

EMPLOYER-TIED LABOUR MIGRATION VS. MIGRANT WORKERS' RIGHT
NOT TO BE HELD IN INVOLUNTARY SERVITUDE: LESSONS FROM THE UK,
ISRAEL, AND USA

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ABSTRACT

In 2006, the Supreme Court of Israel recognized, in a unanimous decision, that the governmental issuance of employer-tied work permits to foreign workers creates a “modern form of slavery” and, more precisely, that it violates individuals’ fundamental right to liberty. Other types of temporary labour migration programs have been documented as less restrictive of migrant workers’ fundamental right to liberty, physical and psychological integrity, and access to justice – or more precisely, to their implied fundamental right not to be held in servitude. For decades, migrant associations and non-governmental organizations around the world have been advocating for the respect of workers’ fundamental rights – and in particular for the removal of state restrictions on the right to change employers. In 1998, the UK government agreed to issue sectoral work permits to foreign domestic workers employed by a foreign national residing in the country - instead of employer-tied work authorizations. Even though this less restrictive framework was confirmed by both civil society groups and state agencies as effective in reducing the abuses and obstacles to justice experienced by these workers, the U.K. government re-introduced, in 2012, the issuance of employer-tied work permits for foreign domestic workers. In the US, the evolution of legal schemes that imposed conditions of servitude on workers confirms that even when an explicit limit exists on the legality of state restrictions on workers’ rights, such as a constitutional recognition of their fundamental right not to be held in involuntary servitude, repeated interventions by the courts has proven necessary to force policymakers to stop facilitating employers’ access to a supply of unfree workers. The limited impact of direct pressure for progressive policies, of formal rights recognition, and of the first legal initiatives challenging the legality of employer-tied labour migration programs demonstrates that in order to secure for migrant workers the right to change employers, court decisions that broadly recognize the incompatibility between workers’ fundamental rights and any form of employer-tying policy are necessary. Furthermore, the most effective court decisions would include detailed accounts of alternative labour migration policies that have a neutral or positive impact on migrants’ rights.

INTRODUCTION

With the gradual phasing out of slave regimes during the late nineteenth century, governments turned to immigration as a way to secure large-scale employer-tied workforces for specific sectors.¹ Such ‘temporary unfree work’ migration programs historically relied on state recognition and enforcement of private employer-tying contracts, and nowadays, increasingly on the issuance of employer-specific temporary work permits² (and other similar administrative tools).³ In the last couple of decades, employers in ‘destination’ countries have pushed policymakers away from permanent immigration programs and secured instead the remarkable expansions of temporary labour migration programs associated with restricted (and typically employer-specific) work authorizations.⁴

The use of employer-specific work authorizations has not been without controversy, typically pitting the right of non-citizens to change employers as a basic human right against the prerogative of sovereign states to determine their own migration policies.⁵ During the past century, international discussions commonly reiterated that state restrictions of non-citizen workers’ right to change employers were acceptable but should avoid the long-term binding of individuals to specific employers. Such traditional consensus within the class in power is well illustrated by the adoption of the following guideline after a 1997 ILO meeting to discuss temporary labour migration:

Tying time-bound migrants to a particular employer, occupation or sector is normal but, on human rights grounds, cannot be extended indefinitely.⁶

While governments were busy reaffirming that employer-specific work authorizations should not be considered as state violations of human rights, non-governmental organisations started to increase their monitoring of the work and life conditions of workers under employer-tied work permits. For example, between 2001 and 2015, thirty-nine

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¹ Cindy Hahamovitch, "Creating Perfect Immigrants: Guestworkers of the World in Historical Perspective" (2003) 44:1 Labor History 69 at 74.

² See Organization for Security and Co-operation in Europe, International Organization for Migration & International Labour Organization, *Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination* (2006)

³ *Infra* section III. THE FIRST CONSTITUTIONAL CHALLENGES AIMING TO ADVANCE MIGRANT WORKERS’ RIGHT TO CHANGE EMPLOYERS (RIGHT TO LIBERTY/FREEDOM OF OCCUPATION).

⁴ International Labour Office, *International labour migration: A rights-based approach* (2010) at 28.

⁵ International Labour Organization, Employment and Training Department, *Report of the Tripartite Meeting of Experts on Future ILO Activities in the Field of Migration* (1997).

⁶ *Ibid.*

reports on employer-tied labour migration programs were published by Amnesty International and Human Rights Watch alone.⁷

In particular, studies confirmed that workers issued employer-tied work permits face major obstacles in the exercise of their labour rights,⁸ are at higher risk of health problems,⁹ face major obstacles in the exercise of socioeconomic rights¹⁰ and in accessing justice.¹¹ More importantly, workers issued employer-tied work permits have been found to have a higher risk of ending up in conditions of forced labor.¹²

Alongside increasing empirical data on the systemic incapacity of employer-tied migrant workers to exercise basic labour and human rights,¹³ legal scholars have recently started to analyze the conditions of migrant workers with the help of social (non-legal) concepts, in particular, the idea of ‘contemporary unfreedom’.¹⁴ Such a condition has been defined in contrast with 19th century slavery:

Traditional understandings of unfree labour, which take as their points of reference historical forms of slavery and bondage, generally expect to see unfreedom ... at the point of entry into a labour relationship. They stem from the notion that a person is ‘enslaved’ ... through their involuntary entry into such an arrangement ... unfree labor in the contemporary era is constituted primarily, although not exclusively, by the constraints that are imposed on a person’s ability to leave a particular arrangement – unfreedom at the point of exit... The dynamics of unfree labour could be said to arise predominantly in the labour relationship that ensues, rather than directly at the site of entry.¹⁵ (emphasis added)

The purpose of this paper is not to add to the debate on whether temporary restricted/employer-specific work authorizations are compatible with basic human rights or with updated notions of what constitutes ‘free labour’ – it considers that controversy

⁷ Eugénie Depatie-Pelletier, *Judicial Review and Temporary Labour Migration Programs Declared a “Modern Form of Slavery”*: State Restrictions of (Im)migrant Workers’ Right to Liberty and Security (Not to Be Held Under Servitude) Through Employer-Tying Policies (LL.D., Université de Montréal Faculté de droit, 2016) [unpublished] at 16.

⁸ See e.g. Amnesty International, *Disposable Labour Rights of Migrant Workers in South Korea* (2009).

⁹ See e.g. Sevil Sönmez *et al.*, "Human rights and health disparities for migrant workers in the UAE" (2011) 13:2 Health and Human Rights International Journal .

¹⁰ See e.g. Malcolm Sargeant, "Layers of Vulnerability in Occupation Health and Safety for Migrant Workers: Case Studies from Canada and the United Kingdom" (2010) 7:2 Policy and Practice in Occupational Health and Safety 51.

¹¹ See e.g. Myriam Dumont-Robillard, *L'accès à la justice pour les travailleuses domestiques migrantes : une illusion?* (Montréal: Les Éditions Thémis, 2015).

¹² See e.g. Ray Jureidini & Nayla Moukarbel, "Female Sri Lankan domestic workers in Lebanon: a case of ‘contract slavery’?" (2004) 30:4 Journal of Ethnic and Migration Studies.

¹³ See e.g. Elizabeth Frantz, "Jordan's Unfree Workforce: State-Sponsored Bonded Labour in the Arab Region" (2013) 49:8 The Journal of Development Studies 1072.

¹⁴ See e.g. Judy Fudge & Kendra Strauss, "Migrants, Unfree Labour, and the Legal Construction of Domestic Servitude: Migrant Domestic Workers in the UK" in Cathryn Costello & Mark Freeland eds, *Migrant At Work: Immigration & Vulnerability in Labour Law* (Oxford: Oxford University Press, 2014) 160-179.

