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Migrant Health Professionals' Systemic Human Rights Vulnerabilities

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ABSTRACT

This article investigates whether the methods by which states implement citizens' human rights possess serious weaknesses for ensuring migrant health professionals' rights. Stemming from the discipline of normative philosophy, the moral approach to human rights sees rights as implemented through multiple waves of duties delivered by state-managed integrity systems. We argue that this otherwise comparatively reliable method can fail to deliver adequate outcomes to migrant health professionals. These professionals can encounter problems stemming from: their lack of political priority as non-citizens; the challenges to effective monitoring of migrant health professional pathways and outcomes; the incapacity of federal lawmakers to impact on key policy levers; the ever-present threat of "pathways to nowhere"; and, state-enabled employee exploitation. The findings provide a philosophically grounded foundation for acknowledging the human rights concerns of even high-skilled migrants, and show why special regimes for rights protection, facilitation and monitoring are necessary for migrant health professionals.

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INTRODUCTION

At first glance, one might suppose that the key human rights problems for migrant health professionals' (MHPs) rights will be constituted by the explicit and direct limitations on their entitlements imposed by destination countries, such as limitations on receiving welfare support or on practising only in a particular region. These are, no doubt, important concerns for working migrants (Ruhs, 2013; Mattila, 2002). Our focus in this paper, however, is a different one. We ask: *Given the ways that the moral approach to human rights sees human rights as being best implemented (by an overall system governed by the nation state), are MHPs likely to suffer systemic vulnerabilities?* By 'systemic vulnerabilities', we mean deleterious impacts on human rights caused by deep-seated qualities of the overall political-economic system.

As is standard in discipline of applied normative philosophy, our method is to employ moral theory (in this case the moral approach to human rights), and apply this theorising to a complex empirical situation to deliver a deeper understanding of the situation's ethical challenges and possibilities. In the following analysis, we draw on practical literature on rights delivery (e.g., by humanitarians) to extend philosophical theory by incorporating seven modes of rights implementation. We then apply this approach to the case of MHPs in Canada and Australia to gauge how existing rights implementation processes function for this cohort. As we will show, this method allows the diagnosis of specific areas of human rights vulnerability and the delineation of potential areas for reform.

This paper focuses on MHPs for several reasons. First, MHPs can be crucial to the functioning of countries' medical systems (as they are in the two case study countries), making up sizable proportions of their workforces, and catering to critical areas of need, including rural and remote service delivery. Second, MHPs encounter challenges resembling those facing other skilled migrant workers, such as facing local restrictions on education, training and certification. Yet third, MHPs remain a somewhat unique cohort, because of the multiple barriers to professional practice—not merely in terms of education, accreditation and entry exams (which occur for many professions), but also their need to access scarce training and

entry-level employment opportunities (e.g., residencies, specialisations). As we will see, MHPs provide a telling example of the way that human rights concerns can arise when officials within a system can profoundly affect particular groups but do not have the mandate, will, resources or information to accommodate their rights-based claims.

Australia and Canada were chosen as case studies because they are both major destination countries for MHPs, and both signatories to the WHO Code (see below). They are also close enough economically and politically to make comparisons possible—but at the same time have sufficiently dissimilar MHP regimes to make comparison valuable. Finally (in line with our thesis that otherwise effective rights protection regimes can struggle to cope with MHPs), they both have broadly effective regimes for realizing human rights, with both nations consistently named in the higher groups of countries worldwide in freedom and human rights rankings.¹ However, and as we will see, this does not necessarily mean these countries are protective of *migrants*' human rights.²

It is worth noting the links between the human rights concerns raised here and the broader issue of (usually unskilled) migrant *precarity*. As we will see, MHPs' human rights concerns resemble several issues raised under the banner of migrant precarity, including work risk and uncertainty, ongoing temporariness and exploitation by employers. Yet MHPs are not subject to the level of work informalisation, wage squeeze, systemic discrimination, risk of poverty and even existential vulnerability as the unskilled workers of the precariat (Schierup, Ålund and Likić-Brborić, 2015: 50-2; Hennebry, 2014: 371; Schierup and Jørgensen, 2016; Hari and Liew, 2018). As such, the human rights concerns raised for MHPs have parallels, but also key differences, with the (often more urgent) ethical concerns faced by the precariat.

We begin in the first section by explaining the moral approach to human rights, and the way that this approach sees human rights as being realized—namely, through strategic governance of overall systems of institutions. The second section outlines the institutional structures MHPs typically negotiate on their pathways to professional practice in destination countries. With these analyses in tow, the third section explores the special challenges these systems face in

realizing MHPs' human rights. We argue that the nation state is stymied in its normal role as overseer of the rights-realizing system through a variety of complex, inter-related factors, leading to systemic vulnerabilities in how MHPs have their rights realized.

THE MORAL APPROACH TO HUMAN RIGHTS

One important approach to thinking about human rights comes from the discipline of normative moral philosophy. This perspective, sometimes termed the “orthodox” approach, takes a *moral approach to human rights* (Shue, 1980; Shue, 1988; Waldron, 1993; Waldron, 2005; Sampford, 1997; Sen, 2004; Tasioulas, 2012; Breakey, 2015). On this approach, human rights comprise a set of moral entitlements that each person possesses on the basis of their humanity. These rights are based around key interests, freedoms or capabilities (henceforth “interests”) that play a critical role in supporting human wellbeing, flourishing, dignity and autonomy. For this reason, these interests warrant moral respect and consideration from all other people. Such rights do not owe their existence to law. Rather, they are pre-existing moral qualities that provide a basis for their legal implementation.

