented by epistemology democracy to fully respond to the challenge (Subsection 4.3).

4.1 Subjective Approaches: Preference and Consent

If it is problematic to define public interests objectively, totally detached from views of the Subjected, then we may try to define public interests by reference to the expressed preferences of the Subjected,[70] so that people can decide the goal for state power 'according to their own judgment.'[71] Alternatively, we may argue that state power is only non-dominating when the Subjected give consent to its exercise. Both views are met with institutional and conceptual difficulties—how to collect the preferences or consent of all; and how could people in a pluralistic society share preferences or give consent so that power exercise of the state could be non-dominating. I examine problems of preference and consent consecutively.

Preference Aggregation and Unanimity

How to know the expressed preferences of all the Subjected? One possible way is to have a unanimous vote for every state action[72] to aggregate individual preferences and 'literally promote each person's welfare or preference-satisfaction.'[73] However, unanimity confronts both practical and conceptual difficulties. Unanimity institutionalises the *status quo* bias.[74] Since the threshold of collective actions is high—everyone's agreement, it is more likely that nothing is done. The *status quo* is therefore more possibly maintained than altered. Suppose

[70] Lovett, *A General Theory of Domination and Justice* (n 41) 142; Richard Bellamy, 'Republicanism, Democracy, and Constitutionalism' in Cécile Laborde and John W Maynor (eds), *Republicanism and Political Theory* (Blackwell 2008) 164–65; Richardson (n 37) 42.

[71] Pettit, *Republicanism* (n 28) 55.

[72] E.g. James M Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (University of Michigan Press 1962) 12.

[73] Richardson (n 37) 42.

[74] E.g. ibid 43. Much empirical evidence shows existence of the *status quo* bias. That is, people prefer the current state of affairs when they need to make decisions between the status quo and alternatives. E.g. William Samuelson and Richard Zeckhauser, 'Status Quo Bias in Decision Making' (1988) 1 Journal of Risk and Uncertainty 7.

changing the *status quo* would improve *A's* welfare but leave *B* in dismay. Unanimity then places a heavy burden on improvement for *A* while it sets an extreme low bar for pleasure of *B*. It discriminates against anyone who prefers change to the *status quo*. Another side of the coin is that unanimity grants each individual a veto against the final result.[75] It thus violates the conception of political equality that each has the same power to decide, since any dissenter has predominant decisional power.[76]

Defining interests as expressed preferences is also problematic conceptually. These problems are not unique to unanimity, but common to any approach with preferences as the goal of state power. First, it involves adoptive preference[77] and technically contradicts the formulation of freedom. People may change their preferences due to external constraints, but this is hardly liberation. Therefore, both freedom as non-interference and non-domination suggest that the question whether *A* is free to *X* should be independent from *A's* preference to *X*. Otherwise, it would lead to the irony that *A* can become free to *X* by giving up her preference to *X*, even if doing *X* is obstructed. In other words, if people adopt their preference to concur with a state intervention, then, by definition, the intervention is never arbitrary. People appear to emancipate themselves through self-adjustment. This is the scenario that we hope to avoid.

Second, in a pluralistic society where people always hold conflicting preferences, defining interests literally as preferences of all would mean permanent domination in the political sphere.[78] Suppose that to avoid the problem that people cannot agree unanimously, we adopt a simple majority vote to decide the goal of the state. Then whenever someone loses in voting, by definition, state power fails to track the losing party's preference. If the state adopts a policy that *A* does not like, from *A's* perspective, the state dominates her.[79] The upshot is we either accept institutional difficulties under unanimity or accept unavoidable domination over the

[75] Bellamy (n 70) 165.

[76] Pettit, *On the People's Terms* (n 1) 168. The criticism here presumes that this particular conception of political equality is desirable. Limited by the topic and space here, I cannot fully defend this conception of political equality. Nonetheless, it should be sufficient to point out that a vision of political equality is internal to freedom as non-domination because domination involves imposition of alien will and unequal political power can facilitate such domination. Therefore, the definition of arbitrariness should assume an idea of political equality.

[77] 'Adoption' refers to that 'individuals adjust their desires to the way of life they know.' Martha C Nussbaum, 'Symposium on Amartya Sen's Philosophy: 5 Adaptive Preferences and Women's Options' (2001) 17 Economics & Philosophy 67, 78.

[78] Assaf Sharon, 'Domination and the Rule of Law' in David Sobel, Peter Vallentyne and Steven Wall (eds), *Oxford Studies in Political Philosophy, Volume 2* (OUP 2016) 137–38.

[79] John Ferejohn, 'Pettit's Republic' (2001) 84 The Monist 77, 89–90.

minority under the majority vote. Finally, it is far from clear that we are willing to accept whatever subject preference as the suitable basis for exercising state power. The preference for self-enslavement appears problematic for the state to maintain slavery, let alone the preference to enslave others. On the other hand, if we set a standard for admissible preferences, e.g. rationality, it then opens the back door for the objective formulation of interests, because now only idealised preferences count for public interests.

Consent

Another way to formulate pubic interests following the subjective perspectives of the Subjected is the consent approach. Skinner is in this vein. He argues that state power is non-arbitrary to the extent that the Subjected give consent to political power:

> What it means to be a free-man under such an association is only that your liberty is never curtailed by arbitrary power; it is only ever limited by laws to which you have given your explicit consent…so long as you give your consent, the law itself can be regarded as an expression of your will, as a result of which you may be said to remain a free-man in obeying it.[80]

Skinner appears to argue for explicit, actual consent, rather than the implicit, hypothetical type. The (actual) consent approach is also one of the major thoughts of political legitimacy under the social contract tradition. However, the consent approach could be simultaneously too demanding and too lenient as the basis to justify state coercion or to ensure personal freedom. It is too demanding because explicit, actual consent of all—either for establishing a political community or for individual laws— has never occurred. Hume famously disputed that the majority of people have ever given any consent to the state in which they happen to be born, nor is their consent meaningful if they have no alternative but to live in that state.[81] Contemporary philosophical anarchists, such as Simmons who considers actual consent the only legitimate basis of political power, inevitably conclude that 'no existing states are legitimate (simpliciter)'.[82] Meanwhile, the requirement of consent would share the institutional and conceptual problems of the preference approach, if unanimity for each law is taken to be the institutional setting.

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[80] Quentin Skinner, 'Freedom as the Absence of Arbitrary Power' in Cécile Laborde and John W Maynor (eds), *Republicanism and Political Theory* (Blackwell Publishing 2008) 86–87.

[81] David Hume, 'Essay XII: Of the Original Contract' in Eugene F Miller (ed), *Essays, moral, political, and literary* (Liberty Classics 1985) 474–75.

[82] Simmons (n 9) 769.

On the other hand, the consent approach might be too weak as a safeguard for freedom, if giving consent is just a life-time agreement to the governance of a state. Such one-off consent would be no less than a *carte blanche* for state authority.[83] Alternatively, if consent has to be continuously given to maintain legitimacy, we might not be ready to conclude that whatever is consented to is legitimate and binding, such as consent for tyrannical government or self-enslavement.[84] Like the case of subjective preference, we might be tempted to add limits to circumstances under which people give consent. This move, however, drags us towards the direction of hypothetical consent.

Theories of hypothetical consent set up ideal terms and conditions under which idealised agents would have consented to state power. The state which can be justified under the ideal terms and conditions is legitimate. Rawls's conception of political legitimacy is a famous example: 'political power is legitimate only when it is exercised in accordance with a constitution (written or unwritten) the essentials of which all citizens, *as reasonable and rational*, can endorse in the light of their common human reason.'[85] The normative force of the hypothetical consent approach does not flow from agency of the Subjected but from the idealised conditions for consent, such as rationality, impartiality etc. Therefore, rather than a subjective formulation, hypothetical consent is an objective methodology to define non-arbitrariness. It is detached from world-views of the real people under real circumstances; and the consented interests are an idealised common good.[86] The direction of hypothetical consent hence shares difficulties with objective approaches. Meanwhile, we are attracted by hypothetical consent partly because the bar of actual consent could be too high for any state to be legitimate. And yet, hypothetical consent could similarly set an idealised standard which illegitimatises all states.[87]

Between Object and Subject

To sum up, subjective and objective understandings of public interests both face difficulties. While objective approaches are susceptible to the paternalistic exercise of state power, a

[83] On this basis Pettit insists that control is different from and superior to consent. Pettit, *On the People's Terms* (n 1) 157–160.

[84] A John Simmons, *Moral Principles and Political Obligations* (Princeton University Press 1979) 87.

[85] John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press 2001) 41. Rawls's view of constitutional essentials includes the governmental structure and political process which allows equal participation of citizens, and equal basic rights and liberties of citizenship. John Rawls, *Political Liberalism* (Columbia University Press 1993) 227. (*Emphasis* mine.)

[86] Sharon (n 78) 136.

[87] Greene (n 9) 73.

moralised conception of republican freedom and epistocracy, subjective approaches raise doubts of institutional feasibility, adoptive preference and permanent domination of the minority. Public interests need to connect with actual people's actual voices (to avoid the pitfalls of the former), whereas pluralistic, conflict individual interests have to be mediated into a basis for collective action (to avoid the pitfalls of the later). A third way between the subjective and objective is needed. Pettit's control approach is such an attempt.

4.2 Control Approach: Deliberative Turn

To strike a middle ground between the subjective and objective, the control approach understands public interests in a communitarian way: through long-term interactions, deliberation, disagreements and contests, a political community will gradually develop shared standards to judge the relevance of policy considerations. When the exercise of state power can be supported by the shared standards, the state ceases dominating the people and fosters public interests. This view avoids the paternalistic tendency of objective approaches, while does not rely on literal aggregation of subjective preference or consent. This view of public interests, however, may internalises long-term domination. It is particularly because of this concern, I shall argue, that democracy is constitutive of the idea of freedom in the public realm, since democracy is an indispensable process for forming the collective standards for pubic interests.

The Control Approach

Pettit argues that a self-imposed restriction is not domination.[88] Therefore, state power does not constitute domination even if it interferes with people's options, as long as it is controlled by the people. Just as in the story of Ulysses, Ulysses asked sailors to bind him during the voyage to the island of siren voices. Despite being physically constrained, Ulysses controlled the sailors' power over him.

Having control over an agent means exerting *influence* over the agent towards the designed *direction*. Public interests represent the direction that state policies should follow (explained below). Meanwhile, the ideal influence that people exert over the state should satisfy the three criteria: individualised, unconditioned and efficacious control. In a nutshell, individualised control holds when each citizen enjoys 'an equally accessible system of popular influence that imposes an equally acceptable direction on government.'[89] Unconditional control is satisfied if

[88] Pettit, 'Law and Liberty' (n 6) 46; Pettit, *A Theory of Freedom* (n 30) 45.

[89] Pettit, *On the People's Terms* (n 1) 302. See also ibid 168–69.

the government does not act on its own will or will of a third party but closely follows the popular influence.[90] Finally, if popular control is efficacious, people would take pubic decisions which they disagree with as mere tough luck rather than a case of illegitimacy.[91] Pettit suggests a combination of electoral and contestatory democracy to realise each criterion, namely the one-person-one-vote electoral system[92] plus ample channels to contest political power prior or posterior to formal decisions.[93] The mixed constitution, which consists of separation of powers with complex checks and balances between government bodies,[94] and a contestatory citizenry,[95] which is vigilant to oppose the government whenever it goes astray, are also required to achieve satisfactory popular control.

Shared Considerations as Public Interests

As mentioned, public interests are the direction towards which state policies should be oriented. They represent the 'equally acceptable direction' in the criteria of individualised control. To understand how a policy could be counted equally acceptable, imagine a group of owners of a condominium who need to manage the building together amid different opinions and interests. They probably would start by organising a committee, which is entrusted to deal with common affairs following terms endorsed by the condominium as a whole. Where do the terms come from? The condominium might write down some terms in a formal constitutional document. But in addition to that, their terms will emerge from daily deliberation and practices. Day in, day out, they discuss and disagree, privately or publicly, about common affairs. Overtime, they develop shared ways to do things among themselves. Some considerations will gradually be accepted by all members as relevant regarding collective matters, while other considerations reputed as irrelevant. These shared considerations will then function as a reference which constrains and guides actions of the committee.[96] It should

[90] Pettit, *On the People's Terms* (n 1) 171–72, 302.

[91] ibid 175–177. Pettit calls it the 'tough luck test'.

[92] ibid 212–13, 216–17.

[93] ibid 213–15. The key is to deal with the concern of the tyranny of the majority. Pettit suggests institutions including federation, parallel deliberative opinion polls and impartial commissions and taking away issues related to minorities away from majority voting. ibid 216–17.

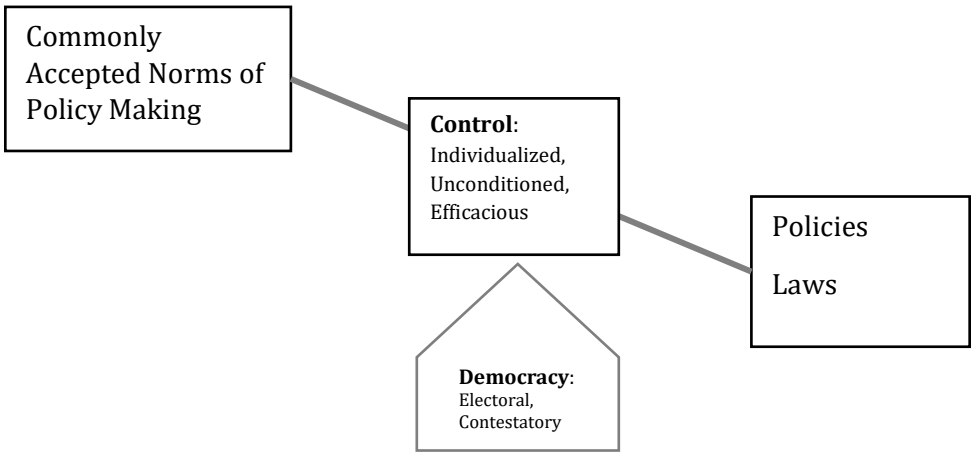
[94] Pettit, *On the People's Terms* (n 1) 220–225.

[95] ibid 225–29.

[96] Philip Pettit, 'Three Conceptions of Democratic Control' (2008) 15 Constellations 46, 52; Pettit, *On the People's Terms* (n 1) 285.

(1) implement projects unambiguously required by the shared considerations; (2) reject projects explicitly contradictory to them; and (3) select from equally satisfactory alternatives following procedures approved by the condominium or allowed by the considerations.[97]

In parallel to the condominium example, people of a political community may disagree about specific decisions or weight policy considerations differently, but they nevertheless could accept some considerations as relevant for collective decisions. Some considerations that are accepted by all as relevant will gradually emerge from people's daily deliberation and practices. These considerations constitute the 'fund of reasons' or 'publicly admitted criteria of argument' of this political community.[98] This fund of reasons is never static; it will constantly grow and change. A policy would count for public interest if it is better supported than alternatives by arguments drawn from the 'fund of reasons'.[99] The state exercises power non-arbitrarily if it implements polices which are properly supported by the shared considerations. Public interests in this view is a framework which is especially useful in keeping unacceptable policies off the table.



Democratic control makes policies and laws track commonly accepted considerations.

Figure 1: Pettit's Control Approach

The control approach avoids the pitfall of objective formulations, especially epistocracy, because the content of public interests, whatever they are, is gradually formed through real

[97] Pettit, 'Three Conceptions of Democratic Control' (n 96) 53.

[98] '…in their evolving practice various considerations and criteria of deliberation will have been identified as reasons that are countenanced as relevant to group decisions and group decision-making. They will constitute a fund of reasons such that short of raising novel objections, everyone will be expected to recognize them as relevant to group behaviour.' Philip Pettit, 'The Common Good' in Brian M Barry and others (eds), *Justice and Democracy: Essays for Brian Barry* (CUP 2004) 163.

[99] ibid 163–164.

interaction and the experiences of real people of a particular community. It also avoids the problem of subjective formulations, because it does not literately take people's expressed preferences as the reference. Rather, it relies on time-honoured considerations which appear to be accepted by all as relevant, using them as the scrutiny to filter out unsupported policies.

Will Shared Norms Emerge?

However, this approach is also met with objections. The first line of objection concerns whether shared considerations will actually emerge in the pluralistic society. In a new community, shared considerations might be slow to fully develop; or a radically divided society might not be able to generate shared considerations which are thick enough to appraise policies.[100]

In response, Pettit's way of understanding public interests can be considered plausible for two reasons. Firstly, the conditions required to bring about shared norms in the control approach are not particularly idealistic. They do not expect an ideal agent to make decisions in ideal circumstances, as hypothetical consent theories assume. Nor do they ask for the ideal speech situation as Habermas's communication theory would do. They do not prioritise consensus either because disagreements and contestations stimulate all sort of considerations to grow. They only need people willing to make the community work together, to take each other as equal and to discuss public affairs. The relatively realistic setting makes the theory conceivable in practice.

Secondly, Pettit's theory of public interests can be read as a political version of growing constitutional norms which emerge from history and daily politics, inside and outside the court and congress, through the tension and dynamics of dualist democracy.[101] Even a new polity or a divided society can start from somewhere to develop constitutional or fundamental norms, which will then be part of the 'fund of reasons' for the community. Also, people can reasonably disagree about interpretations of the constitutional system,[102] They could also

[100] Lovett, 'What Counts as Arbitrary Power?' (n 2) 146.

[101] Bruce A Ackerman, *We the People, Volume 1: Foundations* (Harvard University Press 1993) 6–10 (arguing for a two-track democracy, normal politics and constitutional politics, in the US constitutional practices).

[102] E.g. Sanford Levinson, *Constitutional Faith* (Princeton University Press 2011) 45–49 (suggesting the idea of constitutional protestantism); Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press 2000) 181–82 (suggesting taking the constitution outside court rooms to daily political dialogues).

assent to,[103] or hold faith in,[104] legitimacy of the system according to their own interpretations. Similarly, people can have diverse interpretations about different policy considerations and their relative weights. However, they can still recognise the relevance of the considerations and agree that some policies are permitted based on considerations accepted by all as relevant. In short, to the extent that we can have minimum confidence that constitutional norms could grow in a wide range of societies, each in its own way, we should also take the theory of shared norms of acceptability to be possible.

Control, Democracy and Freedom

The second line of criticism fiercely questions the relationship between democracy, control and freedom from various angles. I will briefly review two relevant objections in this vein: One challenge points out that democracy is never sufficient to establish control, hence unable to protect freedom as Pettit defines it. The other challenge argues that democratic control is not necessary to undermine domination, hence unnecessary for freedom.

As to the first challenge, many criticisms against control concern the problematic metaphor of the Ulysses case. At the outset, there might not be interference at all when the sailors tied Ulysses under his request, even from the perspective of freedom as non-interference.[105] More questionable though, no individual citizen can command the state in the same way as Ulysses commanded his sailors. Therefore, the state law cannot be the self-imposed restriction on citizens in the same sense as Ulysses bound himself through the sailors. Ulysses could even call off the journey, but no citizen can decide to dissolve or exit the political life altogether.[106] In reality, a citizen has minimum control over the state: a vote has almost no impact on the result of an election, and an election result does not directly translate into specific policies or

[103] Frank Michelman, 'IDA's Way: Constructing the Respect-Worthy Governmental System' (2003) 72 Fordham Law Review 345, 364–65 (arguing that constitutional legitimacy establishes on respect-worthiness granted in accordance to interpretation of each member of political community).

