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Rethinking the Temporary, Reconstituting the Citizen: Rights Mobilization by Temporary Foreign Workers in Comparative Perspective

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Rethinking the Temporary, Reconstituting the Citizen: Rights Mobilization by Temporary Foreign Workers in Comparative Perspective

By

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Abstract

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Workers with temporary immigration status have become the economic reality in several countries, as these workers provide a temporally mobile, cheap workforce that is responsive to economic vicissitudes and anti-immigration sentiment. Temporary foreign workers (TFWs) in low-wage sectors such as agriculture are tied to a single employer, have no access to their family and to permanent residence, and face overwhelming barriers in accessing justice. TFWs spend years residing and working outside of their country of nationality and are unable to be self-sovereign agents either in their countries of origin (because of lack of residence) or in their countries of sojourn (because of lack of nationality). While there have been instances where TFWs were able to make individual legal claims for labor violations in the country of sojourn, collective mobilization against the TFW program itself is exceptional. Collective mobilization represents acting as (partial) citizens, as the claims resemble self-determination claims on behalf of the entire TFW collectivity. How do TFWs and their allies, against all odds, mobilize the law to make collective claims and produce citizenship from below?

In this research, I critically examine Israel and Canada, countries that have very similar TFW programs in agriculture but represent two contrasting types of legal mobilization against these programs. Israel is a case of "top-down" constitutional litigation where the results were court-ordered changes to the TFW program. Canada represents a case of legal mobilization "from below" where law is used subversively as a tool for larger political action. What explains the different pathways to legal mobilization in Israel and Canada?

In addition to contributing new empirical data and theoretical conceptualizations of the different ways in which the law can be mobilized, my dissertation combines legal mobilization and social movement theories to offer an analytical framework to understand what affects the type of legal mobilization. TFW mobilization is situated in two broad social movements, labor movements and migrant rights/citizenship movements. I frame legal mobilization in the TFW context as a form of anti-hegemonic, contentious collective action and show the complex interactions between the political and discursive environment (political opportunity structure), the legal environment, and the support structure for mobilization (resource organizations).

I show that despite barriers to access and courts' unwillingness to overturn immigration law, the law can be collectively mobilized on behalf of TFWs. The pathways to legal mobilization depend on legal opportunities and type of resource support. Constitutional litigation is initiated by cause-driven lawyers or legal organizations, but their framing of issues is constrained. Grassroots, solidarity organizations, in contrast, use the law as a tool for the broader goals of worker mobilization and social change. With the support of such organizations, TFWs are able to articulate their demands collectively, engage in direct action and political mobilization, and demand changes to the TFW program. My comparative historical analysis of Israel and Canada shows that legal and discursive strategies, however, depend on the historical political legacies and current political and economic environments. Elite power and ideological discourses are entrenched and distributed in the context of TFW programs. Political contestation impacts constitutional challenges as well as grassroots mobilization.

My dissertation further adds to citizenship theory in three ways. First, it disrupts prevalent myths about the agency of TFWs and their lack of rights consciousness. Second, it offers the possibilities for meaningful change to TFW programs and advances an agentic theory on access to citizenship. Lastly, it adds grist to the conception of "citizenship from below" through the evidence of jurisgenerative practices of TFWs.

For Lakshmi and T.S. Venkateswaran

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Chapter 1
Legal Mobilization by Temporary Foreign Workers

I. Introduction

Temporary foreign worker or guest worker programs in the low-wage sector have had a resurgence since the 2000s (Castles 2006).[1] Liberal states that import foreign workers to work in the agricultural, caregiving, construction and other low-wage sectors argue that temporary foreign worker (TFW) programs adequately protect the rights of foreign workers while meeting the interests of workers, sending countries, and destination countries. In this way, these governments serve the interests of capital while appearing not to violate the norms of liberal democracy and citizenship on which they are founded.

In reality, TFW programs, even in liberal democratic states continue to subject workers to vulnerable working conditions and legal discrimination through the imposition of three common structures of systemic disadvantage. First, TFWs arriving in the low-wage sector, such as agriculture or construction, have no access to permanent residence or citizenship, a right afforded to workers in so-called "high-skilled" categories. Under several programs, the same foreign workers are brought back year after year, sometimes over decades, under systems of temporary status, spurring a process of circular migration. This condition has been eloquently described by leading scholars in the field as one of "permanent temporariness" (Dauvergne and Marsden 2011; Goldring, Berinstein, and Bernhard 2009).

Second, TFW work permits or visas, by design, situate workers in a position of diminished power and great precarity relative to their employers. Workers are tied to a specific employer for a specific period of time. The employer determines whom to recruit and sets conditions for their daily living and continued employment. Third, the program does not allow for families of TFWs to join them. That is, family unification is barred for workers under these programs, making it much harder for them to integrate with the larger community and establish social ties. These three characteristics—lack of citizenship, temporality and lack of family rights—are considered inimical to the liberal rights paradigm that enshrines rights such as right to family life, freedom of employment, mobility rights, and right to political participation (Carens 2008; Bosniak 2008).

[1] Castles (2006) noted that several European countries re-instituted temporary foreign worker programs and rapidly brought in temporary foreign workers on a seasonal basis in the early 2000s. By 2007, annually, Germany had about 300,000 temporary foreign workers, Spain and Italy around 80,000, and the U.K. around 17,000 (OECD 2017, 21). The overall trend lines were disrupted as the Eastern European countries who were the source of foreign workers joined the European Union (thus, workers who were hitherto considered foreign workers no longer fell into that category). Moreover, the economic recession of 2008 dampened the foreign worker surge of the 2000s (OECD 2010, 31). Since then, however, the program has been growing across OECD countries as evinced from the numbers in the agricultural sector in the U.S., which saw a 76% growth in its seasonal agricultural (H-2A) workers between 2007 and 2015 and in Canada, which saw a 37% growth in seasonal agricultural (SAWP) workers in the same period (OECD 2017, 21).

In this thesis, I examine Canada and Israel as two case studies where temporary foreign workers and their advocates have, against the odds, mobilized to pose fundamental challenges to these conditions of their permanent temporariness in distinct ways.

TFW programs, as structured, deny workers agency in their ability to politically and legally mobilize during the most significant working years of their lives. TFWs spend years residing and working outside of their country of nationality and are unable to be self-sovereign agents either in their countries of origin (because of lack of residence) or in their countries of sojourn (because of lack of nationality). While there have been a few instances where TFWs were able to make individual legal claims for labor violations in the country of sojourn, collective mobilization to challenge the strictures of the TFW program itself and produce consequences for the entire community of TFWs are exceptional. Collective mobilization represents acting as (partial) citizens, as the claims resemble self-determination claims on behalf of the entire TFW collectivity. How do TFWs and their allies mobilize the law to make such collective claims?

As my study highlights, although Canada and Israel have very similar TFW programs in agriculture, these two cases represent two different pathways for legal mobilization. In 2006, as a result of a constitutional challenge by a public interest legal organization, the highest court in Israel ruled that the tied work permit violated the inherent right to liberty of the foreign worker and was therefore unconstitutional. Israel became the only country in the world with a constitutional right to labor mobility.[2] In contrast, the Seasonal Agricultural Work (SAWP) program in Canada has been in existence for over fifty years with no legal challenges to the provisions of the program. However, in the past decade, solidarity organizations in Canada have embarked on a political campaign for access to immediate permanent residence for TFWs. Existing laws, considered to be ineffectual, are being used as a tool to organize the workers themselves and to insert subversive discourses in the law that challenge TFW programs. How do the legal and political structures and discursive opportunities in the two countries explain these two contrasting pathways?

Given that collective legal and political mobilization on behalf of TFWs is an exceptional phenomenon, a deep investigation into the causes and nature of the contestation offers critical insights into what opportunities for meaningful change can exist in the TFW system that now marks the immigration policies of numerous countries across the globe. My research illuminates and extends theories of citizenship, types of legal mobilization, and structural factors that determine pathways to transformative legal mobilization—that is, mobilization that challenges basic, entrenched polices of the nation-state.

I. Mobilization as acts of citizenship

My research addresses a gap in the literature by offering new empirical data on non-citizen mobilization. The protest goals, tactics, causes, and impacts of non-citizen mobilization cannot be fully explained by standard theories of mobilization and movements since citizenship assumptions undergird both social movement (Bloemraad, Voss, and Lee 2011) and socio-

[2] *Kav Laoved vs. the Government of Israel,* H.C. 4542/02 (2006))

legal scholarship (Rosenberg 1991; McCann 2006; Tushnet 2008; Scheingold 2004).[3] Non-citizens with precarious status can be easily deported from their country of sojourn and function under a real fear of making their political or legal claims heard, even when they have full cognizance of their injustice. Their mobilization relies on the support of advocacy organizations or citizen groups. The findings of my study highlight that the strategy of advocacy organizations is mediated by the discursive opportunities available to them, which in turn is predicated on immigration rhetoric and the political environment.

Political and legal mobilization by non-citizens raises crucial questions about citizenship, agency, and access to justice (Milkman 2006; Gordon 2005; Abrams 2015; Bloemraad, Voss, and Lee 2011; Beltrán 2015). How do people with no political status to express their politics or change the law exhibit collective agency in ways that transform or challenge critical state and sovereignty paradigms? Collective transformative mobilization is an assertion of the "right to have rights" (Arendt 1973) which is deeply linked with the rights of citizenship. Non-citizens, especially those who are not permanent residents, are deemed to have limited sovereign power to determine their political future as they are not considered to be part of the political *demos* (Song 2009). Non-citizen legal mobilization challenges the discourse that only citizens can and should have positive rights, especially the right to mobilize, to make demands on the state and to change the constitutional contract.[4] The political expression or mobilization of non-citizens is not a "*product* of citizenship" but is a *production* of citizenship (Volpp 2014). My research, therefore, provides a fresh and new perspective on the production of citizenship claims by temporary foreign workers.

Temporary foreign workers remain understudied. My analysis demonstrates that the focus on TFWs, distinct from undocumented workers, offers important and previously unrecognized dimensions to citizenship scholarship. Most of the existing research on non-citizens has concentrated on the undocumented in the U.S. or permanent residents in Europe (Menjívar 2006; Koopmans, Michalowski, and Waibel 2012; Bloemraad, Voss, and Lee 2011; Milkman 2006; Abrego 2011; Gleeson 2012). Calavita's (2007) study on workers in Italy and Spain, for example, shows how citizenship stratification and racialization influences rights-in-action and potential for mobilization. Citizenship and immigration scholarship offers insights into citizenship conceptions, immigrant rights and experiences, and the production of race and class by citizenship and immigration law (Ngai 2004; Haney-López 1996; Daenzer 1993; Volpp 2005).

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[3] For example, Jasper (1997) distinguishes movements into citizenship and post-citizenship movements, with the civil rights, labor movements, feminist movements constituting *citizenship movements*, i.e. movements for full inclusion of a collectivity (of citizens). Post-citizenship movements are composed of people *who already have the basic rights of full citizenship* but their fight is for societal cultural change and lifestyle acceptance (Jasper 1997; Polletta and Jasper 2001). Movements by non-citizens for the right to have rights enjoyed by citizens are *pre*-citizenship movements and are often excluded in typologies. McCann (2006) explicitly only refers to "citizen" consciousness in his discussion on social movements and legal mobilization. Rosenberg (1991) predicates his research on constitutional rights for citizens.

[4] Some scholars assume that a tight, inseparable correspondence between citizenship and (positive) rights has always existed (Jacobson 1996; Schuck 1989). However, it should be noted that membership in a nation-state did not always include "citizenship" status as defined by its relationship to rights (where citizenship status implies at least the right to vote, equality rights and be a part of the political *demos*).

In crucial regards, TFWs are like the undocumented, as they also function under a liminal, precarious, uncertain status. They either remain in the host country or engage in seasonal, circular migration for decades, often slipping into undocumented legal status, creating "immigrants who are settlers in fact but sojourners in attitude" (Gordon 2005).

However, unlike undocumented persons, TFWs are welcomed by the state as a cheap and vulnerable solution to undocumented migration and irregular labor. They are created as an exceptional category of persons who have been given the right to stay within the borders but only to provide labor and not to become permanent residents or citizens (Martin 1997). Rights and access to citizenship are withheld as an active strategy to prevent TFWs from settling in the host country (Hollifield 2000). If they were given citizenship status or rights, they would have the same liberties as other citizens and could compete with them for better jobs. Their presence would no longer alleviate the problem of labor shortage in undesirable, but socially necessary, jobs for which the TFW programs are designed (Walzer 1983). Without the right to become formal citizens at any point, TFWs can be socially and legally constructed as being permanently "temporary," where unequal rights can be justified even in areas, such as labor rights, which have long been considered to be attached to personhood and not citizenship (Dauvergne and Marsden 2011).

And yet, by being removed from direct state control, undocumented persons ironically have more opportunities to create a community life, remain in the country and form ties, and demand further rights as result of their ties (Rosenhek 1999; See also Kemp and Raijman 2014). TFWs, in contrast, are denied their political personhood and opportunity for agency because they are prevented from being part of the polity. Their subjectivity is reduced to being workers who are not political persons anywhere, neither in their countries of nationality because they are not resident there, nor in their countries of residence because they have no political status there. This diminished personhood affects all areas of the workers' lives, as they are unable to avail of civic, social welfare, or labor rights effectively in either country.

The current programs are strictly regulated to correct for the deficiencies in the older programs, where workers could end up remaining permanently, leading to the situation described by Max Frisch's oft-quoted phrase "we asked for workers, but we got persons instead." My study of collective political and legal action by or on behalf of the precarious and politically isolated community of TFWs, therefore, presents a unique opportunity to understand how, in the face of extraordinary state control, "workers" can still constitute themselves as "persons" (using Frisch's formulation) and perform partial citizenship (Abrams 2015).

II. Study of legal mobilization

Given the barriers to individual claims-making faced by non-citizens, collective action by non-citizens using the law is understudied.[5] The majority of case-studies on legal mobilization are

[5] Exceptions include mobilization for family unification of long-term non-citizens/denizens in Europe, asylum cases, and against detention, deportation, and labor exploitation in specific cases (Kawar 2012; Bonjour 2016; Cummings 2009; Prabhat 2016; Passalacqua 2016).

based in the U.S. or Europe, which are not easily generalizable to other socio-political contexts. The cases of Israel and Canada which I study are, therefore, significant because they are unique instances of *collective* legal mobilization on behalf of TFWs, where collective legal mobilization involves demands and claims that affect the entire community and not just the immediate needs of the individual.