The moral approach to human rights aims to draw upon, and closely track, the way that rights are typically delivered in the contemporary context. The overriding imperative put forward by the moral approach is to (as we will put it) *realize* the right, by which we mean that the interest at the root of the right is substantively promoted or fulfilled for each person. In order to secure this result, many alternative mechanisms are available. In some cases, legislated law may not be part of the local solution for delivering rights. For example, a tribal community might rely on longstanding cultural practices to effectively prioritise each member's key interests without relying on formal law. More often, however, law and legislation will be a central part of the overall “scheme of social arrangements” that ultimately delivers the right (Sampford, 1997). These social arrangements make up a multifaceted system that includes all arms of government, as well as private enterprise, civil society, cultural mores, international bodies, professional organizations, academia, media and individual moral decision-makers. Borrowing some influential terminology from corruption studies, we will term this an ‘integrity system’ (Pope, 2000; Sampford, Smith and Brown, 2005). This approach to human rights has its own history, developing out of early natural rights theories (Locke,

1690/1947), and finding voice in the *Universal Declaration of Human Rights* (“UDHR”). As a United Nations General Assembly resolution, the UDHR was not itself a legal covenant. Instead, it invoked explicit moral language and spoke as if all people (and not merely state parties) had a role in upholding human rights (General-Assembly, 1948).

The moral approach can be contrasted with the *legal approach* to human rights, which sees human rights as constituted by legal entitlements set down in international human rights covenants and nations’ bills of rights (Schutter, 2012). This approach views human rights exclusively as legal “guarantees” or “trumps”, to be enforced by a Supreme Court, even against democratically elected legislators. For example, considering the human right to basic sustenance (UDHR, Art.25), the legal approach would focus on the right’s explicit protections in international and domestic law, and courts’ powers to give effect to those laws. The moral approach, in contrast, would focus on whether *all people have enough to eat*, and how this can be reliably achieved by a fair allocation of responsibilities, and a feasible construction of legitimate institutions (including governments, corporations, markets, unions and NGOs). Law, and international human rights law, might well play a role in securing this outcome—but it is only one tool amongst many (Tasioulas, 2017).

In this paper, we adopt the moral approach to human rights. We will assume that all human beings (including migrant health professionals) possess human rights that broadly parallel those enumerated in the UDHR—including socioeconomic rights, such as the right to work, and to just conditions of work. The moral concern driving this paper is the gap between what our best philosophical understandings of human rights require as proper treatment for all human beings, and the situation on the ground for MHPs.

Our focus here is as much on the *way that the human rights are realized* as it is on the specific content of the rights. To understand how this approach sees human rights being realized, consider a focal example of how a society might realize the right to work (UDHR, Art.23) for its citizens.

To this end, suppose that government policy-makers decide the most promising large-scale mechanism for realizing citizens’ rights to work is through the free market, allowing decentralized

market actors to hire employees or start their own businesses. This requires the state respecting and protecting property rights (themselves an intrinsic rights concern—UDHR, Art. 17). The policy-makers therefore implement measures to ensure the state does not itself violate property rights and that it protects property rights from violation by other citizens, with civil remedies when violations occur. The state may also develop special laws, policies and institutions (such as for international trade or limited liability companies) that stimulate employment. And in attending to its own operations, the state takes measures to ensure that it itself is a fair and just employer, such as in its employment of public servants, police and other government workers. Yet let us imagine that the market fails to create decent opportunities for widespread employment, in part because access to education and training is inequitable. In response, policy-makers institute a system of progressive taxes to fund the cost of universal education, providing greater career opportunities for all citizens. However, a further problem arises. Many employers are found to treat their employees harshly, making unsafe and draconian demands on them. Popular media and protests dramatize this concern, and democratic pressures drive lawmakers to impose new regulations on industries to ensure the fair treatment of workers, and to legally protect the formation of unions. The result of the overall integrity system and its processes, operating dynamically and flexibly over time, is the reliable delivery of the right to work—notwithstanding that there may be no explicit rule mandating this outcome, or even any specific government agency charged with its realization (Waldron, 2005).

This focal example is a simplified one, but the overall *process* should appear familiar, in the sense of policies being instituted to deliver a result that furthers citizens' key interests, and when problems and unintended consequences arise, additional or replacement policies are developed to respond to these. The example contains several key factors fundamental to the moral approach to human rights, which we will now relate.

Multiple waves of duties and policies responding to standard threats

In order to realize the right, the policy-makers employed several “waves” of duties (Waldron, 1993). In our example, the first wave constituted the duties that protected property rights. Then there was a wave of positive welfarist duties to provide universal education, and then another wave to ensure

decent work conditions. If a new large-scale problem in rights realization arose—what Henry Shue (1980) refers to as a “standard threat” to rights—then a new policy wave might be required.

Of course, duties do not spring from nowhere. As we note below, the moral approach to human rights includes principles that determine how rights-based duties—including new waves of duties—can be justifiably imposed.

Multiple modes of rights realization

The example shows the different *modes* that rights realization might take. In what follows, we expand on the existing literature from human rights theory (Shue, 1980) and UN rights-based guidance (CESCR, 1999), to consider seven distinct modes of realizing rights.

Respect: To *respect* a right is to observe a “side constraint” on one’s actions (Nozick, 1974: 29). It requires that one does not take action that directly harms the substance of the right. In the example, the state respected the property rights of citizens, and their related economic rights, such as by foregoing arbitrary expropriation.

Protect: To *protect* a right is to prevent (stop, deter or mitigate) another person or group from directly harming the right. In the example, the state provided positive protection to people’s property rights (preventing theft, extortion and vandalism by other citizens).

Provide: To *provide* a right involves actively delivering the substance of, or the means for rights-holders to acquire the substance of, the right. In the example, the state directly provided work opportunities to its own employees—and it also provided education and training to all (in order to subsequently facilitate their employment opportunities).

Remedy: To *remedy* a right is to recompense, or ensure the recompense of, a rights-holder whose rights have been violated. In the example, the state instituted civil remedies for property rights violations.