[104] Jack M Balkin, 'Respect-Worthy: Frank Michelman and the Legitimate Constitution' (2004) 39 Tulsa Law Review 485, 494–97 (arguing that the faith in the future is the ground of constitutional legitimacy).

[105] Philipp Schink, 'Freedom, Control and the State' in Andreas Niederberger and Philipp Schink (eds), *Republican Democracy: Liberty, Law and Politics* (Edinburgh University Press 2013) 222; David Dyzenhaus, 'Critical Notice of On the People's Terms: A Republican Theory and Model of Democracy, by Philip Pettit, CUP, 2012, Xii+333pp.' (2013) 43 Canadian Journal of Philosophy 494, 504.

[106] Dyzenhaus (n 105) 507.

laws.[107] In this light, shared control, measured against Ulysses's control over his sailors, is too weak to be control at all.[108]

Given that an individual's influence over the state is often deemed negligible, the second challenge goes on to question whether universal suffrage is necessary to reduce domination. Suppose in a country where individual rights are fully protected, and everyone can vote except for *A*. There might be an egalitarian ground to oppose disenfranchising *A*. Nonetheless, allegedly, *A* is unlikely to experience more severe domination for not having a (negligible) vote. If the complex design of government, e.g. rule of laws, the mixed constitution, judicial review, bill of rights etc. fails to prevent the state from interfering with *A* arbitrarily, having a negligible vote can hardly make any difference.[109]

The detachment between democracy, control and freedom is compounded by the fact that the idea of shared considerations as public interests does not require democracy to develop. A polity need not be democratically organised to grow shared norms for public policies. Imagine a society which has vibrant public spheres and is well governed by clergies chosen through oracles. People can still develop a set of shared considerations under which public policies can be checked, though debates in courts, discussion on the press, disagreement in daily life etc. Pettit's view of public interests is essentially communitarian, but conceptually distinct from democracy. Lovett takes this to be an advantage of Pettit's approach to public interests, because it avoids conflating freedom with democracy,[110] which I agree. However, it also deepens the doubt in relation to the usefulness of suffrage to republican freedom.

Finally, the communitarian method of finding public interests may reinforce domination.[111] Unbalanced power structures can entrench people's shared considerations. Consider that a community is historically sexist; women are formally or informally discouraged from education, expression and public life. We might consider that systemic deprivation of voices is

[107] Arnold and Harris (n 45) 10.

[108] Schink (n 105) 226; Dyzenhaus (n 105) 507–08.

[109] Brennan (n 57) 346. Arnold and Harris make a similar example that *A* moves to a perfect foreign country which endorses a set of human right values that *A* also embrace. *A*'s rights and interests are so fully protected under law that *A* sees no need to kowtow to civil servants or private individuals. It appears that having no vote does not make *A* any more vulnerable than having votes, or at least not more vulnerable than having votes but facing exploitive and unfair laws. Arnold and Harris (n 45) 9, 13.

[110] Lovett, 'What Counts as Arbitrary Power?' (n 2) 145.

[111] ibid 146 (criticising that the communitarian account of pubic interests will be too conservative).

itself a form of domination.[112] However, sexist considerations might sink deep into the fund of public reasons through long-time interactions and practices, accepted by members of all sexes. Consequently, sexist policies are legitimised as non-arbitrary exercises of state power, rather than recognised as domination.

Intrinsic Value of Democracy?

These are critical doubts which concern the exact relationship between democracy and freedom. There are generally two views about the relationship in the neo-republican tradition: one is instrumental, the other intrinsic. Pettit takes the former view, while his critics, like Rostbøll, disagree. I shall dispute both, arguing for an epistemic view instead.

Pettit insists that democracy is only instrumentally valuable to freedom as non-domination. That is, the value of democracy derives from the consequences that it brings about, namely realising non-arbitrary government and people's freedom. Democratic procedure does not have value independent of the desired consequences.[113] But this view will be necessarily vulnerable to the criticism that suffrage cannot be a means to non-domination. To the extent that suffrage is an essential institution for modern democracy, it is right to doubt on the value of democracy in the theory of republican freedom as a whole.

On the other hand, Rostbøll argues that democratic procedure is intrinsically valuable to freedom. That is, even if getting a vote is not the same as getting what you want, or not shielding you from infringement, being able to vote is nevertheless integral to the status of being free. Outcomes within a democracy should not be prioritised over the procedure, because democratic procedure denotes the relationship among free citizens. Only through democracy do citizens recognise their free status in relation to each other, confirming their independence from the goodwill of each other.[114]

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[112] In Laborde's view, 'Citizens are dominated if (*inter alia*) they are subjected to "institutionalised patterns of cultural value… that prevent [them] from participating as peers in social life"… What exactly are those institutionalized patterns of cultural value, or dominating social norms…? They are social norms and rules which, when pervasive, internalized and partly institutionalized, profoundly affect the free and equal status of the members of certain groups.' Laborde (n 34) 16.

[113] Richard J Arneson, 'The Supposed Right to a Democratic Say', *Contemporary Debates in Political Philosophy* (Wiley-Blackwell 2009) 197.

[114] Christian F Rostbøll, 'Non-Domination and Democratic Legitimacy' (2015) 18 Critical Review of International Social and Political Philosophy 424, 36.

However, Rostbøll's strategy will fall into the problem mentioned in Section 2.1: defining public freedom by directly referring to democratic participation, just as Skinner's slogan[115] or Young's definition of domination as absence of democratic participation do.[116] So defined, democracy will infallibly remedy domination, whatever decisions are made. However, as explained, I seek to avoid literally equating the two ideals, because on the one hand it undermines freedom by substituting freedom with democracy; on the other it trivialises the contributions of democracy to freedom.

Epistemic Function of Democracy

Instead, I suggest that the relationship between freedom and democracy should be understood through the epistemic function of democracy. Democratic procedure is valuable partly for its knowledge-producing capacity;[117] domination is the kind of collective knowledge which could only be known through inclusive democracy. It is by way of democratic participation, deliberation, contestation etc. that what counts as public interests and whether state power is exercised within the framework of public interests could ever be constructed, challenged and reconstructed over time. In this sense, democracy is *constitutive* of freedom as non-domination. Democratic institutions should be designed to facilitate the epistemic function.

More specifically, recall first that the public interest in the control approach is the shared consideration that emerges through long-term democratic deliberation and practices of the community. Accordingly, public interests are not revealed by experts or any superior sources of knowledge. There is no objective, ultimate truth about public interests or public domination awaiting discovery. Rather, we construct the meaning of public interests and public domination in this society at this historical moment through unceasing reflection on real people's experience, suffering, resistance and thoughts. We cannot gradually create the fund of reasons without collectively expressing and listening to stories of systemic pain and powerlessness, then debating what should or should not be done about them.

Undeniably, no society is free from domination, and probably none will be. Lovett is right to be concerned that Pettit's account of public interests will internalise long-term domination.

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[115] Quentin Skinner, 'On the Slogans of Republican Political Theory' (2010) 9 European Journal of Political Theory 95, 99. '*it is possible to live and act as a freeman if and only if you live in a free state.*' (*Emphasis* original.)

[116] Young wrote, 'domination consists in institutional conditions which inhibit or prevent people from participating in determining their actions or the conditions of their actions….Through social and political democracy is the opposite of domination.' Young, *Justice and the Politics of Difference* (n 33) 38.

[117] Fabienne Peter, *Democratic Legitimacy* (Routledge 2009) 110.

However, this indicates that the knowledge-producing *procedure* for pubic interests matters. If our way of knowing could include the voices of all people, or even give extra forums to people most vulnerable to unbalanced power structures, then we would be more likely to have ample knowledge sources, constantly providing reflective views on the *status quo*. We need to include 'situated knowledges' about everyone's particular social position to approximate better understanding about public interests and domination, particularly because domination can hardly be diminished to zero, and because people's views and experiences are structurally differentiated.[118] Therefore, although non-democratic communities can also develop shared considerations about policies, democracy is the only formal way to include every member's view in the collective enterprise of knowledge formation about public interests and domination. We might not be entirely immune from blind spots about entrenched oppression, but we can work towards more inclusive democratic procedures and communication to maximise sources of knowledge and minimise chances of bias.[119] In this light, universal suffrage is the necessary (but minimum) institution of democratic inclusion which is required for collective knowledge construction.

Critics disputes whether democratic control (or suffrage) is neither sufficient nor necessary for freedom. This line of criticism, however, must presume that we already know what public interest and non-domination in the public sphere mean. It is assumed that a certain combination of personal rights and institutional designs *is* the state without domination; therefore, a vote is said to have no impact on that given state. Nonetheless, the presumption is not correct. We cannot know the contours of public interest and the impacts of rights on individual freedom without first undergoing epistemic struggles through democratic politics. When an individual is deprived of votes or other forms of democratic participation, she is forced to be absent in shaping the meaning of public interests and domination. We cannot say that she remains free despite disenfranchisement, because we do not even know what freedom might entail if she were included in the process of democratic knowledge construction in the first place.

[118] Iris Marion Young, *Inclusion and Democracy* (OUP 2002) 114, citing Donna Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective' (1988) 14 Feminist Studies 575.

[119] Young, *Inclusion and Democracy* (n 63) 115–16; Robert E Goodin and Kai Spiekermann, *An Epistemic Theory of Democracy* (OUP 2018) s 7.3 (discussing how enhancing diversity might improve the epistemic function of democracy).

This version of epistemic democracy suggests that democratic procedure and participation are intrinsically valuable, independent from the outcomes of democratic decision-making[120] because the participation of each is necessary to approach the best collective understanding about public domination. In this view, an important dimension of democratic control is that the agent is recognised as an authority of knowledge about her structural position, suffering and struggles.

4.3 Concluding Remarks

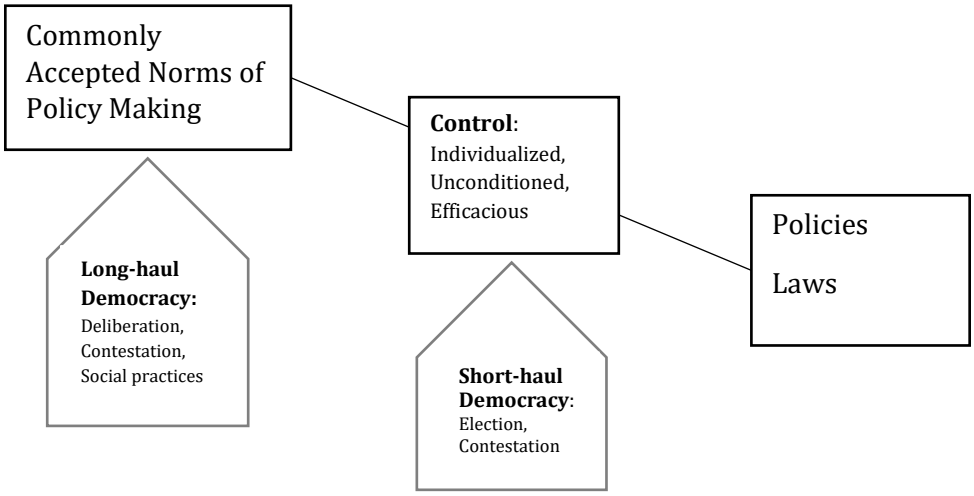
Pettit's method of identifying public interests is a third way between the objective and subjective formulations. It relies on long-term deliberation, practices, contestation, trial and error etc to form norms of policy making accepted by all. State power would not constitute domination, hence be legitimate, Pettit suggests, if citizens were given equal democratic control to influence state policies towards directions supported by policy making norms without relying on the goodwill of other parties.

Critics question whether democratic control is irrelevant to realising non-domination. I argue that the necessary connection between non-domination and democratic participation can be defended, if we perceive democracy as the collective knowledge producing process which approximates the best construction about public interests, public domination and freedom. This view confirms that universal suffrage is indispensable to freedom as non-domination, since everyone must be included as the source of knowledge. Instead of being instrumentally useful, epistemic democracy is constitutive of freedom.

The outcome of the discussion is that universal suffrage is one of the necessary conditions to realise non-domination in the public realm. The conclusion is far from sufficient for collective knowledge finding, non-domination or legitimacy. However, I believe the discussion has served well my modest purpose to tighten the link between non-domination and democracy without literally defining public domination as the absence of political participation.

Finally, my revision of Pettit's control approach may be visualised as below:

[120] Fabienne Peter, 'The Epistemic Circumstances of Democracy' in Michael S Brady and Miranda Fricker (eds), *The Epistemic Life of Groups: Essays in the Epistemology of Collectives* (OUP 2016) 146–47.



Democratic control holds policies and laws to track commonly accepted considerations constructed through inclusive democratic knowledge producing.

Figure 2: Epistemic democracy and the control appraoch

5. Moving on

In discussing people's obligations under a legitimate legal system, Pettit says:

> Even those passing through a society have a *pro tanto* obligation to obey the law, like others,…, just or unjust. But only citizens are likely to *have substantive rights to oppose the law within the system* and only they can be meaningfully bound to limit their opposition to intra-systemic contestation. …All adult, able-minded, more or less permanent residents count as citizens, on this conception, not just those with the right to vote and stand for office. While *not all citizens in my broad sense will have electoral rights*, they will all have formal and informal rights to oppose the law of a kind not readily given to those merely passing through. And in effect most will have the right to seek electoral rights—and to expect to gain them—by applying for formal citizenship.[121]

Here Pettit suggests a concentric model of citizenship with legal citizens in the centre, 'more or less permanent residents' in the middle circle and 'those passing through' in the outer. Legal citizens have rights to political participation; permeant residents enjoy rights to contest; and yet the mere passers-by enjoy neither despite the obligation to obey the law. While the obedience of legal citizens and permanent residents is premised on their right to political

[121] Pettit, *On the People's Terms* (n 1) 138. (*Emphasis* mine.)

participation and/or contestation, unconditional deference to the law is required from passers-by.

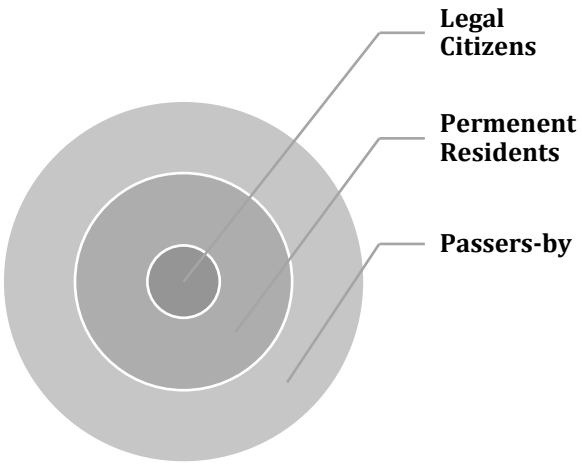


Figure 3: Pettit's Citizenship Model

The citizenship model stands for the central theoretical obstacle to my project to vindicate rights to political participation for TMWs: the boundary of democratic citizenry. This chapter establishes that political legitimacy of a non-dominating state necessitates inclusive electoral and contestatory democracy. However, the citizenship model reveals the opposite story: democracy does not have to be extended to everyone present in the state territory.

In which category do TMWs belong in the model? They are 'more or less permanent residents' *de facto*, but are deemed to be 'merely passing through' *de jure*: This is exactly what the legal techniques of alienage and temporariness seek to do. By legally defining migrant workers as temporary passers-by, it appears legitimate to demand their obedience without democratic rights to control or contest. The legal categorisation of TMWs as passers-by is the source of many forms of private domination, while the very categorisation also denies them political participation, excluding them from the collective knowledge construction about domination. My tentative thesis is that, by virtue of being subjected to the domination of the host state, denying TMWs' rights to political participation undermines political legitimacy of the state. I will argue this thesis and challenge the citizenship model in the next chapter.

Chapter 6

Republican Citizenship for Temporary Migrant Workers

1. Introduction

This chapter argues for rights to political participation for temporary migrant workers (TMWs), since they are essential to legitimise the constitutional order of the host state and to resist public and private domination on TMWs. It aims to show that foreign workers who are subject to structural and systemic domination in the labour market formulated via the law and sanctioned by state coercion are entitled to be included in the political community *upon arrival*, despite their temporary and foreign status.

The previous chapter argued deprivation of actual equal political participation would constitute public domination, undermining the legitimacy of state power. This, however, leaves the question of to whom democratic legitimacy is owed unanswered. The final chapter embarks on the task. While existence of a polity with a boundary—territorial, political and judicial—has been presumed in previous chapters, this chapter focuses on the boundary itself, arguing that the boundary of democratic inclusion should be extended to cover some categories of resident non-citizens.

Attempts to warrant TMWs' rights to political participation will necessarily confront the obstacles of time and citizenship. I therefore start by laying out the debate between two approaches on how TMWs should be protected, which are called the rights-based and citizenship approaches (Section 2). These two camps hold different ethical judgment regarding TMW schemes, especially the design of limited timeframe and forced rotation. While the rights-based approach accepts temporariness of migrant workers and seeks to protect them under the temporal constraint, the citizenship approach considers the schemes fundamentally problematic and pursues a pathway to permanent status for TMWs. What they hold in common, however, is the ethical significance of temporariness (Subsection 2.3) and the marginalised role of political participation for foreigners (Subsection 2.4). Whereas the rights-based approach errs on ignoring the politicalised nature of rights, the citizenship approach surrenders too quickly to the insurmountable connection between time, citizenship, and belonging to the political community.

To rebut to the commonalities of the rights-based and citizenship approaches, in Section 3, I reflect on the boundaries of the democratic community from the non-domination perspective. The problem of democratic boundaries, namely who should constitute the democratic people, is by now a famous debate (Subsection 3.1). My aim here is less about contributing to this lively discussion, and more about identifying the pressing tasks when drawing the boundary and providing a consistent account of *demos* in light of freedom as non-domination (Subsection 3.2). I contend that popular control of state power should be granted to all who are comprehensively dominated by the state. The *demos*, understood as such, disaggregates enfranchisement from citizenship, and yet is still bounded by territoriality. Under this view, TMWs should be democratically included since their dual status as workers and aliens leaves them exposed to a high degree of public domination. The notion of *demos* proposed here is an ethical-universalist approach for constituting the people, [1] which immediately destabilises the close tie between the *demos* and the citizenry.[2] Potentially, the proposed notion of *demos* may be criticised exactly on republican grounds, since republican citizenship[3] traditionally focuses on active political participation which may require an exclusive political community to nourish it. I respond to this line of opposition to end this section (Subsection 3.3). Finally, many commentators believe that it misses the point to analyse TMWs in terms of political freedom. With the hindsight of this Chapter, I respond to this view by reflecting upon what can be gained by examining TMWs' work relations in light of the concept of citizenship and democratic inclusion (Section 4).

2. Rights-Based Approach vs. Citizenship Approach

This section starts with the debate over how TMWs are best protected between those who believe granting rights without legal citizenship status is more sensible and effective (Subsection 2.1) and those who argue that citizenship is essential to ease the precariousness of TMWs (Subsection 2.2). In essence, it is more than a debate about strategies, but a debate

[1] I borrow the categorisation of 'ethical particularists' and 'ethical universalists' from Sarah Song, 'Democracy and Noncitizen Voting Rights' (2009) 13 Citizenship Studies 607, 615–16. While particularists believe that we owe special obligations to our compatriots, the universalists deny that compatriots enjoy priority over the rest of human community.

[2] By '*demos*', I refer to the body of people who are entitled to formal political participation, most importantly the equal right to vote and the right to stand for election. By 'citizenry', I refer to the body of people who possess legal citizenship. The *demos* and the citizenry are not identical. For instance, children, who cannot vote but possess nationality, belong to the citizenry but not to the *demos*.