¹⁵ Stephanie Barrientos, Uma Kothari & Nicola Phillips, "Dynamics of Unfree Labour in the Contemporary Global Economy" (2013) 49:8 Journal of Development Studies at 1038 – 1039.

firmly settled. Rather, the question that concerns this paper is how to stop their widespread use by governments.

Typically, efforts to secure the recognition of the right of non-citizen workers to change employers have taken the form of (I) direct pressure on policymakers for the adoption of less restrictive policies. Yet, history demonstrates that even when (II) formal legal protections exist, repeated judicial interventions have proven necessary to ensure that this right is respected. However, the (III) first attempts at using strategic litigation to put an end to employer-tying measures were characterized by varying degrees of success.

Looking at the impact of these past initiatives as a whole, as well as at a recent legal strategy successfully used by a group of uniquely vulnerable workers in Canada, allows certain (IV) essential lessons to be drawn. In sum, repeated legal initiatives framed in broad terms will be necessary to force, across jurisdictions, the effective and long-lasting abolition of all state restrictions of migrant workers' fundamental right to not be held in involuntary servitude, and their fundamental right to liberty, security of person, and justice in general.

I. THE LIMITS OF POLITICAL ADVOCACY: MIGRANT DOMESTIC WORKERS IN THE UK

Despite their precarious socio-legal condition, migrant workers and/or their allies have managed to collectively organize in order to survive and resist systemic obstacles to the exercise of their rights¹⁶ While such collective organizing can and has achieved considerable changes in policies affecting migrant workers, these victories are often built on unstable ground and can prove to be short-lived.

Take for example the case of migrant domestic workers in the United Kingdom. In 1998 the U.K. government allowed domestic workers employed in private households to change employers, so that even though the worker entered the country with a specific employer, he or she was not tied to that employer. This change 'was the important outcome of a campaign by domestic workers, trade unions and other civil society organisations that supported them ...'.¹⁷ The evidence on these migrant domestic workers' conditions under this new scheme, gathered both by state agencies and by the organization Kalayaan – a UK-based NGO specializing in the labour rights of migrant domestic workers - confirmed the positive impact of less restrictive work permits on migrant workers' exercise of their fundamental rights.¹⁸ In 2009, the Home Affairs Select Committee stated that maintaining the right to change employers 'is the single most important issue in preventing the forced labour and trafficking of such workers'.¹⁹ The impact of the policy change was so beneficial that in 2011 Kalayaan began to pressure the government to extend the visa's

¹⁶ Choudry, Aziz & Mondli Hlatshwayo, "Just Work? Migrant Workers, Capitalist Globalisation and Resistance" in Aziz Choudry & Mondli Hlatshwayo eds, *Just Work? Migrant Workers' Struggles Today* (London: PlutoPress, 2016) at 10 – 12.

¹⁷ Virginia Mantouvalou, "'Am I Free Now?' Overseas Domestic Workers in Slavery" (2015) 42:3 *Journal of Law and Society* 329 at 335.

¹⁸ Mumtaz Lalani, *Ending the abuse: Policies that work to protect migrant domestic workers*, Kalayaan (2011) at 6.

¹⁹ *Ibid* at 36.

portability to domestic workers employed in diplomatic households, who were still being issued employer-tied visas.²⁰

And yet, in 2012, the UK government re-introduced a visa regime that did not permit domestic workers to change employers.²¹

This change created two groups of migrant domestic workers, those employed in the UK with the ability to change employers and those tied to their employer. The data gathered and published by Kalayaan in 2014 demonstrated the devastating impact of employer-specific work authorizations on the rights of latter:

These showed that workers registered with the NGO who entered the UK on the new visa reported significantly worse treatment than those that were not tied to their employer during the same period of time but under the previous regime. More precisely, they found that migrant domestic workers with a visa that ties them to their employers were twice as likely to report having being physically abused to those who were not so tied (16% and 8%); that almost three quarters of workers that were tied to the employer were not allowed to leave the house unsupervised, which is again a significantly larger number than workers under a non-tied visa; that 65% of the domestic workers did not have their own rooms; that the majority work more than 16 hours a day, and a greater number of them than previously were assessed as more susceptible to human trafficking.²²

Furthermore, an independent review on the tied visas, commissioned by the UK government, also concluded that the current tied visa increased the vulnerability of workers to abuse, exploitation, including to slavery and human trafficking and that ‘no evidence that a tie to single employer does anything other than increase the risk of abuse and therefore increases actual abuse’, and recommended workers should be allowed to change employer and be granted an additional two years’ stay in Britain for that purpose.²³ However, the government simply rejected these findings and ignored the recommendation to end the tied visa system.²⁴

The decision to re-introduce the employer-tied visa system is an important reminder that the gains won by political advocacy can quickly be swept away with changes in governments or their priorities, especially given the efficiency of the pressure exercised by employers’ associations on public officials and institutions.²⁵ The phenomenon is not unique to the context of migrant workers. Historical struggles to dismantle institutions of unfree labour show that legislatures are more amenable to adopting policies that restrict workers’

²⁰ *Ibid* at 7.

²¹ Alan Travis, "New visa rules for domestic workers 'will turn the clock back 15 years'", *The Guardian* (February 29 2012).

²² Virginia Mantouvalou, *supra* note 17 at 335.

²³ James Ewins, *Independent Review of the Overseas Domestic Workers Visa* (2015) at paras 68, 71.

²⁴ Alan Travis, "Government rejects call to end UK tied visas for domestic workers", *The Guardian* (7 March 2016).

²⁵ See e.g. Ludovic Rheault, "Corporate Lobbying and Immigration Policies in Canada" (2014) 46:3 *Canadian Journal of Political Science / Revue canadienne de science politique* 691.

fundamental rights than they are to disavowing them. As such, ensuring long-standing institutional shifts towards ‘free labour’ and state recognition of workers’ fundamental rights has required repeated interventions by the courts.

II. THE NEED FOR CONSTANT JUDICIAL PRESSURE ON POLICYMAKERS: INVOLUNTARY SERVITUDE IN POST-SLAVERY USA

History shows us that ‘employers’ easily become accustomed to the benefits of employer-tied workforces and seek the formal recognition and facilitation of such arrangements from state authorities. This tendency to use the law to maintain unfree labour systems continues to operate even when formal legal guarantees exist against state or private interferences with the right to liberty, freedom of occupation, and/or the right not to be held in involuntary servitude.

For instance, the California legislature adopted an anti-slavery constitution in 1850, and in 1865 the Federal Congress passed the Thirteenth Amendment, recognizing for all individuals the very specific right not to be held in slavery or involuntary servitude, except as a punishment for a crime.²⁶ While formally abolishing slavery and involuntary servitude, the enactment of these laws alone did very little to suppress the proliferation of unfree labour systems.

While the constitution might have declared California’s status as a free state, unfree labour, even outright slavery, continued to exist and be supported by state officials:

Slaveholders continued to bring enslaved people into the state under “voluntary” long-term labor contracts that escaped detection as slavery. The California legislature and judiciary upheld these kinds of relationships by passing and enforcing state fugitive slave laws that returned runaway bondspeople to their masters. At the same time, state legislators took pains to preserve systems of bound Indian labor. The 1850 Act for the Government and Protection of Indians provided for the indenture of indigenous children ... the binding of adult Indian convicts, “vagrants,” and debt peons. These laws, expanded and made harsher during the following decade, resulted in full-fledged slave trades in Native men, women, and children.²⁷

The anti-slavery constitution also did little to stop private labour-binding practices, implemented through widespread use of abusive work contracts, nor did motivate legislatures to adopt measures to combat the use of such contracts:

The labor arrangements that brought many Sonorans, Chileans, Hawaiians, and Chinese to California bore key hallmarks of free labor: workers voluntarily entered into contracts, and they frequently received wages. (...) Among foreign miners, contracts were not symbols of freedom but markers of bondage. Foreign employers used these legal instruments to bind otherwise free workers to toil for years on end and

²⁶ United States of America, *Constitution of the United States - Amendment XIII, 1865*.