There is a plethora of scholarship on temporary foreign worker programs. Several historical and sociological studies have examined the lived realities of temporary migrant workers in the domestic and agricultural sectors (Parreñas 2004; N. Constable 2007; Wilkinson 1989; Binford 2009). Labor scholarship has focused on migrant labor self-organization, such as wildcat strikes and covert forms of resistance, and transnational organization by foreign domestic workers (Buckley 2013; Piper 2010; N. Constable 2009; De Genova 2006; Pajares 2008; Binford 2009). Other studies draw attention to the global economic system and neoliberal politics, pointing out that they produce the figure of the "sojourner" through law to maintain the economy. The "sojourner" is gendered, separated from his or her family, and tied to his or her "native home" in order to defray "the costs of the reproduction of labor power" (Chock 1996; Burawoy 1976; Hondagneu-Sotelo 1994).

While these ethnographic and policy studies offer insights into the lived realities and systemic discriminations faced by foreign workers and the economic, macro-structural, cultural, and social forces that feed the labor sectors, significant shortcomings remain. They do not focus on the legal structure, the stratification of citizenship brought about by the legal structure despite constitutional and global rights expansions, and how this legal structure is experienced and challenged by guest workers and their advocates. The non-citizen, especially the foreign worker, is a "regulatable resource" for the state, closely regulated by the law to ensure economic and social gains for the state (Constable 1993). A study on how the law is mobilized in the TFW context directly presents the law, and thereby the state, as "a site of struggle in itself" and counters the criticism of prior studies as being "anemic" in their conceptualization of the law and state (De Genova 2002).

The few studies on *legal* mobilization by non-citizen workers are mainly focused on *individual* claims-making, drawing attention to: a) cognitive barriers to claims-making such as the internalization of stigma and status and a shifted legal consciousness, or b) structural barriers outside of the law such as linguistic difficulties and access to legal representation (Abrego 2011; Gleeson 2012; Speiglman et al. 2013; Coutin 2000). My research is a novel scholarship as it is a study of *collective legal* mobilization against the state.

In courts and social change scholarship, two opposing viewpoints characterize courts as either "constrained" institutions bound to the interests of the majoritarian regime and hegemonic elites or as "dynamic" institutions capable of bringing about substantial expansion of rights for groups marginalized by other branches of government (Rosenberg 1991; Hirschl 2004; Silverstein 2009; Klarman 1991). In immigration law, *prima facie,* courts appear to firmly fall under the first characterization. Courts are reluctant to extend any rights except through oblique means and have been capricious and unpredictable (Motomura 1990; Venkatesh 2016). Their discomfort with counter-majoritarian rulings is amplified in immigration law,

where the legislative or executive branches of the state have full plenary power to decide on immigration.

As Peter Schuck states: “immigration law remains the realm in which government authority is at the zenith and individual entitlement is at its nadir;” he described immigration law as a “constitutional oddity” (Schuck 1984). Positive cases on behalf of non-citizens across countries have usually involved intervention in extreme cases of exploitation, in cases involving permanent residents, or where rights of citizens are affected. Under these circumstances, legal institutions appear to offer little opportunity for non-citizens rights movements to mobilize the law to create new norms of citizenship.

Yet, as I demonstrate throughout this thesis, both Israel and Canada provide examples of two types of cases with legal mobilization on behalf of TFWs. They represent two different and contrasting pathways of using the law to challenge the TFW programs: a) “top-down” constitutional litigation in Israel which resulted in court-ordered changes to the TFW program; and b) legal mobilization “from below” where law is used subversively as a tool for larger political action resulting in social change. Taken together, this study not only provides a picture of diverse pathways of legal mobilization but also shows how legal mobilization can take place even under conditions of restraint from courts to extend rights to non-citizens.

a) Constitutional Mobilization

One important stream of scholarship, especially by scholars of constitutional law and legal liberalism, centers on constitutional litigation as a crucial activity for social change on behalf of minority voices (Siegel 2004; Ginsburg 2003; Hirschl 2004; Epp 1998; Tushnet 2008; Ackerman 2005). Studies of famous rights-enhancing judicial decisions and constitutional courts construct the court as an important counter-majoritarian institution and a "powerful, vigorous, and potent proponent of change” (Rosenberg 1991, 2).

The constitution takes a life of its own as the single most important recourse through which unjust laws can be challenged and changed. Lawyers and legal organizations are important social movement actors who can cause progressive reform (Epp 1998; Ackerman 2005, 4–6). However, even in studies of constitutional litigation, constitutional mobilizations *by citizens* are deemed to be “crucial building blocks of self-governance” and an essential aspect of citizenship and democracy (Siegel 2004). Non-citizens are not deemed to be a part of the narrative of state building, self-governance, and equal citizenship.

My research examines the conditions under which foreign workers and their allies challenge the sovereign right of states to decide on their borders and the conditions of these non-citizens, thereby adding to an important and previously neglected dimension of the legal mobilization scholarship. Israel and Canada were selected because they are paradigmatic examples of constitutional states with an independent, active judiciary with several prominent examples of the court using constitutional law to force the state into making rights-protecting legal change (Hirschl 2004; Epp 1998; Tushnet 2008).

Israel is a case of "constitutional mobilization" from above. In general, as described earlier, courts are reluctant to rule against the state in immigration law. However, my case study of Israel shows that mere lack of precedent or plenary power does not foreclose the possibility of constitutional challenges on behalf of non-citizens. My analysis reveals that constitutional success instead relies on other pertinent factors such as political contestation, strategies adopted by the litigating actor, and the political and cultural discourse that can offer courts an alternative to challenge plenary power doctrines and established legal tradition in immigration law.

The contrast with Canada further illuminates this issue. Canada has one of the most inclusive citizenship laws with pro-immigration policies, protective laws for non-citizens, and a national identity based on being a multi-cultural, liberal, constitutional state. Israel, on the other hand, is an ethno-nationalist Jewish state with exclusionary policies for non-citizens. The fact that Israel stands as a case study for constitutional challenge instead of the more obvious candidate, Canada, is a paradox I explain within my study.

b) Legal mobilization "from below"

Despite the constitutional change in Israel, I found that the TFWs themselves are not organized or mobilized. The challenge was a top-down initiative by a prominent labor law organization and the court's decision itself has had minimal impact in increasing the agency of foreign workers. In contrast, the empirical evidence in Canada shows that while constitutional challenges were absent, TFW advocacy groups engaged in "bottom-up" legal mobilization where the law was used as a tool for organizing and advocacy. The main advocacy group in Ontario, *Justicia for Migrant Workers,* advances the view that law and rights are hegemonic tools that are used to curtail TFW rights. The advocacy organizations have eschewed the constitutional route to use the subversive discourse of "Status Now"- a demand for immediate permanent residence for TFW workers.

When rights-based litigation does not provide much substantive assistance to precarious non-citizens, such as TFWs, what motivates the movement actors such as in Canada to use the law, especially when they deem the law to be the very source of the workers' continued "temporary" or "illegal" status? Legal action is costly in terms of resources and time, neither of which the TFW population possesses. A claim demanding immediate residence status for TFWs should not even be possible in courts as courts lack the institutional capacity to fulfill such collective aims and lack enforcement power and expertise to affect long-term, significant reform (Rosenberg 1991).

The court is limited in its jurisdiction and the kind of remedies it can provide. Possible remedies may be limited to partial or total annulment of the guest worker program, which may not be in the interests of TFWs. Courts may not be able to provide an equitable remedy that would command the legislature to take into account the interests of the foreign TFWs. Studies show that litigation strategies have several other drawbacks as well, such as risk of co-optation

by elite lawyers, dilution and de-radicalization of the claims to fit into the legal framework, and legal victories that do not produce any lasting change.[6]

Why then, despite these factors, have TFWs and/or their advocates undertaken legal actions? Using the Canadian context, my doctoral research shows that TFWs and their solidarity groups rely on legal action and rights discourse as acts of resistance and as assertions of quasi-citizenship.

To understand these different paths of legal mobilization, my research focuses on three factors: the political discursive space related to national identity, the types of legal support resources available (Epp 1998; Levitsky 2006; Marshall and Hale 2014) and the legal opportunity structures (Andersen 2009; Hilson 2002). Together, these factors show the importance of the national legal institutional context when drawing conclusions about causal factors for constitutional litigation. By using the case-study of TFW programs, which are assumed to be exceptional cases for legal mobilization, the research more accurately and closely investigates the differentiating institutional factors affecting legal mobilization.

My research suggests that historical legacies and an environment that encourages litigation strategies for social movements compel legal mobilization to an extent. However, it also suggests that even in such cases, the characteristics of the advocates – whether they are cause-based lawyers versus whether they are grassroots solidarity groups – are a stronger predictor for the type of legal mobilization. In Israel, the constitutional litigation was initiated by a group of elite lawyers that moves in the same social circle as the judges and political and legal elites. In Ontario, Canada, the mobilization is done by volunteer-based or legal aid solidarity groups, who on one hand have less institutional legitimacy compared to the Israeli group, but on the other, have more discursive freedom to frame their arguments.

Advocacy actors routinely support legal action when an *individual* worker makes a legal claim. But this study illuminates the use of this legal action as part of a more broadly-based strategy. The advocacy organizations in Canada have extensively used the existing law in lower level tribunals and in traditional areas of law, such as workers compensation or harassment claims, rather than in constitutional litigation. Given the nature of these tribunals, these are individual claims with no possibility of larger legal change. However, the organization persists in making subversive claims in the legal statements and in using the cases for large scale political mobilization.

[6] Rosenberg (1991) argues that litigation cannot bring about social change and that courts merely act as "flypaper" for social reformers who succumb to the "lure of litigation" (Rosenberg 1991, 427). Scheingold and Tushnet assert that law, litigation, and even the language of rights only reinforce existing hegemonies (Scheingold 1974; Tushnet 1993). Legal strategies and legal rights frames further deradicalize the message of social movements by limiting their demands to legally viable remedies for the immediate case, depleting and diverting limited resources, legitimizing and reinforcing unjust systems, and "[shaping] movement identity consistent with conservative claims" (Albiston 2011, 67; Ferree 2003; Rosenberg 1991; Tushnet 1983; Handler 1978).

This type of legal mobilization provides benefits such as being able to introduce a subversive, radical discourse in legal documents and institutions, media coverage, engendering a collective rights consciousness, and legitimizing the movement. There are costs to legal mobilization such as depletion of scarce resources. Reliance on the law for social change also creates false hopes of rights recognition and sidelines radical, anti-institutionalist ideas that challenge the sovereign authority of the state, for example, to decide on immigration and citizenship (Rosenberg 1991; Hunt 1990; Ferree 2003). Nevertheless, legal mobilization is a necessary, though not sufficient, tactic for the temporary foreign workers when their lived reality is determined by the law.

My research finds that the law can be wielded as a tool of resistance even in institutionalized settings. By showing the systematic nature of the oppression created by temporary status, TFW advocates are able to "collectivize" the issue, even as the court relies on individualized remedies. My research demonstrates how legal mobilization provides a space for subordinated groups such as TFWs to publicly air their grievances and bring them to the notice of public actors. The language of law and rights also serves as a symbolic and organizing resource that is used to generate new meanings of rights for non-citizens and to "perform" actions that are usually derived from citizenship status, such as making new legal claims and civic engagement. These acts, I argue, constitute "jurisgeneration," as institutionalized legal meanings are challenged and reconfigured.[7] TFWs, as non-citizens, are thus disrupting the script of national citizenship and exercising the Aristotelian "right to rule and be ruled," a privilege conferred to citizenship status.

Indeed, prior work has shown that law and rights can also be deployed in "counter-hegemonic" ways to "rework" and "refashion" the "elements which are constitutive of the prevailing hegemony" (Hunt 1990, 313; Santos and Rodríguez Garavito 2005). Legal mobilization can be used to question, and even delegitimize, socially normalized but exclusionary practices and generate new understandings of social relations and statuses (Albiston 2010). Legal strategies can aid political mobilization, give negotiating power, increase media attention, and provide symbolic resources towards empowerment and reshaping identity (McCann 1994). Some of the benefits do not even depend on winning at the courts (NeJaime 2011). These studies illustrate the paradoxical nature of law to be at once hegemonic and "potentially instrumental to its own opposition" (Calavita 2006, 108). My research extends extant scholarship by being the first study where temporary foreign workers are portrayed as actors engaging in counter-hegemonic use of the law.

III. Comparative Historical Analysis of the Political and Discursive Environment

My thesis offers new empirical data and theoretical conceptualizations of the different ways in which the law can be mobilized by and on behalf of TFWs. But it goes further in offering an analytical framework of the structural factors that influence the legal mobilization pathways

[7] The framework of jurisgenerative processes was put forth in Robert Cover's seminal piece in 1983 (Cover 1983) and has gained currency in recent work on social movements, cosmopolitan citizenship, and popular democracy (Lovell, McCann, and Taylor 2016; Benhabib 2007). The term "jurisgenerative" refers to a process where people contest and mobilize the law to create new meaning of rights (Benhabib 2004, 169, 181).

through a comparative historical analysis of the political and discursive environment shaping TFWs in agriculture in Canada and Israel. This is a crucial contribution that combines legal mobilization and social movement theories.

Despite the interconnections, legal mobilization theory and social movement theories largely function in their own silos. As Edward Rubin argues, "Social scientists do not involve themselves in the technical, seemingly arcane details of legal doctrine, legislative drafting, or administrative rulemaking. And legal scholars do not venture into the chaotic, empirical world of mobilization, recruitment, political strategy, and organizational behavior" (Rubin 2001). Most of the research in the field investigates the impact of litigation, court-based-strategies, and legal professionals on social movements (Boutcher and Chua 2018). McCann (2006) has critiqued the standard approach by law and social movement and legal mobilization scholars, which ignores theoretical development. Legal mobilization scholarship has used specific conceptions from social movement theory such as framing (Pedriana 2006; Ferree 2003), organizational resources and strategies (Marshall and Hale 2014), resource mobilization (Barkan 1980), and opportunity structures, albeit in legal institutions (Andersen 2009). While scholars have raised the importance of sociopolitical context in legal mobilization studies (McCann 2006), the political process model has not been used in a conceptually robust way to explain how different types of legal mobilization emerge. This study makes an important contribution to both social movement and legal mobilization theories by showing the crucial impact of historical and current political environment (or political opportunity structure) in determining the discursive terrain, the legal environment, and the constellation of power and privilege.