Facilitate: To *facilitate* a right involves taking steps to indirectly improve the right’s realization. Various entities (people and institutions) often act in ways that further citizens’

key interests. This might occur directly or indirectly, and the entity might be acting for its own purposes, or on the basis of a moral duty. State facilitation involves encouraging, incentivizing and supporting that entity's actions and its beneficial outcomes. In the example, the state initially protected market activities to facilitate the widespread creation of jobs. Later, the state facilitated the right to work by legally protecting worker's efforts to join unions, and so to collectively improve their bargaining power. Facilitation also occurs through regulation of behaviours that carry indirect risks of harm to rights, such as (in the example) regulating rules for workers' safety.

Monitor: To *monitor* a right is to collect or convey information on that right's realization. "Monitoring" is a catchall term including investigating, researching or otherwise learning how fully the right is being realized, and communicating that information, perhaps by alerting, awareness raising, or emergency calls for help. In the example, media helped monitor the right by exposing the unsafe and draconian demands being made of workers.

Empower: To *empower* a right is to place the political means for its realization, and for decisions about its legal scope and constitution, into rights bearers' hands. This includes granting citizens legal standing and representation, participation in policy making and political deliberation, and powers to elect governments. In the example, democratic pressures helped drive solutions to employers' exploitation of workers.

Henceforth, all these terms ("respect", "protect" etc.) refer specifically to these distinct modes of rights realization.

Special mention should be made of *facilitation*. In the moral approach to human rights, all people have rights-based duties to respond to the ethical significance of others' rights. They also have natural inclinations to improve their own situations and that of their dependants (and so to help realize their rights). For this reason, effective state action often involves facilitating the rights-realizing actions that citizens are already performing, and regulating those actions to mitigate indirect risks.

The state is not the only agent that can adopt these different modes. In the focal example, citizens had rights-based duties to *respect* (others' property rights), *facilitate* (by contributing through tax to education institutions) and *monitor* (raising awareness about exploitation). Other entities can also employ these different modes. In developing the *UN Guiding Principles on Business and Human Rights*, John Ruggie (2008) used a tripartite respect-protect-remedy formulation. Similarly, the influential *ALNAP Guide for Humanitarian Protection* employed an "egg model" of responsive, remedial and environment-building rights-protection activities (Slim and Bonwick, 2005). A more extensive guidance, with five modes of protection, was developed for peacekeepers (Breakey, et al., 2012). These are all instances of what Shue (1988) terms 'mediating' duties, where people combine together to create institutions (states, businesses, organisations) that can contribute to realizing human rights by exploiting existing practical levers, or creating new ones. In the focal example, unions were an institution created by workers themselves to better protect their rights against exploitation. Seizing upon this opportunity, the government chose to facilitate worker rights by offering legal support for this institution.

Synergies and conflicts among rights

Rights often work together synergistically. In the above example, rights to property provided opportunities for creating work. Rights to education facilitated rights to work. And in providing resources for the worker and her family, the right to work itself assists rights to sustenance and security.

However, rights sometimes require compromises and trade-offs. As the example showed, the regulation and taxing of property rights was needed to ensure fair work conditions and the provision of welfarist education policies. The moral approach to rights thus cannot offer absolutist guarantees about rights. Each right must be constrained ("regulated" or "specified"), at least at the margins, to fit within a system that workably realizes a full suite of human rights. Some guarantees ultimately can be offered, but, as Waldron (1993: 28) observes, "they may not be so strong or so unqualified as those we had in mind before we remembered the need to balance our own claims against those made by others."

Universal moral principle and contingent empirical context

The above-noted synergies and trade-offs showed how policy-makers in the example were informed by moral principle and empirical evidence. They needed empirical evidence to craft, deliver, and evaluate policies that could reliably produce widespread employment. Moral principle was required to work out how duties could be imposed and trade-offs should occur—how the balance between the rights to work, education and property could be justifiably struck (Shue, 1980). The normative goal is not to maximize the overall amount of realized rights (Nozick, 1974: 28), but rather to impose responsibilities, duties and restrictions on people in a fair way, remembering that each duty-bearer is also a rights-holder (Breakey, 2015). They are an end in themselves, and not a mere means to produce resources and services. For example, it would be a violation of rights for a state to arbitrarily confiscate citizens' property, even if the proceeds of such wrongs were used to provide work for the needy. Instead, the imposition of duties must happen in accordance with principled criteria and the rule of law, and legitimised through democratic decision-making (Shue, 1988; Waldron, 2005; Sen, 2004).

The instrumental centrality of the nation state

On the moral approach to human rights, the agent that intrinsically possesses rights-based duties is not the nation state, but ordinary human citizens. Individual humans owe duties (some 'perfect' and absolute, and others 'imperfect' and context specific) to help realize others' human rights (Sen, 2004). The above-noted fact that the rights-protection modes are used by humanitarians shows us how inventive and resourceful people can find practical levers to respect, fulfil, remedy, monitor and facilitate rights. Unarmed humanitarians can even contribute to protection—e.g., through conveying critical safety information, or using their visible intervening presence to deter violations (Slim and Bonwick, 2005: 91-96).

In many cases, human beings accomplish more through institutions than as individuals. The state has human rights obligations because the fair, effective, comprehensive and authoritative realization of human rights is almost impossible without such an institution. As Locke (1690/1947) argued, without settled law, impartially judged and enforced, disputes over rights can quickly descend into violence.

Human beings therefore contribute to, respect the authority of, and rely on the state to better realize their collective human rights—an example of Shue’s (1988) point that individuals “mediate” their pre-existing moral responsibilities through institutions. For example, rather than each individual adopting a decentralised practice of giving coins to local beggars, duty-bearers can mediate their responsibilities by empowering the institution of the state to take a fair amount from all duty-bearers, and then reliably organise the delivery of food to those who most need it.

