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SYMPOSIUM ON UNDOING DISCRIMINATORY BORDERS

DISCRIMINATION INSIDE: NON-DISCRIMINATION AS A TOOL OF MIGRANT INTEGRATION

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Migration control does not end at the border. Rather, controlling migration (and migrants) continues inside host countries as migration status is used to stratify benefits and limit rights across social, economic, cultural, and political life.[1] This differentiation typically has exclusionary effects and aggravates structural disadvantages that migrants face. This essay argues that we should use anti-discrimination law to address such practices of differentiation and remedy their detrimental effects. While non-discrimination clauses in international human rights treaties provide a powerful resource to this end, they are currently often interpreted in a restrictive manner. "Differentiation within" includes a variety of measures such as restrictions on migration status that limit the right to work, restrictions on political participation, restrictions on freedom of movement based on migration status, and requirements of cultural adaptation.

The analysis in this essay focuses on one specific set of practices, namely limitations regarding work and access to the labor market based on migration status. Such restrictions on migration status interact with employment law-based rules to amplify the disadvantages certain migrants experience. To unleash the potential of non-discrimination clauses as a tool to combat the structural disadvantages migrants face, the essay suggests applying the concept of transformative equality, as developed by Sandra Fredman in the context of gender equality, to the field of migrant integration.[2] The essay argues that transformative equality may work to remedy structural exclusion as well as promote participation by migrants in the socioeconomic life of their host state. It may also ultimately enable an understanding of migrant integration that emphasizes interaction between migrants and citizens, rather than one-sided adaptation by migrants to the societal norms of the host state.

Non-Discrimination Clauses and Labor Restrictions

Two specific practices of differentiation regarding access to the labor market and labor relations can be discerned: (1) restrictions on migration status that grant no formal right to work to migrants or restrict their choice of remunerated activity or employer, or those that give priority to domestic workers, and (2) differentiations regarding remuneration and protection at the workplace. While the former often also affect regular migrants, the latter are often an issue that concerns irregular migrants, but also migrants in specifically vulnerable situations, such as temporary migrant workers or domestic migrant workers. International law has robust non-discrimination

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[1] Linda Bosniak, The Citizen and the Alien: Dilemmas of Contemporary Membership (2006).

[2] Sandra Fredman, Discrimination Law 25 (2011).

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clauses that have implications both for labor relations and migrants' access to the labor market, although there remains a serious implementation gap.[3]

As a preliminary matter, restrictions regarding access to the labor market need to be assessed in light of Article 6 of the International Covenant on Social, Economic and Cultural Rights (ICESCR), which recognizes the right to work for everyone. The non-discrimination clause in Article 2(2) of the ICESCR sets out that state parties "undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[4] In its General Comment No. 20 on non-discrimination, the UN Committee on Economic Social and Cultural Rights (CESCR) has clarified that "[t]he Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation."[5] However, Article 2(3) of the ICESCR includes an exception for developing countries, which are allowed to restrict socioeconomic rights of non-nationals. Still, these restrictions must be made with "due regard to human rights" and therefore the exception should be interpreted narrowly.[6] Moreover, the developing country exception does not apply to the majority of economically developed migrant-receiving countries in the Global North that have particularly restrictive rules regarding labor market access.

The CESCR has not yet decided any case regarding migrants' access to the labor market or restrictions regarding their choice of work. However, in its General Comment on non-discrimination and in line with the requirements in Article 4 of the ICESCR, it has clarified that differentiations between migrants and citizens can be justified if they are reasonable and objective, that is, if "the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society."[7]Arguably, this opens the door for a broad margin of appreciation, whenever a state claims to pursue protection of the domestic welfare system and the integrity of its labor market.

This does not, however, mean that the promotion of domestic welfare automatically justifies differential treatment. First of all, the CESCR requires restrictions to be proportional, that is, the restrictions must be necessary and the objective they seek to achieve must outweigh the interests of the migrant.[8] Second, the interpretation of this proportionality requirement should be informed by specific human rights requirements regarding the protection of migrant workers. For instance, policies granting priority to domestic workers are explicitly permitted under Article 52(3)(b) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW),[9] but after five years of lawful residence, migrant workers are to be treated as equal to citizens.