Legal opportunity and legal support structures matter. The former centers on the ease of access to the courts, while the latter focuses on the presence of an influential cause-motivated legal organization. Both predict the likelihood of a constitutional mobilization in Israel over Canada. However, I make the additional claim that there are other determinative factors involved—in particular, the political environment. Indeed, my research shows that the decision of the Israeli court depended on the partisan political dynamics around the TFW program. Similarly, the ability of the TFW advocates in Canada to harness the agency of the workers and to interject radical discourses in its legal mobilization also depended on the political environment and the historical background around the SAWP program. Thus, political opportunity structure, not just legal opportunity, impacts both constitutional mobilization and mobilization from below.

Academic studies have suggested that non-citizens' rights depend on historical rights legacies that differ between countries. Rights that have been entrenched through earlier social movements or judicial activism and have been framed as "universal" and "fundamental" have been more easily extended to non-citizens (Bloemraad and Provine 2013; Kawar 2012; Sainsbury 2012; Guiraudon 2000). These studies highlight the importance of historically contingent legal rights legacies on mobilization possibilities. However, they do not capture the interaction between the political discourse – historical and current – and the legal environment. Immigration policies reflect historical and current ideologies embedded in nation-building. The contours of immigration law and rights of non-citizens are the outcome

of the interplay between constellations of elite power and privilege entrenched through history and reflected in current practice.

Research shows that the political environment produces the discourse and opportunities for mobilization, but its operation relies on the constellation of power and privilege. In the TFW context, the constellation varies across sectors. Agricultural workers function in a unique political and discursive environment, with pressure from global agro-economics, historical privilege given to farm owners and food production, powerful agricultural elite able to maintain a pre-Fordist economy, and the creation of exceptions in several legal and political areas for the agriculture lobby. In contrast, rights for foreign domestic workers rely on how the notion of "family" and rights of female citizens build into the discourse of nationhood, which in turn shapes the discourse and practice of mobilization by the workers themselves (Parreñas 2004; N. Constable 2007; Bosniak 2009).

The agriculture industry is currently the largest employer of seasonal TFWs in several OECD countries. In many countries, foreign workers form the backbone of the sector. Eleven percent of global migrant workers work in agriculture (Martin 2016, 8). The agricultural sector in several high-income countries is reliant on *seasonal* temporary foreign workers (TFW) for its labor needs, creating a phenomenon called circular migration: workers from low-income countries come to work every year for years on end on a limited seasonal permit. Circular migration agreements ensure that the workers are rotated on a regular basis before they can build financial or social capital in the host country. Current TFW programs are tightly regulated, sector-specific, employer-driven (and employer sponsored) and, in the cases in this study, regulated by bilateral treaties (Hampshire 2013; Castles and Ozkul 2014; Vosko 2013).

The earliest foreign workers programs, such as the Prussian *gastarbeiter* program in the 1880s, were initiated to ensure short-term labor supply in agriculture (Hahamovitch 2003, 70, 74–76). Just like the current agro-economy, the agricultural sector in Prussia, then, faced a massive labor shortfall in the face of rapid industrialization. As part of the program, ethnic Poles were recruited from other countries in Europe to work in Prussian farms. The program subjected them to yearly deportation after the harvest season to stave the virulent, anti-Slav xenophobic sentiment in Prussia (Hahamovitch 2003, 70, 74–76). In order to keep the guest workers separated and temporary, they were given special IDs, banned from speaking German and organizing meetings in their language, and threatened with deportation if they organized collectively (Hahamovitch 2003).

Echoes of the nineteenth century Prussian program are found in present day TFW programs in agriculture in Israel and Canada. Recruitment of the Thai agricultural workers in Israel and the Caribbean and Central American workers in Canada continues to be gendered and racialized. Workers cannot bring their family and are subject to working under linguistically, culturally, and physically isolated conditions in remote farms in a foreign environment under the constant threat of deportation. Although the political and historical context in Israel and Canada are manifestly different, analysis of Israel's foreign work program in agriculture illustrates a common trajectory, where the political economy of agriculture intersects with the state's ideological and political apparatus to produce a foreign worker program under immigration law that closely corresponds with Canada's SAWP program.

More broadly, agriculture in most countries is sustained through what is known as "agricultural exceptionalism," where the sector is protected from property, labor, immigration, and other regulatory laws and is propped by subsidies and trade benefits. I have argued elsewhere that this exceptionalism is motivated by a powerful agricultural elite, concerns about food security, the seasonal and laborious nature of the work that disincentivizes citizens, and the mythologizing of food production (Venkatesh 2018).

The notion of "agricultural citizenship" constructs the landowner who cultivates and tames the land as the ideal citizen necessary for the sustainability of a democratic nation-state (Wald 2016, 6–8). This ideology has given agricultural employers a privileged position that has remained recalcitrant to dilution by other notions of rights and privileges such as those based on labor contribution and ties of workers. As a result, the agricultural sector is protected not only through the expediencies of neoliberal political economy but also through a discourse that characterizes farm owners as an essential part of the nation. Agriculture relies on gendered, racialized labor and functions under pre-Fordist models of employment immunized from collective bargaining and government labor regulations associated with industrial employment (Calavita 2007).

Seasonal agricultural TFW programs have unique characteristics that pose comparatively higher barriers for worker mobilization and legal change, which this study exposes. My research illustrates how advocates for TFWs strategize against the discourse of "agricultural citizenship" in both Canada and Israel. In Israel, the discursive strategy of the advocates has involved appealing to conceptions of "labor citizenship" in the constitutional court that has also been a concomitant part of the Zionist and liberal discourse of Israeli nation-building. In Canada, where labor citizenship has eroded over the past few decades, advocates have had to rely on Canada's multicultural and pro-immigrant legacy. However, this has made it possible for them to make claims to a more radical *access to citizenship* in the political sphere even as access to labor mobility may be foreclosed as an option for legal mobilization. By focusing on the agricultural sector, I am able to investigate and compare closely the politics of agriculture in the two countries to show how agricultural politics shape the possibilities of outcomes by bounding the opportunity structure and the political discourse.

My analysis also shows how politics around agriculture create unique dynamics and political elite configurations. A strict focus on access to legal institutions or on the legal precarity of the worker does not capture the antagonisms within the political arena that produce opportunities for workers to assert their agency. The power struggles at the political level – between agricultural farm owners and pro-labor or pro-immigrant lobbies, between agricultural protectionists and pro-market neo-liberalists – not only create barriers but also create discursive opportunities for workers in their use of the law in courts as well as in political organizing. As such, this study makes an important contribution to legal mobilization scholarship, which has often deemphasized the political opportunity structure as compared to the legal structures and resources.

Political contestations impact mobilization outside and inside courts. Research on law and politics explains how political contestations are reflected in the courts, especially in the

context of "judicialization" of politics (Silverstein 2009; Dahl 1957), where courts function as political institutions by making political decisions under the guise of law. Some studies assert that courts are essentially fulfilling the interests of hegemonic elites (Hirschl 2004) or the political regime (Whittington 2005; Moustafa 2003) and responding only to conventional, less politically controversial demands even when deciding on behalf of the "have-nots" (Ferree 2003; Albiston 2011; Galanter 1974). My analysis complicates this simplistic assertion that courts are either pro-hegemonic, conservative institutions or dynamic, counter-majoritarian social change actors, by showing how the court in Israel relied on the fact that the TFW programs had different reception among different elites to draft their decision. The advocates for the TFWs relied on the contestation among elites by strategically selecting from conflicting historical legacies from early Zionist nation-building ideology (emphasizing Zionist labor values over agriculture protection and ethno-nationalism) to draft their arguments.

Political contestation is reflected in the case of Canada as well, where solidarity groups emphasize right to citizenship even as they use law as a tool. The groups are able to rely on the fight between agricultural lobbyists who seek to expand the program, the nationalist labor groups who seek to limit the program, and the pro-immigration liberal elites who seek to preserve the image of Canada as a multicultural, rights-protecting state. For TFWs, the political environment is shaped not only by nationalistic and sovereignty-based discourse but also by the juxtaposition of economic policies and global politics. The discourse used in the mobilization of TFWs in Canada emphasizes unequal access to citizenship, settler-colonial policies embedded in agriculture and immigration, entrenchment of unfree labor, and the need to open immigration to racialized populations from the Global South. This discourse is different from that used for the undocumented populations, which relies on ties, humanitarian grounds, human rights or unfair border policies. By focusing on the difference between discursive opportunities available for TFWs, in contrast to other non-citizen populations, my study illustrates that the study of the political environment is indispensable in the study of mobilization.

In summary, my research adds to the debate on how legal mobilization functions for precarious people by showing the complex interactions between political environment, legal environment and resources. First, I argue that despite barriers to access, law can be collectively mobilized on behalf of TFWs. Israel and Canada present two types of legal mobilization. Secondly, the pathways to legal mobilization depend on legal opportunities and type of resource (organizational) support. Constitutional litigation is initiated by cause-driven lawyers or public interest legal organizations and their framing of issues is constrained. Grassroots, solidarity organizations, in contrast, use the law as a tool and build their strategy around goals of worker mobilization ensuring that their particular discourse and framing of issues are reflected in the process, even if it is a radical framing with little chance of success in court. With the support of such organizations, TFWs are able to articulate their demands collectively for the broader community of TFWs, engage in direct action and political mobilization, and demand changes to the TFW program. Lastly, legal and discursive strategies are dependent on the historical political legacies and current political and economic environments. My comparative historical analysis of the political environment indicates that elite power and ideological discourses are entrenched and distributed in the context of TFW

programs. The political contestation impacts constitutional challenges as well as grassroots mobilization.

IV. Organization of Remaining Chapters

In what follows, I first offer a conceptual framework – based on legal mobilization and social movement theories – through which to understand the limits and possibilities of foreign workers' agency in the context of globalized migration. I also lay out the research methodology used in the research in Chapter 2.

Chapter 3 outlines the history of the temporary foreign worker programs in Israel and Canada. Chapters 4 and 5 contain the detailed analysis of the conditions affecting legal mobilization in Israel and Canada, respectively. Chapter 4 on Israel shows how the litigation was motivated by a particular public interest organization (*Kav Laoved*) but in the absence of collective action and mobilization by agricultural foreign workers. Chapter 5 on Canada illustrates why constitutional litigation did not occur in Canada and how law was used in innovative ways for collective action by foreign workers in the SAWP program.

Chapter 6 tests my proposed framework in the shadow cases of U.S. and Hong Kong, with implications for further research in Europe. In the concluding chapter 7, I provide a discussion of broader critical issues derived from the empirical and theoretical examination and suggest potential directions for future research.

Workers with temporary immigration status have now become the economic reality in several countries, as this form of labor is seen as a way to have a temporally mobile workforce that is responsive to economic vicissitudes. Continuation and resurgence of temporary foreign worker programs are the fallout of the operation of global capitalism and neoliberal governance co-existing with imperatives of controlling unwanted migration (Binford 2013; Ajzenstadt and Shapira 2012; Smith-Carrier and Bhuyan 2010; Varsanyi 2008; Baubock 2006; Miles 1987; Bauböck 2011).

TFW programs are promoted by countries as if they offer a "triple win," with so-called wins for the migrants, the receiving countries, and the sending countries (IOM 2008, 92). My doctoral research challenges the simplistic portrayals of TFW workers in the scholarship and the media that underscores their satisfaction with present TFW programs. The empirical data in this research, which was garnered through interviews with workers and their advocates, and an analysis of news articles, challenges several assumptions about TFWs in the literature and presents an agentic perspective on TFW mobilization possibilities.

Chapter 2
Research Design and Conceptual Framework

I. Introduction

In order to undertake a deep investigation of the processes and mechanisms that inform the ways in which TFWs mobilize collectively in Israel and Canada, I adopted a qualitative comparative approach. I chose a case-oriented research design as I was interested in uncovering the complex ways in which historical legacies and political environment interact with advocacy resources and legal environment "as an interpretable whole" (Ragin 2000, 22). A case-oriented design supports the choice of small number of cases – Israel and Canada being the primary cases in this study – and yields explanations based on an in-depth knowledge of the cases (Della Porta 2008). Each of the cases of Israel and Canada represent a set of "unique and complex social configuration" (Della Porta 2008). I systematically unpack these configurations through a careful reading of the political history, public discourses, legal and institutional structures that affect the mobilization of TFWs.

II. Defining Legal Mobilization

Although legal mobilization research encompasses the "micropolitics" of individuals engaging the law, this study follows the scholarship on legal mobilization as tool for social change on behalf of a collectivity as part of a "group struggle" (McCann 2008, 532–33). What constitutes collective "legal mobilization" as part of group struggle? This study of TFW legal mobilization is situated in two broad social movements, labor movements as well as migrant rights and citizenship movements. In social movement theory, collective action is differentiated along the margins of "contentious politics" (Tilly and Tarrow 2007; McAdam, Tilly, and Tarrow 2001). In a narrow sense, it covers actions like protests and disturbances. Collective action is discontinuous, contentious, "not built into daily routines, and having implications for interests of people outside the acting group as well as for the actors' own shared interests" (Tilly 2001). In the broader sense, the defining characteristic is that the actions have implications beyond immediate self-interest and disrupt power. Thus, while there are many examples of TFWs engaging in wildcat strikes, it would not necessarily count as contentious collective action because it involves the worker making a self-interested claim against his/her particular employer for enforcement of rights, even if it has indirect implications for the larger group of TFWs.

Legal mobilization can be a form of contentious collective action in two ways. First, legal mobilization can be a tool for contentious collective action when legal cases are used to organize protests and direct actions. TFWs can face deportation if they engage in extra-legal (or what could be deemed extra-legal by enforcement agencies) action. Their repertoire for contention is, therefore, limited. Nevertheless, my study shows that they can question the sources of inequality, and contest or resist the law and the institutional meaning of citizenship as part of their engagement with legal institutions. Evidence of such collective oppositional consciousness that contests the legal status quo would constitute legal mobilization "from below." Such collective action by TFWs is operationalized through evidence of a) organizing,

collective mobilizing, protest actions during legal proceedings and b) articulation of structural problems with the TFW program and using radical frames in courts and political institutions.

