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THE PRICE OF RIGHTS: REGULATING INTERNATIONAL LABOR MIGRATION

By Martin Ruhs
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For 10 years, Martin Ruhs has consistently analysed the ethics and appropriateness of labour migration programs by weighing up the interests of workers, employers, and states of origin and destination.¹ Ruhs' starting point is the ethical dilemma inherent in labour migration programs. Migrant workers from poor countries are prepared to sacrifice rights and equal treatment with domestic workers in developed countries for the opportunity to work. As the title, *The Price of Rights*, encapsulates, rights come at a price.² If migrant labourers have too many rights, the cost to employers increases and work opportunities decrease. But Ruhs recognises there must be a limit to this trade-off. There must be a minimum level of protection for migrant workers to avoid overt exploitation and conditions of work akin to slavery.

Drawing on Joseph Carens, Ruhs makes a distinction between realistic and idealistic policy analysis.³ The idealist focuses on what ought to be the normative constraints on policy making and discusses appropriate policy settings within these constraints. The idealist will establish a view on the universality and inalienability of rights and then be constrained to evaluating policy within the limits of this position. The realist is more pragmatic, focused on providing practical input into policy debate. Ruhs falls firmly into the realist camp, focusing his analysis on existing state practice in the implementation of labour migration policies. Ruhs establishes a hypothesis to drive an empirical analysis of state practice: that there is a direct relationship

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¹ See, eg, Martin Ruhs, 'The Human Rights of Migrant Workers: Why Do So Few Countries Care?' (2012) 56(9) *American Behavioural Scientist* 1277-93; Martin Ruhs, 'Migrant Rights, Immigration Policy and Human Development' (2010) 11(2) *Journal of Human Development and Capabilities* 259-79; Martin Ruhs and Ha-Joon Chang, 'The Ethics of Labor Immigration Policy' (2004) 58(1) *International Organization* 69-102.

² Martin Ruhs, *The Price of Rights: Regulating International Labor Migration* (Princeton University Press, 2013).

³ Joseph Carens, 'Realistic and Idealistic Approaches to the Ethics of Migration' (1996) 30 *International Migration Review* 156-170, as referred to in Ruhs, *The Price of Rights*, above n 2, 164.

between the openness of migrant labour programs and the skill levels required to enter the programs and an inverse relationship between skill levels and the extent of migrant worker rights.⁴

Within this framework, Ruhs questions the appropriate level of rights protection for temporary migrant workers. He answers theoretically, through an analysis of rights, combining this with a comprehensive survey of migrant worker programs around the world. In relation to his rights analysis, it is immediately clear that Ruhs understands rights to be alienable, at least to a degree. In determining optimum policy settings for labour migration programs, Ruhs advocates for a balance between rights-based and consequentialist approaches. Ruhs argues that outside core civil and political rights, such as the right to access the courts of the receiving country, most rights have instrumental value only and can be weighed against other competing interests, values and policy objectives.⁵ This means, for example, that it is possible to sacrifice the right to free choice of employment or the right to be united with family⁶ in order to achieve other benefits. Such benefits include greater economic gains for employers and receiving states, more open labour migration policies that offer opportunities to a greater number of migrant labourers and consequential economic benefits to their countries of origin resulting from the flow of remittances.

Ruhs also tackles the ethical question of rights through the lens of globalisation and citizenship theory. What entitlements and rights of membership are inherent in the fact of residence and work in a place? Is there a point in time when a person's length of stay and contribution is such that it is unethical to deny them permanent residency and citizenship? Ruhs is not satisfied with formal claims to state sovereignty to answer this question. He advocates for a balance between nationalist and cosmopolitan perspectives.⁷ Ruhs accepts that, in formulating labour migration policies, states prioritise the interests of their citizens and maintain border control to protect those interests.⁸ However, by working in the state and contributing to its economic prosperity, migrants necessarily accrue some of the benefits that flow from membership in the state, such as equal protection under state laws regulating employment conditions, and basic civil and political rights. While Ruhs accepts that it is not legitimate for states to disregard the interests of non-members completely, he does not accept the extreme cosmopolitan perspective that calls for the dismantling of state restrictions on migration and the equal treatment of citizens and aliens.

Although Ruhs recognises the range of stakeholders in international labour migration, the perspective he develops most comprehensively is that of receiving states. It is implicit in *The Price of Rights* that Ruhs is appealing to policy-makers in receiving countries and offering them a way to conceptualise their responsibilities

⁴ Ruhs, *The Price of Rights*, above n 2, 80–7.

⁵ Ibid 172–3.

⁶ Ibid 175–6.

⁷ Ibid 160.

⁸ Ibid 164.

to migrant workers when exploiting the economic benefits of migrant labour. His modified rights approach has particular resonance from this perspective.