²⁷ Stacey Leigh Smith, *California bound: Unfree labor, race, and the Reconstruction of the Far West, 1848-1870* (Ph.D., The University of Wisconsin - Madison, 2008) [unpublished] at 5.

to accept nonmonetary compensation – passage, food, clothing, and goods – in lieu of meaningful cash wages. Workers’ debts to employers made them powerless to resist abuse and severely limited their autonomy and mobility.²⁸

In fact, far from adopting measures to curtail the use of such contracts, the Californian government indicated a willingness to increase the coercive nature of these arrangements:

During the early 1850s, the California legislature considered, and came very close to passing, a number of bills intended to put the weight of state authority behind contracts for labor made both within and outside California. Under these proposed laws, African American slaves and Chinese nationals who arrived in California under contracts would be forced to render specific performance of their labor agreements—any breach of contract would make wrongdoers subject to criminal penalties at the hands of the state. Moreover, these laws would vest in slaveholders and employers of contract laborers immense authority over the bodies and lives of their workers. The laws would authorize slaveholders and employers to levy physical and economic punishments on men and women who failed to fulfill their contractual obligations.²⁹

While these measures were ultimately not adopted, historian Stacey L. Smith explains that the opposition was driven primarily by the fear that such systems of contract labor undermined the value of white men’s labour, rather than concerns for the black and Chinese men and women labouring under such contracts.³⁰

The adoption of the Thirteenth Amendment also proved ineffective in preventing governments from using the law to maintain a supply of unfree workers.

In the aftermath of slave emancipation ... state legislatures throughout the North augmented the older codes by passing harsh new vagrancy laws, which punished persons who wandered about lacking work and asking for alms with imprisonment and forced labor ... Labor advocates bitterly opposed the legislation on the grounds that it violated the personal liberty of poor men who were honestly looking for work. Yet vagrancy or “tramp” acts, as they were sometimes called, were passed in state after state... Under the vagrancy statutes the process of justice was summary... No warrant was required for the arrest, and the suspects were usually tried without jury. ... Reversing the ordinary rule, suspects were presumed guilty unless they could rebut police testimony with “a good account of themselves”.³¹

²⁸ Smith, Stacey L., *Freedom's Frontier: California and the Struggle over Unfree Labor, Emancipation and Reconstruction* (Chapel Hill The University of North Carolina Press 2013) at 10.

²⁹ Smith *supra* note 27 at 168 – 169.

³⁰ *Ibid.*

³¹ Stanley, Amy Dru, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* (New York: Cambridge University Press 1998) at 99, 109, 116.

These vagrancy laws were inspired by the experience of the Black Codes in the postbellum South, where vagrancy laws were selectively applied on the basis of race as a way to compel freed slaves to work:

The penalty of black vagrants was hard labor in jails and on chain gangs, or they could be hired out to individual employers for a term of involuntary service. Though by the postbellum era white persons were no longer subject to penal sanctions for breaking labour contracts and were not forced specifically to perform them, under many of the Black Codes freed slaves were arrested for quitting work and were either returned to their employers or imprisoned as vagrants.³²

Vagrancy laws were not the only way that state legislatures employed the criminal law as a way to hold workers in involuntary servitude. Most likely because the Thirteenth Amendment's loophole explicitly allowed for slavery or involuntary servitude 'as a punishment for crime',³³ common employer-tying measures took the form of criminal sanctions for breach of contractual obligations.

Most Draconian of all, Florida's contract law made "willful disobedience of orders," "wanton impudence," or the failure to perform assigned work crimes punishable in the same manner as vagrancy. At the discretion of the employer this penalty might be waived and the laborer remanded back to his custom....[T]he "false-pretenses" act, which made it a crime to take advances and then break a contract if one had entered the agreement with the intention of subsequently violating it...Enacted in Alabama (1885), North Carolina (1889, 1891), and Florida (1891), these early statutes spread a veneer of legitimacy over legal proceedings that were nothing less than criminal prosecutions for breach of contract.³⁴

Other measures restricted workers' rights to change employers through the regulation/criminalization of employers. Enticement laws formalized the initial strategies of Southern planters following emancipation to control the newly freed labour force, who 'effected combinations or understandings among themselves not to contract with any former slave who failed to produce a 'consent paper' or proper discharge from his previous owner.'³⁵

More than any other form of legislation, the enticement acts embodied the essence of the system of involuntary servitude. They re-created in modified form the proprietary relationship that had existed between master and slave. ...Ten southern states enacted enticement laws from 1865 to 1867... Georgia made it a crime to entice a worker "by offering

³² *Ibid* at 126.

³³ United States of America, *Constitution of the United States - Amendment XIII, 1865 supra* note 26.

³⁴ Cohen, William, "Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis" (1976) 42:1 *The Journal of Southern History* 31 at 42.

³⁵ Litwack, Leon F., *Been in the Storm so Long: The Aftermath of Slavery* (1979) at 415 quoted in Miller, Darrell A.H. "Racial Cartels and the Thirteenth Amendment Enforcement Power" (2011-2012) 100:23 *Ky. L.J.* 100 at 32.

higher wages or in any other way whatever." Some states made it illegal to hire a contract-breaker, and a few penalized those who harbored, detained, or fed such a person...the enticement statutes remained active law until World War II.... Alabama made attempted enticement a crime in 1920.³⁶

Past authorities also ensured that workers remained with their employers through measures that protected monopolies of worker placement 'service':

... the emigrant agents represented a menace to those who feared the loss of their workers. Thus, emig-rant-agent laws came first in those states which felt themselves most threatened by Negro out-migration. Hard hit by black move- ment to the West, Georgia took the lead in 1876, when she levied an annual tax of \$100 for each county in which a recruiter sought labor. A year later she raised the amount to \$500. All the southern states which acted to outlaw emigrant agents followed this pattern and attempted to levy prohibitively high license or occupation taxes. ...Each of the Carolinas charged a \$1,000-per-county license fee and provided that violators might be punished with fines of up to \$5,000 or jail terms of up to two years. ... Implicit in the sanctions against emigrant agents as well as in the enticement acts was a widely held proprietary attitude toward blacks, which had its roots in the property relations of slavery. If whites sometimes thought of themselves as the guardians of child- like Negroes, they more often responded to the presence of "enticers" or labor agents as though they thought their goods were about to be stolen.³⁷

It is worth noting that the Thirteenth Amendment did not just enshrine the right of individual's to not be held in slavery, or involuntary servitude (except for punishment of a crime). It prohibited any existence of those two conditions, mandating rather 'the establishment of a free labor system', and imposing a duty on the government 'to root out the prohibited practice wherever it appears and to enact whatever measures might be necessary to prevent it from recurring'.³⁸

As illustrated by the examples above, state legislatures remained willing and apt at implementing a wide-range of employer-tying policies. The legislative history of Thirteenth Amendment reveals that this was expected, and so the Amendment included an enforcement clause, to clarify Congress's power to enforce the Amendment 'because the ratification of the Amendment itself likely would not end state resistance to civil rights for the freedmen.'³⁹ While second section of the Thirteenth Amendment 'enabled Congress to pass any laws needed to curtail the incidents of slavery and to pre-empt state efforts to

³⁶ Cohen *supra* note 34 at 35 -36.