Secondly, contentious politics as per the broad definition does not foreclose the use of courts for directly challenging the law, despite the use of an institutional forum, so long as there is an anti-institutional or anti-hegemonic aim. Direct impact litigation and its connections with social change is an integral part of law and social movements scholarship. Thus, constitutional litigation that challenges the sovereign right of states to decide on immigration laws would constitute a form of contentious politics even if it is a top-down action primarily initiated at the institutional level.

III. Case-Selection

I selected the "paradigmatic cases" of Israel and Canada as suggested in case-oriented research design theory (Della Porta 2008). Both Israel and Canada have legal structures receptive to mobilization as they have a) constitutional and statutory provisions and concomitant causes of actions providing for rights and access, b) relatively independent activist judiciaries, c) liberal standing requirements, and d) judicial restraint over immigration. Both countries are also paradigms of courts engaging in "rights revolutions" after the incorporation of constitutionalized rights which happened relatively recently and close together (1992 in Israel and 1982 in Canada).[8] They are both settler-colonial countries, both are members of the Organisation for Economic Cooperation and Development (OECD) and both have a sustained foreign worker program, which bolsters an agricultural sector that is crucial to their national identities and economies. The agricultural sector in both countries is supported by government subsidies, and agriculture citizenship is an important aspect of national identity in both countries.

Importantly, the Seasonal Agricultural Work Program (SAWP) in Canada and the Foreign Worker Program for agricultural workers in Israel are similar in key respects. Both countries use bilateral agreements with specific sending countries for obtaining foreign workers. Foreign workers in Israel are exclusively from Thailand and SAWP workers in Canada come from Mexico, Guatemala, and countries in the Caribbean. Until recently, recruitment of workers in both countries was employer driven and administered through privatized employer agencies ("manpower" agencies in Israel and provincial farm owner organizations in Canada, such as, Ontario's Foreign Agricultural Resource Management Services (FARMS). Israel has only recently contracted with the International Organization for Migration, IOM, for recruitment of workers from Thailand, but employer agencies still play a primary role in TFW administration.

The TFWs in both countries are denied access to any permanent residence and they cannot bring any family member with them during the period of their contract. The only key difference between the programs is that SAWP workers in Canada arrive every year under 8-month contracts while Thai TFW contracts in Israel can sometimes be continuous for five

[8] s.15 of the Canadian Charter, which is the equality or anti-discrimination provision, came into effect on April 17, 1985

years, depending on the nature of the crop. My case selection strategy thus roughly follows a "most-similar case selection" that has the advantage of maintaining "ceteris paribus" or controlling key case characteristics that lends greater explanatory strength to my inferences (Della Porta 2008).

Despite these similarities, Israel and Canada took very different approaches to mobilization of TFWs with very different outcomes. Understanding the different processes and mechanisms that led to these distinct outcomes is at the heart of this comparative qualitative case study. A comparative case-oriented research design invites scholars to address the question: "what is this a case of?" in order to extend and re-imagine existing concepts (Ragin 2000). In the succeeding paragraphs, I argue that Israel and Canada represent special cases of legal mobilization that allow for a re-examination and reconceptualization of fundamental elements in legal mobilization and social movement theories.

a) Canada - A case of mobilization "from below"

Labor mobility restrictions for TFWs create a situation of economic and legal dependence on their employers: these politico-legal constraints have been described as producing "unfree labor" (Smith 2005; Bauer 2013; Cornish 1992) which impedes political and legal mobilization. TFWs are subject to constraints on their freedom of movement that prevent them from accumulating social capital, forming networks, breaking linguistic and cultural barriers and incorporating into the host community. These constraints include imposing conditions on residence where agricultural workers are forced to reside in remote farms with impositions on their time of continuous sojourn. Social relations are strictly controlled by limitations on their place of residence (which is tied to the workplace) and by preventing the families of foreign workers from joining them. Furthermore, the farm workers live in rural areas where immigrant communities are small in number and access to the farm workers is difficult. Despite the barriers, the advocacy organization, *Justicia for Migrant Workers* (*Justicia),* has managed to incorporate a regular outreach program to access workers in Southern Ontario and involved workers in collective mobilization. Despite Israel being a much smaller country, neither labor nor legal organizations have been successful in mobilizing the workers. What explains the differences in the two countries?

Recruitment of foreign workers is employer driven. Contracts can be discontinued at the will of employers and the workers "repatriated" if the harvest season has been slow or for any other reason. Employers, therefore, have full control of current and future employment and thereby full control of the conditions in which the workers work; employer reprisals have terrible life-changing consequences for the workers. The threat of deportation also creates a regime of self-discipline and fear and a constant awareness of the uncertainty of their presence in the host country. This threat is created at the point of application for guest worker permits in the source countries as recruiters and sending government representatives warn the guest workers from complaining to or talking to activists (Basok, Bélanger, and Rivas 2013). Furthermore, employers rely on cultural stereotypes as well as knowledge about political mobilizations to prefer workers from one country over others and create insecurities. For example, employers in Canada are known to prefer Guatemalan farm workers over Mexican farm workers on an assumption that the Guatemalan workers are less likely to resist or

denounce unfavorable working conditions and have less resources to do so (Valarezo and Hughes 2012; The Human Trafficking Project 2008).

Linguistic and cultural barriers may limit their access to legal knowledge of law-in-the-books. However, even if a worker becomes conscious that he is not being awarded his "fair" work conditions and his entitlements, he is unable to do anything for fear of employer reprisal. What are the mechanisms for mobilizing foreign workers when they face the risk of employer reprisal and deportation? What role does law play in this mobilization?

When TFWs engage in collective action in legal forums, it can approach collective contentious action. Most TFWs' engagement with the law involves individual claims to enforce existing rights such as breach of contract, harassment, or workers compensation. Yet, TFWs can use radical frames in courts to articulate their individual legal claim as a manifestation of larger structural issues in the TFW program that affect all workers (Ferree 2003). Lawyers usually advise claimants to articulate their grievance in courts using frames that resonant with existing law to have greater chance of success.

However, my Canadian case-study shows that is not always the case. A legal proceeding gives a unique advantage for advocacy efforts, the words used by the worker (and other witnesses) are recorded in a public forum and creates a "public transcript" that can be strategically used by workers and their advocates for collective action. Radical framing transforms an institutionalized, individualized action into a contentious collective action. It can inform institutional actors (such as judges) of alternative discourses and challenge pre-existing biases about the TFW program. Additionally, legal cases can be used generally, without taking advantage of the internal framing opportunity, as part of contentious political action to draw publicity and organize constituents. Legal mobilization "from below" can thus engender a sense of belonging, political community, and empowerment, and a citizenship that is performatively generated irrespective of formal status (Abrams 2015; Also see Bloemraad, Voss, and Lee 2011; Coll 2010). Canada presents an important case study to understand how legal mobilization from below can take place in the TFW context.

b) Israel – A case of constitutional litigation

The barriers in making constitutional challenges to the TFW program are even higher than making claims against individual grievances like non-payment of wages. Temporary foreign worker advocates are reluctant to challenge the programs for fear that the Court would strike down the entire program or significant sections of the program, jeopardizing access to the host country for future and current foreign workers. The temporariness and non-citizen characteristic of their legal status poses barriers of standing in constitutional rights claims. It would also be difficult to find plaintiffs who would mount a challenge risking their future chances of remaining in the country. The Court is also limited in its jurisdiction and the kind of remedies it can provide, which would be limited to partial or total annulment of the program (Rosenberg 1991). It cannot provide an equitable remedy that would command the legislature to take into account the interests of the TFWs. Furthermore, immigration law is an expression of the absolute sovereignty of the state over its territorial borders and courts have been reluctant to challenge this authority. Legal institutions such as courts and administrative

agencies actively participate in constituting temporariness and shaping legal frames. As a result, there is a lack of precedent in this area, and therefore legal opportunities for litigation. How then did the successful constitutional challenge in Israel take place? An in-depth examination of the Israeli case can have implications for constitutional litigation on behalf of non-citizens globally.

This study examines the mechanisms by which these two distinctive types of legal mobilization emerged in the two countries.

IV. Theoretical Framework

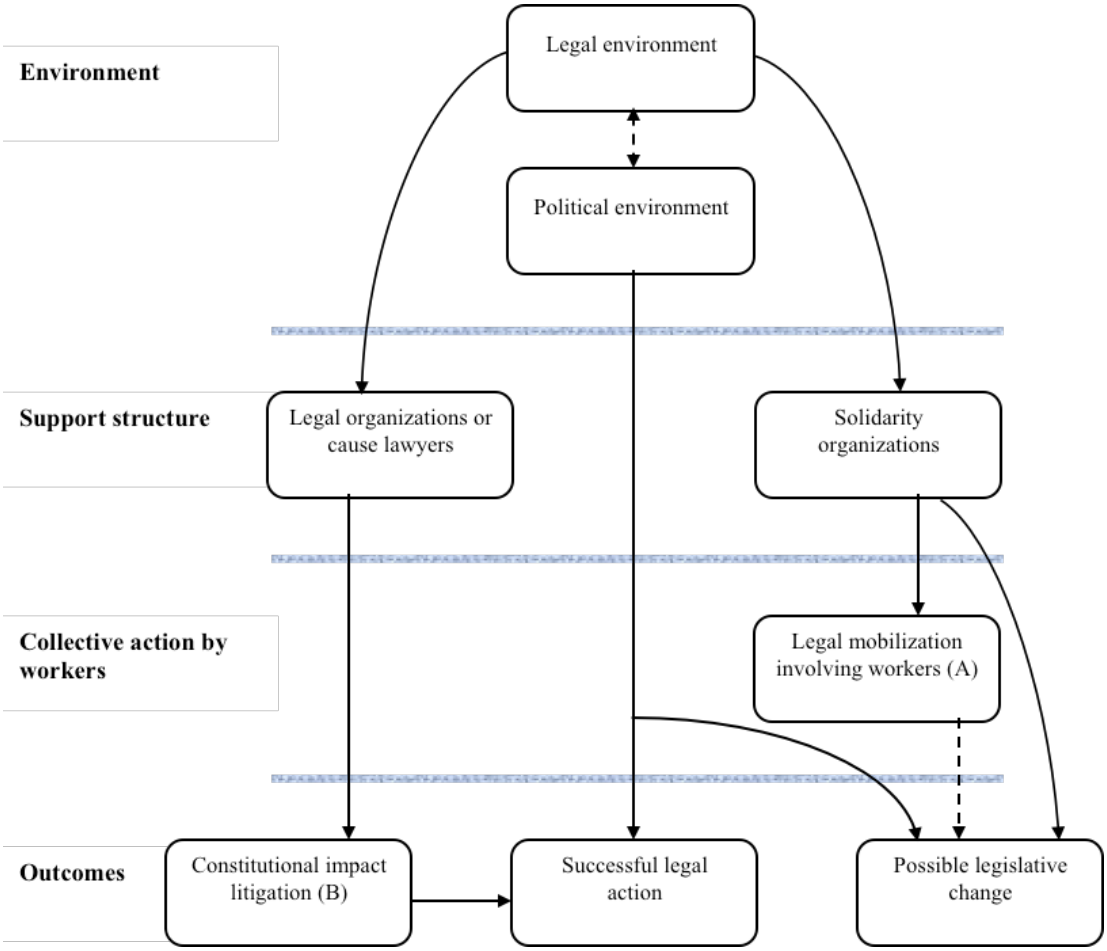
In order to understand the mechanisms by which different types of legal mobilization emerged in Israel and Canada, I extend an analytical framework developed in social movements and legal mobilization theories (Cummings 2013). I look at the interactions between three broad factors: "legal environment" (the structure of legal opportunity), "political environment" (political opportunity structure), "support structure" (organizational resources and their expertise, motivations, and strategies). These three factors interact to produce legal mobilization in various ways. My study also investigates the process of organizing and mobilizing of the TFW workers themselves and the role it plays in the legal mobilization. I undertook a thorough analysis of legal, political, and historical contexts to properly understand how the various factors interact with each other. Figure 1 depicts my proposed conceptual framework. It shows that the legal and political environments influence each other, and they impact how the support structure strategizes their use of the law. The interactions can produce legal mobilization "from below" involving workers (A) or legal mobilization in the form of constitutional impact litigation (B). Constitutional litigation can cause a change in the immigration law through judicial action, which in turn is mediated by the political and legal environment. Legal mobilization "from below" can potentially cause legislative change in certain contexts. The next three sections describe the three factors (legal environment, political environment, support structure) in detail.

a) Legal Environment

The important institution for analysis in legal mobilization is the legal system, including the courts and the laws. Legal opportunity structure draws upon the concept of political opportunity structure in social movement theory to factor in the impact of legal environment in legal mobilization cases. Legal opportunity structure and political opportunity structure are inextricably connected in some ways. For example, labor and immigration laws emerge out of the political institutions and the broader public discourse on labor and immigration and, yet, are interpreted using particular frames by the courts. As a branch of the government, the judiciary is in contestation with the political branches, which establishes the contours of their decisions. Nevertheless, as a result of constitutionalism, the legal institutions retain the ability to engage in counter-majoritarian and counter-legislative decision making, which is directly relevant to the use of litigation as a strategy for social movement actors. Legal institutions have unique characteristics that must be separately analyzed in contexts where legal mobilization is used as a strategy. The legal environment is, therefore, separated out in the analysis and is constituted by a) access to courts, b) applicable laws, legislation, and judicial

precedence and c) resonant legal frames as reflected in court decisions (also called legal stock) and judicial decision-making (Fazio 2012; Hilson 2002; Andersen 2004). Some scholarship incorporates allies or legal support structure into this factor, but I address it separately from legal environment for the purposes of this study.

Figure 1: Conceptual Framework for Legal Mobilization of TFWs



Access to courts

Access to legal institutions is a crucial factor for legal mobilization, and especially for the resource intensive constitutional impact litigation. Countries with exclusive direct-access constitutional courts, like Israel, offer easy opportunity for subordinated groups to make constitutional challenges. In other countries, like Canada and the US, the Supreme Court functions as a court of last instance, which implies that constitutional challenges have to be raised at lower courts and then appealed through every level before the Supreme Court can make a final ruling. This court process drains financial resources, time, and motivation of challengers. Non-citizens are particularly disadvantaged as their physical presence cannot be ensured through the long legal process. In countries, where public interest standing (cases can

be brought forth by public interest organizations) is narrowly construed, courts require legally injured parties present through the entire process or the case gets discontinued on the basis of mootness. In some countries, non-citizens do not have access to the same causes of action as citizens. Limitation periods also make courts inaccessible for seasonal workers. Court procedures can also be expensive if there is no legal aid for claimants with limited financial means and if filing and other fees are exorbitant. This prevents even individual legal claims-making by TFWs, which in turn can impact larger litigations such as class-actions and constitutional challenges.