[3] Here 'citizenship' refers to political participation in a wider sense. It does not refer to the legal status of possessing nationality, or the narrower sense of political participation as formal enfranchisement.

of moral judgment regarding temporariness and the usefulness of rights under temporary status. The binary, however, should not be overly emphasised. Some in the rights-based approach are sympathetic to the idea of granting citizenship, while the citizenship approach is certainly compatible with protection for TMWs' rights. Despite differences, the right to political participation, in particular the right to vote, is commonly deemed irrelevant to TMWs at worst, and dependent on the permanent status at best. Both approaches assume that time, namely TMWs' duration of stay, is decisive for voting, despite their different ethical views about temporariness. I will examine and challenge this assumption later in Subsections 3.2 and 3.3.

2.1 Rights-based approach

The rights-based approach refers to the stance that the central solution to TMWs' difficulties lies in granting them a proper set of rights protections. Commentators contest the optimal packages of rights and benefits; and the spectrum of suggestions is wide. What they share, however, and what makes them distinct from the citizenship approach, is recognition of the usefulness of temporary admission for foreign workers. TMW schemes could be ethical in this view, despite forced rotation and unequal treatment of TMWs. The task is, rather, to manage possible downfalls related to the temporary status with a proper package of rights. There is also consensus that rights to political participation do not make the list of rights for TMWs. This certainly does not mean that everyone under the label of the rights-based approach embraces TMW schemes without reservation. Some commentators may have concerns, but programmatically proceed to consider fair terms for TMWs without further wrestling with the premise of temporariness and alienage. In the following section, I take Ruhs and Carens' views, which occupy two poles of the spectrum, to demonstrate the basic logic of the rights-based approach.

Short Right List

It is apt to start from the most optimistic assessment towards TMW schemes, offered by Ruhs and Martin. With the steady goal of reducing world poverty in mind, Ruhs proposes liberalising labour migration from lower-income to higher-income countries to aid development of the former. Ruhs and Martin observe that, empirically, there is a trade-off between openness of intakes and rights offered to migrant workers. The more rights offered, the fewer migrant workers are admitted.[4] Some rights incur costs on receiving states, and thus

[4] Martin Ruhs and Philip Martin, 'Numbers vs. Rights: Trade-Offs and Guest Worker Programs' (2008) 42 International Migration Review 249, 251.

deter them from receiving more foreign workers if those rights are owed to them. The key is therefore striking the proper balance between maximising the incentives for higher income countries to keep their doors open to TMWs and maintaining enough rights for TMWs to avoid exploitation.

The result is a core list of TMW rights which is shorter than what international labour rights instruments offer.[5] Allegedly, a shorter list of TMW rights encourages more host states to accept the enlisted obligations, as opposed to widespread reluctance against the ICRMW,[6] which in turn will enhance the overall protection coverage for TMWs. As Ruhs noted: 'when it comes to protecting migrant rights, it turns out less is more.'[7] The suggested core list includes all civil and political rights, except for the right to vote, but leaves out social rights, freedom of employment, the right to family reunion, and the right to the permanent stay.[8]

In this vein of argument, maintaining genuine temporariness is positive and beneficial for all parties involved, including current TMWs, countries of origin, receiving states and potential TMWs in the future. It is thus critical to strictly enforce temporary stay of migrant workers, on which the success of TMW schemes depend. On the other hand, Ruhs clearly opposes long-term temporary status and the consequent exclusion from the mainstream society of the host state. At a timepoint, advisably about four years after entry, the host state must either send back TMWs or grant them permanent status. If the term of work permit is too short, TMWs might not gain the expected income; if too long, the schemes would morph into permanent exclusion.[9]

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[5] Martin Ruhs, *The Price of Rights: Regulating International Labor Migration* (Princeton University Press 2013) 172–78; Martin Ruhs, 'Protecting the Rights of Temporary Migrant Workers' in Joanna Howe and Rosemary Owens (eds), *Temporary Labour Migration in the Global Era: The Regulatory Challenges* (Bloomsbury Publishing 2016) 300–09.

[6] International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, enter into force 1 July 2003) 2220 UNTS 3 (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3. The ICRMW has only 51 state parties, as of June 2018. United Nation, Office of Legal Affairs, 'Multilateral Treaties Deposited with the Secretary-General, Chapter IV Human Rights 13. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families' (*United Nations Treaty Collection*) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-13&chapter=4&lang=en> accessed 4 June 2018.

[7] Ruhs, 'Protecting the Rights of Temporary Migrant Workers' (n 5) 309.

[8] Ruhs, *The Price of Rights* (n 5) 172–76.

[9] ibid 176–77.

On the other end of the spectrum are theorists like Carens, who strongly disagrees with Ruhs's stance that the right package of current TMWs should be austere for the benefits of future migrant workers.[10] Carens insists on freedom of employment for TMWs. He also suggests that labour rights, work-related social programmes, other social programmes, and freedom of employment should be granted. However, comprehensive equal protection is not required. Disparity treatments between nationals and TMWs in unemployment benefits and redistributive social benefits are acceptable in his argument.[11]

Carens is a famous advocate for open borders based on freedom of movement as a human right.[12] State power to control immigration is unjust, violating basic principles of liberal democracies in his view. It therefore might come as a surprise that I categorise Carens as a theorist of the rights-based approach. However, since the earth's surface is divided by enclosed territorial states, a theory of open borders does not get us very far in the ethics of immigration. He therefore further articulates how immigrants should be ethically treated, presuming that states enjoy wide discretion over immigration control.[13] In that case, Carens concedes that TMW schemes are morally permissible, on the condition that foreign worker's duration of stay 'is truly limited'[14] and the schemes provide a sufficient package. By making this move, Carens shares the logic of rights-based approach, which I will come back to examine (Subsections 2.3 and 2.4) after a brief articulation of the citizenship approach.

2.2 Citizenship Approach

Citizenship denotes the full membership of a political community. Legally, it provides territory security and political participation,[15] two things that TMWs are not entitled to. Commentators of the citizenship approach demand TMWs to be offered a chance of citizenship or permanent

[10] Joseph Carens, *The Ethics of Immigration* (OUP 2013) 124–26.

[11] ibid 120, 121 and 123.

[12] Joseph H Carens, 'Aliens and Citizens: The Case for Open Borders' (1987) 49 The Review of Politics 251; Carens, *The Ethics of Immigration* (n 10) 236–54.

[13] Carens, *The Ethics of Immigration* (n 10) 10.

[14] ibid 113.

[15] Matthew J Gibney, 'Precarious Residents: Migration Control, Membership and the Rights of Non-Citizens' (United National Development Programme 2009) UNDP Human Development Research Paper 6 <http://hdr.undp.org/en/content/precarious-residents> accessed 12 January 2018.

status. Their point is less about an ever-extending list of rights. Rather, the concern is about the morality of introducing temporary labour, the permissibility of discrimination on the basis of nationality, and the extent to which rights could be functional under temporary status of TMWs.

Caste-System Argument

Michael Walzer is perhaps the most famous theorist who proposes that all guest workers 'must be set on the road to citizenship'.[16] He holds that distribution of (1) admission and (2) membership are governed by different principles of justice. The state in general may take in or reject foreigners at its discretion,[17] but it is not free to withhold membership from non-citizen residents already within the state territory. Attribution of membership should follow the principle of anti-caste. Differentiated status in a society cannot be maintained. Thus, 'every new immigrant, every refugee taken in, every resident and worker must be offered the opportunities of citizenship.'[18]

TMW schemes function like a social caste system, which systematically perpetuates exploitation of migrant workers, and thus is the modern-day *metic* of ancient Greek, in Walzer's view.[19] With the West German guest worker programme in the 1970s in mind, Walzer points out that guestworkers are admitted 'to free citizens from hard unpleasant work'.[20] With their presence, the host state is 'like a family with live-in servants'.[21] And the very rationale of excluding guestworkers from citizenship and political participation is to freeze their *status quo*. Should they enjoy citizenship, they would demand to be treated as domestic workers, refusing to be confined in the segmented secondary labour market.[22] TMW programmes

[16] Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books 1983) 60.

[17] For Walzer, 'Admission and exclusion are the core of communal independence'. ibid 61–62. Therefore, based on the principle of self-determination, except in exceptional circumstances (such as the claims of refugees under the principle of mutual aid), the state should have an absolute right to decide admission policies, since 'at stake here is the shape of the community'. ibid 61.

[18] Walzer (n 16) 62.

[19] ibid.

[20] ibid 52.

[21] ibid.

[22] ibid 59.

sabotage the texture of the egalitarian, democratic society. The host state ceases to be 'a community of equals'. [23]

Notice that Walzer was writing in a slightly different context from today's cross-border labour migration. The guestworker programmes in post-war Europe are considered by many as a failure, exactly because a large population of guestworkers ended up remaining in receiving states but were excluded from naturalisation.[24] Most commentators agree that the long-term exclusion of guestworkers was problematic. It is also the very lesson that contemporary proponents of TMW schemes, such as Ruhs, learnt from history: the significance of strict enforcement of temporary stays for TMWs cannot be over-emphasised.[25] Once the obvious moral wrong of long-term exclusion is managed through strict return policy, ironically with harsher implement if necessary, it is more difficult to argue for the inclusion of TMWs in the citizenry.[26]

Flaws not Remediable by Rights

The contemporary citizenship approach indeed opposes TMW schemes on grounds beyond permanent exclusion shown in the post-war European model. To begin with, TMW schemes exemplify relationships of exploitation[27] and domination. Timely return of TMWs does not

[23] Owen M Fiss, *A Community of Equals: The Constitutional Protection of New Americans* (Beacon Press 1999) 17.

[24] Martin Ruhs, 'Temporary Foreign Worker Programmes: Policies, Adverse Consequences, and the Need to Make Them Work' (International Labour Organization 2013) Perspectives on Labour Migration No. 6 3 <http://www.ilo.org/global/topics/labour-migration/publications/WCMS_232367/lang--en/index.htm> accessed 18 May 2015.

[25] To be clear, I do not mean that Walzer's arguments on guestworkers are no longer relevant for TMWs today. The essential theoretical message of Walzer is moral significance of territorial presence: It is up to the state to exclude foreigners outside the state boundaries. However, once they are granted entry, by virtue of their presence, foreigners should be treated as equal, and eventually set on the route to citizenship. It is a moral argument more based on geographical space (territories of the state) and less on time (duration of stay of migrants). In this regard, it casts a light on today's TMW scheme. I follow Walzer in significance of territoriality but reject his national view of political participation.

[26] David Miller, *Strangers in Our Midst* (Harvard University Press 2016) 99.

[27] How exploitation should be defined and identified in the case of TMWs is controversial. The key issues concern reasonable standards of payment (namely, by what benchmark it can be said that TMWs are paid too little), and initial circumstances of TMWs (namely, whether reasonable alternatives other than accepting the overseas job offer are available). Some conclude that TMWs are not exploited since they earn more than they could have earned in the home country, and most TMWs are relatively well-off and have alternatives in the home country. Eg. Lea Ypi, 'Taking Workers as a Class: The Moral Dilemmas of Guestworker Programmes' in Sarah Fine and Lea Ypi (eds), *Migration Political Theory: The Ethics of Movement and Membership* (OUP 2016) 164–65 (arguing that TMWs are exploited because everyone's wage in the secondary market is driven down, not because TMWs earn less than nationals); Anna Stilz,

change their vulnerable status. The root of domination experienced by TMWs is unequal power relation as foreigners. It therefore requires the route to permanency to change the power dynamic.[28]

Can exploitation and domination be relieved through better rights protection regardless temporary status? Several doubts are cast: firstly, TMWs are caught in what Owen Fiss calls the political disability of non-citizens:[29] they cannot monitor or enhance execution of rights via democratic representatives.[30] Secondly, the border—understood as a regulation regime with 'fences' to keep away categories of outsiders—imposes social disabilities on foreigners.[31] Being subject to the border regime impedes right claims. It is hard enough to bring rights on books into reality. Without territorial security attached to citizenship, rights are even harder for TMWs to pursue.[32] The issue is deeper than lack of resources. Rather, the border regime usually interferes with the process of claiming rights; or deters those who are subject to it from ever considering lawful claims. The time required to make claims of rights may be longer than the valid period of the visa. They might lose their job, and hence the sponsorship to stay, by initiating the process of a claim etc. As Bosniak's insight critically shows, the border functions not only at the frontier of the state territory, but also within the territory, following wherever foreigners go.[33] The mere possibility of losing the status of legal stay, being subject

'Guestworkers and Second Class Citizenship' (2010) 29 Policy and Society 295, 299–302; Robert Mayer, 'Guestworkers and Exploitation' (2005) 67 The Review of Politics 311, 322–27.

However, concurring with commentators like Attas, Lenard and Straehle, my view is that TMWs are exploited because of high migration costs and lower pay below the prevalent market standard in the host state. Both are products of TMWs' immigration status in the host state. Daniel Attas, 'The Case of Guest Workers: Exploitation, Citizenship and Economic Rights' (2000) 6 Res Publica 73 (arguing that TMWs are exploited because deprivation of freedom of employment drives down their pay); Patti Tamara Lenard and Christine Straehle, 'Temporary Labour Migration: Exploitation, Tool of Development, or Both?' (2010) 29 Policy and Society 283. Both articles further take the position of the citizenship approach. Attas (n 27) 80; Lenard and Straehle (n 27) 73.

[28] Alexander Reilly, 'The Ethics of Seasonal Labour Migration' (2011) 20 Griffith Law Review 127, 143, 147.

[29] Owen Fiss, 'The Immigrant as Pariah' [1998] *Boston Review* <http://bostonreview.net/forum/owen-fiss-immigrant-pariah> accessed 23 April 2018.

[30] Catherine Dauvergne and Sarah Marsden, 'The Ideology of Temporary Labour Migration in the Post-Global Era' (2014) 18 Citizenship Studies 224, 236.

[31] Fiss, 'The Immigrant as Pariah' (n 29).

[32] Dauvergne and Marsden (n 30) 236.

[33] Linda Bosniak, 'Being Here: Ethical Territoriality and the Rights of Immigrants' (2007) 8 Theoretical Inquiries in Law 389, 397.

to deportation and detention, has chilling effects.[34] As Walzer reminds us, impediments to rights claims for TMWs are not accidental, but the very design of the scheme. Thirdly, emphasising rights, in Dauvergne and Marsden's view, ironically naturalises fundamental subordination of TMWs.[35] That is because the general assumption of right talks is fairness between rights holders. However, the departure point of TMW schemes is the exact opposite. It is presumed that TMWs can be treated unequally; and doing so is within the sovereign state's 'right' to control immigration. Focusing on rights only thus inevitably leaves the underlying presumption of state sovereignty unchallenged.[36]

Citizenship as Reward Argument

Finally, arguments for TMWs' citizenship are also based on their contributions. In a sense, TMWs 'earn' their entitlement to citizenship by providing an essential service. Especially, jobs left to them are usually arduous and soul-destroying. TMWs make significant investments to the host state. Thus, when the personal costs of TMW accumulate to a certain point, the host state is obliged to offer the pathway to citizenship in return. TMW schemes are unethical if they deny the claim for permanent status.[37] More specifically, TMWs establish relationships with the host state through work. Work is a suitable basis to distribute citizenship, because it is 'universal, liberal, tangible and democratic', in contrast to 'intrinsically illiberal and undemocratic' bases like birth and ancestry.[38] Coming to work denotes that, unlike visitors, TMWs are here by invitation to make contributions. At the personal level, work provides workers with a sense of identity.[39] As their identity deepens, workers might become more affiliated with the host state. Fiss once said that the society of equals needs to treat foreigners as equal not necessarily because it owes foreigners anything.[40] However, it turns out that the

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[34] Linda Bosniak, 'Persons and Citizens in Constitutional Thought' (2010) 8 International Journal of Constitutional Law 9, 16–17.

[35] Dauvergne and Marsden (n 30) 238. *Cf.* Judy Fudge, 'Making Claims for Migrant Workers: Human Rights and Citizenship' (2014) 18 Citizenship Studies 29, 39 (arguing that Dauvergne and Marsden's approach blur the complex circumstances of TMWs). I will respond to Fudge in Section 4.

[36] Dauvergne and Marsden (n 30) 237.

[37] Reilly, 'The Ethics of Seasonal Labour Migration' (n 28) 149.

[38] Alexander Reilly, 'The Membership of Migrant Workers and the Ethical Limits of Exclusion' in Joanna Howe and Rosemary Owens (eds), *Temporary Labour Migration in the Global Era: The Regulatory Challenges* (Bloomsbury Publishing 2016) 285.

[39] ibid 287.

[40] Fiss, *A Community of Equals: The Constitutional Protection of New Americans* (n 23) 17.

host state does owe TMWs something, considering their affiliation with, contribution to and sacrifice for the host state.

By now it is clear that the rights-based and citizenship approaches have distinct assessments on TMW schemes. However, the next two subsections show that they hold two commonalities which will be the major conceptual challenges for political inclusion of TMWs: the role of time and legal citizenship.

2.3 Ethics of Temporariness

2.3.1 Moral Credential of Temporariness in the Rights-based Approach

Temporariness strengthens the moral credential of TMW schemes for the rights-based approach. This view unites commentators who would otherwise disagree with each other over the ethics of immigration, the assessment of TMW schemes and the rights for TMWs. Divergence and convergence between Ruhs, Carens and Miller illustrate this point well.

Ruhs argues that the strictly enforced temporary stay of TMWs is the linchpin of successful TMW schemes. First, temporariness renders the schemes more popular, because it reduces costs for the host sate. Also, forced rotation allows a larger number of TMWs to participate, which further enhances moral currency of the schemes by aiding global development on a larger scale. Finally, TMWs are in a state of curtailed rights and vulnerability, which cannot last forever.[41] On the other hand, genuine temporary stays of migrant workers matter for Carens too, because he argues for the inclusion of non-citizens based on the theory of social membership which prioritises people's affiliations and ties over formal legal citizenship.[42] Time is a significant proxy for social membership. Hence his slogan goes: 'the longer one stays in a society, the stronger one's claim to remain'.[43] The reverse side of the slogan would be that a short-term stay—supposedly under five years in Carens's view—does not merit the claim of permanency.[44] It is worth asking why duration of stay is the most important moral ground, or

[41] Ruhs, *The Price of Rights* (n 5) 177.

[42] Joseph H Carens, 'On Belonging' *Boston Review* (1 June 2005) <http://bostonreview.net/carens-on-belonging> accessed 12 January 2018. The implication is significant for undocumented migrants. He argues that, as time goes by, undocumented migrants gain the right to permanent stay.

[43] Carens, *The Ethics of Immigration* (n 10) 113; Joseph H Carens, 'Live-in Domestics, Seasonal Workers, and Others Hard to Locate on the Map of Democracy' (2008) 16 Journal of Political Philosophy 419, 422.

[44] Carens, *The Ethics of Immigration* (n 10) 113–14.

whether it is the only ground, to assess foreigners' claims towards the host society.[45] Yet, for now, it is sufficient to note that Carens's theory of social membership in fact concurs with Ruhs's view that strict temporariness is essential if TMW schemes are to be adopted at all.