Ultimately, the nation state possesses enormous significance because it functions as the integrity system’s overall governor. It manages and curates the entire scheme of social arrangements—a feature Teubner (1983) described as “reflexive law”—where law works by promoting, structuring and balancing communicative and self-regulating arrangements in and between social institutions.

Because the state is the only agent able to manipulate the integrity system in sustained, systemic, coordinated and authoritative ways, it is *instrumentally* fundamental to realizing rights. It plays this role not only through its powers as legislator and executive, but also through delivering public services, empowering regulatory bodies, providing oversight and monitoring, and directing resources and incentives to productive activities (Sampford, 1997). Through its enormous array of powers, spread across multiple institutions, the nation state has access to countless levers by which to modulate the overall system’s functioning.

This is not to say the state is omnipotent. It is constrained on the basis of practical limits to its powers, knowledge and resources, and on legal and moral limits restraining how it can treat, impose duties upon, and draw resources from, its rights-bearing subjects. As we noted, the state could not arbitrarily confiscate citizens’ property, even to fund rights-provision elsewhere.

Summing up, in normal circumstances the nation state has the power to strategically manipulate integrity system elements in order to create the multiple waves of duties that realize rights in the face of standard threats.

THE GLOBAL STRUCTURE OF THE MIGRANT HEALTH PROFESSIONAL RECRUITMENT SYSTEM

This section sketches the regulatory and institutional structures MHPs negotiate on their pathways to professional practice in destination countries—specifically, in major destination countries Canada and Australia.

WHO Global Code of Practice on the International Recruitment of Health Personnel

The current era of professional globalisation has produced a global surge in the international mobility of health professionals, and the predominant flow of MHPs has been from developing countries to, between, and within countries in the developed world. Rising concern about the ethical status and sustainability of uncoordinated, large-scale *ad hoc* developed world recruitment practices, and especially their effect on developing world health systems, led to the development of international codes of practice for overseas health professional recruitment (Willets and Martineau, 2004; World Health Organisation (WHO), 2006; OECD, 2010). A shared desire to unify these codes culminated in the adoption in May 2010 by World Health Organization (WHO) Member States of the *WHO Global Code of Practice on the International Recruitment of Health Personnel* (“the Code”). Australia, the United States, the United Kingdom and Canada—the four dominant developed world recruiters—have adopted the Code, which, *inter alia*, requests that signatories designate a responsible national authority which reports at regular intervals on progress with respect to the realization of the Code’s principles (WHO, 2010: 9-12).

The Code’s guiding principles establish transparency, fairness and sustainability as the defining ethical ideals for international health personnel recruitment (WHO, 2010: 5). These principles clearly link to human rights, in particular rights to ‘just and favourable’ remuneration and conditions of work (UDHR Art.23), and the standard threats that ad hoc MHP recruitment practices present to these.

Structure of the global MHP recruitment system

The global MHP recruitment system is complex, dynamic, and multi-layered. Overarching international-scale elements, including ethical codes, multilateral and bilateral legal instruments and

transnational institutional settings, are determined at an international political level. These global “top-down” elements aim at influencing a great number of individual subnational and local decisions across a complex global-scale multi-institutional landscape—much of which occurs from the “bottom-up” both inside and between source and destination countries (Ransome and Sampford, 2012).

Governments, their agencies, and other institutional stakeholders represent a broad range of different interests, and operate in the light of their own mandates, norms, legal rules and institutional settings.

Subsequently, “top-down” prescriptions derived from global principles and international arrangements meet a complex array of bottom-up functions, responsibilities, interests, priorities, limitations and loyalties operating across national, subnational and individual levels (Ransome and Sampford, 2012: 47-48).

At a direct individual level, MHPs themselves represent a unique and central group: their personal circumstances and prospects, rights, interests and expectations stand to be profoundly affected by the actions of those within the system who influence and control their pathways to employment (Xu and Zhang, 2005; Connell and Walton-Roberts, 2016; Kingma, 2008; Kingma, 2018). At subnational institutional levels in both source and destination countries there are many interests represented, both directly and indirectly, in recruitment regimes (Edge and Hoffman, 2013; Tam, Edge and Hoffman, 2016). Health agencies and facilities in destination countries are directly responsible for the planning and execution of international health personnel recruitment practices in an institutional environment in which many different, competing, and often conflicting official and unofficial, formal and informal obligations, commitments and loyalties operate within and between institutions (Ransome and Sampford, 2012: 49-50). These agencies and facilities operate under legislative and professional regulatory rules and procedures set by national and provincial governments and regulatory bodies, and within established public and private sector managerial and operational cultures, where health personnel interests, including economic rights to fair conditions and adequate remuneration (UDHR Art.23), are collectively represented by professional associations and workers’ unions at local health facility, agency, state and national levels (Ransome and Sampford, 2012).

Recruiters, migration agents, educational institutions in destination and source countries, source country health systems, and other government agencies and NGOs also represent various differently-motivated interests affected by recruitment regimes at the subnational institutional level, and bring their influence to bear on recruitment policy formulation and practice through negotiation and lobbying. National governments, on the other hand, generally act in their own national interest, whereas global institutions such as the UN, WHO and OECD operate with a broader set of global ethical and other relevant principles, yet with limited power and resources to directly represent their interests within member countries (Buchan, 2010; Ransome and Sampford, 2012).