Laws and legal legacies

Constitutional rights provide for rights on the basis of personhood that can be availed of by non-citizens. Immigration laws and laws specifically aimed at foreign workers directly impact TFW rights and agency. Independent of constitutional rights, jurisdictions also provide for disaggregated rights, where residence status does not matter for legal protection. Labor rights, especially basic employment standard laws, are universally applied to all workers in most countries. In addition, local and provincial administration can provide for social welfare rights such as education, healthcare, pensions to all persons irrespective of citizenship. How legislation is devolved in each country will impact legal mobilization. On the one hand, provinces and municipal administration can allow for generous entitlements for non-citizens, which increases their agency and capacity to mobilize. On the other, complicated devolution of laws can lead to jurisidictional and administrative confusion that impedes claims-making by TFWs (Faraday 2012).

In addition to statutory laws, judicial precedents also predicate legal claims-making. In most countries, the judiciary is reluctant to challenge the state's formulation of immigration laws and rules against the government only in the narrowest of cases. Cases where courts have ruled against the state in immigration laws usually involves issues of division of powers, egregious violations of basic rights of non-citizens (such as deportation to torture or appealing denial of procedural fairness), or where rights of citizens are implicated (Motomura 1990; Dauvergne 2012). In addition, there are few cases that implicate non-citizen rights globally, and thereby there is limited precedent.

Rights legacies and judicial decision-making

Historical rights legacies can provide for opportunities for TFWs and non-citizens to make claims. The laws can, for example, have a strong conception of labor citizenship built in, as in Israel. Many liberal courts rely on anti-discrimination or equality rights legacies to provide for rights to non-citizens. Such legacies often correspond to core national values that may be codified in preambles and foundational texts. They also often provide the language for political activism, such as in civil rights movements. While political mobilization relies on "cultural stock" to frame claims, "legal stock" shapes the progress of legal mobilization (Andersen 2009). In this study, I engag in an in-depth analysis of the rights culture and resonant legal frames in each country to identify how TFWs can frame their claims and mobilize the law for substantive change.

Both Israel and Canada, as well as the shadow cases of Hong Kong and the U.S., are known for the independence and relative activism of their judiciary, which was one of the bases for case selection. I nevertheless investigate the culture of legal professionals in each country. Israel is a much smaller country than Canada and the judges and lawyers and other legal professionals form a relatively close-knit epistemic community, which impacts the perception and legitimacy of the legal support structure as well as the strategies that are used by the support structure. The Palestinian conflict is also an important backdrop against which judges make decisions in Israel. The judiciary in all countries is concerned about its own legitimacy and its positionality in the governance structure and is known to engage in "judicial acrobatics" (Shamir 1990). Depending on the context, the judiciary may be more or less entrenched in the interests of special groups, lobbies, and political parties. A contextual analysis helped to unearth these dynamics and understand how they impact legal mobilization.

b) Political Environment

Social movement theory identifies political opportunity structure (McAdam 1999) as the "environmental" factor that decide contentious activity. Political opportunity structure is defined as "consistent-but not necessarily formal or permanent-dimensions of the political environment that provide incentives for people to undertake collective action by affecting their expectations for success or failure" (Tarrow 1998, 85). It thus configures the environment, which encourages or discourages a specific strategy for social change, or rather, legal change for the case at hand. As Koopmans' succinctly puts it: "By offering favourable access to the policy process, and public resonance and discursive legitimacy to some forms of claims-making, while creating negative stimuli for other forms of claims-making, the political opportunity structure favours some collective actors, some expressions of collective identities, and some types of demands over others"(Koopmans 2004).

The elements of the political opportunity structure depend on the context in which the empirical comparison is being made. Tarrow's (1994) conceptualization of political opportunity structure relies on the arrangement in which various institutional decision-makers engage in contestation and bargaining, such as "the opening up of access to participation; shifts in ruling alignments, the availability of influential allies, and cleavages within and among elites." Tarrow's conceptualization has been modified in later scholarship, especially in framing approaches (Benford and Snow 2000; Koopmans and Statham 2000, 36) to include both institutional and discursive opportunities that emerge from the political environment (Koopmans 2004).

What constitutes the political environment in the context of strategies for temporary foreign workers to change the program? Specific to the immigration context, Koopmans has used the concept of citizenship and incorporation regimes that include not just the formal basis of citizenship inclusion but also the degree of acceptance of cultural inclusion (Koopmans 2004; Koopmans and Statham 2000). Israel being an ethno-nationalistic state and Canada being a pluralistic, multicultural, pro-immigration state (Koopmans and Statham 2000, 19–20) affect the extent to which the policies in the immigration programs can be changed. For example, while one might expect access to permanent residence to be an issue raised by TFWs in Canada, the same strategy will be of limited use in Israel. However, it does not foreclose its

use in radical discourse or in demands for other quasi-permanent statuses, even in Israel, where workers could demand the right to family or labor and residential mobility that are given to other long-term foreign residents in Israel. Nevertheless, the implied assumption is that Canadian courts are more likely to extend citizenship rights to TFWs.

Koopmans uses this "field-specific" political opportunity structure in his analysis of ethnic contestation and public participation of immigrant communities. However, while there is a racial and ethnic dimension to mobilization of TFWs, the contestation is about the rights of non-citizen workers in a market economy. This complicates the political opportunity structure in TFW mobilization. Legal citizenship status or ethnic status is not the only purveyor of rights, privileges, and engagement as a political community. The power structures at play in the political environment that act on TFWs are not just the political system and parties as conceptualized in political opportunity structures in other mobilizations. The SAWP program and Israeli's foreign worker program has persisted through all political regimes even while the degree of opposition (or support) to the program may be different and may be motivated by varied interests.

Immigration law is shaped by business needs and nation-building interests. The political environment around immigration law is defined by a constellation of power centers including business lobbies, pro-market or neoliberal powers, nationalist groups, and interest groups supporting myths around an imagined "nation" (Benedict Anderson 1991), such as agricultural citizenship in the case of foreign farm worker programs. As mentioned in the previous chapter, agricultural nationalism not only reflects "the cultural power of agriculture as a primary marker of one's relation to the nation" (Wald 2016, 6) but also influences policies and has made the agricultural lobby a powerful political actor. These interest groups promote commodified foreign labor but use different discourses with respect to TFW programs.

In contrast, labor groups push for worker rights and notions of "labor citizenship," but in the TFW context, often have citizen labor interests as their priorities (Garcia 2002). Nevertheless, the substance of labor citizenship relies on disaggregating rights from the status of citizenship and attaching them to the status of being a worker (Fudge 2005; Bosniak 2006). Multiethnic countries can have ethnic community lobbies, which may represent interests of citizens of other countries, but their attitude to TFW programs is difficult to predict and depends on context. Solidarity groups advocating open borders, rights of non-citizens, and anti-hegemonic, radical mobilization may not have political power but could have organized power in certain countries. Put together, the political environment for mobilizing TFWs is thus a contestation among: those supporting various conceptions of agricultural citizenship and business interests that construct TFWs as decommodified labor; nativist and other interests against TFW programs in general; and those who wish to disrupt current configurations of citizenship and capital and protect TFW's rights. Advocates for TFWs have to strategically navigate the political landscape of cleavages, allies, and political alignments to mobilize effectively.

Bringing together the above theories of political opportunity structure, I conduct an analysis of the political environment along three dimensions: a) constellation of power interests identified through a process-driven historical analysis of nation-building and the legislating of

immigration laws and policies, b) immigration and citizenship regime also identified in the same way as above, and c) current attitude to non-citizens, TFWs, and TFW programs as revealed in the media and political discourse.

c) Resources or Support Structure

Allies, such as advocacy groups, unions, lawyers, play a crucial role in the political and legal mobilization of non-citizens, including TFWs (Grugel and Piper 2011; Bloemraad, Voss, and Lee 2011). Organizations, advocacy groups, lawyers, and other allies are collectively referred to as "resources" in social movement literature and make up the "support structure" in legal mobilization theory. For example, in some countries, unions were instrumental in initiating and supporting litigation to expand the rights of non-citizens; in others, cases were led by lawyers or legal organizations trained in the tradition of civil-rights (Kawar 2011).[9] In some other cases, immigrant groups spearheaded the litigation.

Specifically, in the context of impact litigation in courts, it seems evident that one or more organization must actively support impact *constitutional litigation* as a strategy and have financial and other resources to engage in the strategy. Using an interest group analysis, Krishnan (2001) outlines various advocacy goals such as donor satisfaction, (not wanting) publicity, role fulfillment and reputation and the desire to win through litigation that impact the choice of constitutional litigation as a strategy. He attributes the specific interests of the organizational and lawyer advocates as determining the choice of strategy of constitutional litigation *even when legal and political opportunities would suggest otherwise* (Krishnan 2001).

Studies on cause lawyers shed light on specific ethical dilemmas related to their involvement, their role, utility, and impact in social movements, how they frame grievances, how they capitalize on legal and political opportunities, and on the globalization of cause-lawyering (See the studies in Sarat and Scheingold 1998, 2001, 2006). Legal organizations, in general, are more ideologically drawn to legal liberalism and the use of law to impact social change (Scheingold 1974; Silverstein 2009). But lawyers are also concerned about intra-movement backlash and legitimacy (Vanhala 2011). Solidarity and other advocacy organizations, in contrast, operate along different mandates and interests.

Canada and Israel present two contrasting cases where cause lawyers form the primary resources for TFWs in Israel and solidarity groups are more relevant in Canada. Studies find a correlation between the desire to use litigation as a strategy and the *organizational form* of the predominant resources (Bouwen and Mccown 2007, Gray 2006, Kawar 2011). Bouwen and Mccown (2007), for example, find that "the broader and more encompassing the interest group's mandate and constituency," the less likely it will choose a litigation strategy because of the difficulty in getting consensus from multiple kinds of stakeholders for the relatively narrow and focused strategy that litigation entails. In addition, organizational form in the social justice space is usually determined by ideological motivations, which in turn affects how the support structure (organizational) actors perceive their environment and fashion their

[9] *Plyler v. Doe*, 457 U.S. 202 (1982); *Haitian Refugee Center v. Civiletti,* 503. F.Supp. 442, 457 (S.D.Fla.1980).

strategies. Felstiner et al (1980) have highlighted the importance of ideology in shaping dispute transformations (Felstiner, Abel, and Sarat 1980). Thus while lawyers and public interest legal organizations would likely encourage a litigation strategy, solidarity and grassroots organization (Keck and Sikkink 1998) with radical ideologies of labor and migration would prefer direct action over litigation. Such groups might still use law as a tool to highlight discriminatory and oppressive conditions, to instill their frames into the legal institution, and to garner media and political attention.

Lastly, the impact of the environmental factors depends on how these resources (organizations, advocacy groups, lawyers and others) *interpret* the opportunities and frames in the legal and political environment (Epp 2011). For example, Kawar's (2011) work illuminates how different actors *perceived* the legal opportunities available to them differently and how they strategized and framed their grievance based on this perception.

My study draws from legal support structure scholarship from social movement theory and provides an in-depth assessment of the behavior and strategy of resource actors in both countries.

II. Data Collection and Methodology

I pursued a case-oriented comparative research design because it favors an in-depth and holistic approach. Thus, I am able to illuminate the complex processes that interplay with each other and, specifically, in the agricultural sector that enable TFWs to mobilize the law. The theory that I propose is sector specific; however, I expanded the scope conditions of my theoretical findings by testing its validity against cases in Hong Kong and the U.S. in chapter 6. Hong Kong witnessed an unsuccessful cause-lawyer constitutional challenge to the lack of permanent residence condition albeit in the context of foreign domestic workers. Thus, I examined the singular importance of cause-based lawyering for legal mobilization in the case of Hong Kong. The U.S. case is similar to the Canadian case but is confounded by a much larger population of undocumented workers in the agricultural sector.

My research design resembles what Tarrow refers to as "paired comparison" that has the advantage of offering greater generalizability than single case designs but being manageable enough to allow "intimacy of analysis," study of historical knowledge, and identification of mechanisms and processes (Tarrow 2010). My study comports with comparative historical approaches as I analyzed the development of political environment over time in order to uncover processes and mechanisms that produce different legal mobilization outcomes in Israel and Canada (Mahoney 2004).

I lent strength to my qualitative approach through triangulation of data from multiple sources. I took a consistent ethnographic approach (interviews and observation) combined with documentary analysis to create an "evidence-rich encounter with theory" (Fitzgerald 2006). I also conducted a news report analysis of major publications in Israel and Canada to confirm the political environment that TFWs face. Mass media is an important forum for public and political discourse as it is a site of contestation of framing strategy by proponents and opponents of a movement (M. A. Gamson 2004). The media frame becomes the "central

organizing idea" for the political environment (W. A. Gamson and Modigliani 1989) and on political issues, such as immigration. It becomes the conceptual tool based on which the public interprets and evaluates the issue at hand (Graber 1993; Neuman, Just, and Crigler 1994). News frames not only define the parameters where political issues are discussed but also determine the available political alternatives (Tuchman 1978). Therefore, an analysis of newspaper media is useful in triangulating the political environment with data from my interviews and secondary research. I conducted the analysis by identifying news frames relevant to TFWs and looking for the occurrence of these frames in news articles (see Semetko and Valkenburg 2000 for methodological guidance on news analysis).

a) Data

Data for my dissertation draws upon legal case analysis, qualitative interviews with lawyers, activists, and organizations engaged in mobilization of foreign workers, informal conversations with foreign workers, participant observation, and secondary research. As I noted above, for my primary cases of Israel and Canada, I also conducted an analysis of news reports in major newspapers to assess the political environment.

In Israel and Canada, I conducted qualitative interviews with organizational members, attended organizational meetings, went on fieldtrips to farms, and took part in participant observation during organizational events where foreign workers were involved. At these events, I took the opportunity to interact with foreign workers directly.