Miller is another theorist of the rights-based approach who disagrees with Carens on many points, but happily affirms temporariness of TMW schemes. Unlike Carens and Ruhs, Miller stresses that admission of TMWs is not governed by justice, since the state enjoys wide discretion. The only plausible moral basis for migrant workers to seek admission is mutual advantages: both TMWs and members of the host state benefit from TMWs' presence. However, benefits of cross-border migration should be justly distributed.[46] Hence, rights for TMWs is a question of fair terms and reciprocity. TMWs are fairly treated, in Miller's view, if they are protected by international human rights and employment contracts.[47] In return, TMWs are expected to benefit the host society and obey its laws.[48] However, TMWs need not to be equally treated as citizens in every aspect, otherwise TMW schemes will lose their attractions.[49] In short, Miller appraises TMW schemes based on fairness and mutual benefits, an approach that differs from Ruhs and Carens. And yet, temporariness is also useful for Miller. Here, the advantage of TMWs' temporary stay lies in preventing anger from local workers against TMWs. He even argues that duration of stay of TMWs should be as short as one or two years.[50]

I doubt whether local anger would be eased if TMWs were treated as vastly unequal and were therefore cheaper and more attractive for employers. It is also unclear whether a work permit as short as one year could be deemed 'fair' for TMWs.[51] However, the point here is to show that temporariness is generally deemed as positive and useful under the broad umbrella of the

[45] Bosniak, 'Being Here' (n 33) 405.

[46] Miller, *Strangers in Our Midst* (n 26) 95.

[47] ibid 98.

[48] ibid 127. I disagree with Miller that TMWs express their consent to obey the law of the host state by virtue of entry. See the discussion in Subsection 3.2.1.

[49] ibid 99.

[50] ibid.

[51] Ruhs, *The Price of Rights* (n 5) 184 (pointing out that the one-year work permit is too short to be financially useful for TMWs).

rights-based approach. I now turn to how temporariness is perceived in the citizenship approach.

2.3.2. Entanglement of Time and Space in the Citizenship Approach

The citizenship approach denies the positive connotation of temporariness demonstrated in the rights-based approach. Rather, temporariness is the legal technique which manipulates legal and moral responsibilities of the state towards foreign workers. This is because mere presence in the territory of a state incurs responsibilities on the state, and such responsibilities could intensify over time. We may say that the moral significance of temporariness derives from the weight of territoriality. Time and space are intertwined in this domain. Territoriality is often subject to manipulation. The state might define someone who is physically here as legally not here to avoid obligations.[52] Temporariness—understood as temporal controls over the presence of TMW backed up by deportation—works in a similar way to restrict the effects of territoriality. By specifying a maximum period of contact between migrants and the state territory in advance, the host state also sets out its maximum moral and legal liabilities towards them in the first place.

Understood as a technique to regulate territoriality, time should not be a positive factor in enhancing the moral credentials of TMW schemes; or if time does matter, it should not be that the shorter the stay of migrant workers, the better, as Miller advises. Timely rotation of individual workers, subjectively, may make workers feel the harsh work is more bearable. Yet, objectively it does not render their employment less exploitive, or their status less vulnerable. Nor does manipulating TMWs' time of presence do the trick to remedy the harms of democratic deficits or social inequality caused by TMW schemes. Just like a society tolerating slavery is a slavery society at any rate, even if people take turns being slaves.

However, time regains its importance in the citizenship approach when it comes to the remedy, since the approach strives for full legal membership of TMWs. Naturalisation takes time, usually years, to establish the tie between would-be citizens and the state. To the extent that we treasure the connection between the land and migrants, there is a limit as to how prompt naturalisation can be. Therefore, a gap between temporary and permanent statuses of foreign workers is likely to remain. The state can always make the TMW scheme a step shorter for triggering permanent status. When temporariness goes extreme, workers are most vulnerable,

[52] Bosniak, 'Being Here' (n 33) 402. Bosniak's example is the detention centre at the border. People detained in the centre are defined as legally outside US territory. In the context of work, free economic zones may be regarded as an example of manipulating territoriality. The zones can be deemed as offshore for the purposes of trade, tax or manufacture etc. Labour standards and trade union rights can therefore be undermined in free economic zones.

and yet the citizenship approach has difficulty in keeping pace. It has no solution to offer, say, the one-year workers in Miller's suggestion, or circular agricultural workers admitted for months per year.

Alternatively, the citizenship approach may seek to repudiate all schemes offering only temporary status. It may insist that foreign workers must either be admitted as would-be citizens, setting on the pathway to naturalisation from day one, or not admitted at all. Indeed, the citizenship approach has an underlying implication to cancel TMW schemes outright. I am open to this policy direction. However, it may imply a more exclusive border line, a tendency that commentators in this approach may not be willing to see. Also, this view would offer no hint to empower workers who currently join the schemes.

In a nutshell, the length of TMWs' stay has moral significance and legal functions in both approaches. The rights-based approach fails to capture that the temporal regulation of migrant workers can be manipulative and exploitive, rather than ethical. The citizenship approach, on the other hand, seeks to undermine the weight of temporariness, and yet has difficulty coping with the necessary period for connecting the host state and migrant workers.

2.4 Citizenship-Confined Democracy

The next commonality of the two approaches is the presumption of a close link between citizenship and voting. The rights-based approach in general considers that voting should not be granted to TMWs since they possess no legal citizenship, whereas the citizenship approach argues the other way around: citizenship is needed exactly because it offers rights to political participation. In the following, I start with the common contention of the rights-based approach that TMWs should go home to vote and proceed to the opponents of the citizenship approach. Although the two approaches hold different views about the role of democratic participation, they nevertheless accept the underlying model of disaggregated citizenship, hence the idea that democratic participation is interwoven with state-centric belongingness.

2.4.1 Democratic Participation in the Rights-based Approach

No matter what rights might be suggested under the rights-based approach, the rights to political participation and citizenship are said to be irrelevant to TMWs, or unfit for the purpose of TMW schemes.[53] As Raskin nicely put it: 'We do not think of aliens, legal or illegal, as being "disenfranchised", because we assume that voting must be based on nation-state

[53] Miller, *Strangers in Our Midst* (n 26) 99.

citizenship'. [54] One rationale for overlooking democratic participation of TMWs is ineffectiveness. Stilz concedes that deprivation of some rights for TMWs, such as freedom of employment or the live-in requirement, will lead to domination. However, voting is not among them.[55] She draws an analogy between tourists and TMWs: if tourists can remain undominated without political enfranchisement, then so can TMWs. Despite being foreigners, they both enjoy effective safeguards against arbitrary treatment, such as protection from police and courts or freedom to leave the territory. In comparison, political rights are not effective protection for TMWs, Stilz argues, because the numbers of TMWs are too small to make a difference via voting.[56]

Stilz appears not to recognise that state power—including police and courts—could be a source of domination. Whatever protective functions that police and courts might have, they cannot replace democratic will formation, particularly in light of the theory of epistemic democracy argued in the last chapter. Nor are minority votes meaningless unless they can make a difference. It is also doubtful whether tourists are an apt analogy for TMWs, which I will further respond to in Subsection 3.2.3. However, unpersuasive it may be, underlying Stilz's argument of ineffectiveness is the deeper concern over whether political freedom and citizenship are the apropos tool to diagnose TMWs' plights. Fudge thinks not. She criticises the citizenship approach as it simultaneously 'over-eggs-the-pudding' and is insensitive to the circumstances of TMWs. [57] Citizenship encompasses too many elements. Not all of them address TMWs' needs. It also unduly blurs the unfreedom that TMWs experience in the labour market with unfreedom in the political realm.[58]

In fact, a commonly raised point of the rights-based approach is that TMWs are not deprived of political freedom, because it is sufficient that they are able to vote somewhere, ideally in their home countries. After all, TMWs are citizens of other states. They can resume equal status as citizens after returning to their country of origin.[59] It is wrong to think that migrants should

[54] Jamin B Raskin, 'Time to Give Aliens the Vote (Again): Green-Card Power' (1993) 256 The Nation 433, 433 citing from Song, (n 1) 607.

[55] Stilz (n 27) 304.

[56] ibid 305.

[57] Fudge (n 35) 38.

[58] ibid 39.

[59] Miller, *Strangers in Our Midst* (n 26) 98; Fudge (n 35) 39.

be members of any political community where they happen to reside.[60] The more worthwhile battle field for TMW's political participation is in their home state. Therefore, to protect TMWs' political rights, the host state can facilitate TMWs to take part in elections in the home country, rather than directly enfranchise them.[61] The implication is that TMWs are essentially economic status. The discourse about political freedom is redundant.

Notice that the rationale of going home for the full membership, if plausible, could be invoked to deprive any right of TMWs. Any right could be compromised by saying that it is alright that TMWs do not enjoy X, Y, or Z here, since they could resume the rights after returning home. What stops the logic of resuming-at-home 'spilling all over' is the unspoken presumption that political participation relies on legal citizenship status, while other rights can be separated from citizenship belonging. As Miller notes, the right to vote in national elections is 'one of the defining features of citizenship, and it would be anomalous, therefore, to extend it to immigrants who have not yet acquired that status'.[62] Democratic participation is distinguishable from other rights in this regard.

2.4.2 Democratic Participation in the Citizenship Approach

On the other hand, the point of the citizenship approach is to reject taking TMWs as an isolated economic phenomenon limited to the labour market. Workers should not be reduced to labour; labour should not be diminished to a commodity. TMWs schemes, however, make migrant workers commodities *simpliciter*.[63] In the host state, TMWs are striped of the relational dimensions of human beings: family life, social connections and public participation. Offering TMWs the path to citizenship status is to restore them conditions to be a full person.

Unlike the rights-based approach which treats political participation as irrelevant, the citizenship approach diagnoses that silencing political voices of TMWs contributes to stagnation of their lower economic gains.[64] Depriving political participation, however, is more

[60] 'The right to be a citizen somewhere, however, does not entail the right to be a citizen everywhere.' Fudge (n 35) 41.

[61] Miller, *Strangers in Our Midst* (n 26) 117.

[62] ibid.

[63] Reilly, 'The Ethics of Seasonal Labour Migration' (n 28) 145. To be clear, the argument here does not imply that workers outside TMW schemes are not commodified. It rather emphasises that TMW schemes are an extreme form of commodification due to deprivation of citizenship.

[64] Attas (n 27) 79; Walzer (n 16) 59.

than making TMWs cheaper. A recurring theme in the citizenship approach is political exclusion downgrading TMWs to the quasi-slavery status of the polity.[65] In Aristotle's view, slaves live a life of necessity; citizens live a life of choices. The fare of the former is decided by their economic conditions, while the fare of the later is taken in collective hands in the political sphere.[66] Arendt further claims that 'The chief difference between slave labour and modern free labour is not that the labourer possesses personal freedom, but that he is admitted to the political realm and fully emancipated as a citizen'.[67] In the meantime, the government which forces TMWs into the slavery status becomes a tyranny. Unjustly excluding TMWs from political participation renders the governance of the host state over TMWs illegitimate.[68] Therefore, TMWs going home to vote or not, as suggested by the rights-based approach, is inconsequential when it comes to the vices that the citizenship approach seeks to remedy: extreme commodification of labour, political isolation of TMWs and democracy deficits of the host state. Political inclusion of TMWs is needed in the host state where political coercion and domination occur, whether TMWs go home to vote or not. It is also partly for facilitating political inclusion of TMWs that formal citizenship is called upon.[69]

2.4.3 Unbundling Model of Citizenship

Underlying the divergence between the two approaches is the bigger debate about the role of democracy in protecting non-citizens, a special minority group. While the rights-based approach is confident that legal rights, including international human rights, should be the primary and effective resort to guard migrants, the citizenship approach points out that democratic participation in politics is indispensable. Nonetheless, both approaches are founded on the model of 'unbundling citizenship', in which the boundaries of rights and democracy pull towards opposite directions. The assumption that voting is premised on legal citizenship is left unchallenged in both approaches based on this model of citizenship.

[65] E.g. Dauvergne and Marsden (n 30) 238.

[66] Walzer (n 16) 54.

[67] Hannah Arendt, *The Human Condition: Second Edition* (University of Chicago Press 2013) 217.

[68] Walzer (n 16) 59–60.

[69] Reilly, 'The Ethics of Seasonal Labour Migration' (n 28) 146–47.

More specifically, the concept of citizenship consists of four interrelated dimensions: formal legal status, equal rights and benefits, active political participation and identity.[70] In the ideal prototype of state-centric citizenship, the boundaries of the four dimensions are more or less consistent. Those who possess the formal legal status share a common identity, are entitled to the rights and benefits of citizens and govern themselves.[71] However, conceptually these dimensions are in tension with each other; and the development of human rights brings the internal tensions of citizenship to the fore: As the rights dimension of citizenship moves towards the pole of universal inclusiveness, it potentially conflicts with the political dimension of citizenship which tends to embrace an exclusive, bounded people.[72] The human rights discourses also press the concern of hollowing-out democracy by imposing given norms on political communities.[73]

Benhabib, Cohen and Fudge, among others, all propose a similar strategy to cope with the tension. On the one hand, they advocate a 'disaggregation' framework of citizenship.[74] Whereas rights reach beyond state boundaries, separate from citizenship and realised through international human rights regimes, democratic participation continues to presume an enclosed political community, functioning on a bordered territory, bounded people and shared identity. On the other hand, they seek to politicise human rights locally to ease the concern of hollowed-out democracy. It is argued that human rights are not externally imposed static norms. Their coverage, contents and realisation are subject to unceasing debates, deliberation, contestation, reiteration etc. It is through the mobilisation of human rights in dynamic struggles by those who are denied the rights that human rights find their democratic

[70] Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton University Press 2006) 19–21; Seyla Benhabib, 'Citizens, Residents, and Aliens in a Changing World: Political Membership in the Global Era' (1999) 66 Social Research 709, 720–724.

[71] E.g. Theodora Kostakopoulou, *The Future Governance of Citizenship* (CUP 2008) 47–51; Seyla Benhabib, 'Borders, Boundaries, and Citizenship' (2005) 38 PS: Political Science and Politics 673, 673; Jean L Cohen, 'Changing Paradigms of Citizenship and the Exclusiveness of the *Demos*' (1999) 14 International Sociology 245, 246.

[72] Benhabib ibid 674.

[73] Cohen (n 71) 264.

[74] E.g. Fudge (n 35) 41; Seyla Benhabib, 'Another Cosmopolitanism' in Robert Post (ed), *Another Cosmopolitanism: Hospitality, Sovereignty, and Democratic Iterations* (OUP 2006) 28–31; Saskia Sassen, 'Towards Post-National and Denationalized Citizenship' in Engin F Isin and Bryan S Turner (eds), *Handbook of Citizenship Studies* (SAGE Publications Ltd 2002); Linda Bosniak, 'Citizenship Denationalized' (2000) 7 Indiana Journal of Global Legal Studies 447; Cohen (n 71).

expression.[75] The democratic people are authoring human rights laws when they live out the laws which they believe bind themselves.[76]

Perhaps ironically, although the participatory politics of human rights play such a critical role in the disaggregated model of citizenship and non-citizens are the primary subject of human rights protection, they are not expected to join politics through formal political participation. Cohen highlights that: 'Membership in the active *demos* must…be delimited, and it has an irreducible ethical and symbolic dimension to it. Identification with one another as a *demos*, as a democratic community with *something in common*, and with *a shared fate* is necessary to motivate participation and solidarity among the citizenry' (*emphasis* mine).[77] Both the rights-based and citizenship approaches are committed to this binary of universalist rights vs. particularist democracy in the disaggregation model.[78]

Nonetheless, the functional division between rights and democracy presented in the disaggregation model is questionable. In fact, all rights—international and domestic—are essentially controversial and politicalised. Rights involve priority settings of conflicting interests. It is the democratic forum that strikes the balance between contradictory claims.[79] Being excluded from democratic participation is being disqualified from joining the forum of rights talks where individuals are formally recognised as equal. To be sure, it does not necessarily take the formal right to vote to join the deliberation and contestation of rights, and yet deprivation of formal political participation cannot be justified on the basis that there are informal channels available. It seems to me unattainable to deny non-citizens the status of equal political inclusion, while at the same time expecting them to mobilise rights politically, as Fudge suggests.[80]

[75] Cohen (n 71) 261–62; Fudge (n 35) 42.

[76] Seyla Benhabib, 'Cosmopolitanism and Democracy: Affinities and Tensions' (2009) 11 Hedgehog Review 30, 37–38; Benhabib, 'Another Cosmopolitanism' (n 74) 42–44; Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (CUP 2004) 181.

[77] Cohen (n 71) 263.

[78] Robert W Glover, 'Radically Rethinking Citizenship: Disaggregation, Agonistic Pluralism and the Politics of Immigration in the United States' (2011) 59 Political Studies 209, 211.

[79] Meghan Benton, 'The Tyranny of the Enfranchised Majority? The Accountability of States to Their Non-Citizen Population' (2010) 16 Res Publica 397, 405–06.

[80] Fudge (n 35) 42.

2.5 Concluding Remarks

This section explains two common presumptions shared by the rights-based and citizenship approaches: the unavoidable significance of time and the close tie between democratic participation and legal citizenship. Taken together, the commonalities reflect a particular conception of the democratic boundary and citizenship model: the *demos* is to be constituted solely by the citizenry.

I concur with the citizenship approach in recognising temporariness as a manipulation and the connection between private and public domination. However, I part ways with it at both of the commonalities which it shares with the right-based approach, since they reflect a conception of *demos* lacking democratic legitimacy. The next section aims to reframe the democratic boundary from the perspective of freedom as non-domination, which will uphold political rights of TMWs (Subsection 3.2). The two commonalties pose critical challenges to the democratic inclusion of TMWs. I will respond to each in subsections 3.2.3 (ethics of temporariness), 3.2.1 and 3.3 (the tie between voting and nationality).

3. Non-domination as the Boundary of *Demos*

The problem of the democratic boundary, that is, how the self-ruling people should be constituted, is a vibrant debate. I first briefly sketch the theoretical background (Subsection 3.1), which provides resources to loosen the assumption of a close connection between the *demos* and the citizenry, but also highlight challenges that boundary-drawing must meet. I then articulate how the democratic boundary is to be defined from the view of non-domination (Subsection 3.2). It will be proposed that comprehensive state domination triggers the right to political participation. Being workers and foreigners at the same time, TMWs experience intersections of private and public domination. Their circumstances call for rights to equal democratic participation to justify coercive state power. Therefore, TMWs should be included in the *demos*. My view of democratic inclusion is a middle ground between the national model (e.g. Miller, Kymlicka) on the one hand and the unbounded-*demos* theory (e.g. Goodin and Abizadeh) on the other. I seek to defend the territoriality of the *demos* (Subsection 3.2.3) but resist temporal constraints on access to political membership (Subsection 3.2.4).

3.1 Democratically Drawn Boundaries?

Recall that in the disaggregated citizenship model, democracy, namely self-rule by the *demos*, necessarily presumes a well-defined, pre-existing *demos*. The boundary problem (i.e. who

should be included in the self-ruling people) must be solved before any democratic decision can be made. Some commentators thus conclude that democracy cannot provide guidance on the logically prior issue about how the *demos* should be constituted.[81] The boundary problem is hence deemed an embarrassment for democracy. For instance, Shapiro and Hacker-Cordon describe it as a 'chicken-and-egg problem… [that] lurks at democracy's core. Questions relating to boundaries and membership seem in an important sense prior to democratic decision making, yet paradoxically they cry out for democratic resolution'.[82] Facing this paradox, there are three major methodological positions for approaching the boundary problem.