While (as we will see), these factors can combine to contribute to serious human rights concerns for MHPs, there are also larger forces that empower this cohort. Significantly, MHPs have in-demand skills, meaning host countries must compete for global talent (Ruhs, 2013), and that MHPs can possess credible exit options from rights-violating situations.³

Professional pathways into Australia's MHP recruitment system

In major destination countries such as Australia and Canada, overseas health professional recruitment takes place within a complex national institutional landscape that is uniquely arranged and often in considerable flux (Hawthorne, 2014; Owusu and Sweetman, 2014; Stilwell, et al., 2004). To give an idea of numbers and significance, in the most recent available data (OECD Stat, 2019), Australia has around 30 000 foreign trained doctors, constituting just over 32% of its workforce. This percentage has remained stable over recent years, translating to a rise in real numbers of 1000 per year. Canada has around 25 000 foreign trained doctors, making up a stable proportion of 25% of its workforce with real numbers also rising by 1000 per year. Turning to nurses, Australia has almost 54 000 foreign-trained nurses, a stable 18% of the workforce translating to 1000 new nurses each year. Canada has 33 500, with its similar intake of around 1000 new nurses resulting in a gradual rise to 8.3% of its workforce.

The historically fluid pattern of health professional migration into Australia has developed into six well-defined pathways for MHPs: temporary sponsored migration; permanent skilled migration; the

study-migration pathway; trans-Tasman migration from New Zealand; spouse and family migration; and humanitarian migration—with members of the latter two categories being “unscreened in advance for human capital attributes,” and at disproportionate risk of occupational displacement and skills loss (Hawthorne, 2014: 115). These six pathways have developed in an Australian federal government migration policy environment characterised by the grandfathering of historically more generous visa conditions for migrant workers—including a greater range of opportunities for conversion from temporary to permanent residency—in favour of a shift towards temporary-only visas with reduced opportunities for conversion to permanency (Hugo, 2018; Dutton, 2017) and a federal health policy environment committed to a long-term goal of health workforce self-sufficiency (Buchan, Naccarella and Brooks, 2011; Mason, 2013).

The Australian system of pathways for MHPs is currently dominated by temporary visa positions, with strict professional registration and competency requirements, including English language testing, designed to protect patient safety and ensure effective integration into a well-functioning healthcare system (Elkin, 2015; McGrath, 2004; McGrath, et al., 2012; McGrath, Henderson and Holewa, 2013). Restrictive conditions are often attached to work rights—for example, tying visa entry conditions and pathways to permanent residency to specific locations and areas of need (Hawthorne, 2014). In addition, the privatised and free market-based nature of Australian MHP pathways gives temporary employer-sponsored migrants priority over state-sponsored and traditional independent points-based visa applicants (Hawthorne, 2014). Within this context, there has been significant innovation in pathways to registration and practice for MHPs, including the “Competent Authority” and “Workplace-Based Assessment” pathway for doctors, and the development of nurse bridging programs. There has also been a boom in the study-migration pathway, with dramatically better employment outcomes compared with overseas-trained MHPs (Hawthorne, 2014: 124-25). However, evidence points to starkly varying employment outcomes for different categories of MHPs (Hawthorne, 2014), and concerns with exploitation have emerged, as we discuss below.

Pathways into Canada's MHP recruitment system

Canada's health professional recruitment system, and therefore the trajectory of MHPs into the country, differs in several important respects from the open, partially privatised, and demand-driven Australian MHP recruitment market—resulting in an equally complex and opaque, but in important respects dissimilar, series of pathways for MHPs. Within a complex administrative landscape of provincially-based health systems, where provincial and direct employment pathways for MHPs are particularly notable, Canadian health professionals are qualified, represented, and regulated at the provincial level (Owusu and Sweetman, 2014: 136; Hawthorne, 2014). A key contrast with the Australian system is that, in Canada, an uncoordinated “single-payer” provincial government-run public health system operates for medically necessary services, muting labour market dynamics in favour of centralized provincial control (Owusu and Sweetman, 2014). Under this system, provinces determine medical school and immigrant doctor residency numbers, and ration medical school (for the former) and postgraduate training (for the latter) places, resulting in lower-than-OECD-average per capita physician numbers, and unaddressed problems with geographic maldistribution (Owusu and Sweetman, 2014).

Since a 2002 federal legislative change eliminated an occupations-in-demand points test in favour of a more generalised education, language and age-based points system, immigration of overseas health professionals into Canada increased. However, maldistribution problems have remained, and MHPs face “expensive and time-consuming” mandatory education, accreditation, and registration processes, through which they are significantly less likely to pass than domestic graduates (Owusu and Sweetman, 2014). In addition, because many health professions in Canada are regulated via independent professional colleges subject to provincial legislation, pathways to MHP licensure and practice—despite sporadic and usually uncoordinated efforts across various provincial and federal bureaucracies to redress problems of inequitable access—remain “both opaque and difficult” (Owusu and Sweetman, 2014). Thus, MHPs in Canada can enter the country, and select a (geographical, employment, education) pathway, with an expectation of progressing through the process to eventual accreditation and practice. However, the opacity of the inter-tangled governance systems, the shifting

policies and priorities of the various agencies, and the challenging standard of shifting educational requirements often combine to disappoint those expectations (Breakey, Ransome and Sampford, 2019).

Table 1 summarises similarities and differences between the Canadian and Australian systems.

	Canada	Australia
Deliberate policy of using transnational MHPs to deliver health outcomes	Yes	Yes
Admissions policy for migrant postgraduates	Generalised points-based system	Targeted occupations
Multiple pathways to employment	Yes	Yes
Role of subnational entities (provinces, states)	Critical: Very strong federalism	Significant: Weaker federalism
Legal human rights protections	Yes	No
Voting rights	Permanent residents can vote after five years	Only citizens can vote
Competitive labour market for health professionals	No	Yes
Overarching national health practitioner regulation	No	Yes

Table 1: Key Differences & Similarities in Australian and Canadian MHP Regimes

THE CHALLENGE IN REALIZING THE HUMAN RIGHTS OF MIGRANT HEALTH PROFESSIONALS

This section explores how the same state-governed integrity system that reliably realizes ordinary citizens' rights can be uniquely unsuited to realizing MHPs' rights.