International human rights law prohibits states from indefinitely denying migrant workers the freedom to choose their remunerated activities. Article 52(2)(b) of the ICRMW and Article 14 of the International Labor Organization (ILO) Convention No. 143 on the Protection of Migrant Workers (ILO Migrant Workers'

[3] Shauna Olney & Ryszard Cholewinski, *Migrant Workers and the Right to Non-Discrimination and Equality*, *in* MIGRANTS AT WORK 259, 264 (Cathryn Costello & Mark Freedland eds., 2014).

[4] International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 UNTS 3.

[5] UN Comm. on Economic, Social and Cultural Rights, General Comment No. 20 on Non-Discrimination, UN Doc. E/C.12/GC/20, at 30 (2009) [hereinafter General Comment No. 20].

[6] On the interpretation of this clause, see Colm O'Cinneide & Cathryn Costello, *The Right to Work*, *in* OXFORD HANDBOOK OF INTERNATIONAL REFUGEE LAW 957 (Cathryn Costello et al. eds., 2021).

[7] General Comment No. 20, *supra* note 5, at 13.

[8] *Id.*

[9] International Convention on the Protection of All Migrant Workers and Members of Their Families, Dec. 18, 1990, 2220 UNTS 3.

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Convention)[10] state that such restrictions may only be applied during the first two years of residence. The general principle that migrant workers should be able to freely choose their remunerated activity and to change their employer at the earliest possible time is also supported by Objective 22 (g) of the Global Compact for Safe, Orderly and Regular Migration under which the signatory states commit themselves "to allow migrants to change employers . . . with minimal administrative burden." While the Global Compact is not a legally binding instrument, it nevertheless expresses the political commitment of the 164 states that formally adopted the Compact, which has also been adopted as a resolution by the UN General Assembly.[11] The rationale behind Objective 22(g) is that a migrant worker will be especially vulnerable, including to potential exploitation, if his or her resident status is dependent on employment with one specific employer. Here, international human rights law attempts to overcome power asymmetries and structural imbalances in labor relations that are reinforced by migration law.

Finally, international human rights law is unlikely to countenance an absolute prohibition on the right to work even for those migrants who have not entered the country as migrant workers, but are nonetheless there based on some other migration status (such as family reunion, refugee status etc.). Not only is an absolute prohibition likely to be considered disproportionate under Article 6 read together with Article 2(2) of the ICESCR, but it might also violate other provisions of international law. For instance, Article 17(2) of the Convention Relating to the Status of Refugees[12] provides that restrictive measures relating to employment shall not be applied to refugees after two years of residence or if they have a spouse or a child possessing the nationality of the country of residence.

The analysis above demonstrates that although differential treatment regarding access to the labor market based on migration status is not generally prohibited, international human rights law nevertheless sets a high bar for justifying such practices. The impact of this standard of justification is, however, limited. For one thing, international human rights bodies have not yet decided many cases regarding migrants' access to the labor market.[13] As a consequence, the standard of justification for such practices has yet to be concretized. Second, many of the treaty provisions that support strict scrutiny in assessing the proportionality of differential treatment apply to a very limited number of states, because there are only few signatories to the respective conventions. Finally, even in signatory states, there are still significant implementation deficits in state practice.[14]

Irregular Migrants and Access to the Labor Market

In contrast to regular migrants, migrants in irregular situations, that is, those who are not in compliance with the requirements for legal residence in the host country, are less protected by international law when it comes to the right to work. No international human rights provision grants them access to the labor market. Nevertheless, many of those in an irregular situation are in fact included in the (informal) labor market and contribute to the national economy of their host state. While they do not have a formal right to be included in the labor market, they nevertheless benefit from non-discrimination clauses with respect to working conditions and remuneration. Article 25 of the ICRMW explicitly recognizes a right to equal treatment regarding remuneration and conditions of work for *all* migrant workers. This provision echoes Article 1 in conjunction with Article 9 of the ILO Migrant Workers' Convention, which provides for the equal treatment of *all* migrant workers regarding the remuneration of past work. This right to equal treatment is also reflected in the CESCR's interpretation of Article 2(2) of the ICESCR, which stresses that "the Convention applies to everyone . . . regardless of legal status and

[10] International Labour Organization Convention No. 143 on the Protection of Migrant Workers, June 24, 1975.