³⁷ *Ibid* at 39 – 42.

³⁸ Gray Pope, James, "What's different about the Thirteenth Amendment, and why does it matter?" (2011) 71:189 Md. L. Rev. at 193 – 195.

³⁹ Carter, William M., Jr., "Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery" (2007) 40:4 U.C. Davis L. Rev. at 1344.

undermine national policy’,⁴⁰ the courts also played an indispensable role in furthering this objective.

In addition to demonstrating the importance of the courts in the battle against slavery and involuntary servitude, Thirteenth Amendment litigation also identified what rights must be recognized and protected in order to negate those conditions. While the amendment is a right-granting provision, it does not specify what rights fall under its purview.⁴¹ Legal challenges to employer-tying policies under the Thirteenth Amendment were therefore not just significant in combatting state efforts to infringe on the right not to be held in involuntary servitude, but also for defining the content of that right.

The challenge to Alabama’s ‘false-pretenses’ law, which made it a crime for a worker to obtain an advance on wages and then subsequently refuse or fail to perform the work, firmly established the ‘right to quit’ as being essential to the right not to be held in involuntary servitude.

(...) (T)he *Bailey* majority looked to the purposed of banning involuntary servitude and the consequences of denying the right to quit. In addition to abolishing slavery, the Thirteenth Amendment was intended “to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another’s benefit which is the essence of involuntary servitude.” The evil, then, was to be found in the relation of control, and not in the presence of absence of consent to be controlled.⁴²

As a result of this 1911 decision, ‘Arkansas and Mississippi belatedly removed the false-pretenses laws from their legal codes’, but other states continued to employ versions of the law ‘until the high court struck them down during World War II’.⁴³ While *Bailey* did not immediately put an end to use of ‘false-pretenses’ laws, the decision is notable because it also implicitly recognized that when it comes employer-tying policies, states can be very creative in indirectly doing what they are not allowed to do directly:

We cannot escape the conclusion that, although the statute in its term is to punish fraud, still its natural and inevitable effect is to expose to conviction for crime those who simply fail or refuse to perform contracts for personal service in liquidation of a debt; and judging its purpose by its effect, that it seeks in this way to provide the means of compulsion through which performance of such service may be secured.... What the State may not do directly it may not do indirectly. If it cannot punish the servant as a criminal for the mere failure or refusal to serve without

⁴⁰ Tsesis, Alexander, "Congressional Authority to Interpret the Thirteenth Amendment." (2011) 71:40 Md. L. Rev. at 46.

⁴¹ Gray Pope, James, "Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude"" (2010) 119:119 Yale L.J. at 1478.

⁴² *Ibid* at 1489.

⁴³ *Ibid* at 1489 – 1499.

paying his debt, it is not permitted to accomplish the same result by creating a statutory presumption which upon proof of no other fact exposes him to conviction and punishment.⁴⁴

In 1920, the South Carolina Supreme Court declared that the tort of a hiring a laborer who was under a contractual obligation to work for another invalid due to the Thirteenth Amendment.⁴⁵ In this case, the Court affirmed that the right to quit one's employer included the right to change employers:

A sharecropper named Carver breached his one-year employment contract with Shaw and took a job with Fisher. Shaw obtained an award of damages against Fisher for the tort of knowingly hiring a worker who had quit his previous employer in violation of a labor contract. The high court reversed. "If no one else could have employed Carver during the term of his contract with plaintiff," reasoned the court, "the result would have been to coerce him to perform the labor required by the contract; for he had to work or starve." Because this "compulsion would have been scarcely less effectual than if it had been induced by the fear of punishment under a criminal statute for breach of his contract," it violated the Thirteenth Amendment. Although the Court posed the alternatives as *work* or starve, that language did not fully capture the gravamen of the violation. Stated more precisely, Carver's alternatives were to work for *his current employer* or to quit and starve.⁴⁶ (emphasis original)

The resistance of states to abide by the Court's decision and abandon 'false-pretenses' laws eventually led to another decision more than 30 years later, in *Pollock v. Williams*, the right to quit (and change employers) was once again emphasized as integral to purpose of the Thirteenth Amendment:

When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work. Resulting depression of working conditions and living standards affects not only the laborer under the system, but every other with whom his labor comes in competition.⁴⁷

As discussed above, the inclusion of the enforcement clause intended to 'provide the federal government with the express constitutional power to protect the freedmen from continued state and private discrimination and subjugation after the formal end of slavery.'⁴⁸ However, that was not its only purpose. Enacted ten years after the Supreme

⁴⁴ *Bailey v. Alabama*, (1911) 219 US 219 (United States Supreme Court), online: <<https://supreme.justia.com/cases/federal/us/219/219/case.html>>.

⁴⁵ *Shaw v. Fisher* (1920) 102 S.E. 325, 113 S.C. 287 at p. 290.

⁴⁶ Pope *supra* note 41 at 1531.

⁴⁷ *Pollock v. Williams* (1944), 322 US 4 (United States Supreme Court).

⁴⁸ Carter *supra* note 39 at 1323.

Court held that blacks could not be citizens in *Dred Scot*, it was also included to ‘remove any judicial discretion to abridge inalienable or congressionally created rights.’⁴⁹

That being said, the legislative power to identify and protect fundamental rights was not meant to exclude the judiciary, but to be exercised in concert with it.⁵⁰ In the years following ratification ‘it was Congress, not the judiciary, that took the lead in both identifying the rights of free-people and promulgating statutes to protect them.’ However, Congress’ commitment to enforcing the Thirteenth Amendment soon waned:

The Section 2 power lay dormant through the first half of the twentieth century... Congress repealed a number of Reconstruction-based statutes, and the executive branch was reluctant to enforce the statutes that remained.⁵¹

Furthermore, the statutes put in place by the Reconstruction Congress did not address all forms of forced labour that had taken root after emancipation. The Peonage Act only applied to debt-based forms of forced labour, despite the fact that ‘many instances of forced labor during the first half of the century did not involve contracted debt ...’⁵² Enticement laws also remained unaddressed.⁵³ And so, while the enforcement clause clearly envisioned Congress as the guardian of the fundamental rights protected by the Amendment, the courts became an important forum for combatting the safe-keeping of unfree labour supply policies by policy makers for the benefit of employers and their coalitions.

III. THE FIRST CONSTITUTIONAL CHALLENGES AIMING TO ADVANCE MIGRANT WORKERS’ RIGHT TO CHANGE EMPLOYERS (RIGHT TO LIBERTY/FREEDOM OF OCCUPATION)

Israel: Employer-Tied Work Permits Declared a “Modern Form of Slavery”

Whether employer-specific work authorizations are compatible with the fundamental rights of migrant workers has been debated in various types of arenas for more than a century,⁵⁴ it was only in 2002 that employer-tied work permits were finally subject to constitutional review on human rights grounds, in the Israeli case of *Kav LaOved Worker’s Hotline v. Government of Israel*⁵⁵ (hereafter *Kav LaOved*). In 2006, the Court unanimously held that that the employer-tied work permit system constituted a ‘modern form of slavery’⁵⁶ and, more precisely, unjustified state violations of migrant workers’ rights to liberty and dignity.

⁴⁹ Tesis *supra* note 40 at 48.

⁵⁰ *Ibid* at 50.

⁵¹ *Ibid* at 48.

⁵² Goluboff, Risa L., "The Thirteenth Amendment in Historical Perspective " (2009) 11:5 U. Pa. J. Const. L. at 1453 – 1454.