Inequality in rights priority for MHPs

An initial systemic vulnerability identifiable in MHP integrity systems for developed-world destination countries, given the complex and multi-layered integrity system structures outlined above, concerns an inequality in priority with reference to MHPs' rights. As we saw earlier, human rights are normally secured, through a type of division of labour (Shue, 1988), by each citizen's own state, responsive to empowered citizens through the democratic process. Migrants are not typically accorded equal priority to citizens, until and unless they become citizens. This can mean that the agent at the centre of rights realization (the nation state) can de-prioritise its pro-active governance of the integrity system to the needs of this cohort. Compounding this systemic vulnerability, migrants usually do not have voting rights (especially during their most vulnerable early years) and so cannot exert pressure through the ballot box. This factor differs across jurisdictions. While Australia only allows citizens to vote, Canada allows migrant workers voting rights after five years.

Perhaps the only organizations explicitly in the migrants' corner are international organizations like the UN and the WHO. These institutions can declare policy but cannot enact it. Responsibility for planning, implementation, execution, and day-to-day administration and oversight of international health professional recruitment regimes in the developed world is subnational, falling on state, provincial and local health agencies, regulators, professional organisations and health sector employers. As such, ethical guidelines such as those represented in the Code have been critiqued as abstract, rigid, and ineffective, and to lack grounding and support within a sustainable governance regime (Willets and Martineau, 2004; Buchan and McPake, 2007; Buchan, 2010). Research studies tend to bear out these criticisms (Edge and Hoffman, 2013; Brugha and Crowe, 2015; Bourgeault, et al., 2016; Tam, Edge and Hoffman, 2016). The integrity system analysis aligns with these critiques;

the organisations explicitly concerned with protecting MHPs have limited capacity to protect, provide, empower, facilitate and even monitor MHP rights.

Challenges in monitoring

Monitoring plays a critical role in the moral approach to human rights. Information is a critical resource in understanding the scope and nature of standard threats, the factors causing them and the waves of duties and policy reforms that may assuage them. Without clear lines of communication and information gathering, mistakes and omissions can be made in all these judgments.

MHPs pose special problems with monitoring. In such a complex, multi-layered and often opaque integrity system, there is potential for a lack of oversight and failures in monitoring MHP rights even by nation states themselves. This means that problems generated by the inequality of rights can remain invisible, with relevant information scattered across different departments and levels of government (and within and between other organisations, such as universities and professional associations), with no one institution having responsibility for aggregating, analysing, and acting on the relevant data. The challenges of monitoring rights for this cohort are therefore substantial, as the sketchy national reporting on WHO Code implementation suggests (Bourgeault, et al., 2016; Tam, Edge and Hoffman, 2016). This results in a situation with a strong potential for the non-realization of rights. While there are limits to how far international organisations and codes can alter state behaviour, it would be a significant step if the WHO Code regime could at least improve information gathering and sharing amongst member states.

Incapacity of federal lawmakers to impact on key levers and mechanisms

Push and pull factors for immigrating professionals can be subject to myriad exogenous shocks, over which the nation state has little control, meaning that the system's operating conditions can shift in ways national governments may struggle to predict or mitigate. For instance, international conflicts can act as a sudden push factor, while large-scale economic fluctuations in source or destination countries can shift migration flows in either direction. Likewise, education, employment, emigration and remittance policies of source countries (which vary greatly), and policies and opportunities

offered by competing destination countries, may affect the capacity of federal lawmakers to impact on key levers and mechanisms, significantly impacting the realisation of MHPs' rights (Clarke, et al., 2017).

Federal government action in destination countries can also be stymied in achieving policy coherence by state, provincial and local government actors and health administrators. To the extent that agencies at the subnational level are concerned about human rights, they are focussed on the health (as per UDHR Art.25) of their citizens, constituents, clients, customers and patients. Even in a comparatively centralized federation like Australia, many employment decisions are made by state or privately run hospitals. Low-level decision-making becomes even more significant in relatively decentralized federations like that of Canada, where the decision-making on migration policy is usually made federally, but the pivotal policy and decisions governing actual employment and pathways to employment are made by local employing organizations, provincial governments, professional regulatory organizations and educational institutions. Even if the federal government attempts to conform with international agreements, local actors may be unaware of these agreements, and hold very different priorities, compounding perceived problems and failures of compliance and reporting that have riddled attempts at international cooperation (Edge and Hoffman, 2013; Brugh and Crowe, 2015; Bourgeault, et al., 2016; Tam, Edge and Hoffman, 2016).

In addition, states may have limited control over crucial aspects of service delivery. For example, major destination countries with geographically dispersed populations such as Australia and Canada may struggle to influence the willingness of local health professionals to work in rural and remote communities. At the same time, professional organizations' decision-making, especially via control over MHPs' entry into professional service—through, for example, registration processes, exams and clinical placements—may not prioritize inclusiveness, leaving MHPs from non-English speaking backgrounds especially vulnerable (Sinclair, 2017). True, there are areas where states *do* possess control over key levers—such as restricting or expanding the amount of universities authorized to provide degrees in the health professions. However, these can be lagging mechanisms, taking years to impact on service provision.

The problem of “pathways to nowhere”

In relation to MHPs specifically, destination countries such as Australia and Canada are usually looking to flexibly respond to short-term shortfalls in local service delivery. But immigrating professionals are making massive life decisions for themselves and their families, and usually need long-term stability and transparency over accreditation processes and work opportunities in order to inform their decision-making and expectations. This leads to the problem of “pathways to nowhere” (Breakey, Ransome and Sampford, 2019). Because of federal governments’ lack of control over exogenous and internal factors, and the challenges in gathering and analysing relevant data, states can struggle to create transparent, visible, consistent and reliable regimes capable of providing clear information on pathways to prospective migrants. All this can create major problems for the rights of migrating healthcare professionals, increasing their vulnerability to exploitation, and liability to exist at the bottom tier of a hierarchical legal system (Breakey, Ransome and Sampford, 2019). This frustration of the capacity for long-term decision-making can constitute a standard threat to human rights. As well as specifically threatening economic rights (e.g., UDHR Art.23), arbitrariness in the sense of legal unpredictability clashes with the requirements of human reason and dignity set down by natural and human rights (Locke, 1690/1947; Shah, 2014).