Mere-Fact Position

The first stance takes the *demos* to be a mere reality. It does not conceive of boundaries as questions calling for justification; boundaries can be determined in any way the people deem appropriate.[83] This position is utterly unsatisfactory because it potentially allows a polity to disfranchise any groups, yet still be called a democracy.[84]

[81] E.g. Frederick G Whelan, 'Prolough: Democratic Theory and the Boundary Problem' in J Roland Pennock and John W Chapman (eds), *Liberal Democracy* (New York University Press 1983) 40–42; see also Sofia Näsström, 'The Legitimacy of the People' (2007) 35 Political Theory 624, 629–30.
Whelan appears to suggest that the boundary problem cannot be solved democratically because it does not make sense to ask a pre-existing people to vote on who belong to the people, as 'who can vote' is exactly the issue requiring voting to decide. Indeed, if 'solving the problem democratically' refers to the imaginative voting scenario, then it is hopeless to be solved.
However, asking how the boundary problem can be solved democratically does not necessarily mean the question is to be voted via an existing or imaginary mechanism. It is rather an exercise of normative evaluation by appealing to democratic theories. Democratic theories may or may not give sufficient guidance on the boundary problem; yet, asking how the *demos* should be constituted in line with normative principles underlying democracy, say equality, reciprocity, autonomy, personal rights etc, is not a chicken-and-egg problem. David Miller, 'Democracy's Domain' (2009) 37 Philosophy & Public Affairs 201, 204. The principles of democratic composition so inferred are not subject to vote. But it is *not arbitrary* from the democratic point of view because they are consistent with the purposes or conditions of democracy.

[82] Ian Shapiro and Casiano Hacker-Cordón, *Democracy's Edges* (CUP 1999) 1.

[83] Schumpeter is an example of this view. Joseph Alois Schumpeter, *Capitalism, Socialism and Democracy* (New Edition of 6 revised Edition, Routledge 2006) 245.

[84] Robert A Dahl, *Democracy and Its Critics* (Yale University Press 1989) 121.

Contrarily, the next two approaches seek normative criteria for democratic boundaries. This second stance establishes criteria independent from the results of democratic decisions, while the third stance seeks to draw the line in accordance with the impacts of collective decisions.[85]

Democracy Independent Criteria

The second stance tends to leave the boundary problem to history, and in general understands existing geographical boundaries of a state to be the proper outline of a bounded people.[86] Note that history and territory are two different, though overlapping, criteria. A history-oriented view is prone to be communitarian or nationalist, emphasising a shared memory, culture, language etc, which may be further institutionalised through legal nationality, while the territorial view relies on the existing border between states. People who share the same piece of land do not necessarily share history, and vice versa. History and territory are not the only two criteria independent from democratic consequences. Bauböck's theory of social stakeholder, or Smith's suggestion of coercively constituted identity, for example, are also criteria not contingent on consequences of democratic decisions.[87]

Criteria in this category are contingent factors external to the democratic system. Relying on them to draw the democratic boundary has two methodological implications. First, these criteria are usually products of past random facts, beyond the reach of current affairs, and hence inclined to be backward-looking and exclusive. Some seek to avoid the tendency. Habermas suggests that democracy would 'retroactively' transform the once historically contingent people into a legitimate constitutional people. Benhabib argues that the people made out of violent and unjust history could reconstitute itself through the process of 'democratic iterations'.[88] They recognise that the *demos* had been formed in a remote

[85] My categorisation here is similar to Bauböck's distinction of input and output legitimacy. Rainer Bauböck, 'Morphing the *Demos* into the Right Shape: Normative Principles for Enfranchising Resident Aliens and Expatriate Citizens' (2015) 22 Democratization 820, 822.

[86] E.g. Sarah Song, 'The Boundary Problem in Democratic Theory: Why the Demos Should Be Bounded by the State' (2012) 4 International Theory 39; John Rawls, *Political Liberalism: Expanded Edition* (Columbia University Press 2011) 402–03; Benhabib, *The Right of Others* (n 76) 175, 178; Jürgen Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?' (2001) 29 Political Theory 766, 773–76; David Miller, *Citizenship and National Identity* (Polity Press 2000) ch 5; Robert Alan Dahl, *After the Revolution?: Authority in a Good Society* (Yale University Press 1990) 62; Walzer (n 16) ch 2.

[87] Rainer Bauböck, 'Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting' (2006) 75 Fordham Law Review 2393; Rogers M Smith, *Political Peoplehood: The Roles of Values, Interests, and Identities* (University of Chicago Press 2015) 219–264.

[88] Habermas (n 86) 774; Benhabib, *The Right of Others* (n 76) 178.

historical point, but the *demos* is still open to contestation and reshaping via daily democracy which struggles to live out ideals of constitutional rights and human rights. This reading of the *demos* is both historical and future-oriented.

Second, being independent from democracy, these criteria are not vulnerable to the logical circularity that allegedly haunts the democratic boundary problem. However, by the same token, they are open to the criticism of arbitrariness from the democratic point of view.[89] More deeply, in Näsström's words, by 'running into the arms of history', the critical question of how the democratic people ought to be legitimately constituted is avoided.[90] Näsström's challenge to 'the legitimacy of the people' is important, because without a proper response this approach falls into another version of the mere-fact position mentioned above: the *demos* is just what it happens to be. Notice that the historical criteria are usually the theoretical foundation for the conventional view that the *demos* should be constituted by and only by citizens. The two methodological implications above therefore also indicate the theoretical strength and legitimacy weakness of the conventional view of the *demos*.

I agree that it is preferable to solve the boundary problem in a democratically non-arbitrary way.[91] Hence, the historical criteria are unsatisfactory for neglecting democratic legitimacy in constituting the *demos*. Some commentators seek to synthesise the external criteria with the democratic ideal. For instance, Song argues for a territorially bound people, because the territorial state is one of the constitutive conditions of democracy—without which political equality and freedoms cannot be secured, solidarity cannot be fostered and the connection between citizens and representatives cannot be maintained. Therefore, historically contingent as they may be, boundaries of territorial states are morally relevant and democratically desirable.[92]

Habermas, Benhabib or Song's strategy are all efforts to reconcile the random, and often violent, origins of the *demos* with democracy, seeking a legitimate basis for the *demos* as it is

[89] Näsström (n 81) 631.

[90] ibid 626.

[91] Not everyone agrees that a democratic solution is preferable over a non-democratic one. For instance, Nili poses the question: 'why is it morally necessary to specify the group of individuals that is to comprise the citizenry through democratic theory itself?' Shmuel Nili, 'Democratic Theory, the Boundary Problem, and Global Reform' (2017) 79 The Review of Politics 99, 103.

[92] Song, 'The Boundary Problem in Democratic Theory' (n 86) 58–59.

today. Being successful or not, the enterprise is essential; and yet the tension between the static past and dynamic democracy will not easily fade away.

Democracy Dependent Criteria

The third stance suggests that the *demos* should be decided according to consequences of democratic decisions, such as their influences or coercion. Several principles are proposed to draw the boundaries. For instance, the 'all affected interests' principle suggests that anyone whose interest is affected by a particular political decision should participate in making the decision;[93] the 'all subjected' principle states that anyone who is subject to the coercive power of a polity should participate in the political process to determine how power is wielded.[94] In a similar way, I will write in favour of a notion of democratic inclusion informed by freedom of non-domination, which suggests that anyone who is prone to be dominated by the state should participate in the system of popular control to have influence over how power is wielded.[95]

Theories in this vein recognise that democratic legitimacy is owed to whoever under the state power. Since impacts of democratic decisions are not confined to nationals or limited within the state territory, the boundary of *demos* is potentially detached from the legal citizenry and territory. Thus, Goodin radically called for 'giving virtually everyone everywhere a vote on

[93] E.g. Robert E Goodin, 'Enfranchising All Affected Interests, and Its Alternatives' (2007) 35 Philosophy and Public Affairs 40; Gustaf Arrhenius, 'The Boundary Problem in Democratic Theory' in Folke Tersman (ed), *Democracy Unbound: Basic Explorations I* (Stockholm University Press 2005); Benhabib, *The Right of Others* (n 76); Carol C. Gould, *Globalizing Democracy and Human Rights* (CUP 2004); Iris Marion Young, *Inclusion and Democracy* (Oxford Political Theory 2002); Ian Shapiro, *Democratic Justice* (Yale University Press 1999); Whelan (n 81).

[94] E.g. Eva Erman, 'The Boundary Problem and the Ideal of Democracy' (2014) 21 Constellations 535, 201; David Owen, 'Transnational Citizenship and the Democratic State: Modes of Membership and Voting Rights' (2011) 14 Critical Review of International Social and Political Philosophy 641; Sarah Fine, 'Democracy, Citizenship and the Bits in Between' (2011) 14 Critical Review of International Social and Political Philosophy 623; Arash Abizadeh, 'Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders' (2008) 36 Political Theory 37; Claudio Lopez-Guerra, 'Should Expatriates Vote?' (2005) 13 Journal of Political Philosophy 216; Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press 1998); Dahl (n 84).

[95] See also Alex Sager, 'Political Rights, Republican Freedom, and Temporary Workers' (2014) 17 Critical Review of International Social and Political Philosophy 189, 196; Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (CUP 2012) 130–31; Benton (n 79) 407–09.

virtually everything decided anywhere';[96] Abizadeh suggested that the *demos* is 'principally unbounded'.[97]

As such, the democratic-dependent approach to the *demos* provides resources to loosen the presumed tie between legal citizenship, territorial presence and rights to democratic participation. By drawing the boundary of the *demos* according to the reach of political power, the *demos* become less essentialist as opposed to the traditional citizenship model.[98] These theories are also less vulnerable to the chaotic, even unjust, historical origin of the *demos*, as the *demos* is to be constituted through a forward-looking, inclusive, and dynamic political process.

And yet, doubts about feasibility of open-ended democratic people(s) always linger.[99] Abizadeh responded partly by indicating that the unbounded-*demos* thesis is meant to be a normative account rather than a practical one: 'No actual set of procedures and processes can fully live up to the ideals' of democratic self-rule.[100] Nonetheless, the issue is not only that the ideal theory is beyond the reach of this non-ideal world. Rather, critics question whether an open-ended *demos* is indeed ideal or desirable. Eventually, the question of how the *demos* should be legitimately constituted is linked to the kind of democracy that we seek to achieve.[101] An unattainable *demos* may also fail to reveal the desirable ideal of democracy.[102]

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[96] Goodin (n 93) 68.

[97] Arash Abizadeh, 'On the *Demos* and Its Kin: Nationalism, Democracy, and the Boundary Problem' (2012) 106 American Political Science Review 867, 868.

[98] Bauböck, 'Morphing the Demos into the Right Shape: Normative Principles for Enfranchising Resident Aliens and Expatriate Citizens' (n 85) 822.

[99] E.g. Miller, 'Democracy's Domain' (n 81) 215, 222; Bauböck, 'Morphing the Demos into the Right Shape: Normative Principles for Enfranchising Resident Aliens and Expatriate Citizens' (n 85) 821–22; Song, 'The Boundary Problem in Democratic Theory' (n 86) 54–58.
On the other hand, some attempt to suggest democracy beyond state borders, e.g. David Held, 'The Transformation of Political Community: Rethinking Democracy in the Context of Globalization' in Ian Shapiro and Casiano Hacker-Cordón (eds), *Democracy's Edges* (CUP 1999); James Bohman, *Democracy Across Borders: From Dêmos to Dêmoi* (MIT Press 2007).

[100] Abizadeh, 'On the *Demos* and Its Kin' (n 97) 880.

[101] Eva Erman, 'The Boundary Problem and the Right to Justification', *Justice, Democracy and the Right to Justification: Rainer Forst in Dialogue* (Bloomsbury Publishing 2014) 130.

[102] Miller, 'Democracy's Domain' (n 81) 226.
More specifically, Miller contends a particular relationship between the desired conception of democracy and the boundary of *demos*. He suggests that there is a trade-off between 'thickness' and inclusiveness of democracy: the more inclusive the *demos*, the thinner democratic procedure tends to

Concluding Remarks

The debate of the democratic boundary calls for re-examining the legitimate composition of the *demos*. It will be shown that I concur with the unbounded-*demos* theories in believing that the democratic boundary should not be taken as given but requires justification too. Such justification is owed to whomever the state exercises its power. On the other hand, I dissent with the unbounded-*demos* theory in the open-ended tendency. In the next subsection, following the theory of non-domination, I argue that the democratic boundary should be informed by operation of public domination, and includes at least those who are similarly dominated as citizens are, such as TMWs.

3.2 Non-domination as the Democratic Boundary

The first subsection (3.2.1) will briefly articulate the principle of democratic inclusion informed by non-domination. It then points out that political equality is a critical normative requirement internal to republican freedom, which in turn sets up a threshold of state domination for joining the democratic people. Following that, two critical features of the democratic inclusion theory proposed in 3.2.1 are highlighted, namely territorially sensitive (3.2.2) and temporally insensitive (3.2.3).

3.2.1 Democratic Inclusion under Freedom as Non-domination

Freedom as non-domination suggests that state power is legitimate, i.e. non-dominating, only when it is under popular control.[103] However, the theory is relatively silent or ambiguous regarding whose control is required to authorise state power. As indicated at the end of the previous chapter, Pettit assumes that all citizens of the state should join the system of popular control. Citizens refers to at least 'all adult, able-minded and more or less permanent residents'.[104] This view does not take legal citizenship as a precondition for access to the system of popular control, but it does not make room for temporary residents to join either.

become. For those who expect a thicker form of democratic procedure, such as deliberation, reciprocity, rationality etc, the *demos* has to be more exclusive compared with democracy as a simple model of vote aggregation. How the two should be balanced against each other depends on how the ideal democracy is perceived. Thus, the challenges posted by Miller are: Is it possible to have a boundless *demos* while maintaining active and engaging democracy? If an unbounded *demos* must lead to ultra-thin democracy, is it still a desirable vision of the *demos*?

[103] Pettit, *On the People's Terms* (n 95) ch 3.

[104] ibid 130.

In fact, freedom as non-domination should imply a wider view on democratic inclusion than Pettit's citizenship model may allow. To be theoretically consistent under freedom as non-domination, the question to whom legitimacy of state power is owed should be informed by the inquiry into who are vulnerable to public domination of the state. This is because popular control over the state is precisely meant to prevent it from imposing alien will on relevant subjects. Vulnerability to state domination is therefore the starting point to decide who should be entitled to exercising control over the state.[105]

In this regard, not only do citizens and permanent residents experience vulnerability to uncontrolled interference of the state.[106] Temporary visitors and people outside the state territory alike could be confronted by state interference over which they have no control. As Abizadeh observes, the border regime potentially renders anyone in the world its subjects.[107] We may thus be forced to conclude that, as Abizadeh does, the entitlement to political control should radically be extended to the global population. However, this conclusion is liable to hastiness in my view since it fails to give political equality proper weight when considering who should count as political members.

Equal Membership v. Proportional Participation

As explained in the previous chapter, popular control that is strong enough to resist state domination is only achievable, Pettit argues, through democratic institutions which enable individuals to exercise individualised, efficacious and unconditioned influence over the government towards the direction equally acceptable to all.[108] The idea of 'individualised influence' expresses a conception of political equality under which each member should be granted equally easy access to an equal opportunity of exercising influence.[109] That is, no matter who is entitled to joining the *demos* which exercises control over the state, we expect that each participant not only has a voice in forming collective political will, but also an *equal* voice.[110]

[105] Sager (n 95) 193.

[106] ibid 196.

[107] Abizadeh, 'Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders' (n 94) 44–45.

[108] Pettit, *On the People's Terms* (n 95) 170.

[109] ibid 169.

[110] Erman, 'The Boundary Problem and the Right to Justification' (n 101) 133.

In comparison, theorists of open-ended *demos* tend to hold a different interpretation of political equality. They suggest that opportunities of political participation are to be attributed in proportion to people's stakes in respective decisions, either the weight of affected interests or the degree of state coercion. For instance, although Abizadeh argues for an unbounded *demos*, given that state coercion potentially reaches out to the global population, he nevertheless emphasises that equal democratic voices for all is not required. He argues that political equality only mandates that rights and opportunities of political participation are distributed based on equal concern for all. This, however, does not mean that each individual should be given the same opportunities.[111] Therefore, taking the border regime as an example, participatory rights can be distributed according to intensity of state coercion. The weakest rights can be given to those who only have remote interest in entering a state *S*; louder voices can be granted to people who cannot have adequate options to maintain autonomy without the option to enter *S*; and citizens of *S* are supposed to enjoy the strongest democratic rights.[112]

The suggestion of 'proportional participation' renders the unbounded *demos* theory more feasible, but also less radical. Distributing participatory rights based on the degree to which people are subject to state coercion appears desirable at first glance, because otherwise it is counterintuitive to insist on giving full democratic rights to people remotely coerced. Imagine the uneasiness that people with no knowledge about a state *S,* and thus do not ever long to enter *S,* are entitled to an equal vote with citizens of *S* regarding the border regime of *S*. However, the proportional approach also seriously waters down an essential aspect of what it means to be part of the *demos*. It used to be strongly assumed that an equal say in the collective decision-making process is granted to each individual who belongs to the *demos*.[113] Now the unbounded-*demos* no longer maintains the equal-say assumption. This move not only changes

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[111] Arash Abizadeh, 'The Democratic Legitimacy of Border Coercion: Freedom of Association, Territorial Dominion, and Self-Defense' (2015) 8 <https://mershoncenter.osu.edu/media/media/publications/misc-pdfs/Abizadeh_Democratic_Legitimacy_Border_Coercion.pdf> accessed 1 May 2015.

[112] Abizadeh, 'Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders' (n 94) 55.

[113] Thomas Christiano, 'A Democratic Theory of Territory and Some Puzzles about Global Democracy' (2006) 37 Journal of Social Philosophy 81, 87 (explaining the underlying connection between the moral equality of individuals and having an equal say in democratic decisions).

the ideal of the *demos* as we know it, but also runs into endless retrogression about distribution of proportional voices.[114]

Threshold of Domination

The challenge is hence this: we hope to maintain the ideal of equal voices among political members, which is integral to the popular control system required by non-domination, while also recognising that a domination-based theory of democratic inclusion has the tendency to encompass an extensive *demos*, including those who are only remotely dominated by the state. The more desirable approach for this dilemma of political equality, I suggest, is to set up an intensity threshold of state domination for the purpose of full democratic participation. Although it is not easy to formulate a threshold in abstract, the degree of legal subjection experienced by citizens can be a useful reference point for considering normative boundaries of the *demos*.

We may think that full democratic participation is not always needed when minor, occasional state domination occurs. Democracy is not the only mechanism of popular control; and democratic elections alone are not sufficient to control all forms of public domination either. The rule of law, the bill of rights, access to courts, a vibrant civil society etc (or procedural constraints of contestatory democracy in Pettit's term)[115] are all part of institutions to control state power in the republican view. That is, these institutions outside electoral democracy also share a partial function of popular control over some forms of state domination. However, when intensity of state domination escalates to a particularly high degree, full and equal opportunities to participate in electoral democracy will be required, since it is the main mechanism for formulating standards for public interests. At minimum, we should be able to agree that the level of state domination endured by citizens is high enough to necessitate full rights to join democratic will-formation to resist state domination. Without democratic rights to join the system of popular control, citizens are subject to uncontrolled state power which could interfere with their life options through the legal system at its will.

The intensity of domination that citizens experience within the state territory, roughly speaking, is *total subjection to the entire legal system of state with no easy escape*. In the same

[114] Namely, the question regarding what proportion of voices each participant should enjoy on the issue of attributing political voices should depend on the result of proportional political voices distributed, because the result reflects the intensity of political coercion. And yet, we cannot know the result, unless we have distributed proportional voices to the *demos* and then decided the question democratically in the first place.