[11] G.A. Res. 73/195 (Dec 18, 2018).

[12] Convention Relating to the Status of Refugees, July 28, 1951, 189 UNTS 137.

[13] An exception being CERD, A.A.M. v. Switzerland, UN Doc. CERD/C/84/D/50/2012, para. 8.6 (2014).

[14] Olney & Cholewinski, *supra* note 3.

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documentation."[15] In international human rights jurisprudence, the relevance of the principle of non-discrimination for the treatment of migrant workers in an irregular situation has been emphasized most prominently by the Inter-American Court of Human Rights (IACtHR). In its advisory opinion on the rights of undocumented migrants, the IACtHR held the principle of equality and non-discrimination to be *jus cogens*.[16] The IACtHR, however, explicitly admitted that distinctions based on immigration status can be justified if they are reasonable, objective, and proportionate.[17] Here again, the core issue seems to be under which conditions differential treatment may be justified.

Generally speaking, the core dilemma confronting international human rights law appears to be the need to ensure that both the interest of the state in protecting its domestic welfare system and the interests of migrant workers are taken into account when assessing the legality of differential treatment regarding migrants' participation in the labor market. More specifically, how can anti-discrimination law and norms serve to combat the structural disadvantages and power asymmetries that shape a migrant's situation?

Transformative Equality as a Tool for Migrant Integration

This essay advocates using Sandra Fredman's concept of transformative equality to ameliorate the deficiencies identified above in the currently dominant interpretation of non-discrimination clauses in the context of migration.[18] According to Fredman, transformative equality pursues the goal of combating inequality by not only prohibiting direct or indirect discrimination, but by also obliging states to achieve structural change and enable participation and mutual recognition. It comprises four interrelated elements: (1) combatting concrete disadvantages (the redistributive dimension), (2) addressing stigma, stereotyping, prejudice, and violence (the recognition dimension), (3) accommodating difference and remedying structural exclusion (the transformative dimension), and (4) promoting participation (the participatory dimension).[19] This approach would challenge the hegemonic use of "integration," which has rightly been criticized for focusing exclusively on the obligations of migrants to adapt to the cultural norms of the host society, thereby undermining the realization of human rights rather than furthering them.[20] This essay instead advocates for an interactionist and participation-oriented reading of integration that requires mutual adaptation by newcomers *and* citizens, thus emphasizing the host state's obligations to facilitate participation, eliminate structural disadvantages and combat stereotypes.[21] Injecting this understanding of transformative equality into the reading of non-discrimination clauses would help to develop a more critical standard to evaluate current integration policies and existing barriers to participation of migrants in the economic and social life of the host society.

A legal anchor for the concept of transformative equality can be found in the various existing non-discrimination clauses. Fredman has shown that such a substantive concept of equality is already reflected in the case law

[15] General Comment No. 20, *supra* note 5, at 30; see also, with regard to labor relations more specifically, UN Comm. on Economic, Social and Cultural Rights, General Comment No 18 on the Right to Work, UN Doc. E/C.12/GC/18, at 18 (2006).

[16] Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, para. 101 (Sept. 17, 2003).

[17] *Id.* at para 119.

[18] FREDMAN, *supra* note 2, at 25.

[19] *Id.*

[20] Alexandra Xanthaki, *Against Integration, for Human Rights*, 20 INT'L J. HUM. RTS. 815 (2016).

[21] On such a concept of integration, see LUDGER PRIES, REFUGEES, CIVIL SOCIETY AND THE STATE (2018).