In the case of MHPs in the more decentralized Canadian federation, given the lack of coordination between the federal immigration system, provincial health systems, educational institutions, professional associations and registration agencies, pathways to licensure can be opaque and difficult. A recent investigation (Sinclair, 2017) of the personal experiences of fifteen immigrant doctors denied the opportunity to practise medicine but qualified for medical recertification exemplifies the problem of “pathways to nowhere”. Arriving highly motivated, anticipating the opportunity to build a new life and contribute as citizens to Canada, and seeking “coveted positions earmarked for immigrant doctors”, these MHPs were instead faced with “costs, frustration, humiliation, embarrassment and low-income levels” (Sinclair, 2017: 137-8, 66). Participants reported feeling that they had been “tricked into believing that there are jobs in Canada for foreign doctors; that, if they pass the Canadian exams, they will be eligible for a license to practise” (Sinclair, 2017: 170).

In Australia, a contrasting example of vulnerable MHP pathways has occurred with respect to a historical tolerance for immigrant doctors practising in designated rural areas without being required to sit professional exams—a policy introduced during a period of acute rural shortages (Grindlay, 2018). However, as the need became less urgent, expectations shifted to a requirement that the exam be sat by all incumbent MHP doctors. Although a grace period of several years was allowed, the concern remains that in cases where a hurdle is introduced, if that hurdle turns out to be far more difficult than would have been ordinarily anticipated—and ultimately presents what for some practising MHPs turns out to be an almost insurmountable obstacle—then there remains a systemic vulnerability in the realization of their rights. In the event, the finishing of the grace period saw award-winning doctors serving in rural areas forced to give up practice (Grindlay, 2018). While this may not amount to a “pathway to nowhere”, it illustrates that even targeted migrant occupation regimes can leave MHPs’ capacities for productive work extremely vulnerable (Health and Ageing Standing Committee, 2012).

Exploitation and discrimination in a context of already constrained entitlements

MHP visas are often linked to specific employing organizations, or to particular areas (e.g., rural or remote), or they are denied welfare benefits for a period, as in Australia. These restrictions can hamper integrity system mechanisms that otherwise work, sometimes in an indirect way, to facilitate or protect human rights.

For example, the threat of arbitrary power—of *domination*—was a key concern animating early rights theorists like Locke (Pettit, 1996). Applied to employment contexts, domination, harassment or exploitation of employees is prohibited by UDHR Art.23. In ordinary market situations, the threat of employer mistreatment can be mitigated by the capability of workers to move employers, especially when this can occur at relatively low cost. Likewise, having welfare as a fall-back option assists in employees having a credible threat to leave an exploitative situation. Taking away these capabilities for visa-holders removes organic safeguards in the integrity system. This can mean that existing legal protections against exploitation and harassment do not work as effectively, as an MHP might legitimately fear that the breakdown in relations with their sponsor will threaten their visa status, even

if their concerns with employer misconduct are legally vindicated. In the most serious cases, this arrangement may effectively grant a private actor (the employer) a type of arbitrary political authority (over the MHP's visa status) that would be utterly prohibited by human rights thinking.

Specific constraints on employment may thus impact on other features of the rights-realizing integrity system. This concern aligns with the extensive research in Australia on the various and complex contexts that tend to constrain entitlements for overseas workers—including but not limited to MHPs (Li, 2015; Velayutham, 2013; Underhill and Rimmer, 2015; Robertson, 2011; Robertson, 2014; Breen, 2016). Indeed, concerns with exploitation have recently been the subject of a high-profile Federal Government Inquiry into the establishment of a Commonwealth Slavery Act (Joint Standing Committee on Foreign Affairs and Trade, 2017).

This provides a good example of how the moral approach to human rights sees standard threats interacting with waves of policy reform. The central use of employee-sponsored pathways (such as in Australia) helps respond to the threats of MHPs being unable to reasonably progress through pathways to employment. But that very policy may give rise to a *new* standard threat to MHPs' rights, namely, widespread exploitation based on employers' direct control over the MHP's visa status.

Finally, the vulnerability created by constrained entitlements and limited economic and employment opportunities may combine with other prevailing vulnerabilities. While our focus has been on institutional impediments that are likely to plague *even good faith efforts* by national and subnational agents to realise rights, the reality is that these constitute just one array of challenges and vulnerabilities presenting to MHPs, an array that overlays across an already intersectional landscape. Much MHP movement is from developing to developed countries, implicating cross-cutting and interpenetrated categories of ethnicity, gender, class, religion, citizenship and more (Anthias, 2012; Lulle and Jurkane-Hobein, 2017; Grosfoguel, Oso and Christou, 2015). Where these intersectional issues are at work, the vulnerabilities created in the reliable realization of MHP rights are unlikely to affect individual MHPs equally, but will instead combine with and exacerbate existing precarities. For

example, employers might exercise their capacity for exploitation along racist, sexist or other discriminatory lines.