[115] Philip Pettit, 'Democracy, Electoral and Contestatory' in Ian Shapiro and Stephen Macedo (eds), *Designing Democratic Institutions: Nomos XLII* (New York University Press 2000) 129.

spirit, non-citizens who are subject to the degree of domination similar to or higher than the degree of subjection that citizens endure under the law should be considered as potential bearers of full rights to equal democratic participation. When the state can exercise its power to dominate people to such intensive and comprehensive degree, the democratic participation of those who are subject to it would be required to legitimise its power.

This threshold still links democratic inclusion with vulnerability to domination; but adds a qualification to respond to the concern of political equality. The threshold is in line with Pettit's understanding of 'citizens', which includes long-term residents, and yet further broadens the Pettitian view to encompass some categories of temporary residents under comprehensive and intensive state domination. This view implies that territorial presence of an individual is an important condition for s/he to be included in the *demos*, while time of stays of the individual is not a decisive factor for democratic inclusion. This contention will be further explained in Subsections 3.2.3 and 3.2.4.

Case of TMWs

The above sketch leaves many questions open. For instance, how to measure and compare the degrees of exposure to domination among individuals. It is difficult to set up objective criteria for measurement; and, for my purpose here, a comprehensive theory of measuring domination might not be needed either. Rather than taking a top-down approach by inferring from abstract criteria of comparison, it appears more concrete and manageable to take a bottom-up approach by observing the status and legal treatment of different categories of non-citizens on an *ad hoc* basis.

Based on the intense legal regulation and unbalanced employment relations experienced by TMWs, they are likely to endure a similar, if not higher, degree of domination as citizens do during their stay. As explained in Chapter 4, TMWs are subject to structural, systemic and extractive private domination which is supported by laws. Here I only recap some of the points. First, as foreigners, they are subject to the immigration regime backed up by potential deportation and detention, while citizens enjoying territorial security. The border control regime leads to close monitoring of TMWs' physical presence on a daily basis, which largely limits their mobility and privacy. In addition, as workers, TMWs are channelled into precarious jobs, in which they have little leverage to negotiate terms and conditions that are predetermined by sending and receiving states and the employer. Next, alienage interacts with unbalanced power in TMWs' work relations and leads to the curtailment of fundamental rights, such as employment mobility, involvement in unions, legal remedies and social insurance. TMWs' family life is not allowed due to immigration limits and the market reality. Indeed, as

repeated throughout, they are admitted and hired particularly because they can be paid less, deprived of many rights and subject to more severe domination, both publicly and privately, in a way that citizens cannot. Finally, in addition to all of the above, by mere entry, TMWs are certainly subject to the entire legal system of the host state. In sum, if this level of public domination were not high enough to trigger the threshold which mandates equal democratic control to justify, no other cases would.

Revisiting Exits and Consent

It might be argued that exits and consent distinguish the degree of domination experienced by TMWs from citizens. While citizens are born into the state, having no chance to disapprove or escape the law, TMWs come by choice and they may return if they wish.[116] TMWs' voluntary entry is an act of consent to obey the law of the host state,[117] including the extra control particularly targeting TMWs, despite the absence of democratic rights. Therefore, TMWs are not exposed to a similar intensity of public domination as citizens are.

Objections related to exits and consent are discussed in other contexts[118] and will be raised again later in responding different challenges.[119] Here, however, the focus is on whether exits or consent lowers the vulnerability of TMWs to state domination, so that TMWs should not gain full rights to democratic participation. Regarding exits, conceptually, I oppose the view that existence of exits negates domination, as Lovett's definition of domination suggests.[120] Empirically, I further doubt whether there are easy exits for TMWs to escape domination of the host state under heavy debts, if not for the more profitable jobs. More importantly, the level of dependency (measured by exit costs) alone is not a decisive or sensitive index for severity of domination, because dependency could be positive, and therefore not always the lower the better.[121] A profitable job might be harder to quit than a poorly-paid job, all other things being equal; but this does not mean that a well-paid worker is more dominated than an

[116] Stilz (n 27) 305.

[117] Kieran Oberman, 'Immigration, Citizenship, and Consent: What Is Wrong with Permanent Alienage?' (2016) 25 Journal of Political Philosophy 91, 92; Miller, 'Democracy's Domain' (n 81) 222.

[118] The exit approach in the neo-republican context is challenged in Subsection 4.3 of Chapter 4; the view taking consent of the ruled as the basis of political legitimacy is challenged in Subsection 4.1 of Chapter 5.

[119] See discussion in texts accompanying *infra* notes 153 and 154.

[120] See Chapter 4, Subsection 4.3, under the subtitle Lovett's Exit Approach.

[121] Frank Lovett, *A General Theory of Domination and Justice* (OUP 2010) 51.

exploited worker. The exit cost for leaving one's family is likely to exceed the cost of quitting a job; and yet this by no means shows that the family is more dominating than the employment. Likewise, the fact that citizens have a special tie with the state which is not available to TMWs, does not support the conclusion that TMWs are less dominated during their stay. The tie of citizenship heightens dependency, but also increases security. Many factors other than the exit alone contribute to the level of state domination.

Regarding consent, it is first questionable whether voluntary entry can be taken as an expression of consent to the law or to terms and conditions for their stay. Entry of undocumented migrants, for example, might well be voluntary. Yet, by entry they express rejection to compliance. In my view, TMWs' entry expresses nothing more than citizens' stay. Both are a mix result of individual agency and limited options, not necessarily an assent to state authority. It is also often noted that TMWs cannot be said to migrate voluntarily, given their economic needs.[122] Notwithstanding, even if TMWs do come with genuine choices and their entry expresses consent to the restrictive laws of the host state, the fundamental issue remains the moral significance of consent in justifying domination. I have rejected consent as the sufficient basis to legitimise domination, just as voluntary slavery is illegitimate all the same.[123] Reversely, refusal of consent does not render a law illegitimate either. People may remain obligated to obey the democratically legitimate laws that they refuse to agree.[124] Most importantly, being a valuable expression of agency as it might be, consent cannot replace democratic participation to control state power. As suggested in Chapter 5, democratic procedure is a dynamic, epistemic, will-formation process which generates knowledge and creates options about political ends as much as makes decisions.[125] An opportunity to consent, by contrast, does not necessarily offer the chance to shape collective understanding about domination and available options. Therefore, voluntary entry of TMWs cannot make them less dominated by the host state compared to citizens.

To conclude, TMWs are exposed to a similar or higher level of state domination as citizens, which would require full democratic participation as citizens have. The objections of exit and consent cannot plausibly support that TMWs are less dominated than citizens. It will be

[122] E.g. Walzer (n 16) 58.

[123] See Chapter 5, Subsection 4.1 under the subtitle, 'Consent'.

[124] HLA Hart, 'Are There Any Natural Rights?' (1955) 64 The Philosophical Review 175, 185; John Rawls, 'Legal Obligation and the Duty of Fair Play' in Samuel Freeman (ed), *Collected Papers* (Harvard University Press 1999) 117.

[125] See Subsection 4.2 of Chapter 5.

further proposed below that the democratic inclusion theory of non-domination should be qualified by territoriality (Subsection 3.2.2), while indifferent to past or future time of stays (Subsection 3.2.3).

3.2.2 Territorial Bounded Demos

The democratic boundary drawn under the lens of non-domination is still confined by the territorial boundary of the state. In other words, setting foot on the territory of the host state is the premise for foreigners' access to political participation. It rejects the tendency of an endlessly open *demos* suggested by the all-subjected and all-affected principles.[126] Limiting the scope of the dominated people under state power at the verge of the territorial border faces the challenge that the state border is itself an extensive regulatory regime which takes foreigners as its primary subjects. An explanation for the difference that the state border makes requires an explanation: why do insiders enjoy political rights, while those who are on the other side have none? I will first reject Pettit's view that the border is not a domain of democratic control and proceed to confirm democratic significance of territoriality.

Pettit's Strategy

Pettit suggests a possible strategy to deny democratic participation for foreigners outside the territory. Perhaps surprisingly, he denies that the border regime dominates people, because it is not 'intentional interference' in his view. It hence removes the need for democratic legitimacy away from the border regime altogether.

More specifically, Pettit argues that it is simply a historical and political necessity that individuals cannot choose to live in another state other than the one where they currently live. 'No state can open its borders to non-residents in general, on pain of internal malfunction or collapse; as a matter of political necessity, every state has to place limits on who can enter and in what numbers,'[127] Pettit claims. Hence, unavoidably the state has to adopt selective entry policies. As the state cannot admit all, the state's decision is not a 'fully voluntary interference'.[128] Its rejection does not represent an alien will to dominate. The fact that some

[126] See texts accompanying *supra* notes 96 and 97. However, my view here does not exclude overseas citizens from rights to political participation. *But see* Lopez-Guerra (n 94).

[127] Pettit, *On the People's Terms* (n 95) 161.

[128] ibid 162.

must be rejected at the border is just like the natural fact of gravity. It conditions rather than infringes upon freedom.[129]

I have argued in Chapter 4 that intension of the powerholder should be insignificant to determine whether domination exits. [130] However, even if intension is taken into consideration, this is still a surprising conclusion to draw from the republican perspective. The border regime appeals to coercive and forceful measures to keep would-be migrants out. Like Carens vividly depicts: 'borders have guards, and the guards have guns,'[131] the regime directly obstructs numerous people's choices with the threat of force. No other institutions more graphically demonstrate the coercive power of the state than the border does. Even if an open border is unattainable and is beyond the will of the state, it certainly cannot mean that the state has no intension whatsoever regarding the wide range of decisions about how the border is designed and implemented. It is almost like claiming that because a stone that is thrown will fall due to the unavoidable fact of gravity I therefore cannot have the intention to hit you if I throw a stone and it falls on you.

Pettit perhaps rightly depicts the border as a necessary evil in the scenario of resource scarcity, but he wrongly attributes its moral implication. Like Costa points out, in a zero-sum game where the party has no other choice but to gain from loses of the other, it is more properly described as a justifiable interference into the other's freedom, rather than non-interference.[132] Pettit also reaches a similar conclusion with a different example: two people rush to the only newspaper available in the room; one grabs it first. Here Pettit suggests that the act to grab the newspaper is an invasive hinderance, which is 'inherently inimical to freedom of choice' and thus dominating.[133] It appears to me that the newspaper example and the case of selective borders have a similar condition. That is, available resources cannot satisfy everyone, but can only satisfy some. We may say it is a condition of 'moderate scarcity', using Rawls's term.[134] While the condition of moderate scarcity itself is not dominating, an act

[129] ibid 162–163.

[130] See discussion in Subsection 3.3.2 of Chapter 4.

[131] Carens, 'Aliens and Citizens: The Case for Open Borders' (n 12) 251.

[132] M Victoria Costa, 'Republican Liberty and Border Controls' (2016) 19 Critical Review of International Social and Political Philosophy 400, 406.

[133] Pettit, *On the People's Terms* (n 95) 40.

[134] John Rawls, *A Theory of Justice* (OUP 1999) 127.

to outcompete other's access to the scarce resources for one's own enjoyment is one of interference and rightly raises the concern of domination.[135] Now, suppose that instead of letting people directly compete against each other for resources, the state steps in with an institution of distribution. This move will necessarily produce winners and losers, which certainly should be a concern of domination, too. The border regime is a typical institution to distribute admission of entry. In Walzer's words, admission is 'the first and most important distributive question'.[136] In this regard, scarcity is indeed unavoidable, but it rather makes the question of legitimacy and justice of the border regime more pressing, not relinquishing the border regime from moral scrutiny.

Significance of Territorial Presence

Pettit's view to remove the border from the domain of democratic legitimacy is not plausible. The proper departure point should be recognising the border regime as state coercion over people outside and inside the territory;[137] and such coercion requires democratic legitimacy. Admitting that the border is prone to dominate, however, does not directly lead to the conclusion that everyone who has the distant possibility of being subject to a foreign border should join the *demos* of the state. Instead, presence in the territory fundamentally intensifies the dominating relation between individuals and the state; intensity of domination in turns puts a normative burden on the state to justify political exclusion of those who are dominated.

To begin with, the republican theory of non-domination mainly concerns the *legal* relation between the state and individuals; [138] and territoriality is usually the premise of comprehensive legal subjection. While foreigners outside the territory may be occasionally subject to the law of the state, e.g. border regulations or serious crimes, they are not subject to the legal system as a whole without first setting foot on shore.[139] Meanwhile, under the traditional Westphalian state system, the legal jurisdiction of the state is in principle limited

[135] See also discussion in Subsection 3.3.2 of Chapter 4.

[136] Walzer (n 16) 31.

[137] But see David Miller, 'Why Immigration Controls Are Not Coercive: A Reply to Arash Abizadeh' (2010) 38 Political Theory 111. Miller disagrees that border controls coerce would-be immigrants. He distinguishes 'prevention' from 'coercion' and categorises border operation as the former. As a result, he rejects Abizadeh's conclusion that foreigners are entitled to democratic participation due to their subjection to the coercion of border controls.

[138] Sager (n 95) 192.

[139] Ludvig Beckman and Jonas Hultin Rosenberg, 'Freedom as Non-Domination and Democratic Inclusion' (2018) 24 Res Publica 181, 188–89.

to its territory.[140] In other words, territory is 'the geographical domain of jurisdictional authority' of the state.[141] Although the state might unilaterally make laws with extraterritorial effects, its power to enforce the law outside the territory is significantly weakened. It is therefore less capable of interfering with options of people who are outside the territory with legal means at will.[142] Thus, public domination beyond territory is less of a concern.

Next, being subject to the entire legal system is the appropriate minimum qualification to be included in the *demos*, because it maintains correspondence between possible outcomes and potential inputs of the political process. The democratic system at the national level has the authority to make decisions about comprehensive legislative affairs, rather than limited to specific laws or subject matters. Thus, access to the control of the comprehensive legislative power should also be limited to people who are prone to domination of such comprehensive power. Put differently, if it is agreeable that those who are subject to domination of the whole legal system should be entitled to control the system, then reversely, those who are not dominated by the whole legal system should not have access to control it, hence, not be a part of the *demos*.

That said, I do not deny that being subject to individual laws extraterritorially still raises the concern of domination. It cannot be denied that justification and accountability are owed to people under those laws, too. Following Bohman, however, I take public domination against people outside the border to anticipate shared obligations of states to establish appropriate forms of democratic accountability suitable to the global community.[143] Not all forms of democratic deficits can be solved by democracy at the level of sovereign states. Democracy beyond borders is a hotly debated topic which cannot be pursued here. For the current purpose of vindicating political participation for TMWs, it should be adequate to make the case for the territorially bounded *demos*, while rejecting the theory of the unbounded *demos*.

3.2.3 Rebutting Temporariness

While the democratic inclusion theory under non-domination should be sensitive to the legal space of the state, it, however, should be insensitive to people's past or future duration of stay in the territory, since time appears to be irrelevant to the domination-prone status of

[140] Cedric Ryngaert, *Jurisdiction in International Law* (Second Edition, OUP 2015) 21.

[141] Margaret Moore, *A Political Theory of Territory* (OUP 2015) 26.

[142] Beckman and Rosenberg (n 139) 190.

[143] James Bohman, 'Republican Cosmopolitanism' (2004) 12 Journal of Political Philosophy 336, 346.

foreigners. As soon as entering the jurisdiction of a state, people are subject to the entire legal system, hence likely to be dominated by it. If democracy is meant to resist public domination, then rights to political participation are needed from day one after entry. My view here would be confronted by two common objections: the requirement of democratic mores and ridicule of tourist voting. I respond to each in turn.

Rationale of Democratic Mores

In the conventional citizenship model, rights to democratic participation only await at the finish line of years-long naturalisation. The length of stay contributes to immigrants' ascending the ladder of rights towards the apex of full citizenship, including votes and standing for election. It is believed to be correct to withhold entitlements to political participation for years because it takes time to cultivate democratic mores.[144] Casting a vote is not only a right, but also deemed a responsibility and a form of political power. Hence, the quality of how political rights are exercised matters to the democratic society.[145] Supposedly, letting people who are not immersed in a society for years to vote would impair the quality of democracy. For this reason, TMWs are unfit to participate in democratic mechanisms in the host state. Their short term of stays makes them unprepared for democracy in a foreign country.

The rationale of democracy mores has an assimilationist tone, which is sometimes invoked to justify selective immigration policies by egalitarian liberals[146] and racist immigration policies alike.[147] The argument thus should be cautiously made, and narrowly applied, in the context of immigration policies to avoid unchallenged ethical biases sneaking in through the backdoor.

Arguing that TMWs lack the democratic mores necessary for rights to political participation, as in Miller's view, is inconsistent with judgment about rights of TMWs elsewhere. In general,

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[144] Miller, *Strangers in Our Midst* (n 26) 127.

[145] For this reason, Miller supports the requirement of the citizenship test, which I find objectionable (ibid 128). For commentators against the test, see e.g. Owen (n 94) 649; Joseph Carens, 'The Integration of Immigrants' (2005) 2 Journal of Moral Philosophy 29, 38–39.

[146] Bruce Ackerman, *Social Justice in the Liberal State* (Yale University Press 1981) 94–95 (Suggesting that admitting more incoming immigrants than the number that the liberal state can assimilate will destroy the entire liberal dialogues and rights guaranteed for citizens).

[147] Such as the 'unassimilable-race' rationale for anti-Chinese sentiment in nineteenth-century America, exemplified in Justice Harlan's dissenting opinion in the *Plessy* case: 'There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race.' *Plessy v Ferguson* (1896) 163 US 537 (US Supreme Court) 561.

TMWs ought to be granted the right to join trade unions and industrial actions.[148] Collective labour rights have strong correlation with democracy. They embody democratic ideals in the industrial contexts[149] and play a significant role in realising active democracy.[150] Freedom to association, an essential civil and political right, is taken to be the foundation of involvements of trade unions. [151] It is thus tempting to propose that since TMWs are given collective labour rights, and most civil and political rights (except for democratic participation), TMWs enjoy meaningful voices and protection. They have the most apt forums to make themselves heard.

However, just like democracy, unionism requires strong democratic mores to be successful. It involves casting votes to elect representatives, making collective decisions, negotiate between conflict interests and views, demonstrating solidarity, accepting disagreements etc. Organising workers, especially migrant workers, requires considerable political skills and effort. Yet, TMWs are expected to possess such skills to voice and protect themselves via this highly politicalised channel. Moreover, partly due to this expectation of self-protection through unions, absence of rights to political participation is justifiable. This line of argument thus must be a tacit affirmation that TMWs' democratic mores and political skills are well-cultivated to take full advantage of collective labour rights. Otherwise, the thought that TMWs can protect themselves via unions falls into lip service and tokenism.

Admittedly, as a matter of fact, migrant workers are disadvantaged in fully exercising collective labour rights. Yet, as a matter of principle, they are not deprived of the rights because of factual disadvantages or speculation about their 'trade unionism mores'. It thus seems to me an off-balanced judgment to recognise TMWs' agency and skills in trade unionism, while denying them the right to vote for being unaccustomed to democracy.

In sum, TMWs might have shorter stays in the host state than people with permanent status, but this does not mean that they lack the democratic capacity to take part in voting. The next criticism shifts the focus to correlation of time and domination, arguing that granting

[148] E.g. ICRMW (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 art 26.

[149] Victoria Mantouvalou, 'Democratic Theory and Voices at Work' in Alan Bogg and Tonia Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (OUP Oxford 2014) 217–220.

[150] Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart Pub 2009) 255–57 (Arguing that the right to strike is the condition to realise deliberative democracy).