⁵³ Novak, Daniel A., *The Wheel of Servitude: Black Forced Labor after Slavery* (Kentucky: The University Press of Kentucky 1978) at 63.

⁵⁴ See e.g. Smith, *supra* note 27 at 18.

⁵⁵ *Kav LaOved Worker’s Hotline v. Government of Israel* (2006), 1 IsrLR 4542/02; HCJ 4542/02 (Supreme Court of Israel).

⁵⁶ *Ibid* at para. 4 of Vice-President Emeritus M. Cheshin concurring opinion.

The Court held that the employer-tied work permits violated workers' right to resign, (implied by the rights to liberty and dignity), caused them major harm, were arbitrary, and that no government objective could justify such severe violation of fundamental rights. Importantly, the Court also concluded that no 'change of employer' procedure could negate the harm caused by employer-tied work permits or be considered compatible with the right to resign.

Employer-tied work permits restrict the individual's right to resign

A few years before the *Kav LaOved* decision, workers' right to choose their employer was held as not only being implied by the right to 'freedom of occupation' (constitutionalized in Israel and various other jurisdictions such as the Republic of Korea), but also as fundamental to, and protected by, the right to liberty and dignity. In *Kav LaOved*, the Court, in review of that jurisprudence, unanimously affirmed that the right to choose one's employer implied the 'freedom to resign'.⁵⁷

The Court found that the employer-tied work permit, by associating the act of resignation with a serious sanction – the loss of the work permit – was tantamount to an 'effective denial of the freedom to resign' and was equivalent to 'compelling a person to work in the service of another against his will.'⁵⁸ In restricting migrant workers right to resign, the employer-tied work permit violated the right to liberty and dignity.

Employer-tied permits: increased risk of harm

The Court identified three different ways the restriction on workers' ability to change employers was harmful: an increased risk of slavery-like work conditions, an increased risk of illegal employment, and an increased risk of 'economic death'.

The Court found that the evidence demonstrated employer-tied work permits increased the risk that the worker would find themselves enslaved and trapped in abusive work conditions. The problem with employer-tied work permits was two-fold, it provided employers with power that most were likely to abuse and then forced workers to remain with such employers:

It weakens, and possible even negates, his bargaining power. It leaves him with no real choice between being compelled to continue working in the service of an employer who may have violated his rights, delayed paying his wages and abused him, on the one hand, and resignation on the other, a choice that means losing the permit to reside in Israel. Thus the restrictive employment arrangement limits the freedom of operation given to the worker to a single choice between a bad alternative and a worse one.⁵⁹ (emphasis added)

Furthermore, the Court found that employer-tied work permits also increased foreign workers' risk of finding themselves involuntarily in illegal employment and thus afforded extremely limited legal protection. The Court accepted evidence that workers control over

⁵⁷ *Ibid* at para. 33.

⁵⁸ *Ibid* at para 32.

⁵⁹ *Ibid* at para 31.

such situations was negligible, they had little power to contest transfers by employers or agents, and that they were often not aware they were being transferred contrary to the law.⁶⁰

Finally, the Supreme Court of Israel also identified, in direct association with the increased risk of illegal employment, an increased risk of deportation before the end of work permit's validity, or said otherwise, before the time necessary to repay migration debts, which 'deals a mortal economic blow to the worker and his dependants.'⁶¹ In a subsequent decision, Justice Levy clarified that this meant that employer-tied work permits created a system in which migrant workers laboured under the constant threat of deportation to conditions of debt bondage.⁶²

'Change of employer' procedure inadequate harm reduction policy

The Court found that, in practice and in theory, the implementation of a 'change of employer' procedure was neither an effective harm reduction policy or a remedy for the violation of the right to resign:

the change of employer procedure does not significantly change the excessive power held by the employer. The initial link between legality of the residency of the foreign worker and the identity of the employer is likely to lead to a situation in which the worker, even though he came to Israel lawfully, will become an illegal resident as early as his first day in Israel ... Moreover, an application to change employer involves ... the loss of the permit to work in Israel for an unknown period ... in the interim period between finishing work for the original employer and changing over to the new employer, the worker will receive a B/2 residence permit. This permit is a temporary permit ... and does not allow a person to work lawfully. It is not clear, therefore, how the worker is supposed to support himself in this interim period, and especially why his legitimate request to change employers should result in the loss of the permit to work in Israel for an unknown period...⁶³

Importantly, the Court underlined that any 'change of employer procedure' relies on a problematic premise, the denial of fundamental rights as the general rule:

the change of employer procedure assumes, as a premise, the power to hold onto a worker. The premise underlying the normative structure created by the restrictive employment arrangement — a normative structure that is not changed by the procedure — is that the employer is entitled to hold onto his worker, whereas the worker is entitled, only in certain circumstances, to be released lawfully from the employment contract with the employer. A normative structure of this kind is inconsistent with the constitutional status of the right to liberty, human dignity, autonomy and freedom of action.... A legal system that provides

⁶⁰ *Ibid* at para 38.

⁶¹ *Ibid* at para 28.

⁶² *Hotline for Migrant Workers v. Government of Israel* (2007) (not yet reported) at para 22 of Justice E.E. Levy's dissent.

⁶³ *Kav LaOved supra* note 55 at para. 42.

constitutional protection to human rights cannot accept a normative premise that assumes the absence of basic rights as a fundamental rule. It is impossible to accept that in a legal system that has established human dignity as a protected constitutional value the individual will be allowed to enforce his basic rights only in ‘exceptional’ cases. The change of employer procedure seeks to make basic rights that the individual — every individual — possesses into a mere ‘administrative’ matter that can be dealt with by officials.⁶⁴

Employer-tied work permits an ‘arbitrary’ policy

The government of Israel justified the use of employer-tied work permits as necessary to monitor the residence and employment of foreigners in the country, and to protect citizen workers’ employment.⁶⁵ However, the Court found that the evidence showed that the employer-tied work permit system was not rationally connected to state’s objective of ‘protecting the national workforce’, but actually undermined that objective:

...in research conducted for the Ministry of Industry, Trade and Employment... The conclusions of the research were that ...it encourages working in a manner that is not organized, increases the number of illegal foreign workers and makes it even more difficult to supervise the employment of foreigners. With regard to protecting the population of local unskilled workers against competition from the foreign workers, it is almost certain that the low wage level paid to the legal foreign workers in the restrictive employment arrangement has had an effect on the whole market of unskilled workers, including local ones, who are compelled to satisfy themselves with low wages or to be pushed out into the ranks of the unemployed... The actual beneficiaries of the arrangement are precisely the employers, who pay lower wages both to the foreign workers and to the local workers. In other words, it is reasonable to assume that the restrictive employment arrangement has actually harmed the local unskilled workers rather than protecting them’⁶⁶

Employer-tied work permits: no compelling state’s justifications

Even if the employer-tied work permit system had been found to be connected to the state’s goals, the Court held that it could not satisfy the test of proportionality. While perhaps being the cheapest method, it could not be characterized as the ‘least harmful measure’, especially in light of the ‘supreme status of the rights that are violated by the restrictive employment arrangement and the seriousness of these violations’.⁶⁷ Furthermore, the benefit flowing from employer-tied work permits could not be considered justifiable in proportion to the harms created by it (in light of the fact that the benefit was ‘speculative

⁶⁴ *Ibid* at para. 43.

⁶⁵ *Ibid* at para. 49.

⁶⁶ *Ibid* at para. 51.

