

# Theoretical Inquiries in Law

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THEORETICAL INQUIRIES IN LAW is a biannual English-language law journal published by the Cegla Center for Interdisciplinary Research of the Law at the Buchmann Faculty of Law, Tel Aviv University. The journal, founded by Prof. Ariel Porat in 2000, specializes in the application to legal problems of insights developed in other disciplines, such as moral and political theory, epistemology, history, cultural studies, social sciences, economics and game theory, probability theory, and cognitive psychology. The range of issues dealt with by the journal is virtually unlimited, in line with its commitment to the cross-disciplinary cultivation of ideas. Contributors to the journal are distinguished legal scholars working in different “law and . . .” areas. The journal also strives to offer a forum for contributions to legal theory by scholars working in disciplines outside of law.

The previous issues of the journal have been devoted to the following topics: Restitution and Unjust Enrichment; Judgment in the Shadow of the Holocaust; Contemporary Legal Scholarship: Achievements and Prospects; Protecting Investors in a Global Economy; Economic Analysis of Constitutional Law; Negligence in the Law (Parts 1 & 2); Writing Legal History; Liberty, Equality, Security; The Palestinian Refugees and the Right of Return: Theoretical Perspectives; The Role and Limits of Legal Regulation of Conflicts of Interest (Parts 1 & 2); The Excessive Use of Force; Personal Bankruptcy in the 21st Century: Emerging Trends and New Challenges; Critical Modernities: Politics and Law Beyond the Liberal Imagination; Why Citizenship?; Moral and Legal Luck; Legal Pluralism, Privatization of Law and Multiculturalism; Community and Property; Histories of Legal Transplantations; Money Matters: The Law, Economics, and Politics of Currency; Comparative Tax Law and Culture; Copyright Culture, Copyright History; Rights and Obligations in the Contemporary Family: Retheorizing Individualism, Families and the State; Back to the State? Government Investment in Corporations and Reregulation; International Courts and the Quest for Legitimacy; Public and Private, Beyond Distinctions?; New Approaches for a Safer and Healthier Society; Sovereignty as Trusteeship for Humanity: Historical Antecedents and Their Impact on International Law; Labor Organizing the Law; The Constitution of Information: From Gutenberg to Snowden; Law, Economy and Inequality; Sovereignty and Property; Fifty Years of Class Actions – A Global Perspective; The Tragedy of the Commons at 50: Context, Precedents, and Afterlife; The Problem of Theorizing Privacy; Freedom, Choice & Contracts; Elder Law and its Discontents; Historical Justice in the Israeli-Palestinian Context; Legal Discontinuity; How Law Changes What You Want: Positive and Normative Effects of Law on Values and Preferences; The Global Law Market.

Forthcoming issues will include: Private Law Theory Meets the Law of Work; Regionalism: Shifting Scales Beyond Cities and States; Controlling Minority Shareholders; Third Party Litigation Funding.

An online version of the journal, as well as comments on articles published in the journal, are available on the *Theoretical Inquiries in Law* website (<http://en-law.tau.ac.il/til>). All articles are also indexed and available on HeinOnline, LegalTrac, Lexis-Nexis, and Westlaw.

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## INTRODUCTION

In the past century, states have entered into hundreds of bilateral labor agreements (BLAs) in order to regulate the flow of migrant workers between them. A BLA is a legal instrument signed between two countries—usually a migrant-sending and a migrant-receiving country—to set the terms, conditions, and the mutual commitments they take upon themselves in the governance of labor migration between the two states. As such, BLAs lie at the nexus of migration policy and labor practices. However, the nature, scope, and impact of these agreements have hitherto received little attention from the academic community. Through the study of these agreements much may be learned about the commitments and practices of states regarding pressing social issues like migration and workers' rights. In this issue of *Theoretical Inquiries in Law*, we seek to engage in an encompassing, multidisciplinary academic conversation on BLAs. By bringing together experts from different fields to assess, analyze and provide insights on the nature, potential, and limitations of these agreements as a migration governance tool, we wish to enable the establishment of a common theoretical and empirical basis for the study of bilateral labor agreements.

In this issue, the twelve articles can be broadly grouped into two categories. The first six articles in this issue offer evaluations of BLAs as a governance tool. The latter six articles conduct case studies examining specific countries' use of BLAs. In both of these categories, the articles tackle a range of substantive and theoretical issues and employ a variety of research methods. For instance, the articles by Hila Shamir and Yuval Livnat, Tamar Megiddo, Jennifer Gordon, Alan Hyde, and Yahel Kurlander and Avinoam Cohen offer theoretical assessments of BLAs and their context. Adam Chilton and Bartosz Woda, Tijana Lujic and Margaret E. Peters, Nonna Kushnirovich and Rebeca Raijman, Sudarat Musikawong, and Marion Panizzon present empirical studies of BLAs and their characteristics. Additionally, the article by Jenna L. Hennebry, Nicola Piper, Hari KC and Kira Williams offers an empirical analysis of the interactions between gender and migration, while Ayushman Bhagat provides on-the-ground insights and proposes normative stances on how to improve those interactions.