[151] Alan Bogg and Cynthia Estlund, 'Freedom of Association and the Right to Contest' in Alan Bogg and Tonia Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (OUP 2014).

democratic membership to sojourners would lead to tourist voting. I reject that tourists are morally analogous to TMWs.

Distinguishing Tourists

It is a criticism of all coercion-based theories of democratic inclusion, which take time of stays as irrelevant, that they cannot distinguish transients from long-term residents or citizens. Allegedly, coercion-based theories would grant democratic rights to tourists, foreign students, TMWs and permanent residents alike, for they appear to be similarly subject to state coercion or domination. However, this conclusion cannot be right, as the criticism goes, since time should matter to assessment of coercion and domination. Firstly, the power of the state is stronger over those who have a long-term life plan in the territory than passers-by.[152] Song thus takes TMWs to be closer to travellers than long-term residents in this regard and denies them rights to vote because they do not plan to stay permanently. Secondly, time affects foreigners' exit costs. A longer stay incurs higher exit costs which further increases dependency on social relationships in the host state and escalates risks of domination.[153] Consequently, Benton argues, democratic participation should be warranted on the basis of long-term stays but is redundant to new arrivals since their exit costs are relatively low.[154] The upshot is that TMWs lack both future and past stays which are long enough to vindicate their democratic inclusion.

To respond, it should first be emphasised that the non-domination theory of democratic inclusion should be sensitive to levels of domination to which different categories of non-citizens are vulnerable. It only refuses to take temporariness as the sole basis of democratic exclusion. Agreeably, the degree of domination varies depending on circumstances, including the length of stay in the past or future. However, time is but one factor, and its implications for domination are far from non-equivocal. It is not always the case that the longer one stays, the higher one's exit costs are. Importantly, as noted, TMWs usually incur debts for expenses of cross-border migration. Early return means that they cannot earn enough to repay debts, which can crush their family in the home country financially. Their exit costs are thus at the highest upon arrival and then becomes less formidable as they stay longer to pay back debts and attain savings. However, they also build up social connections in the host state over time

[152] Sarah Song, 'The Significance of Territorial Presence and the Rights of Immigrants' in Sarah Fine and Lea Ypi (eds), *Migration in Political Theory: The Ethics of Movement and Membership* (OUP 2016) 239.

[153] This inference is based on Lovett's definition of domination, which I do not entirely agree with, as argued in Subsection 3.2.

[154] Benton (n 79) 411.

and become more vulnerable to forced removal. In other words, a longer stay simultaneously reduces economic dependency and increases social dependency of TMWs. The impact of time on exit costs is therefore manifold, pulling in opposite directions. It does not support the conclusion that new arrivals necessarily suffer lighter public domination.

It is equally wrong, in my view, to bracket TMWs with tourists on the basis that they both do not stay for long. Again, TMWs should be democratically included because they are prone to state domination to such intensity comparable to that of citizens. TMWs are clearly distinguishable from tourists in this regard. For those who have the resources to visit as consumers, they do not come to be tied with a restrictive legal relationship sanctioned with coercive state power. They do not enter with the high personal prices of debts, limited mobility, around-the-clock monitoring and deprivation of family life. The intense regulatory power over TMWs is not similarly exercised on foreign tourists, investors, students or professional workers.[155] For tourists, factors including a stay as short as few days, absence of affiliation, casual purposes, welcoming policies, voluntary entry and easy exits all contribute to the lower level of domination imposed on them. Many of these conditions just do not exist in TMWs' case. It therefore should be fair to conclude that tourists endure lower levels of domination as opposed to many categories of people subject to state domination: citizens, permanent residents, foreign investors, overseas students and TMWs. Tourists are therefore an inappropriate analogy to justify the deprivation of political rights of TMWs.

Finally, temporariness *per se* is already an unpleasant condition. It is worth noting that the time limit of stay which successfully makes TMWs 'irrelevant' to political rights in many commentators' eyes is precisely the product of the political structure which excludes democratic participation of TMWs. This represents exactly the kind of domination which should invite contestation and democratic control by the dominated, rather than serve as the *prima facie* foundation to deprive political participation.

3.2.4 Concluding Remarks

Section 2 discusses two commonalities of the citizenship and rights-based approaches: (1) ethical significance of temporariness and (2) legal citizenship as the prerequisite for democratic participation. The non-domination theory of democratic inclusion argues against both. On the one hand, the non-domination theory of democratic inclusion rejects the citizenship model that takes the boundaries of *demos* as historically given. It loosens the tie between democracy and legal citizenship by drawing democratic boundaries according to

[155] But see Ypi (n 27) 156–57; Stilz (n 27) 305.

vulnerability to state domination. On the other, it also downplays the ethical role of time by more sensibly observing the relationship between duration of stay and intensity of domination. Taken together, the non-domination theory of *demos* reflects an alternative model of citizenship in which not only rights, but also democratic participation are detached from legal status and identity.

Granting rights of political participation is not, and need not to be, the same with offering legal citizenship.[156] It is compatible to extend democratic boundary beyond the citizenry, while attributing special bonds and obligations to the status of citizenship,[157] a view that liberal nationalism or communitarianism might wish to defend.[158] Citizenship may still require years of continuous residence to acquire for its link with identity, fidelity, senses of community, territory security, and civil virtues etc. Yet, rights to democratic participation should be readily available to competent adults[159] since democratic inclusion is ultimately informed by the domination-prone position, rather than terms of stay or nationality.

3.3 Responding to Objections

I would like to end my arguments in this section by responding to two important and related objections which are internal to the republican tradition. The first is about extending democratic inclusion to people who do not share the same national identity and cultural backgrounds would undermine necessary conditions for republican citizenship and democracy. The second concerns whether democratic self-determination is violated if foreigners are allowed to vote, especially in elections of national level.

[156] Sager (n 95) 192; Fine (n 94) 625.

[157] Fine (n 94) 627.

[158] E.g. Margaret Moore, 'Normative Justifications for Liberal Nationalism: Justice, Democracy and National Identity' (2001) 7 Nations and Nationalism 1, 3–4; Yael Tamir, *Liberal Nationalism* (Princeton University Press 1995) 121–39; David Miller, 'The Ethical Significance of Nationality' (1988) 98 Ethics 647.

[159] It involves the problems of disenfranchisement of the mentally ill, the young and the imprisoned. Although I aim to keep the threshold of voting competence as low as possible to encompass all who are subject to state domination, I recognise that the requirement of the cognitive capacity could be a challenge to my theory. See also Will Kymlicka and Sue Donaldson, 'Inclusive Citizenship Beyond the Capacity Contract' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (OUP 2017).

3.3.1 Objection of Democratic Conditions

It is often argued that democracy requires practical conditions. Exactly what conditions will be needed depends on the favoured democratic ideal. Ideal democratic models are profuse in supply. Miller helpfully categorises them into a spectrum with the liberal democracy model at one end and the radical at the other. The liberal model takes democracy to be a useful mechanism for aggregating preferences, protecting interests and enhancing welfare of the constituency. In contrast, the radical model places more emphasis on the democratic procedure which facilitates decisions that everyone can identify. For this, everyone needs to feel that they have equal influence, and the final decision is a product of fair compromise. It also values deliberating and mutual recognition. [160]

Shared Commonalities as Conditions of Democracy

The liberal model appears to be a thinner, instrumental democratic ideal, while the radical model is thicker and non-instrumental. The more we move towards radical democracy, Miller argues, the more demanding it is for the quality of the democratic people. A people of a radical democracy are expected to show sympathy, to share ethical convictions, to trust each other, and to act reciprocally so that they can work collectively towards common ends.[161] A people with such sense of trust is only possible when they share commonalities such as culture or national identity.[162] Therefore, Miller believes that it is not possible to expect engaging, active democracy and yet suggest a fluid, open-ended boundary of *demos*.[163]

The above argument should concern republicans, because the republican conception of citizenship traditionally resonates with the radical democracy ideal. [164] Citizenship is not primarily perceived as a passive legal status with rights and benefits, but as an active role by which citizens fully participate in public life with public virtue. [165] Republican citizenship

[160] Miller, 'Democracy's Domain' (n 81) 205–06.

[161] ibid 208–09.

[162] ibid 212.

[163] ibid 226.

[164] Richard Bellamy, *Citizenship: A Very Short Introduction* (OUP 2008) 3, 31–36 (describing the ancient Greek root of citizenship idea).

[165] Iseult Honohan, 'Liberal and Republican Conceptions of Citizenship' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (OUP 2017) 88–90; Richard Dagger, 'Republican Citizenship' in Engin F Isin and Bryan S Turner (eds), *Handbook of Citizenship Studies* (SAGE Publications Ltd 2002) 150; Miller, *Citizenship and National Identity* (n 86) 82–83.

requires people to deliberate together about the common good, and to act responsibly to bring about the good, sometimes by giving up own's own views and interests.[166] People have to be confident that others would be similarly devoted and rational.[167] The republican *demos* therefore should be a steady group of people with long-term interactions. A common language is needed to facilitate deliberation of the common good, a common culture to enable trust, and a common identity to nurture reciprocity.[168] Without these community ties, people will not trust others who they do not know personally.[169]

The argument that (thick) democracy requires (cultural) commonalities thus appears to provide a reason internal to republican tradition and democratic theories for excluding foreigner who do not share similar culture backgrounds politically.[170] However, it is an empirical observation that is hard to verify[171] and vulnerable to counter examples. Miller is confident that a successful democratic state that does not build on national ties is unlikely to be found.[172] Nonetheless, many polities consisting of multicultural peoples manage to have

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[166] Miller, *Citizenship and National Identity* (n 86) 84–85.

[167] David Miller, *On Nationality* (OUP 1995) 91.

[168] Moore, 'Normative Justifications for Liberal Nationalism: Justice, Democracy and National Identity' (n 158) 8; Will Kymlicka, 'Territorial Boundaries: A Liberal Egalitarian Perspective' in David Miller, Sohail H Hashmi and Sohail H Miller (eds), *Boundaries and Justice: Diverse Ethical Perspectives* (Princeton University Press 2001) 266 (emphasising that a shared language is needed for deliberative democracy).

[169] David Miller, 'The Left, the Nation-State, and European Citizenship' [1998] *Dissent* 47, 48; Miller, *On Nationality* (n 167) 92.

[170] This argument is not confined to the republican tradition. John Stuart Mill suggested that people of different national identities cannot run a democratic government together: 'Free institutions are next to impossible in a country made up of different nationalities. Among a people without fellow-feeing, especially if they read and speak different languages, the united public opinion, necessary to the working of representative government, cannot exist.' *The Collected Works of John Stuart Mill, Volume XIX-Essays on Politics and Society Part II* (John M Robson ed, University of Toronto Press 1977) 547 <http://oll.libertyfund.org/titles/234> accessed 1 May 2018.

[171] David Owen, 'Resident Aliens, Non-Resident Citizens and Voting Rights: Towards a Pluralist Theory of Transnational Political Equality and Modes of Political Belonging' in Gideon Calder, Phillip Cole and Jonathan Seglow (eds), *Citizenship Acquisition and National Belonging* (Palgrave Macmillan, London 2010) 68–69 (arguing that the evidence supporting Miller's view on cultural nations can equally support thinner notions of demos, such as Habermas's constitutional patriotism).

[172] Miller suggests: 'One test of this argument is to see whether we can find states whose members lack such common identities but are nonetheless democratic. The search will, I confidently predict, be in vain.' *On Nationality* (n 167) 88. In a more recent work, Miller points out that the empirical question is hard to answer particularly due to the non-existence of a counter example: We cannot find an existing democratic welfare state which does not hold people with national identity. David Miller, 'Immigrants, Nations, and Citizenship' (2008) 16 Journal of Political Philosophy 371, 378–79.

well-functioning democracy, such as Canada.[173] Contrarily, there are also people(s) sharing values and moral conventions hostile to democracy. Such common cultures may inhibit democratisation, rather than sustain democracy. The 'Asian Values', for example, was a popular ideology which praised social harmony, collectivism and loyalty to authority etc.[174] These ideas arguably deprioritise some backbone notions of good democratic politics, e.g. 'western' political competition, accountability, political freedom, rule of law etc. Imagine that a people have a common language, belong to the same ethnicity but commit to Asian Values. Would the imagined people be more capable of building an engaging, vibrant democracy than peoples of diverse cultural identities, say New Zealanders, would? Not necessarily. Similarly, a shared cultural experience may give people reasons, true or false, not to trust each other or act reciprocally. Individuals might find that their national fellows less trustworthy in terms of political accountability and rule of law than e.g. Germans or Norwegians, exactly because they share the view to respect authority or belittle corruption.[175] Moreover, the 'shared' language and culture could be a product of unjust assimilation policies in the past, which represent historical wounds, generate irreconcilable divisions, and become sources of regional distrust. In short, although devoted citizenship and engaging democracy require supportive conditions, shared culture and languages may or may not be part of them.

My point is not to deny the benefits of shared languages, historical experience, culture and identity for democracy. Instead, I only argue for the moderate position that active democracy is possible despite some foreign residents joining it. Partial severance between nationality and rights to vote will not render vibrant democracy unattainable. In fact, in history there is constant divergence between boundaries of the *demos* and the citizenry.[176] The right to vote

[173] To be sure, commentators in this vein recognise that multicultural states can have successful democracy. However, it is the second-best scenario and necessitates assimilation policies. Miller, 'Immigrants, Nations, and Citizenship' (n 172) 380; Moore, 'Normative Justifications for Liberal Nationalism: Justice, Democracy and National Identity' (n 158) 14 (arguing that divided national identities makes representative democracy harder).

[174] Diane K Mauzy, 'The Human Rights and "Asian Values" Debate in Southeast Asia: Trying to Clarify the Key Issues' (1997) 10 The Pacific Review 210, 212.

[175] In addition, Abizadeh points out that shared culture cannot explain people's trust of institutions and individuals. Trust is affected by multiple factors such as backgrounds institutions and professional reputations. People may trust foreign judges or foreign merchants more because they have excellent professional reputations. Arash Abizadeh, 'Does Liberal Democracy Presuppose a Cultural Nation? Four Arguments' (2002) 96 The American Political Science Review 495, 501.

[176] Jo Shaw, 'Citizenship and the Franchise' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (OUP 2017) 298.

used to be unequally attributed based on sex,[177] race and property ownership,[178] rather than generally available to all. Even today, disenfranchising prisoners and the mentally ill are common practices in many jurisdictions.[179] On the other hand, extra-territorial voting is common; alien suffrage is not non-existent.[180] About sixty jurisdictions worldwide allow all or some resident foreigners to vote in local, municipal or even national elections.[181] The EU is but one well-known case. Admittedly, alien suffrage has historical and institutional limitations.[182] States tend to grant foreigners suffrage based on historical and reciprocal relations.[183] However, existence of alien suffrage across jurisdictions is sufficient to demonstrate that extending democratic participation to TMWs, who live and work among citizens, will not necessarily dilute democratic engagement and frustrate republican citizenship.

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[177] Francisco O Ramirez, Yasemin Soysal and Suzanne Shanahan, 'The Changing Logic of Political Citizenship: Cross-National Acquisition of Women's Suffrage Rights, 1890 to 1990' (1997) 62 American Sociological Review 735.

[178] A famous example is the disenfranchisement of racial minorities and poll tax in the history of US voting rights. 'A History of the Voting Rights Act' (*American Civil Liberties Union*) <https://www.aclu.org/issues/voting-rights/voting-rights-act/history-voting-rights-act> accessed 14 May 2018.

[179] Generally, Shai Dothan, 'Comparative Views on the Right to Vote in International Law' in Anthea Roberts and others (eds), *Comparative International Law* (OUP 2018); Charles Kopel, 'Suffrage for People with Intellectual Disabilities and Mental Illness: Observations on a Civic Controversy' (2017) 17 Yale Journal of Health Policy, Law, and Ethics 209.

[180] Rainer Bauböck, 'Expansive Citizenship: Voting beyond Territory and Membership' (2005) 38 PS: Political Science and Politics 683, 683.

[181] Shaw (n 176) 202.

[182] Regarding the limitations of alien suffrage: firstly, alien suffrage is more likely to be granted in jurisdictions which establish the idea of the polity beyond ancestry, have *jus soli* rules for citizenship attribution, and actively seek to incorporate immigrants into the citizenry. Acceptance of alien suffrage is, after all, related to historical self-understanding of a state about its own nationhood. David C Earnest, *Old Nations, New Voters: Nationalism, Transnationalism, and Democracy in the Era of Global Migration* (SUNY Press 2008) 95–96, 141–42.
Secondly, openness towards noncitizen votes is not necessarily a sign of strong immigration protection. It could just be a substitute for more expensive benefits, such as social and economic rights. Moreover, openness towards alien suffrage does not imply openness of borders either. To the contrary, allowing foreign residents to vote, especially in national elections, implies that it is the immigration regime rather than the nationality law which decides the contour of the *demos*. It then may urge a more discriminatory, exclusive border. Cristina M Rodríguez, 'Noncitizen Voting and the Extraconstitutional Construction of the Polity' (2010) 8 International Journal of Constitutional Law 30, 45–46 (comparing New Zealand's case with US immigration policy which prioritises family ties rather than professional skills or 'assimilability'; arguing that US policy reflects a more diverse conception of political community).

[183] Shaw (n 176) 203.

Reciprocity

So far, the strong view of Miller that shared culture is indispensable for active democracy is not founded. However, opponents can further press that short-term stays of TMWs render them unsuitable for democratic participation because they cannot be expected to act reciprocally, given that they will soon go home. That is, if voting were a one-off opportunity, people do not bother to compromise, to negotiate or to sacrifice for others.

It should first be remined that TMWs' stays are by no means 'short'. As explained, circular migration of workers can last over a decade depending on institutional designs. Next, it is critical to reconsider what reciprocity means and who needs it the most. It appears that, by reciprocity, Miller implies mere exchanges of interests or compromise with others, and yet this is far from the notion of reciprocity understood in the more radical camp of democracy. Gutman and Thompson, for example, suggest that reciprocity is one of the basic principles of deliberative democracy.[184] The foundation of reciprocity is mutual respect. It refers to the capacity to seek fair terms for all parties by appealing to mutually acceptable basic principles. Deliberative democracy requires policy decisions to be justified on grounds that all parties who are subject to the decision can accept.[185] This process of mutual justification, in my view, is critical for minorities to defend or gain favour for their choices. In this sense, minorities, including TMWs, have stronger incentives than majorities to be reciprocal because, other than efforts to persuade on grounds mutually accepted, they have nothing to rely on. Therefore, reciprocity does not necessarily relate to duration of past or future stay, but to the ability of reasoning and willingness of mutual respect. Respect is more likely to be cherished by the weaker than the stronger people, so is reciprocity.

In sum, there is no reason to believe that TMWs have no incentive to be reciprocal or have the bargaining chips to refuse being reciprocal. On the country, by excluding TMWs from political participation, citizens exempt themselves from the obligation of giving mutually acceptable reasons for the dominating work relations and immigration regime to which TMWs are subject.

The next objection concerns foreign control of democracy. It is also an internal criticism from the republican point of view, and thus particularly requires response.

[184] Amy Gutmann and Dennis F Thompson, *Democracy and Disagreement* (Harvard University Press 1998) 53.

[185] ibid 52–55.