⁶⁷ *Ibid* at para. 53.

and unproven').⁶⁸ Importantly, the Court stated that even if any benefit could be proven, it was unlikely to be considered in due proportion to the serious violation of basic rights.⁶⁹

South Korea: Employer-Tied Work Permit Systems Found to be Compatible with Migrant Workers' Fundamental Rights

While the Supreme Court of Israel affirmed in *Kav LaOved* that a 'change of employer' procedure could hardly be found to negate the harm experienced by migrant workers under employer-tied work permit systems, the Constitutional Court of the Republic of Korea held the contrary a few years later.⁷⁰

South Korea's Employment Permit System's 'change of employer' procedure was challenged in 2007 by a coalition of human rights NGOs, including Amnesty International. Access to the procedure was argued to be too restrictive to allow a meaningful exercise of individuals' basic 'freedom of occupation' and 'right to work'.⁷¹

The 'change of employer' procedure in question allowed workers to change employers up to three times in total through job centers. However, it was difficult to access, since any change required a release from the initial employer. Additionally, workers were technically allowed to change employers in case of 'closure of the business'.⁷²

In theory, access to the job centers was also permitted if 'unfair treatment by the employer' had been confirmed by the Labour Ministry⁷³ or the National Human Rights Commission (NHRC). However, the 'fear of losing their jobs' made it 'difficult for them to come forward' to complain against their employer to the labour ministry.⁷⁴ In 2013, the NHRC confirmed only one case of 'unfair treatment by employer'⁷⁵ (for a group of workers estimated about a year later to be 500 000 individuals).⁷⁶ Two conclusions can be drawn here, either migrant workers in South Korea do not experience the widespread abuse and

⁶⁸ *Ibid* at para 55.

⁶⁹ *Ibid*.

⁷⁰ Amnesty International, *South Korea: Constitutional Court ruling leaves migrant workers to human rights abuses* (2011).

⁷¹ Amnesty International, *In the Matter of "Confirmation of Constitutionality of EPS Act Article 24(4) and its Enforcement Decree 30(2)" under Consideration by the Constitutional Court of the Republic of Korea* (2010).

⁷² ⁷² See e.g. International Labour Organization Committee of Experts on the Application of Conventions and Recommendations, *Individual Observation concerning Discrimination (Employment and Occupation) Convention, 1958 (No. 111) Republic of Korea (ratification: 1998)*, I.L.O. (2008); International Labour Organization Committee of Experts on the Application of Conventions and Recommendations, *Individual Observation concerning Discrimination (Employment and Occupation) Convention, 1958 (No. 111) Republic of Korea (ratification: 1998)*, I.L.O. (2009); International Labour Organization Committee of Experts on the Application of Conventions and Recommendations, *Observation (CEACR) - Discrimination (Employment and Occupation) Convention, 1958 (No. 111) - Korea, Republic of (Ratification: 1998)*, International Labour Organization (2012)

⁷³ The Korea Herald, "Only the beginning for Korea's migrant workers' labor movement" (10 November 2015).

⁷⁴ *Ibid*.

⁷⁵ Committee of Experts on the Application of Conventions and Recommendations International Labour Organization, *Individual Case (CAS) - Discussion: 2014, Publication: 103rd ILC session (2014) - Discrimination (Employment and Occupation) Convention, 1958 (No. 111) - Korea, Republic of (Ratification: 1998)*, International Labour Organization (2014).

⁷⁶ U.S. Department of State, *Trafficking in Persons Report 2015* (2015) at 209.

exploitation consistently documented in other jurisdictions or the procedure was almost impossible to access in practice. The authors of this paper believe that the latter rather than former is more probable. If that was indeed the case, it is not unreasonable to assume that the procedure was equally difficult to access prior to 2011.

Furthermore, in cases of documented abuse by the employer, officers at the job centers systematically asked for an additional ‘release’ document from the employer (even if not mandatory according to the enforcement decree).⁷⁷ The problem in accessing the ‘complaint-based’ path to change employers was later explained by Amnesty International in the following terms:

... migrant workers are routinely told by job centre staff that they must continue working at the place of employment while their complaint is being investigated, thereby exposing them to further abuse at the hands of their employer. To exacerbate matters, the burden of proof to show “unfair treatment” is on the workers, who are unlikely to speak Korean fluently or understand the Korean legal system.⁷⁸ (emphasis added)

Finally, unemployed migrant workers in South Korea were only given three months to access the job centers, receive a job offer from an authorized employer, and have the government validate the new employment agreement in order to maintain their legal status in the country.

The constitutional challenge to the state restrictions associated with the ‘change of employer procedure’ resulted in a judicial decision in which the Constitutional Court confirmed that the constitutional protection against state interference with the fundamental right to work and freedom of occupation applied to foreign workers.⁷⁹ Additionally, the Court affirmed that ‘foreign workers are entitled to fundamental rights that are closely related to human dignity and the right to pursue happiness,⁸⁰ and that the freedom to choose one’s place of work falls into those categories.’⁸¹

However, the Court held that ‘the current Work Permit System, which allows migrant workers to change their place of employment only up to three times, poses no legal problems.’⁸²

The Impact of the First Court Challenges

⁷⁷ Amnesty International, *South Korea: "Migrant Workers are also Human Beings"* (2006) at 21; Amnesty International, *Disposable Labour: Rights of Migrant Workers in South Korea* (2009) at 22-23.

⁷⁸ Amnesty International, *Bitter Harvest: Exploitation and Forced Labour of Migrant Agricultural Workers in South Korea* (2014a) at 7.

⁷⁹ Amnesty International, *supra* note 70

⁸⁰ *Constitution of the Republic of Korea (1988)*

⁸¹ Constitutional Court of Korea, "Questionnaire: Reply by the Constitutional Court of Korea" (paper delivered at the 3rd Congress of the World Conference on Constitutional Justice ‘Constitutional Justice and Social Integration’, Seoul, Republic of Korea, 28 September - 1 October 2014) at 3.

⁸² Migrant World TV, "The Legal Limitation on Migrant Workers' Change of Their Employment Is Constitutional", *MWTV News English* (2 February 2012).

The risks of using strategic litigation as an advocacy tool is not just confined to the possibility that an unfavorable decision will result in a bad precedent that limits the potential of the law to serve as a vehicle for the advancement of rights. It may also facilitate the implementation of policies that are even more restrictive of the rights the legal challenge sought to advance. This would at least seem to have been the case after South Korea's Employment Permit System received the stamp of approval by its constitutional court.

Following the 2011 decision, the 'change of employer' procedure was modified in 2012 by the government so that only migrant workers with no previous job changes were permitted to renew their work permit.⁸³ The new policy also consolidated employers' capacity to 'blacklist' migrant workers:

Under the *Measure for Improvement in Foreign Workers' Change of Workplaces and Prevention of Broker Intervention...* migrant workers in search of new employment will no longer have access to a list of prospective employers. Instead the Ministry of Employment and Labour will provide a list of job-seeking migrants to employers only. If migrants are not recruited for a new job within three months, they will lose their work visa, thus risking arrest, imprisonment and deportation.⁸⁴ (emphasis added)

Finally, the policy was modified to further restricted the alleged choice of workers to change employers:

The Ministry of Employment and Labor added a provisory clause, "If the job seekers turn down the interview or employment without reason, their access to job referral services might be suspended for two weeks." It means the migrant workers go punished for 2 weeks when they refuse an offer because they wish to find a better workplace.⁸⁵ (emphasis added)

The Ministry of Labour justified these 2012 modifications to the 'change of employer' procedure in the following terms: 'If the workers change the workplace too often, labour productivity will be dropped down'.⁸⁶ In this context, observers have argued that the 'change of employer' procedure discourages workers from leaving exploitative conditions and compels them to accept new employment despite sub-standard conditions.⁸⁷

To our knowledge, however, there has not been a second constitutional challenge to the policy following these modifications in 2012.