The Price of Rights is an important contribution to the migrant worker debate. Ruhs' discussion of the issues is assured and acknowledges the many perspectives that must be considered in establishing policy settings. Although his approach is a provocation to those who advocate for states to accede to obligations in the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*⁹ and other rights-based international treaties, Ruhs' approach recognises the place of this perspective and leaves space for its advocates to argue the case for rights protection against the interests of states and migrant workers. What he requires, though, is a proper acknowledgement of the cost of rights on the economic and other interests of migrant workers.

The empirical work in *The Price of Rights* is impressive in its breadth, covering 46 countries.¹⁰ However, I am uncertain of its enduring value. One immediate shortcoming of the empirical work is the decision to limit the definition of migrant workers to those who are on a visa 'for the primary purpose of work'.¹¹ This constraint puts form over substance. It is the *fact* of migrant work, and not the official purpose of a visa, that determines the extent and scope of migrant work. A substantial amount of low- and semi-skilled work is done by migrants on visas that are for a different primary purpose but that still provide for limited work rights. Furthermore, the stated purpose of a particular visa category might hide that the visa is in fact being used primarily as a vehicle for work. In Australia, for example, migrant workers contribute to low- and semi-skilled work through a range of migration pathways. Despite a clear and express policy preference for highly skilled migration, working holiday-makers and international students perform a large amount of low- and semi-skilled work and have a direct impact on the extent and operation of dedicated labour migration programs, such as the sub-class 457 Business Long Stay visa.¹²

In my view, Ruhs' empirical work would have had greater value if it had focused on a smaller sample group and drilled down further into the categories of migrant work in each country. This would have given a deeper sense of how state policies provide incentives for migrant labourers, protect their rights, and further the economic interests of the state and private employers. More useful and interesting observations are derived from Ruhs' qualitative analysis in chapter 5 than from his empirical analysis in chapter 4.

⁹ Opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003).

¹⁰ Ruhs, *The Price of Rights*, above n 2, ch 4.

¹¹ *Ibid* 10.

¹² For a discussion of the 457 visa scheme, see generally Joanna Howe, 'The Migration Amendment (Worker Protection) Act 2008: Long Overdue Reform, But Have Migrant Workers Been Sold Short?' (2010) 23(4) *Australian Journal of Labour Law* 251.

Australian policy settings confirm Ruhs' hypothesis that there is a correlation between higher skilled work and migrant rights. Unlike working holiday-makers and international students, sub-class 457 visa holders have specific rules protecting their pay and conditions of work. However, policy settings in Australia do not confirm the correlation Ruhs draws between the level of skill required and the openness of the labour migration pathway, in light of the easy access of international students and working holiday-makers to the Australian labour market. In fact, Ruhs' framework for analysis offers a useful way to critique the policy settings in Australia. There is widespread concern that the level of openness to unskilled work in Australia through the international student and working-holiday visa pathways is leading to a high level of exploitation of vulnerable workers on these visas, and contributing to unemployment.¹³

There were points in the theoretical discussion that would have benefitted from further analysis. Ruhs lists a number of categories of rights — civil and political rights, economic rights, social rights, residency rights and access to citizenship — and argues that some are fundamental and others are not. But the allocation of rights to one or other of these categories was intuited rather than justified theoretically. Some rights were described as accruing over time, but why and to what extent was not explored in depth. A key issue in relation to the conferral of membership is if and when temporary labour migrants ought to have the right to apply for full membership in the state. Ruhs argues that there is a limit to how long a state should be able to offer work to a migrant as a temporary resident, after which permanent residency ought to be offered or the employment relationship terminated. Ruhs settles on four years as the appropriate maximum length of time for temporary work, but does not offer a justification for this position. Is it because of the extent of the migrant worker's contribution, the level of integration that occurs within this time, or the degree of separation from the worker's country of origin? Could there be a distinction between high- and low-skilled workers in relation to this length of time, based on their contribution to the receiving state, their vulnerability to exploitation or their level of integration? Having committed to a particular limit for temporary work, further explanation was warranted.

In an area of policy with such a diverse range of interests and policy perspectives, Ruhs contributes an important framework for analysis that recognises the complexity of the ethical issues surrounding the employment of migrant workers within the geopolitics of economic migration and state practice. *The Price of Rights* is a valuable resource for policy-makers in choosing settings for labour migration programs and for academics grappling with the appropriate terms of analysis.

¹³ Alexander Reilly, 'Protecting Vulnerable Migrant Workers: The Case of International Students' (2012) 25(3) *Australian Journal of Labour Law* 181; Peter Mares, 'Temporary Migration and its Implications for Australia' (Papers on Parliament No 57, Parliament of Australia, February 2012) <http://www.aph.gov.au/about_parliament/senate/research_and_education/pops/pop57/c03>.