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of the European Court of Human Rights (ECtHR) on Article 14 of the European Convention on Human Rights.[22] The court has addressed all four dimensions of transformative equality, most notably in its jurisprudence on racial discrimination and minority status.[23] Transformative equality is also reflected in the CESCR's call for an "active approach to eliminating systemic discrimination and segregation in practice," which may also include "temporary special measures."[24] Anchoring transformative equality in the ICESCR's non-discrimination clause would also provide a legal standard that is binding on the majority of states as the ICESCR has been ratified by 171 states. Moreover, Article 10 of the ILO Migrant Workers' Convention includes the concrete obligations of states "to declare and pursue a national policy designed to promote and to guarantee . . . equality of opportunity and treatment . . . for persons who as migrant workers or as members of their families are lawfully within its territory." This provision mirrors Article 2 of the ILO Discrimination (Employment and Occupation) Convention No. 111, which has been ratified by 175 states. Thus, active promotion of equal opportunities, including positive measures to combat structural inequalities, is already recognized by various international legal provisions. However, international human rights bodies and academic literature have yet to sufficiently concretize the specific obligations following from these clauses with respect to migrants' integration.

The Impact of Transformative Equality on Migrant Integration

What impact would a transformative understanding of equality have on the interpretation of non-discrimination clauses? Three concrete implications already follow from the analysis presented in this essay. First, transformative equality would impact the standard of justification for differential treatment in the labor market. Given the host states' obligation to enable participation in socioeconomic life on an equal footing and remove structural disadvantages faced by migrants, restrictions regarding access to the labor market for regular migrants will only be justified for a short period. Critics of such a robust claim for substantive equality argue that exclusionary border policies are a necessary "price of rights" on the inside as the financial and social costs of integration rise with increasing rights to participation.[25] However, this concern about "burdens" focuses exclusively on the short-term economic capacities of the receiving state. This critique reinforces a purely utilitarian view of migration that is increasingly mirrored in immigration policies worldwide.[26] Second, transformative equality requires addressing structural exclusion and inequality. Restrictions regarding the choice of employer and remunerated activity would only be justified in exceptional cases. At the very least, the proportionality assessment would need to take into account the concrete effects of these measures on power asymmetries and the vulnerability of migrants. While this may have the effect of making labor migration less responsive to the economic demands of the labor market,[27] it would help to overcome a functionalist approach to migration, whereby migrant workers are primarily viewed as a fungible labor force rather than equal members of society and bearers of human rights. Finally, transformative equality would impose positive obligations on states resulting from non-discrimination clauses. In particular, it would require states to actively combat stigmatization and vulnerability. One way to do so would be to introduce a legal path to regularization for undocumented migrants, at least in circumstances where

[22] Sandra Fredman, *Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights*, 16 Hum. Rts. L. Rev. 273 (2016).

[23] For an extensive discussion, see Fredman, *supra* note 22, at 284–89.

[24] General Comment No. 20, *supra* note 5, at para. 39 (2009).

[25] Martin Ruhs, The Price of Rights: Regulating International Labour Migration 111 (2013).

[26] Anna K. Boucher & Justin Gest, Crossroads: Comparative Immigration Regimes in a World of Demographic Change 153–56 (2018).

[27] Philip Martin, *The GCM and Temporary Labour Migration*, 18 Global Social Pol'y 339, 341 (2018).

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they are de facto contributing to the labor market of the host country. Regularization as one way to end the precarious situation of undocumented migrants is already recognized in Articles 35 and 71 of the ICRMW. The ECtHR has also recognized states' obligation to regularize the residence status of irregular migrants under specific circumstances.[28] Indeed, notwithstanding the concern frequently voiced by states that this practice might encourage more irregular migration, states already resort to regularization when it suits their economic interests.

A transformative understanding of equality would thus compel states as well as international human rights bodies to take into account the specific forms of stigmatization and vulnerability, as well as the power asymmetries migrants face not only due to the behavior of private actors, but also due to the specific interplay of migration law and labor law regulations. By making issues of redistribution and power in our societies generally more visible, transformative equality may ultimately also contribute to social cohesion beyond the context of migration.

[28] For an analysis of this line of jurisprudence see JÜRGEN BAST ET AL., HUMAN RIGHTS CHALLENGES TO EUROPEAN MIGRATION POLICY 195–98 (2d ed., 2021).

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