There is also a cautionary tale in the case of *Kav LaOved*, which would appear, at first glance, to constitute a landslide victory in the fight to end state practices that tie a worker

⁸³ Migrant World TV, "The Legal Limitation on Migrant Workers' Change of Their Employment Is Constitutional", *MWTV News English* (2 February 2012) at 2.

⁸⁴ Amnesty International, *supra* note 77 at 48.

⁸⁵ Um Ji-Won, "Life about to get enough tougher for migrant workers", *The Hankyoreh* (10 December 2012).

⁸⁶ *Ibid.*

⁸⁷ Amnesty International, *supra* 78 note at 42.

to their employer. However, the decision had limited impact in preventing the government from subjecting workers to restricted work authorization schemes.

After *Kav LaOved*, the Israeli government started to issue work permits valid for more than one employer. However, it continued using employer-tied work permits for one group of workers, but without any ‘change of employer procedure’. The human rights organization, Kav LaOved-Workers’ Hotline, launched another constitutional challenge.

Although *Hotline for Migrant Workers v. Government of Israel*⁸⁸ (hereafter *Hotline*) was decided only one year after the *Kav LaOved* decision, two new justices to the Court (a small majority) decided that the *Kav LaOved* precedent was not relevant, since the specific employer-tied work permit scheme for Turkish workers was characterized by a foreign government’s oversight of the workers’ recruitment and employment:

I agree with the rule held in *Kav LaOved* ... [but t]he conclusion of the court ... was ... based to a large extent on the [different] factual background. In the case before us ... the Turkish workers are not required to pay huge amounts to middlemen or to manpower companies ... [and] a delegation from the Turkish Ministry of Defence actually ... check[ed] the employment conditions (...). ... [T]hese workers benefit *ab initio* from a different status than that of other foreign workers, since the Turkish government represents them (...). ... [I]t is in the interest of the Turkish government that foreign currency — the workers’ wages — will flow into it. ... [T]he Turkish government can be presumed to ensure that the economic value that was agreed to will actually be transferred (...).⁸⁹ (emphasis added)

We often applaud courts that engage in a contextual analysis⁹⁰ when interpreting constitutional rights. However, the Court’s nuanced discussion in *Kav LaOved* of the factors - specifically the role of debt - that shape the conditions under which migrant workers migrate and work, opened the door to arguments that the problems identified in *Kav LaOved* flowed not from the restrictive employment arrangement but from the systemic vulnerability to debt occasioned by exorbitant recruitment fees and predatory lending practices. As such, it could be argued that employer-tied work permits could be found to respect the rights of migrant workers if coupled with policies that addressed the problem of recruitment debt. In *Hotline*, the Turkish government’s oversight of the workers’ recruitment led the majority to conclude ‘that the petition is unjustified on its merits and that the rights of the foreign workers, whom the petitioners wish to protect, are not being violated to a degree that justifies our intervention.’⁹¹

⁸⁸ *Hotline supra* note 62.

⁸⁹ *Ibid* at para.17-21.

⁹⁰ Refers to an interpretive approach in Canadian constitutional law in which Charter issues are assessed in the light of the specific social, cultural, economic, and political factors that bear upon the right claimed or the basis asserted for limiting the right. See Sharpe, Robert J. & Roach, Kent, *The Charter of Right and Freedoms* Third ed (Toronto, Ontario Irwin Law 2005) at 53 – 55.

⁹¹ *Hotline supra* note 62 at para. 13.

Justice Levy, who wrote the Court's reasons in *Kav LaOved*, nevertheless firmly registered his dissent, taking great pains to clarify certain issues – and expand on others that he had failed to address in *Kav LaOved*. In particular, while debt bondage and being restricted to one employer may interact to increase the harm to the worker, they constitute two separate obstacles to the exercise of rights:

It cannot be denied that when the two evils – the debt [associated to huge recruitment fees] and the restrictive arrangement - befall a worker simultaneously, the extent of the harm to him is greatly increased. ... But all of this is not capable of combining the two [evils] ... into one entity that cannot be separated. ... *A restrictive arrangement without a debt is still a restrictive arrangement, and the harm that it causes is great. ... This harm, the essence of which is the worker's loss of his bargaining power, does not depend ... on the existence of a debt and does not derive from it.*⁹² (italics in the text; underline added)

Secondly, that the 'voluntary' return of the worker to his country of origin who is unsatisfied with his conditions of work, even in the absence of debt, cannot be considered a remedy to the violation of rights inherent in the restrictive employment arrangement.⁹³

Justice Levy also took issue with the argument that the supervision by foreign officials could be an effective harm reduction policy for the enforcement of proper conditions of employment. On a purely theoretical level, it ignored the fact that states have interests - diplomatic and economic - that override their concern for the individual rights of workers.⁹⁴ He noted evidence from other countries showed that the supervision of work conditions by foreign officials did little to protect the rights of migrant workers and that foreign officials reinforced the effects of the restrictive employment arrangement by replacing workers who complain with new workers and blacklisting those that attempt to enforce their rights.⁹⁵

Finally, he argued that the focus should not be on the form of the restrictive arrangement, as indirect restrictive arrangements can be just effective in violating the rights of migrant workers. Policies, such as those that allow the blacklisting of workers or that do not prevent workers from being forced to sign promissory notes, also operated to deprive workers of their rights.⁹⁶

Contrary to his dissent in *Workers Hotline*, Justice Levy's judgement in *Kal LaOved* did not address the issue of indirect forms of employer-tying policies. It may be for this reason that the *Kal LaOved* ruling failed to prevent the Israeli government from adopting alternative employer-tying policies equally as restrictive on rights as the employer-tied work permit system.

Before the conclusion of the *Kav LaOved* proceedings, the Israeli government started to replace the employer-tied permit with a variety of non-employer specific work permits. They issued 'manpower agency-tied' work permits in the construction industry and sector

⁹²*Hotline supra* note 62 at para. 23-24.

⁹³ *Ibid* at para. 24.

⁹⁴ *Ibid* at para. 16 – 17.

⁹⁵ *Ibid* at para. 17.

⁹⁶ *Ibid* at para. 9.

specific work permits for agricultural workers. According to legal advocates, all of these alternatives fall short of respecting the Supreme Court's 2006 *Kav LaOved* decision, the Israeli Basic Laws, and workers' fundamental rights.

During the following year, Kav La Oved (the NGO) studied the work and life conditions of construction workers issued such 'agent-tied' work permits and, unfortunately, confirmed its fear: the protection and the exercise of workers' fundamental rights had not been improved under the new system.⁹⁷

With regard to the new agricultural sector-tied work permit system, the international NGO Human Right Watch published preliminary results leading to the conclusion that the agricultural migrant workers employed under this new, alternative, 'not employer-tied' Israeli scheme still face *de facto* major barriers to the exercise of their rights.⁹⁸

While the *Kav LaOved* decision was unsuccessful in securing meaningful policy reforms and the Constitutional Court of South Korea failed to acknowledge the serious problems associated with state restrictions on workers' right to resign, this does not mean constitutional challenges cannot be an effective advocacy tool. However, accomplishing the long-standing abolition of employer-tying policies will require an improved legal strategy. Indeed, several key lessons may be drawn from the various initiatives discussed above, as well as from a recent successful legal challenge by a group of vulnerable workers in Canada.