For each interview, I maintained confidentiality of all participants. Other than organizational actors, which are noted explicitly, the people I interviewed are identified by anonymized codes rather than names. I obtained informed consent of the interviewee notifying them that their input would be kept confidential and assuring them they had the right to withdraw their statement at any time during my dissertation research.

I made every effort to be unobtrusive and unbiased during my data collection. However, it is possible that my experience as an immigrant woman of color informs the analysis I present in this work. At the same time, I believe my immigrant experience granted me the ability to connect
with interviewees (advocates and workers) and pick up on insights that I would have missed otherwise. I conducted most of my interviews in English, so no translator was needed.

Furthermore, I identified discursive opportunities in the political environment through an analysis of published news articles in each country. Details of the frames used and coding methodology are found in Appendix 2. I was able to cross reference the data from news reports against the data from primary interviews, probing deeper if there were inconsistencies. As an example, I found multiple instances of unclear statistical data on TFWs in news articles. Additionally, I used secondary literature from organization reports, and scholarship that identified the legal opportunities and barriers for non-citizens to triangulate the data from my interviews and participant observation.

I identified the political environment for each case starting with a historical tracing of immigration and citizenship law and policy and an interpretive analysis of the migrant worker programs. I paid close attention to how these texts portray migrant workers, especially farm workers, and rights of non-citizens to understand how the environment can facilitate or constrain mobilization. I limited my analysis to specific junctures when changes to the immigration and citizenship law or to temporary foreign worker programs were enacted.

For the Hong Kong shadow case study, I used primary data – interviews and participant observation – and secondary data on the domestic foreign worker program to test my theoretical findings. I conducted interviews with advocates of domestic foreign workers and attended and observed events where domestic foreign workers were involved. For the U.S. study, I relied primarily on secondary data. Even though I conducted interviews in the U.S., the size of the country and scope of the conditions limit the usefulness of the primary data I collected in the U.S.

b) Further Details Related to Each Site

Canada

I have been a volunteer at *Justicia for Migrant Workers* (*Justicia* or *J4MW*) since 2013. Since the summer of 2015, as part of fieldwork, I have been volunteering actively attending organization meetings, going on field trips, and helping with migrant worker mobilization efforts. I was able to earn the trust of the organizational members who openly shared *Justicia*'s history and knowledge that was of immense help to triangulate the data in news stories on SAWP workers in Canada.

As part of the participant observation, I completed ten trips to southern Ontario farmland with each trip lasting at least four hours (not including transportation time). In 2016, I also helped to organize and participated in a *Justicia* coordinated campaign called 'Harvesting Freedom' to mark 50 years of the Seasonal Agricultural Work Program in Canada. The Harvesting Freedom campaign was a migrant farm worker led caravan from Windsor to Ottawa stopping along the way in farms in Southern Ontario. During the caravan, I talked to migrant workers and observed the activists from *Justicia* in action. I also supported *Justicia* in filing a complaint against the Ontario Provincial Police which was accused of racial profiling as it engaged in a DNA sweep case of 100 migrant farm workers in Tillsonburg, ON during a crime investigation (see Ontario Human Rights Commission 2014). In particular, I gathered evidence and witness testimony. I also attended hearings at courts, tribunal, and legislative committees dealing with migrant farm workers. Formally, I interviewed six members of *Justicia*. I also interacted with 30-40 workers as part of participant observation and during the processing of cases. In my dissertation, I have only quoted public statements by workers made before expert committees, and at rallies and meetings. The interviews were used to confirm reliability of the information I had gathered and gain an in-depth understanding of issues. No confidential information has been used or quoted in this research.

I have been a volunteer board member of *Industrial Accident Victims Group of Ontario* (*IAVGO)* legal clinic in Toronto since 2011. I was elected as the chair of the board of directors

in 2015. As a board director, I engaged with caseworkers and lawyers in board committee work, strategic planning, and meetings with institutional actors such as Legal Aid Ontario and networks such as the Association of Community Legal Clinics of Ontario. My position as a board member gave me a close view of the strategy and operations of *IAVGO*. I was privy to all internal correspondence and documents. I was able to incorporate this first-hand knowledge into my analysis. I participated in *IAVGO* presentations on migrant workers. I also tracked all the reports on migrant farm worker related employment and health or workplace injury cases as part of board activity. I formally interviewed three members of *IAVGO* who worked directly with migrant workers.

I was transparent about the goal of my research project with both organizations. Being intimately connected with both organizations, I knew when my participation was in a confidential setting and when I could function as participant observer for data collection. I ensured that any data obtained through participation observation had the explicit consent of participants for use in my research. The only data that is reported is information than can be triangulated from multiple sources. I also obtained consent to publish data before any formal interview.

Being seen as a committed volunteer in each organization, I was able to have in-depth conversations and learn about historical nuances that I might have missed if I were an outsider. Prolonged engagement helped me develop credibility and trustworthiness and allowed me better access (Lincoln and Guba 1985).

Israel

I visited Israel in November 2016. I was able to meet with members of *Kav Laoved*, the legal organization representing migrant workers in Israel, and take part in participant observation of migrant workers using *Kav Laoved* services. Israel has a small, close-knit community engaged in legal advocacy or advocacy on behalf of non-citizens. I was therefore able to speak to almost all actors involved in legal action, outreach or organizing TFWs. In all, I conducted interviews with five lawyers and three organizers/outreach managers in the Thai farmworker section of *Kav Laoved*. These eight members were currently or previously employed in *Kav Laoved*. I interviewed all the lawyers who were involved in the Binding Arrangement case. I also interviewed three union organizers and five academic researchers who had conducted field research among farmworkers or had expert knowledge on the issues. I spent five hours in *Kav Laoved* for participant observation and took an independent trip to a farm. In addition, I spoke with two independent lawyers who had familiarity with the issue of migrant farm workers.

United States and Hong Kong

My fieldwork in the U.S. was limited to interviews with three members of the *National Guestworker Alliance* (*NGA*) in New Orleans, which I conducted in 2014 and conversations with five members of *Centro de Los Derechos del Migrante* (CDM) between 2015-2018. I also observed a presentation by two members of Coalition of Immokalee workers in 2018 and asked them specific questions relevant to my research.

I spent two months in Hong Kong in February and March 2016 during which time I spoke to three cause lawyers who were involved in the constitution case challenging the lack of access to permanent residence for domestic workers, including the primary counsel in the case. I also interviewed four foreign domestic workers, who were organizers and leaders of advocacy organizations, four Hong Kong residents who worked with foreign domestic worker organizations and attended meetings of the Indonesian, Filipino, and Nepali domestic workers unions.

V. Conclusion

As with any case-based approach, the study is not robust with respect to generalizability beyond the cases at hand, though I show the fruitfulness of my framework through the discussion of Hong Kong and the U.S. Despite this limitation, my research introduces new empirical data on TFWs in the context of legal mobilization, which adds much needed nuance to current theories about non-citizen mobilization and to TFW scholarship in general. In doing so, I made important conceptual advances, such as combining social movement and legal mobilization theories to strength the notions of political environment and support structure and suggest causal chains in top-down and bottom-up legal mobilization through process tracing. In the following chapters, I present the detailed analysis of the mechanisms and processes around legal mobilization in Israel and Canada.

Chapter 3
Constituting Temporariness: History of the temporary foreign worker program in agriculture in Israel and Canada

I. Introduction

The agricultural sector in Israel and Canada rely on temporary foreign workers (TFWs) to meet the seasonal labor demand particularly during harvest season. The justification of TFWs in agriculture is based on a desire to sustain the agricultural sector as part of a national project while also wanting to remain competitive in a fiercely competitive global economy.

TFWs supply a low cost, racialized, ready labor force to perform the daily agricultural work that native citizens of these countries are not willing to assume themselves. In this chapter, I examine the history of immigration law and the creation of agricultural TFW programs in Israel and Canada. I discuss the role that immigration law and state policies have played in contributing to the precarity of TFWs who play a central role in sustaining nationalist agricultural projects in both countries.

II. Historical Background on the Israeli temporary foreign worker program

The temporary foreign worker program in the agricultural sector in Israel is a product of the historical development of migration and other policies since the inception of the Israeli state. A variety of factors have shaped the program to its present form: the nation-building of a Jewish state, the importance of the agricultural sector in nation-building and the influence of the agricultural lobby, the conflict with Palestine, the desire to maintain global competitiveness, anti-foreigner sentiment and Jewish nativism, and the stigmatization of certain labor sectors. Deportation campaigns in the 2000s and Jewish nationalism have also contributed to increasing the vulnerability of foreign workers.

Agricultural settlement formed an essential part of state creation in the early years of the formation of Israel and was integral to Zionist principles of "settling the land and causing the desert to flower" (Tzfadia and Yacobi 2011, 67, 69). Zionist organizations provided financial and political support to build agriculture settlements or Moshavim over Palestinian villages (Tzfadia and Yacobi 2011, 67). The ability to own and to work land was essential aspect of the Zionist movement as Jews were historically prohibited from owning land in many countries (Rogin 2004, 14–15). As Rogin (2004) describes it, "the time of the *Yishuv* (period of Jewish migration before 1948) has gained a mythic quality in the Israeli national ethos: stories about the Jewish *halutzim* (pioneers) who worked the land making it livable, who toiled under the hot Israeli sun working with nothing but the sweat of their labor, who did all this while under attack from hostile neighbours…. The new Israeli male was to be strong, stoic and brave, breaking the mould of the '*shleml*'." The goal of the Zionist was to "conquer the barren earth, create new life" (Jorgenson 1994, 273).

After the Israeli state was established in 1948, the period of nation-building ensured the employment of new Jewish immigrants across labor sectors, as they replaced Palestinian labor

and took control of Palestinian land. However, as Israeli citizens advanced economically into higher classes, it resulted in an acute labor shortage in low-wage sectors, which was initially filled by Palestinian labor, especially from the occupied territories.

Changes in the global economy and integration of Israel's economy with the international economy resulted in sectors like agriculture, which were family-owned and operated, having to rely on mass low-wage labor to maintain their competitiveness and respond to increased demands (Kaminer 2016). It created a labor shortage, which could not be met by Palestinian or local labor, and Israel began to rely on foreign labor. In agriculture, the first Thai workers arrived in the 1970s and then in the late 1980s as volunteers or interns for which they received subsistence wages, which were not regulated. These "volunteers" did not need work permits and began to work in areas of Israel such as the Arava valley which had never relied on Palestinian labor (Drori 2009, 106). Towards the end of the 1980s, the government instituted a formal temporary migrant worker program (Averbukh 2016; Amir 2000). The migrant workers have since been referred to as *ovdim zarim* or "foreign workers" (Averbukh 2016). As the farm-owners gave favorable reviews of the Thai workers, the use of Thai workers in agriculture slowly began to be institutionalized. At the same time, the Long-Term Care Insurance Act was passed in April 1988, which allowed for caregivers from other countries to provide nursing and home-based care for the elderly and disabled, thus beginning the large influx of foreign caregivers mainly from the Philippines into Israel.

The labor shortage across all low-wage sectors was further exacerbated in the 1990s due to the outbreak of the first Intifada and subsequent closure of Palestinian borders (Averbukh 2016; Amir 2000). The huge wave of immigration of Jews from the erstwhile Soviet Union placed further demand on the labor-intensive construction and agricultural sector (Averbukh 2016; Bartram 2005). In 1988, Palestinians held 25 percent of Israeli agricultural jobs and 43 percent of construction jobs (Bartram 2005, 62 using data from the Israeli Central Bureau of Statistics; Central Bureau of Statistics 1994). Initially, the newcomers from the Eastern bloc filled the labor shortages in the low-wage sectors but soon, their upward mobility resulted in the continuation of the labor shortage as employers refused to increase wages to attract Jewish Israelis, claiming high costs of operations.

The labor shortage was worst in the construction sector as the new immigrants ratcheted up demand for housing (Bartram 2005, 68). The employers in the construction sector began extensive lobbying in the government arguing that the border closures impeded their ability to respond to the immediate needs of the new Jewish immigrants for housing and other infrastructure. Agricultural employers followed suit. The government was reluctant to expand the labor importation program as it was concerned about the impact that the importation of foreign workers would have on the Jewish makeup of Israel (Amir 2000, 3). At first, the government implemented training courses and provided subsidies for Israelis to attract them to sectors with labor shortages (Bartram 2005, 68–70). Despite spending a substantial amount - over five years - on the Israeli workers' training program, barely 25 percent of those trained continued to work in these identified sectors beyond the training period, and even those who worked soon left the low-wage sectors as soon as better opportunities became available. Although Bartram (2005) attributed the failure to structural issues within the sectors such as low wages and unpleasantness of work, researchers and NGO advocates that I interviewed

attributed it to the stigma and Israeli prejudice against these sectors.[10] Agriculture, construction, and caregiving are "tainted" as work done by non-Jewish populations, specifically Palestinians or foreign workers. One interviewee pointed out that there are several sectors where the wages are even lower, and the work is as unpleasant and unfulfilling, like butchery or retail and packaging work in large stores. These sectors have had no problems in hiring and retaining Jewish Israelis. In the 1990s, even the new Israeli immigrants from Russia were reluctant to do "Arab jobs" (Bartram 2005, 68). This comports with my fieldwork evidence as well as Calavita's (2007) study on foreign workers in Italy and Spain where she describes the production of an "economics of alterité" where the foreign workers' location in the host economy reproduces the notion of certain sectors as "unwanted" and workers in those sectors are marked with the "ugly stigma" of "otherness," racialization, and poverty.

It should be noted that foreign workers did not replace Palestinian workers in all sectors. Palestinian workers did not work in caregiving or in agriculture in places like the Arava and Jordan Valley. The labor shortage in these sectors were a result of changing global economic pressures on agriculture that favored large-scale farming over small farms (Kaminer 2016).

The construction and agriculture industry continued to pressure the government and even filed a lawsuit against the government on the basis that the government had failed its responsibility to ensure labor supply by closing the borders (Bartram 2005). The Israeli government finally instituted a formal foreign worker program, but it started initially with only few permits. The government's reluctance to institute a foreign worker program stemmed from anxiety about illegal migration and a demographic need to maintain a predominantly Jewish state. In addition, there were concerns based on the failure of guest worker programs in Europe and the likelihood of labor exploitation, wage depression, and weakening of organized labor. Several MPs pointed out the failure of the guest worker program in Europe and the risks of it creating a permanent population of non-Jews, which would threaten citizenship laws (Bartram 1998). The Foreign Worker Law was passed in 1991, imposing obligations on employers to provide proper employment contracts and adhere to labor and social welfare laws, and penalizing illegal employment (Foreign Workers Law 1991; Drori 2009, 49; Kemp 2010).