Starting the general evaluation of BLAs, Chilton and Woda introduce three novel research sources for BLAs which they have produced. First, a BLA dataset containing indications as to the existence of over 1,200 BLAs. Second, a corpus that includes the complete text of over 800 BLAs. Third, a dataset coding the contents of over 500 BLAs based on the best practice requirements published by the International Labour Organization (ILO). This project is revolutionary in its dimensions, as it greatly expands the existing data and knowledge on BLAs and introduces numerous new avenues for researching BLAs. In doing so, the authors have taken an important first step in the development of complex tools for the ongoing research of BLAs, which has hitherto been limited, at best. Furthermore, in their initial analysis of the corpus of the agreements, the authors find that, while the rate of new BLAs has remained high in the last decades (as compared to other international agreements), these

agreements have not incorporated worker protections, contrary to the expectations of scholars, activists and international organizations.

Shamir and Livnat provide an in-depth examination of the motivations of states to enter BLAs. The “Control Thesis” proposed by the authors suggests that a key motivation to enter these agreements derives from the shared interest of migrant-receiving and migrant-sending states in controlling and policing the movement and actions of migrant workers and controlling the migration industry that develops along the migration corridor. The Control Thesis is presented in the article as a leading factor in shaping BLAs and their attributes, such as secrecy, nonbindingness, and unenforceability. The authors suggest that the potential of BLAs to protect migrant workers’ rights in many BLAs is undermined by the interests of states, which transform them into a tool of control rather than a means of protection. The article suggests that despite these interests, workers, unions, civil society organizations and other actors who seek to protect workers’ rights may find in BLAs an opportunity to do so, if they carefully engage with and challenge states’ mutual interest in control. The article concludes that insisting on transparency, introducing enforcement mechanisms, and adjusting the language of BLAs to address workers’ rights may help realize their potential for protection and counterbalance states’ interest in establishing control.

Megiddo analyses MOUs and BLAs under the umbrella of international law and delves into the design choices of these legal instruments and their implications. In particular, she explores the prevalence of obscurity and nonbindingness in the bilateral regulation of labor migration. Megiddo relies on the conceptual distinction between contract-like treaties and those akin to lawmaking and introduces a novel implementation of this distinction on MOUs and BLAs. She argues that treaties identified with the latter type must adhere to rule of law requirements, such as transparency. Upon this theoretical foundation, Megiddo makes the normative claim that BLAs should be viewed as instruments that create rights and obligations for third parties, notably labor migrants, and thus finds a level of illegitimacy in BLAs that suffer from obscurity and nonbindingness.

Lujic and Peters present a quantitative analysis regarding the accessibility of BLAs. The authors argue that, given the contentiousness of immigration policies in many countries, and the nature of BLAs as a workaround to those policies when immigration is unpopular, countries will choose more informal agreements and limit the accessibility of those agreements. In contrast, when looking to lock in a certain policy, countries are likely to adopt formal treaties. Through a statistical analysis of the accessibility of the BLAs included in Peter’s 2019 database, and the measurements of several attributes of the countries involved in those agreements, the authors find mixed support for their arguments. The analysis confirms that the informality and inaccessibility of BLAs have increased since 1945 and that these developments seem correlated with the rising unpopularity of immigration policies. At the same time, the authors find that veto players and executive constraints have exerted only limited influence on informality and accessibility.

Gordon challenges the accepted paradigm, which posits trade and migration as separate, at times opposite, spheres of public policy. Analyzing the phenomenon

of migrant work in Free Trade Zones (FTZs) through various case studies, the author explores the theoretical assumptions, practical approaches, and implications pertaining to the intersection of migration and trade. To this end, she considers each party's interests, advantages, issues and possible solutions. Gordon argues that utilizing migrant labor in FTZs, a strategy she coins "double labor arbitrage," generates additional value to the industry players. This surplus results from the unfreedoms of migrant workers in FTZs. For example, there are certain situations where the decision to outsource labor is driven by the global competition over cheap manufacturing and trade. Conversely, in an effort to control or divert immigration, certain countries promote policies that directly affect trade. All in all, the result is an illuminating inquiry into the web of relationships between governments, manufacturers, corporations, migrant workers, and the local workforce.

Completing our bird's-eye discussion of BLAs as a governance tool, Hennebry, Piper, KC and Williams argue that the intensification of "feminization of migration" requires in-depth analysis of the effect of BLAs on women's migration. The article studies 583 BLAs, including 182 countries, from 1930 to 2015, through an intersectional feminist approach, which highlights the human and labor rights of women in these contexts. The authors suggest that BLAs have the potential to promote the social protection of rights, by applying a gender-responsive methodology. The case studies of Asian BLAs demonstrate that existing BLAs are characterized by three "G's": gains, gaps, or gaffs in terms of gender equality and human rights as well as labor rights protection of women migrants. To achieve BLAs that may be considered labor migration governance tools that enhance regular pathways for all, gender-specific, nondiscriminatory and rights-based clauses need to be included and rooted in international legal and normative frameworks.