Law and human rights

While the moral approach to human rights sees human rights *law* as just one tool among many to realise human rights, it can nevertheless provide an important safety net. In Canada, human rights are protected constitutionally by The Canadian Charter of Rights and Freedoms (1982) and through statute by federal, provincial and territorial laws, backed up by provincial and territorial human rights agencies, commissions and tribunals. MHPs have historically sought—and occasionally achieved—redress through these instruments. For example, in *Bitonti v. College of Physicians & Surgeons of British Columbia* (1999), MHPs with foreign medical qualifications challenged the way the College's rules distinguished between graduates of medical schools in different countries. The Tribunal upheld their claim, judging that the inflexible registration requirements placed on MHPs with foreign qualifications, combined with the absence of provision to demonstrate the equivalency of their qualifications, amounted to discrimination on the basis of place of origin. More recently, Canadian medical graduates educated abroad have petitioned British Columbia's Supreme Court about the violation of their constitutional rights through the preferential access to placements given to graduates of Canadian medical schools (Fayerman, 2018).

With respect to this part of their integrity system, Canada offers stronger protections than Australia. Australia is the only liberal democracy that has neither a constitutional nor statutory bill of rights, and mechanisms for the application of international treaty obligations in domestic legal courts are weak and unreliable (Triggs, 2019).

Benefits, resources and wider concerns

Any analysis of rights realization by integrity systems must pay heed not only to a system's constraints and limitations, but also its resources and opportunities. MHP migration can deliver important results in human rights realization. This is obviously so for the patients cared for by the MHPs in their professional work—patients who are typically from under-serviced lower-

socioeconomic and rural/remote areas. So too, the practice of MHPs sending remittances back to their extended families can be a critical source of income for the beneficiaries, furthering their rights-based economic, educational and health interests.

Even for MHPs, there are important benefits. Developed countries (as destinations) often implement human rights more successfully than the original source countries—indeed, this can be a key driver of immigration (Wong and Celbis, 2019). Moreover, the MHP cohort has special qualities. They are well-educated in socially valuable (“in demand”) occupations, proficient in the local language and comparatively well-resourced compared to other migrant workers (Mattila, 2002). As a self-selected group, they are often highly intelligent, practical and pro-active. And their international mobility and valuable skill set means that they may possess a viable “exit” option (namely, immigration to another country), that they can exercise when pathways disappear, or employment conditions become unworkable. These qualities give them a level of agency over their lives that states can facilitate, working with the MHPs to deliver mutually beneficial outcomes.

Yet the educational, linguistic and financial resources enjoyed by MHPs carries a further warning. In showing that MHPs—*one of the most well-resourced and in-demand migrant worker cohorts*—face significant human rights threats, this analysis suggests that less well-positioned migrant worker cohorts are likely to be more vulnerable again. Many of the challenges noted above apply to other migrant workers, making a state-based system of rights realization a difficult tool to bend to the benefit of inherently precarious workers (Hennebry, 2014).

CONCLUSION

There is no “silver bullet” solution to the concerns raised above. They arise from large-scale features of politico-economic systems—international sovereignty, federalism and role of subnational organisations in education and healthcare, independence of professional organisations from state decision-makers, and the fluctuating need for medical service providers versus the long-term nature of migration decisions. These deep-seated causes make it a challenge to respond to the root causes of this vulnerability. However, as we have shown, there are smaller-scale changes that can be ‘bolted on’ to

the larger system to ameliorate these adverse outcomes. These smaller changes are often legal and bureaucratic—better monitoring, increased invigilation of exploitation issues, grandfathering changes to pathways, human rights legislation and court protections, and so on. The use of such reforms exemplifies the multiple ‘waves of duties’ described in the first section, where extra policies are initiated to mitigate problems created by, or unsolved by, the first wave of duties.⁴

The crucial lesson is for policy-makers to be aware of the special weaknesses that otherwise reliable rights-realizing integrity systems face with respect to this cohort. Governments need to be cognisant of the likelihood of unintended knock-on effects of policies that stymie the workings of otherwise reliable modes of rights realization. Specifically, MHPs may need different types of dedicated rights *protection* (from exploitative employers). They may need different types of rights *facilitation* (such as grandfathering to mitigate the life costs of pathway changes—a strategy recently employed by Australia). Above all, they need special *monitoring*. Governments struggle to keep track of the changing outcomes for this highly dispersed community with little political representation. This lack of visibility heightens the risks of MHPs “falling through the cracks”. Ensuring clear and comprehensive reporting on WHO Code implementation must be a critical first step towards informed policy.

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NOTES

¹ For example, the human rights analysis of ‘Our World in Data’ (Roser, 2016) has Australia at +1.75 and Canada at +2.79 on a scale from -4 to +4, while Freedom House’s rankings for political rights and civil liberties scores Australia at 97/100 and Canada at 98/100 (Freedom House, 2020).

² On the one hand, Australian and Canada are both ‘settler’ countries, offering genuine opportunities for migrants to settle permanently. However, in both countries these opportunities are accessible primarily by skilled migrants (including MHPs). While temporary skilled migrants do face rights violations (Boucher, 2019), unskilled migrants entering through complementary regimes in both countries have far more restricted entitlements and opportunities (Hari and Liew, 2018; Ruhs, 2013; Schierup, Ålund, and Likić-Brborić, 2015). Refugees and undocumented workers constitute separate categories again, with Australia in particular sharply criticised on human rights grounds for its treatment of refugee boatpeople (Tazreiter, 2017).

³ The competition by developed countries for global talent gives skilled migrants privileged entry, employment, permanent residency and family unification opportunities compared to those going to unskilled migrants (Ruhs, 2013). This provides a major reason why MHPs (and other highly skilled migrant workers) are not members of the precariat (Hari and Liew, 2018).

⁴ It is unclear how far the same process of multiple avenues of policy reform (new supplementary ‘waves of duties’) would be appropriate for realising the rights of the highly vulnerable unskilled workers of the precariat. No doubt, targeted reforms could improve human rights for this cohort. However, it is arguable that unskilled worker precarity is not merely *caused by* the larger system, but

is a *deliberately intended or necessary part of it* (Schierup and Jørgensen, 2016: 948). If so, then such precarity may prove resistant to targeted legal and bureaucratic reform measures.

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