The foreign worker program was concomitant with an overall shift from collectivist welfare state policies towards neoliberal economic policies (Kemp 2004; Ajzenstadt and Shapira 2012; Bartram 2005; Weintraub 2010). It also enabled further separation and independence from the Palestinians in the Occupied Territories and within Israel. The foreign worker program instituted guest worker policies that had been abandoned in Europe and which, ironically, more closely resembled the labor migration programs in the Middle East Gulf states (Kemp 2004).

By the years 2002 and 2003, foreign workers constituted between 10 to12 percent of the Israel labor force, the second largest population percentage after Switzerland (Averbukh 2016; Drori 2009; Willen 2007). Foreign workers from China, Romania and other Eastern Europe countries, as well from Latin America and Africa began to work across all low-wage labor sectors. The caregiving and agriculture sectors continued to be dominated by Filipino women

[10] KD and KC (*Kav Laoved* caseworker and lawyer), interview with author, November 2016.

and Thai men respectively. The demographics in urban areas also changed as workers and tourists began to overstay their visas and form large undocumented communities. In 2003, 60 percent of all foreign workers were undocumented (Drori 2009; Kemp 2010). However, a majority of the undocumented labor force consisted of people who had overstayed their tourist visa. According to an annual report by the OECD expert group on migration, in 2015, 91,000 tourists overstayed their visas compared to some 16,000 foreign workers who became irregular because of a lapse in their legal foreign worker status (Gilad 2017).

The formation of communities of undocumented migrants was perceived as an emerging threat (Amir 2000, 3). Until 2002, Israel was somewhat reluctant to engage in mass deportations afraid of how the world would view their human rights record in the context of the Palestinian conflict. Even though in 1995, Israel was deporting undocumented residents in spurts, it was when the Sharon government took power in 2001 that Israel began to engage in large-scale deportations. Prime Minister Ariel Sharon announced the "Closed Skies" policy on October 3, 2002, which put a moratorium on new foreign workers. The government formed a new branch called the Immigration Police who were tasked with deporting at least 50,000 migrant workers within a year. According to a Jerusalem Post article, 41,000 foreign workers were expelled in 2003 and 2004, but the number was scaled back in later years. In the years 2005 to 2008, only 17,800 foreign workers were expelled (Friedman 2010). The leaders of social and political organizations of undocumented residents were particularly targeted (Drori 2009, 154).[11] The Minister of Interior made public statements that the leadership had to be targeted to prevent the formation of communities of foreign residents.

The deportation increased the precarity of even legal foreign workers, as they could be and were detained under feeble pretexts. Several of my interviewees spoke about how many Israeli employers began to report falsified contract violations against their workers to escape prosecution for wage-theft and exploitation (see also Kemp 2004).[12] One interviewee from the *Hotline for Migrant Workers* described the difficulty in accessing the workers once they were put in detention facilities. The only window in the cell would be above the height of the detainees and they would have to talk to the detainee through the window without even getting the chance to see him or her. The detainee had no right to legal counsel or interpreter. In 2003 and 2004, an unprecedented 40,000 workers were expelled through deportation orders on the basis of not having valid permits and a further 130,000 left "voluntarily" under duress (Friedman 2010; Kemp 2010).

Noticeably, about two-thirds of the population of "illegal" foreign workers (those without valid work permits) overstayed their tourist visas but they constituted the smallest group among the deportees, compared to asylum seekers and foreign workers who arrived under work permits (Nathan 2011, 19). In a survey of 607 detainees conducted by *Hotline for Migrant Workers* between February and March of 2003, the researchers found that 81 percent of migrant workers under arrest entered the country with a valid work permit (see also Kemp 2010). 21 percent of these workers had become 'illegal' because they were reassigned to another employer (which is not permitted under the binding agreement) or their visas had

[11] Corroborated by RB (academic researcher), interview with author, November 2016.
[12] KE and RB (*Kav Laoved* lawyer and researcher), interview with author, November 2016.

expired without their knowledge since their passports were confiscated by their employer (Kemp 2004). Davidov (2005, 19) mentions how the Israeli government spends an inordinate amount of resources to locate and deport migrant workers who were admitted with work permits but may have suffered a lapse in the permit.

The "Closed Skies" policy put a moratorium on new foreign workers but allowed employers to go to deportation centers and hire workers who had been detained (Kemp 2004). But, the regulations explicitly stated that migrant workers had no right of "reassignment," i.e. to work for an alternate employer, who had not sponsored them in the first place. One judge in the Court for the Supervision of the Custody of Illegal Residents expressed her disgust at the policy:

> It is not at all clear to me according to what unacceptable custom the employer believed that foreign workers are merchandise, for which they can receive credit at a prison or a custodial facility any time they feel like it (quoted in Kemp 2004).

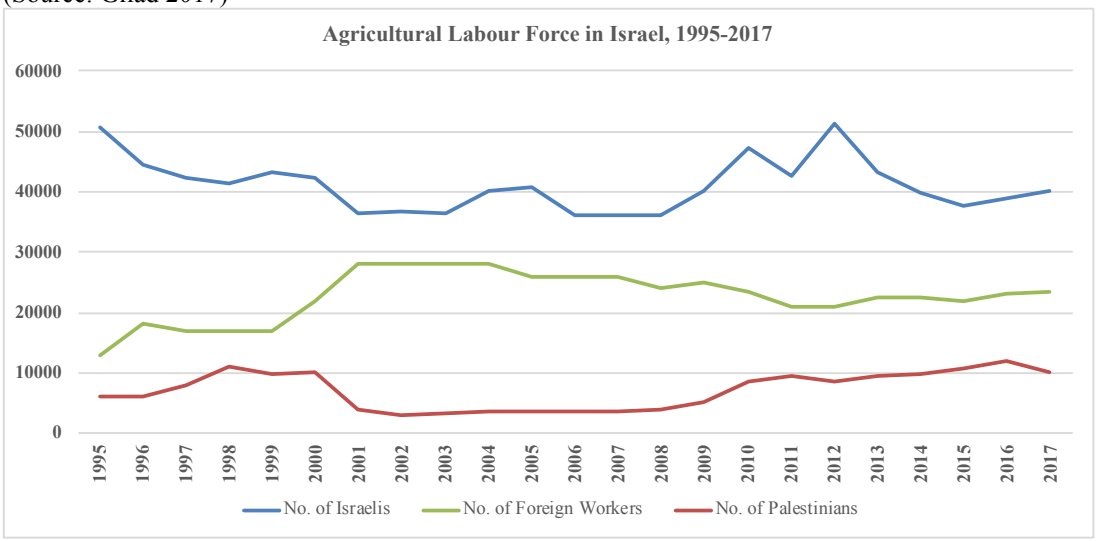
Despite the public rhetoric of "Closed Skies" policy, permits for agricultural and caregiver workers were resumed within two years. Agricultural work permits have hovered around 20,000-25,000 annually in the past ten years (see Figure 2). In 2015, 20,000 work permits were issued for construction, 25,000 for agriculture, and 45,000 for care-giving (Center for International Migration and Integration (CIMI) and Israel Population and Immigration Authority 2016, 30). The total number of foreign workers in 2015 was estimated to be 174,000 (Center for International Migration and Integration (CIMI) and Israel Population and Immigration Authority 2016, 22). The state comptroller estimates that foreign workers currently make up nine percent of the Israel labor force (Goldlist-Eichler 2015).

In 2006, the Israeli High Court ruled the binding arrangement unconstitutional resulting in the institution of sector-based work permits. The important binding arrangement case is discussed further in the following chapter. In 2009, a High Court ruling imposed an obligation on the Minister of Interior to protect workers from recruitment debts. This resulted in a regime of bilateral agreements resembling Canada's SAWP program in many ways. The first bilateral agreement was reached with Thailand in July 2012 – the Thailand-Israel Cooperation on the Placement of Workers (TIC) – which put the International Organization for Migration (IOM) in charge of recruitment in Thailand, leading to the arrival of 12,600 Thai agricultural workers in the four years that followed. During the same period, around 460 seasonal agricultural workers arrived via the bilateral agreement with Sri Lanka. A bilateral agreement with Bulgaria was signed at the end of 2011; a similar agreement with Moldova was signed in 2012 and with Romania in July 2014 (Center for International Migration and Integration (CIMI) and Israel Population and Immigration Authority 2016).

The placement fee of around 40,000 NIS that the workers were paying to manpower companies before was removed. The agreement resulted in several manpower agencies declaring bankruptcy and shutting down their operations. This arrangement appears to have positively affected the condition of Thai workers as their debt bondage has reduced. Nevertheless, the manpower companies are still in charge of monitoring the stay of foreign workers when they are working in Israel.

Currently, foreign workers in Israel are mostly from Asia (Philippines, Thailand, China, Nepal, Sri Lanka, and India). Caregivers constitute the largest group of migrant workers (60,000), 80 percent of whom are women. About 25,000 foreign workers are employed in the agricultural sector. These workers come mostly from Thailand, with others coming from Vietnam and Nepal (Kav Laoved n.d.; also see Appendix 3). Foreign workers make up over 30 percent of all workers in agriculture (Gilad 2017). Further statistical details on Israel's TFWs are presented in Appendix 3.

Figure 2: Agricultural labor force in Israel 1995-2017
(Source: Gilad 2017)



a) Israel's Temporary Foreign Work Program

A report by the Centre for International Migration and Integration in Israel clarifies the foreign worker law as follows:

> The "Foreign Workers Law" (1991), defines a "foreign worker" as "a worker who is not a citizen or a resident of Israel." The legality of a worker's status is dependent upon the fulfillment of two conditions: (1) The employer has in his/her possession a valid employment permit for one of the sectors for which foreign employment has been approved by the government; (2) The foreign worker has a valid work permit for the same sector, and s/he is registered with the employer who holds the employment permit. (Center for International Migration and Integration (CIMI) and Israel Population and Immigration Authority 2016, 6).

"Foreign workers," as a group, refers to three classes of workers: regular workers, irregular or unauthorized workers, and Palestinian day workers. Infrequently, authors also include in the foreign workers count, tourists who have overstayed their visas and work without authorization. For the purposes of this dissertation, I define a foreign worker as a non-Palestinian worker with a permit. Under the authorization of the Foreign Workers Law, Israel

began to recruit workers focusing primarily on low-skilled laborers for the agriculture, construction and domestic care sectors.

The Ministry of the Interior formulated the work permit system as per its jurisdiction under the Entry into Israel Law, 5712- 1952. The work and residence permit to foreign workers was conditional upon the worker being employed by the specific employer who applied to employ him/her. The employer was obligated to inform the Ministry when the employment relations were terminated and ensure that the worker leaves the country. The name of the employer was stamped in the passport of the worker. The worker was prohibited from working for another employer or from doing additional work. A breach of these conditions resulted in the foreign worker losing his or her legal right to remain in Israel. This tied visa regime is called the "binding arrangement" and was in force until 2006. Much like the 'Kafila' programs in Middle East, the binding arrangement served the employers in ensuring an indentured workforce and it benefited the state in being able to control the mobility of the workers (Kemp and Raijman 2014). State control was, however, feeble as employers would "sublet" the workers to other employers, without telling the workers, rendering them deportable and in violation of their permit, further increasing their indentured status. Foreign workers are not guaranteed right to asylum, family reunification, access to comfortable housing, social benefits, and health care.

In addition to the temporary foreign worker program, a "work study" based program has gained currency since 2005 and has been used to bypass the prohibition on the binding arrangement (Kav Laoved 2014). In 2010, there were only 750 "students" in agriculture on temporary resident permits engaging in training and working on the farms (Gilad 2017). Between 2013 and 2016, the number of students increased sharply and it is estimated today to be around 5,000 (Gilad 2017). These students, from Asia, Africa, and Latin America pay large sums in fees with the understanding that they would get theoretical and practical training along with food and accommodation. They work alongside the Thai workers and are often supervised by the Thai workers. Instead of academic training, they are forced to work six to seven days a week, earn less than minimum wage, and are given no overtime or other benefits. They live in the same sub-standard housing as the Thai workers. When they try to protest, they are threatened with deportation and the loss of the high fees they have paid to be in the program (Gilad 2017; Kav Laoved 2015). However, as described in the next chapter, these student workers have been proactive in challenging their conditions and have concurrently highlighted the conditions of the Thai workers in their petitions (Gilad 2017).

b) Privatization of foreign worker administration

Like many other countries, the administration of the foreign worker program in Israel is delegated not only to employers but also to private or semi-private agencies called "manpower companies." The manpower companies are involved in recruitment (with the exception of Thai workers after the TIC) and management of the foreign workers. Manpower companies have played a key role in labor importation. They are known to use innovative ways to get migrants into the country through tourist visas and organizing "fake" conferences and then trafficking them into the low wage labor market (Bartram 2005; Udell 2014).

III. Historical Background on Canadian Immigration Policies and the Seasonal Agricultural Workers program

Extensive scholarship has addressed the practices of settler colonialism in Canada and its impact on immigration policies. The economic analysis of colonization concentrates on the resources and economic gain for colonizing countries through exploitation of the colonized people. Race-centered scholarship points out how settlement and occupation was predicated on a deeply racialized construction of non-European countries as inhabited by savages and the uncivilized (Morgensen 2011; Wolfe 2006; Coulthard and Alfred 2014). I provide a historical overview of how agriculture was used as a tool of colonization even as settlers struggled to cultivate Canadian lands because of the seasonal nature of farming and the persistent lack of labor. As explained in chapter 1, agricultural production is linked with special rights, privileges, and status that construct the boundaries and goals of the nation-state and defines national belonging and the citizen ideal. In Canada, from the time of Confederation, agriculture began to be intimately tied with immigration policies culminating in the Seasonal Agricultural Work Program (SAWP) that persists to this day.