Moving to the analysis of national case studies, Hyde focuses on China's use of bilateral trade agreements in transnational regulation. He shows that while the future of transnational labor regulation requires Chinese participation, there is currently no effective mechanism for protecting relevant workers from labor abuses. Following his analysis of this unfortunate situation, Hyde suggests that the ILO and global financial institutions such as the World Bank or the Asian Development Bank should propagate model treaty provisions to enforce the basic labor rights detailed in the 1998 Declaration. Although it seems to have had little impact on the ILO's activity so far, Hyde argues that the Declaration is the most significant and appropriate development in international labor law. Since China will increasingly find it to be in its own interest to cooperate with trading partners and rivals on basic labor rights, Hyde claims that cooperative solutions of this form will become more prominent.

Bhagat explores the relationship between BLAs and domestic policies on migration and gender in Nepal. The article presents an unconventional point of view assessing the impact of BLAs "from below"—from the standpoint of women migrant workers in Nepal. Bhagat argues that through interactions between BLAs and Nepal's domestic policies entrapments are created, enforced, and maintained by the many different spheres of interaction (cultural, societal, legal, political, and more) that impact migrant workers' decision to migrate and their migration path.

The article focuses on the female members of Nepal's lower classes, who resort to labor migration in attempting to better their position and free themselves from the abuse and limitations in their origin societies. Labor migration, however, results in additional entrapments that ensnare these women in the orthodox positions in their society. The article aims to show how this entrapment is harmful and raises normative questions as to how it should be addressed.

Kurlander and Cohen introduce an analysis of the impact of BLAs on the processes of labor migration institutionalization in Israel across different employment sectors. The article provides a theoretical framework focused on the context leading to the adoption of BLAs and their effect on the meso-level development of migration institutionalization. Through their innovative approach, the authors find that the adoption of BLAs by Israel in the construction and agricultural sectors revolutionized recruitment practices and reduced illicit migration. However, structural differences in the sectors, particularly regarding the skill level of workers, are a salient cause for differences in the institutionalization process across sectors. The article concludes by projecting the theoretical framework on the development of BLAs in the care sector in Israel.

Kushnirovich and Rajman take a new approach in examining the conditions of migrant workers in Israel before and after the introduction of BLAs. They develop an index of vulnerability based on five measurable criteria extracted from the relevant literature: working, living, and safety conditions, wages, and dependence on migration costs. These criteria are then applied to two groups of migrant workers in Israel: Chinese construction workers and Thai agricultural workers. Both were analyzed prior to and post the application of the BLAs, thereby enabling a better understanding of the effects of BLAs on migrant workers. In both cases, it becomes evident that BLAs prompted a dramatic decrease in dependence on migration costs yet did not significantly improve other working conditions.

Musikawong presents the case of foreign migrant workers in the agricultural sector in Thailand. Her study relies on data that her research team collected by conducting surveys throughout 2017-2018. The article highlights the limitations and weaknesses in ASEAN's bilateral agreements, which prevent the improvement of the migrant workers' conditions. After pinpointing the systemic problems in ASEAN's bilateral agreements, Musikawong criticizes the fundamental design of the workers' rights system in the region and offers several ways in which it could be improved.

In the final article of this issue, Panizzon focuses on France's agreements on the joint management of migration flows (AJMs). The article provides an in-depth analysis of France's AJMs, while focusing on France's relations with Senegal. By examining the agreements, as well as the relevant judgements by France's administrative courts, the article offers rich insights into the respective state-level interests in BLAs and their application. A primary focus is the Franco-Senegalese creation of an exceptional pathway for labor migration, as compared to the remainder of the European Union. More broadly, the article proposes a multilevel legal analysis, looking at the colonial and postcolonial contexts of various generations of BLAs. The author argues that



AJMs played a crucial positive role in shaping European labor migration, and could continue doing so in the future.

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The articles collected in this issue are the product of the conference on “Bilateral Labor Agreements,” held at Tel Aviv University, Faculty of Law, in June of 2021, and organized in collaboration with the research group TraffLab (ERC). Recordings from this event are available at the TraffLab website ([www.trafflab.org](http://www.trafflab.org)). Theoretical Inquiries in Law thanks Adam Chilton, Tamar Megiddo and Hila Shamir, the organizers of the conference, for bringing together an outstanding group of contributors and for serving as guest editors of this issue; Ruvik Danieli for style-editing the articles; Michal Semo Kovetz for graphics; and all the conference participants and commentators for a most fruitful discussion. We also thank our Managing Editor, Sharon Vered Shaked, for her wonderful work. Finally, we thank the Editor in Chief, Ronen Avraham and his predecessor, Yishai Blank, for their trust and guidance. The conference and editing process received the support of the TraffLab research project funded by the European Research Council (ERC) under the European Union’s Horizon 2020 research and innovation programme (grant agreement No. 756672). The articles published in this issue are available online at the Theoretical Inquiries in Law website (<http://en-law.tau.ac.il/til>).

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