3.3.2 Objection of Free State

Neo-republican thought establishes a close correlation between the 'twin notions' of the status of a free person and the free state.[186] Maintaining free states is essential to the freedom of all who are ruled by the state. As Skinner's republican slogan goes: 'it is possible to live and act as a freeman if and only if you live in a free state'.[187] Externally, a free state refers to independence from uncontrolled will outside its citizenry; the state is not interfered with arbitrarily by a foreign power.[188] However, allowing foreigners to be part of the *demos* raises the danger of foreign interference. It introduces will outside the citizenry into the process of democratic will formation, interfering with self-determination and self-governance of the people. In so doing, the state risks losing its free status. If the state is no longer free, the reverse side of Skinner's slogan suggests that the people cannot be free either. Similar rationale is also seen in the constitutional theory of the trichotomy of rights which exclude foreigners from the right to vote as mentioned in Chapter 2.[189]

This argument is at best a half-hearted defence of democratic sovereignty in this era of globalisation and neo-liberalism when many states allow international institutions (such as the World Bank and International Monetary Fund) and foreign investors, in other words forces of capital, to erode democracy.[190] How could a group of dominated workers be more detrimental to free states if they are allowed to cast votes than foreign capital?

The free-state rationale again assumes that democratic will can only come from a *demos* constituted exclusively by those who possess legal citizenship; and the *demos* cannot be understood otherwise. It thus relies on a pre-political, pre-existing conception of 'We the People' which is expressed through the positive nationality law. Nevertheless, as the debate on the democratic boundary demonstrates, who should belong to the relevant democratic community to which legitimacy of state power is owed is the issue to be solved; and referring

[186] Sarah Fine, 'Non-Domination and the Ethics of Migration' (2014) 17 Critical Review of International Social and Political Philosophy 10, 10.

[187] Quentin Skinner, 'On the Slogans of Republican Political Theory' (2010) 9 European Journal of Political Theory 95, 99.

[188] Cécile Laborde and Miriam Ronzoni, 'What Is a Free State? Republican Internationalism and Globalisation' (2016) 64 Political Studies 279, 288–90; Fine (n 186) 11; Philip Pettit, *Just Freedom: A Moral Compass for a Complex World* (W W Norton & Company 2014) 152.

[189] See discussion in Subsection 5.3 of Chapter 2.

[190] David Harvey, *A Brief History of Neoliberalism* (OUP Oxford 2007) ch 6. This point is raised to me by Dr. Nimer Sultany.

to the positive law made by the current *demos* begs the question.[191] Freedom of non-domination in fact demands that the constitution of the *demos* be examined and its legitimacy investigated. Insistence on non-domination should lead to the view that the state ceases to be free internally if the democratic boundary is not extended to all who are prone to intense public domination, such as TMWs.

In addition, even if it is insisted that the people should have control over self-constitution, the democratic inclusion of TMWs does not contradict this vision of self-determination. TMWs' entry is still the pre-condition of joining the *demos*, which is ultimately subject to the democratic decisions of the people currently in the territory. In other words, the territorially-bounded *demos* still controls the democratic boundary via regulating the territorial frontier. The citizenry is not deprived of the voice over composition of the *demos*, although the coercive frontier should always be under democratic contestation at both domestic and international levels.

In sum, the idea of the free state is compatible with enfranchising non-citizens. It is true that republicanism historically owes its origin to a city polity where only citizens enjoyed access to self-governance. And yet, the neo-republican conception of non-domination, correctly read, challenges the *status quo* that state power is not required to be democratically answerable to non-citizens. Without the effort to make state power equally non-dominating for non-citizens, the state can never be a free one.

4. Conclusion

This chapter started with the two commonalities shared by the right and citizenship approaches: ethical significance of temporariness and exclusion of non-citizens from political participation. Read together, they represent a model of citizenship which allows rights to go universal while limits democracy within the national community. Such a model, however, operates on the presumption that the boundary of the *demos* does not require democratic legitimacy, but is given by contingent history. This chapter challenges such a presumption. It responds to the call for legitimacy of constituting the *demos* with the principle that equal democratic membership should be opened to all who are comprehensively dominated by state power in the territory via the comprehensive legal system. TMWs, under this view, should be entitled to full democratic rights. The non-domination-oriented *demos* is bounded within legal

[191] Abizadeh, 'Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders' (n 94) 49.

jurisdiction of the state, and yet it is dependent from legal citizenship and residents' duration of stay. Thus understood, the boundary of *demos* repudiates temporariness and alienage as the definite factors which disqualify TMWs from voting. Rather, it draws attention to how temporariness and alienage intensify domination over TMWs and render full democratic inclusion more compelling.

Guy Mundlak once asked what is to be gained and lost in analysing labour relations through the concept of citizenship.[192] We may rephrase the question in the context of TMWs. More precisely, does citizenship—and the ideal of political equality and self-rule encompassed in citizenship—sharpen our view on migrant workers' circumstances?

Mundlak and Fudge both point out that citizenship may be a blunt tool for economic inequality. Mundlak warns that citizenship—being a claim of equal membership—tends to blur class struggles among members alleged to be equal. Efforts to enhance workplace democracy or industrial citizenship appear to be no different than accounts for 'corporate citizenship'.[193] Fudge further challenges the suitability of analysing TMWs' disadvantages from the angle of political unfreedom and citizenship. Migrant workers are differently exploited in the labour market, and yet in the lens of citizenship they are compressed to a single category—the unenfranchised.[194]

These are good reminders about the limited horizons of democratic citizenship. Indeed, being a concept that traditionally differentiates outsiders, citizenship appears an unlikely rescue for right claims of foreigners, but instead a ground for justified deprivation.[195] Nevertheless, I believe that this chapter has demonstrated that democratic citizenship and political freedom, understood from the perspective of non-domination, could contribute to TMWs without losing sight of economic inequality and exploitation of various degrees.

Two things are worth emphasising here: First, positing democratic citizenship and TMWs side by side immediately highlights the exclusionary effects of legal citizenship and immigration regimes. It draws attention to how political isolation adds to economic inequality, as previously discussed in Chapter 4. We are compelled to see how private domination in the

[192] Guy Mundlak, 'Industrial Citizenship, Social Citizenship, Corporate Citizenship: I Just Want My Wages' (2007) 8 Theoretical Inquiries in Law 720.

[193] ibid 739, 746.

[194] Fudge (n 35) 39. See also texts accompanying *supra* notes 57and 58.

[195] Donna Baines and Nandita Sharma, 'Migrant Workers as Non-Citizens: The Case against Citizenship as a Social Policy Concept' (2002) 69 Studies in Political Economy 75, 81.

economic realm is tolerated or intensified through public domination, how different forms of domination intersect and strengthen each other. In addition, focusing on democratic citizenship brings qualifications and privileges of members to the fore. The presence of TMWs urges us to test the legitimacy of the political community and justice of members' privileges. Second, it is right that people who lack political freedom are not all similarly dominated. However, the attempt to establish TMWs' political inclusion through degrees of domination requires an investigation of how TMWs fare under the legal system of the foreign state. Arguing political rights for TMWs requires us to translate power relations that TMWs experience in the labour market and in the political realm to the language of private and public domination of different intensity. This process allows a nuanced view on individual circumstances. The talk of citizenship does not entail an all-or-nothing analysis of political freedom.

Is it feasible to enfranchise TMWs? The answer is positive. Granting TMWs equal formal rights to political participation is not particularly challenging in terms of the technical aspects. After all, alien suffrage is not an unprecedent invention. TMWs are already in the territory, well-registered by the authorities about their residence and work place for immigration purpose. The obstacle to enfranchise TMWs is rather absence of political will, just like many issues concerning ethics of immigration.

Is it effective to remedy TMWs' economic plight through political enfranchisement? Probably not entirely. However, political inclusion of TMWs enhances the legitimacy of the constitutional order of host states, recognises TMWs as an indispensable and equal social composition, trusts the political agency of TMWs and stops the extreme commodification of labour. The theoretical implication of reluctance to strike for equal democratic participation of TMWs, on the other hand, is that the border regime seriously lacks legitimacy and that foreign workers are not morally obligated to comply.

Chapter 7

Conclusion

'Together We Live, Together We Decide'

On 7 January 2018, just at this thesis was close to completion, over 1000 migrant workers, non-governmental organisations and their supporters gathered on the streets of Taipei, the capital of Taiwan. They used slogans such as 'Seeing Non-Citizens' (看見非公民) and 'Together We Live, Together We Decide' (共同生活共同決定), as they marched to the Ministry of Labour, urging the government to listen to their voices.[1] The Migrants Empowerment Network in Taiwan (MENT) was the major organiser of the demonstration. From September to December 2017 they held mock referendums inviting citizens and non-citizens to vote on several issues including; (1) paid time off for domestic workers, (2) abolishing the private brokerage system and (3) the freedom to change employers. Volunteers set up approximately 24 voting stands across Taiwan in places where temporary migrant workers (TMW) gather during their days off work, inviting them to participate. To make the mock referendum as real as possible, volunteers checked the IDs of voters and prepared policy explanations and bullet points in four different languages. Of the 12000 people who voted in the mock referendum, less than 100 objected to the three proposals. The January demonstration was used as an occasion to publish the result of the referendums, to urge changes in the law, and to demand that non-citizens are seen.

Holding mock referendums for citizens and non-citizens as a form of campaign to change the law is a bold way to demand changes to laws and policies relating to TMWs. The people who should make the policy relating to TMWs are primarily TMWs themselves, together with the residents of the host society. The campaign was not only about improving the welfare and rights of TMWs but also about their democratic engagement, political agency and decision-making power and to shape a better future for everyone. Their activism shows that the democratic inclusion of TMWs is a useful agenda as not only is democratic inclusion a valid

[1] Ya-Wen Lee, 'Kan Jian Fei Gong Min Yi Gong Da You Hang Yu Zhong Zheng Gong Gong Zheng Ce Can Yu Quan [Seeing Non-Citizens: Fighting for the Right to Participate in Public Policies in Heavy Rain] (「看見非公民」移工大遊行 雨中掙公共政策參與權)' *Liberty Times Net* (Taipei, 7 January 2018) <http://news.ltn.com.tw/news/politics/breakingnews/2305075> accessed 16 August 2018.

claim, but by collaborating it can help to address TMWs' substandard working conditions including paid time off work.

This case also highlights the fact that the right to democratic participation is independent from the claim for permanent status such as formal legal citizenship, as the MENT does not have legal citizenship as its goal, or as the premise for democratic participation. MENT rather demands straightforwardly that labour affairs should be decided by all workers together. It also provides an opportunity to rethink what citizenship should mean and could actually mean for foreigners. I propose the slogan-like proposition as outlined in Chapter 4 that to be a free worker, one has to be a free citizen in a free state. In Chapter 6, the image of a free citizen is clarified. Free citizens are not necessary those who possess legal citizenship, but people who, alongside other conditions, have equal rights to democratic participation and to decide and contest both private and public domination through laws.

The Question and the Answer

This thesis began with a simple, intuitive curiosity about the justification for discriminatory border controls that create indentured-servant-like working conditions for TMWs in a liberal, democratic constitutional state. How can a liberal democratic constitutional state reconcile itself with the legal institutions that generate such working conditions while keeping its moral legitimacy intact? The question is; what justifies depriving TMWs of their economic and political freedom in a liberal democratic constitutional state?

This thesis investigates closely possible justifications and debunks them. It argues that a state that institutionalises such deprivation hampers its own legitimacy and challenges us to reconstruct the relationship of governance between TMWs and the liberal democratic constitutional state. Based on a republican theory of freedom as non-domination and its democratic implications, and after reviewing the circumstances of TMWs who are subject to comprehensive and intense public domination under coercive laws, I conclude that the state owes democratic legitimacy to people who reside in its territory regardless of their length of stay and their (formal) citizenship. TMWs are one group of such people, and as such, should be entitled to political participation according to the concept of non-domination-oriented democratic citizenship. This entails equal membership of a democratic community in which all those who are subject to state domination should have equal control over the power of the state.

The Cases: Taiwan and Canada

I began my enquiry by examining Taiwan's temporary foreign worker (TFW) scheme, and then compared it with TFW programmes in Canada. The factual examination allowed me to provide the background to and basic features of the operation of the TFW scheme through the border

regime. The Taiwanese TFW scheme privatises border control power, delegating it to the hands of the employers over TMWs. Racial anxiety, class bias, the gender stereotyping of foreign workers and concerns about protecting the domestic labour market, social order and public health, led to a discriminatory and strict immigration control system. Under this system, the responsibilities imposed on the employer to ensure the implementation of border administration gave immense management power over TMWs. It was the employers' duty to provide accommodation, to facilitate health checks, to report any workers who lose contact and to ensure their timely exit. These duties morph into the employer's having excessive powers to comprehensively monitor the whereabouts of TMWs, to pry into their health conditions, to revoke their permits and to deport them. In contrast, the Canadian Temporary Foreign Worker Programme (TFWP) have less administration and fewer signs of privatised border control. In addition, some features of the Canadian TFWP alter the power relations between TMWs and their employers, such as the insistence on equal pay for migrant workers, allowing them to arrange their own accommodation, as well as limited employment mobility and distributing the financial burdens of migration to the employers.

However, despite divergences between these two jurisdictions, the commonalities underlying both schemes reveals a deeper truth. Both are plagued by the troubling racial motive, conflicting policy goals, fictional temporariness and perpetual alienage. These structural elements constitute the core of the TFW schemes and limit the extent to which legal protection for TMWs can be effective. This temporariness and alienage constitute the theoretical obstacles to envisioning a democratic relationship between the host state and TMWs.

Temporariness of TFW schemes is executed through forced rotation, by instituting an upper limit to the length of a TMWs' stay and by issuing short-term permits. Temporariness is arguably a legal fiction that serves essential functions; it tends to be fictional because the economic logic of the TFW scheme demands a steady, long-term supply of exploitable labour. This demand, however, contradicts the temporal presumption of the scheme and restricts the extent to which the forced rotation of TMWs can be thoroughly executed. The term limit of TMWs cheapens the individual workers' experience, keeps them flexible and trivialises their ties with the host state. However, TMWs as a whole are a permanent composition of the host society. Alienage, on the other hand, means that TMWs are always subject to border controls. It allows TMWs to be deprived of their fundamental rights through the daily operation of the immigration regime which confine them to an insecure status. This in turn generates unfree and deferential workers who are irreplaceable for the employers. Importantly, alienage is usually the lynchpin which ensures that the severe deprivation of TMWs' rights and freedoms

is reconciled with the liberal constitutional order, and that the political exclusion of TMWs from issues related to the immigration regime does not appear as a constitutional issue.

The Theory: Debunking Three Presumptions

These case analyses indicate that TFW schemes are established on the basis of a double denial of the TMW's equal participation in both the political and economic spheres of the host society. I suggest that both economic and political denial have to be dealt with at the same time. However, it is difficult to perceive political participation as being as relevant to TMWs, because it is usually presumed that: (1) economic precariousness is not connected to democratic participation; (2) an individual's free status in relation to the state is not relevant to democracy and (3) the right to democratic participation, especially the right to vote, is tied to legal citizenship. Relying on a republican theory of freedom as non-domination, I challenge the assumptions based on the following three propositions: (1) Private domination, if properly understood, is conceptually connected with public domination. (2) Equal democratic participation is necessary to achieve non-domination in the public realm. (3) The democratic boundary of a polity, such as a state, should be drawn to include all who are present in the state's territory and who are subject to the entire legal system, regardless of their legal citizenship.

Connection between Public and Privation Domination

The first proposition is argued based on a close examination of the proper formulation of freedom as domination. Pettit defines domination as being subject to the power of arbitrary interference. More importantly, mere exposure to such power is sufficient to constitute domination; there is no actual interference needed. This definition is criticised by liberals as anti-market and indeterminate, as if anyone who has the ability to out-compete in the market can dominate others. Observing Pettit's reply to the critique, it is clear that he modifies his position, drawing it closer to the liberal stance of freedom. He proposes an individualist view of domination and confirms the non-domination nature of wealth inequality and the market. However, this is a lamentable approach in my view. It loses sight of domination in work relations and leads to the paradoxical view that workers are dominated if employed, but free when unemployed.

I think a more plausible response to the anti-market criticism is that the market is likely to be unfree if we focus on the structural, systemic and extractive dimensions of power. It is such power that leads to domination, not minor, occasional interference which happens to obstruct one option over others. Structural, systemic and extractive domination has institutional roots and is supported by positive law. In this sense, private domination that people experience is linked to their relationship with laws in the public sphere. In other words, laws condition

private domination. Arguably, to resist private domination, the chance to change or control the laws that condition and supports domination is required. Suppose that we agree that having the opportunity to control the law is the characteristic of a free citizen, then it follows that one must be a free citizen to be a free worker. TMWs are a typical case that demonstrates the entangled connections between the dominating power of employers to legal constructions. It thus foresees that TMWs should have certain opportunities to control the law.

Links between Freedom and Democracy

The next presumption concerns the proper relation between freedom and democracy. Previously I have only assumed that being free from public domination means having democratic control over law. However, as shown, this position is not without controversy. There are many ways to argue how individuals can be free in the public realm, which means not being dominated by state power, without invoking democracy. The main issue here is to identify under what conditions state power over individuals ceases being arbitrary. The question comes down to a proper definition of public interests. Pettit suggests a deliberative, communitarian understanding of public interests to determine the arbitrariness of state power. That is, when the state exercises its power in line with a time-honoured, communitarian-based, deliberative-orientated understanding of public interests, then the state does not dominate those who are under its power.

However, the communitarian tone of this approach alerts liberals, and rightly so, as it is imaginable that race and sex bias can be time-honoured and communitarian-based too. Such bias could affect the collective judgement of public interests, which in turn could justify the existing domination. I suggest this is actually the reason why equal democratic participation is necessary, but not sufficient, to resist public domination. Democratic processes are not only about decision making but also about knowledge generating. Collectively, people inform, deepen and challenge each other's understanding about, say, oppression, exploitation, and domination, through democratic participation. In fact, without formally including everyone in the democratic procedure, we cannot even say that we know what counts as public domination. In this sense, democracy is necessary for freedom. This debate may appear unrelated to TMWs. However, it implicitly rebuts the view that we can protect the interests of TMWs, without allowing them to participate and decide how they can be best protected.

Detachment between Legal and Democratic Citizenship

Finally, I engage with the theories of democratic boundaries to challenge the third assumption, regarding the connection between legal and democratic citizenship, which draws many things together. It considers the debate raised in the Chapter 1, Introduction, about how TMWs are best protected: through rights or legal citizenship. It also seeks to address temporariness and

alienage as the obstacles to democratic citizenship for TMWs. Based on the arguments in Chapter 5, it is further argued that to constitute a self-governing people in a way that is in keeping with the democratic principle, the rights to democratic participation should be granted to everyone who is subject to the state domination. The difficulty here, however, is that the democratic people defined in such a way could be open-ended. It potentially includes people who are only remotely subject to domination by state power. I therefore propose a threshold of domination, taking the intensity of public domination endured by citizens as the bar. People who endure a similar degree of domination as citizens should constitute the democratic self-ruling people. In this regard, it is plausible that TMWs can be deemed as being similarly dominated as citizens are and should therefore be included in the *demos.* This idea of *demos* is time-insensitive and independent from legal citizenship which overcomes the obstacles of temporariness and alienage.

In conclusion, the fact that TMWs are subject to structural, systemic and extractive domination supported and institutionalised by law necessitates that they should be granted democratic citizenship. Anything less than equal democratic citizenship for TMWs illegitimates the constitutional order of the host state. Democracy is not only for enhancement of rights alone. It is achieved by including, recognising and listening to everyone who is dominated. Only then do we begin to learn about what counts as domination in real life. Is democratic citizenship meaningful to TMWs? I believe it is. The slogan 'Together We Live, Together We Decide' says it all.

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