IV. LESSONS TO LEARN FROM PREVIOUS INITIATIVES

Certain questions arise when considering the constitutional challenges discussed in section III. For instance, why was the 'change of employer' procedure acknowledged as inadequate in *Kav LaOved* but not in the South Korean decision? How can legal challenges be improved so that favourable decisions translate into the desired policy outcomes? Formulating answers to these questions can be assisted with reference to the 2013 Canadian case of *Canada (AG) v. Bedford*⁹⁹ (hereafter *Bedford*).

In *Bedford*, the Supreme Court of Canada struck down major prostitution laws on the grounds that the laws imposed dangerous conditions on sex work and therefore infringed on sex workers' right to security of person. Furthermore, the Court affirmed that Parliament can regulate sex work '...but not at the cost of the health, safety and lives of prostitutes', as that would violate the principles of fundamental justice by being grossly disproportionate.¹⁰⁰

Bedford succeeded where a previous attempt had failed. Two of the laws at issue in *Bedford* had already been reviewed for constitutionality back in 1990, but on the basis of freedom of expression and personal liberty.¹⁰¹ The Court found that although the laws infringed on

⁹⁷ Kav La Oved - Worker's Hotline, *Freedom Inc. Binding Migrant Workers to Manpower Corporations in Israel* (2007) at 18.

⁹⁸ Human Rights Watch, *A Raw Deal Abuses of Thai Workers in Israel's Agricultural Sector* (2015).

⁹⁹ *Canada (Attorney General) v. Bedford*, [2013] 3 SCR 1101.

¹⁰⁰ *Ibid* at para. 136.

¹⁰¹ *Reference re Criminal Code (Man.)*, [1990] 1 SCR 1123.

these rights, the violations were justifiable. While the 1990 review focused on the more arguably abstract rights of personal liberty and freedom of expression, the *Bedford* challenge was propelled by a massive evidentiary record¹⁰² attesting to the fact that the effects of the law were to put the safety and lives of sex workers at risk.¹⁰³

This was also a key difference between the *Kav LaOved* decision and the South Korean one. In *Kav LaOved*, the violation of the right to resign was considered, but so was the overwhelming evidence of abuse and exploitation occasioned by the employer-tied work permit. In contrast, the South Korean decision focused on whether the ‘change of employer’ procedure was compatible with the right to work and freedom of occupation, but there was no discussion of the harm or mistreatment characteristically experienced *en masse* by migrant workers working under restricted work authorizations. It would seem that limitations on rights such as ‘freedom of expression’, ‘right to work’ and ‘freedom of occupation’ are easier for courts to stomach in comparison to limitations that result in tangible and distressing forms of harm.

In the case of *Hotline*, the evidentiary record was apparently less clear. The petitioners submitted evidence in the form of affidavits from workers attesting to harsh conditions, poor housing, mistreatment, delayed wages and confiscation passports. The respondents also presented affidavits from other workers, in far greater numbers, that testified to fair employment conditions and the payment of wages on time.¹⁰⁴ In the face of conflicting evidence, the majority decided that the harm identified in *Kav LaOved* was not present.¹⁰⁵ However, Justice Levy arrived at a different conclusion, noting that the affidavits provided by the respondents were suspiciously ‘all drafted in identical language, as if they were dictated word for word.’¹⁰⁶ As such, while legal challenges that put front and center the effects the impugned law or policy has on the psychological and physical health of the worker tend to be more persuasive, it is important that the evidentiary record be strong and uncontested.

Bedford, much like *Kav LaOved*, was unsuccessful in producing policy reforms that respect the fundamental rights the challenge sought to advance. After *Bedford*, the government passed new laws based on the Nordic model of prostitution, which criminalizes clients but not the sale of sex, despite opposition from sex workers and experts that such a model would recreate the problems identified in *Bedford*.¹⁰⁷ The issue in both cases is that courts, because of doctrine of separation of powers, can assess the constitutionality of a policy, but they cannot rewrite laws nor dictate to policymakers what are acceptable replacements.¹⁰⁸ This can limit the impact of favourable decisions in bringing about desired

¹⁰² *Bedford supra* note 99 at 15.

¹⁰³ *Ibid* at para. 60.

¹⁰⁴ *Hotline supra* note 62 at para. 19.

¹⁰⁵ *Ibid* at para. 14 – 15.

¹⁰⁶ *Ibid* at para. 19.

¹⁰⁷ Schwartz, Daniel "Sex workers like New Zealand law, not Canada's new 'Nordic model' for prostitution", *CBC News* 2014), online.

¹⁰⁸ Sharpe *supra* note 90 at 26, 352.

policy outcomes, which can be exceedingly frustrating when there exist viable policy frameworks that have been shown to respect the rights in question. However, while courts may hesitate to directly tell policymakers what policies they should adopt, that does not mean it is impossible to enter into the court record any discussion of potential alternatives. Many constitutions incorporate a ‘balancing of interests’ test,¹⁰⁹ which usually require courts to assess whether the impugned law minimally impairs the right in question or is rationally connected to the objective it purports to serve. It is here that constitutional challenges can showcase alternative policy frameworks that have been empirically shown to be compatible with the fundamental rights in question as points of comparisons for courts to consider. This strategy will be especially important when governments attempt to justify indirect employer-tying policies as worker protection measures. Once included in the court record, the decision can be used to guide policymakers as they draft replacement laws.

Furthermore, efforts to impose ‘unfree labour’ are insidious, like a game of whack-a-mole, you knock down one bad policy and another one quickly pops up in its place (sometimes masquerading as a policy to protect workers). Similarly, as demonstrated by the policy alternatives put in place both by former southern slave states in the US as a replacement for slavery¹¹⁰, and by the Israeli government as substitutions to the employer-tied work permit¹¹¹, employer-tying policies may take various forms. There exists a myriad of ways that states can restrict workers’ right to resign and change employers beyond employer-specific work authorizations. And as Justice Levy noted in his dissent in *Hotline*, the fact that certain measures may operate to indirectly tie a worker to an employer does not necessarily make those measures any less effective than direct ones.¹¹² As such, constitutional challenges should seek to invalidate as many employer-tying policies as possible, in order to pre-empt attempts by policymakers to replace an invalidated policy with an alternative policy that is just as restrictive on rights as the employer-specific work authorizations. Since states tend to regulate different sectors of migrant workers using different forms of employer-tying policies, advocacy groups representing different groups of migrant workers should consider consolidating forces and mounting challenges together so that a greater number of policies can be invalidated at once. Of course, even if this strategy is successful, repeated challenges will still probably be necessary.

CONCLUSION

Abolishing the wide-spread use of employer-tied migration programs will not occur overnight, even if every instance of strategic litigation delivered favourable decisions.

¹⁰⁹ See e.g. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 being Schedule B of the Canada Act 1982, (U.K.), c. 11, s.1 Section 1 states "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

¹¹⁰ See Section II. THE NEED FOR CONSTANT JUDICIAL PRESSURE ON POLICYMAKERS: INVOLUNTARY SERVITUDE IN POST-SLAVERY USA.

¹¹¹ See Section III. THE FIRST CONSTITUTIONAL CHALLENGES AIMING TO ADVANCE MIGRANT WORKERS’ RIGHT TO CHANGE EMPLOYERS (RIGHT TO LIBERTY/FREEDOM OF OCCUPATION)

¹¹² *Hotline supra* note 62 at para. 7 – 8.

However, well-crafted challenges can increase the likelihood that such decisions will have a positive impact in producing policy reforms that respect the fundamental rights of migrant workers. Future constitutional challenges of employer-tying policies must be framed in broad terms and they must rely in particular on strong human security and/or right not to be held in involuntary servitude arguments. Furthermore, they must showcase detailed examples of alternative temporary labour migration policies compatible with individuals' fundamental rights.