The white settler colonial perspective emphasizes how Canada was constructed as an extension of Britain, with settlers forming a nation-state with citizenry and political institutions replicating colonial Britain, while displacing and disenfranchising Aboriginal peoples in the territory. The Canadian state, as all settler states, has been built through the process of replacement- a) replacement of Indigenous peoples through displacement, occupation, and disease and b) replacement of Indigenous life stories with settler myths (Coulthard and Alfred 2014). The initial relationship between Europeans (predominantly French) and Canadian Indigenous peoples in the 1600s was defined by the fur trade and commodity exchange, that resulted in "bi-directional transformations" (Stasiulis and Jhappan 1995, 98–100). The major upheaval of Aboriginal life began with the later introduction of Christianity and settler-colonization objectives.[13]

Agricultural cultivation was one of the primary ways to induce immigration of "desirable" populations from England and to occupy the territory of Indigenous nations. Immigrants from the United Kingdom dominated migration into Canada from 1760 onwards after French claims to Canada were squashed by British victory in Quebec (Harper and Constantine 2014, 12; Kelley and Trebilcock 1998, 21, 30). Migration and settlement were encouraged through subsidized passages and land grants.

Finding agricultural labor proved to be particular challenge from as early as the 18th century. Unlike in the United States, imported slavery did not provide a significant labor force in

[13] Christian missionaries brought with them diseases that were to devastate the Indigenous populations and forced social, political, and institutional transformations in Aboriginal culture. Although settler-colonization objectives were slowly being formed in the mid to late 1600s, the French, who were the initiators, were "half-hearted settlers" and the policies were ambiguous, officially claiming that the Indigenous people were "allies" and trade-partners and allowing for inter-mixing and inter-marriages, while imposing French colonial law and usurping land for the French citizens who wanted permanent settlement in Canada (Stasiulis and Jhappan 1995, 104–5). British colonization policies, especially after the defeat of France, set the stage for racialized occupation and displacement.

Canada (Pentland 1981, 1–4). Black slavery, imported from America or the Caribbean, existed in the 17th and 18th century but the numbers appear to have been less than 100 in Quebec with similar numbers in other parts of colonized Canada. Aboriginal slaves formed the bulk of the slave population (Pentland 1981, 1). Other researchers have found a higher number of slaves, 1,400 black slaves and 2,300 aboriginal slaves, over a span of 150 years until the 19th century but the numbers are still minimal compared to the United States. Slaves were mainly used as domestic servants by the wealthy. Canadian weather necessitated a *seasonal* workforce in agriculture, which could not be met by slave labor. It was too expensive to maintain the slave workforce during the off-season when labor was not required (Pentland 1981, 3–4). Slave labor in agriculture was also found to be unproductive compared to free laborers who had 75 percent more productivity (Pentland 1981, 4). In any case, importation of slaves was legally banned in 1793 (Upper Canada/Ontario) and by 1803 in Lower Canada (Pentland 1981, 2).

Indentured labor, which forced workers to work for a specific time period, became the only viable substitute. Poorer British citizens were given the chance to arrive in the New World, where their journey from Europe would be paid, so long as they agreed to be indentured and offer their labor for four to five years (Pentland 1981, 8-9). Irish immigrants formed a significant portion of indentured labor migration between 1825 and 1867 (Kelley and Trebilcock 1998, 21). However, the laborers began to break their bonds by underworking or deserting and then buying cheap land. The Irish also migrated to the United States in large numbers (Harper and Constantine 2014, 13). Initially, the early colonialists tried to lobby against the desertion by restricting land grants and making land too expensive for the indentured labor and the poor (Pentland 1981, 10; Kelley and Trebilcock 1998, 47–49). These efforts ultimately failed, and farm-owners continued to rely on fickle temporary contract labor.

After Confederation in 1867,[14] the imperative to extend Canada to the West Coast set forth a long period of nation-building and occupation epitomized by the building of the Canadian Railway from the East coast to the West Coast. The continued agricultural growth in the East Coast through land grants and the policy to populate the Prairies (mid-western Canada) and the West coast created a need for agricultural labor. The nation-building projects after Confederation led to additional demand for cheap labor in railway construction, mining, urban construction, and other large-scale projects. Women migrating as domestic servants, seamstresses, nurses, and potential wives formed the third category of low-wage labor migration (Harper and Constantine 2014, 18; Kelley and Trebilcock 1998, 46).

In order to meet labor needs and populate the western Canada, the Canadian government expanded their definition of "desirable" settlers beyond the United Kingdom to include other Europeans. The shortage of a workforce in agriculture as well as in other nation-building projects led to a further demand for cheap labor in agriculture and other sectors leading to formal immigration policies (Harper and Constantine 2014, 18; Kelley and Trebilcock 1998,

[14] On July 1, 1867, the East coast provinces of Ontario, Quebec, Nova Scotia and New Brunswick agreed to be part of a federation (federal state system) of the Dominion of Canada, establishing Canada as a federal state, autonomous from Britain. The West Coast states of Manitoba and British Columbia followed soon after within five years with Alberta and Saskatchewan joining the Canadian federation in 1905.

46). The continued significance of agricultural development in immigration law is indicated by the fact that in 1869, the Ministry of Agriculture sponsored Canada's first Immigration Act.

In 1892, the jurisdiction and responsibilities of immigration were transferred to the Ministry of Interior (Kelley and Trebilcock 1998, 116). Later, in 1917, a new Department of Immigration and Colonization was established to take over the immigration administration (Kelley and Trebilcock 1998, 166) . Throughout the history of Canadian government, the changing names of the immigration department have indicated the prevailing objective of immigration.

In the period after Confederation, agriculturalists, industrialists, and transportation companies wanted cheap labor and the Canadian government wanted to ensure the settlement of all of Canadian territory displacing Metis, Aboriginal, and other mixed ancestry groups. Immigration polices arose in conflict not only with Aboriginal interests but also Canadian workers and labor groups and British nationalists. Agriculturalists, along with industrialists and transportation companies, lobbied the government for cheap immigrant labor. This was initially met with resistance from labor groups and nativist British nationalists. Between 1896 and 1905, the Minister of Interior Cliford Sifton implemented an intense campaign to attract Europeans from outside Britain to Canada. Nevertheless, labor shortages remained a critical issue as European immigrants refused to work in precarious, seasonal sectors and migrated to the more attractive United States to settle.

While agricultural occupation and labor supply were important objectives of immigration policies to create the new nation-state, it clashed with the imperative of racial gate keeping. Migration from Asia of Chinese, East Indians, and Japanese especially presented a challenge to efforts to create a White Canada in the face of labor shortages. Immigration policies towards people from China provide the paradigmatic example of the coexistence of migrant labor with xenophobic construction of anti-immigrant myths. The first official foreign labor importation scheme was implemented in the 1880s when 15,000 Chinese laborers from Guangdong were brought into the country to work on the western side of the Canadian Pacific railway (Kelley and Trebilcock 1998, 94). The hazardous work conditions, ease of obtaining Chinese workers in the West coast, and expectation of servility from the Chinese spurred the policy, despite the strident anti-Chinese racist sentiment in British Columbia.[15]

"Native" was defined based on race and not on birth or citizenship. For example, a person of Indian descent was classified "Indian" even if they were born in the UK and had citizenship in

[15] Anti-Chinese protests gained momentum and racist propaganda about their "noxious" habits, lack of cleanliness, moral depravity, and lawlessness led to the Chinese being constructed as a threat to Canadian health and safety and therefore they could be not be allowed to permanently settle, even as they were found to be essential to the economy (Kelley and Trebilcock 1998, 94, 143). A commission was setup and although they found that the complaints against the Chinese were based on unfounded prejudice and stereotypes and that they were essential to the economy, a $50 head tax was imposed on the Chinese to prevent their settlement which was later raised to $500 in 1903 (Kelley and Trebilcock 1998, 143). Soon, even those Chinese who manage to naturalize to become British subjects or were born in Canada were officially disenfranchised from the federal government, which implied that they could not vote, sit on juries, or engage in several profession such as law, teaching, and medicine (Kelley and Trebilcock 1998, 144).

another British colony. Laws were passed that restricted even naturalized Canadian citizens of Asian origin from voting and engaging in particular businesses.

About 50,000 immigrants from China, Japan, and East India arrived between 1900 and 1915 (Kelley and Trebilcock 1998, 143) and were disenfranchised and subject to racism and racist laws such as the 1908 Continuous Journey Legislation, that refused entry to any immigrant who did not come on a continuous journey from their native country.[16] The legislation also prohibited Canadian companies like the Canadian Pacific Railway from issuing through tickets.[17] At that time, East Indian migration was on the increase as they had full mobility within the British Empire. The Continuous Journey legislation prohibited entry to Canada unless the immigrants had a through ticket from their "native" country in order to prevent East Indians from entering Canada. Many had farming backgrounds and would eventually form important farming settlements in Sacramento Valley in California. Agricultural labor-based citizenship was valued but only for those who were white.

African Americans from the United States formed the essential bulk of Black migrants in Canada until the 1800s. Although immigration was open to all Americans, once the formal immigration process came into place in the late 1800s, applications by "negro" immigrants were often rejected on the basis that they could not acclimatize to Canadian weather (Kelley and Trebilcock 1998, 154). In 1909-1910, only seven African Americans were allowed to immigrate (Kelley and Trebilcock 1998, 155–56) . At this time, Caribbean workers began to be recruited for labor in the mines and steel factories of Nova Scotia. In 1910, a domestic worker importation scheme also brought 100 women from Guadalupe in the Caribbean (Vosko 2000, 51). Their numbers were so limited that there is no information in the official statistics.

Sifton's open European immigration policy was short-lived as prejudice and hostility rose even against Poles, Ukrainians, Italians, and other Eastern and Southern Europeans, who were providing essential labor in the agricultural and other sectors. In 1906 the immigration policy was reversed to mainly limit it to people from the British empire (Kelley and Trebilcock 1998, 18–19, 113). In 1917, a new immigration department was established to take over the immigration administration (Kelley and Trebilcock 1998, 166). The department was named Department of Immigration and Colonization, signaling outright that the aim of immigration was to serve colonizing objectives.

The 1906 and 1914 Immigration Acts set the stage for executive control of immigration. The Immigration Acts asserted the sovereignty of Canada to decide on all entry and citizenship laws (Kelley and Trebilcock 1998, 113–14). While the broad principles were to be determined by the Parliament, the executive cabinet under the Prime Minister has expansive discretion to decide on entry, deportation, and citizenship laws. A 1910 Act introduced the notion of "domicile," which would later become the residence requirements for becoming permanent residents. An immigrant had to be domiciled in Canada for three years before he or she could become a permanent resident. During those three years, he or she could be expelled for a wide variety of reasons including crimes, prostitution, and public charges and if they were found to

[16] *Statutes of Canada*, Edward vii 1910, Chapter 27, Article 38 (a), (c).
[17] A*n Act to Amend the Immigration Act*, S.C. 1907-08, c.33, s.1.

be “undesirable” (Kelley and Trebilcock 1998, 137). These acts also removed provincial jurisdiction to control immigration, until 1978, when provinces beginning with Quebec were given jurisdiction to have separate schemes for additional immigration to those provinces (Kelley and Trebilcock 1998, 392).

It was only in the 1920s that acute labor shortage in agriculture led to the government reopening permits for all European farmers and agricultural laborers, including those from “non-preferred” countries (Kelley and Trebilcock 1998, 195). Sustaining agricultural labor continued to be a challenge for Canada. Agricultural cultivation was particularly difficult in the Prairies because of low rainfall and short harvesting seasons (Kelley and Trebilcock 1998, 106). Dry farming techniques were not viable until there was an overall increase in wheat prices. Yet, the Canadian government insisted on following a policy of agricultural settlement as an essential part of their colonizing and land occupation agenda, post-Confederation.

The agricultural labor shortage was exacerbated in the 1920s when Britain’s economic conditions improved and there was no more land left in Canada close to the railways (Kelley and Trebilcock 1998, 189). Several schemes tried to encourage migration of farmers, such as the Empire Settlement Agreement and Farm Family Settlement (Kelley and Trebilcock 1998, 189–90). They provided assistance with transportation from Britain, boarding, agricultural training, and credit for buying land. Even after the government facilitated the immigration of more than 100,000 farmers and farm laborers through these schemes, the schemes failed because the new immigrants refused to remain as farm laborers. These immigrants would migrate to the United States, move to urban areas to seek semi-industrial employment, or go back. For example, in the late 1920s, around 10,000 British unemployed miners were brought to Canada to work on the farms in the prairies, with assurance of boarding, wages, and a 25 percent reduction in return fair (Harper and Constantine 2014, 30). The migrant workers found that the wages and living conditions were exaggerated in the advertisements and they could not find work in the harsh winters. 80 percent of the migrant workers returned home quickly after arriving.

Immigrants from non-preferred European countries again became favorable. The transportation companies also lobbied hard so that they can get more passenger traffic in Europe (Kelley and Trebilcock 1998, 195). The Canadian Railways got formally involved in the selection and recruitment of agriculturalists and farm-laborers from Southern and Eastern Europe, leading to the arrival of 185,000 European farmers, which satisfied the demand for agricultural labor for a few years. Again, because of the seasonal nature of agriculture, these migrants were forced to move into other sectors such as mining or urban employment. They were also paid less than their promised wage and ended up more often, poor and unemployed. Non-white immigration was strictly discouraged. “Negro” immigration was fewer than 500; East Indians numbered less than 800; and all East Asians were excluded with only 15 Chinese persons emigrating to Canada between 1923 and 1938 (Kelley and Trebilcock 1998, 199, 204). Jewish immigration was also strictly controlled; even the railway companies were enjoined from selecting Jewish passengers.

Labor unions and nativist groups began large protests against Eastern European labor, creating propaganda and fear about “gradual displacement of the English-speaking farmers from the

small farms and soils by Central Europeans who demand less from life" (Kelley and Trebilcock 1998, 211 quoting Professor Lower, a noted Canadian historian and academic of that time). With unemployment increasing, the government instituted a ban on labor importation permits in 1929 (Kelley and Trebilcock 1998, 335).

In1947, Canada reinstated a labor importation scheme for agriculturalists from Poland who were given landed immigrant status, which implied that they could apply for citizenship after a two year labor contract in a farm (Kelley and Trebilcock 1998, 334). The labor importation was extended to all post-war refugees, primarily male, from Europe. 100,000 refugees entered Canada under this scheme with an obligation to fulfill an eighteen month or two-year contract or pay the government for passage. Married men could not bring their families until they had saved enough to sponsor them. A shortage of domestic help led to a focus on single European women, but the demand could not be met as domestic labor, like agriculture, was unable to retain workers.

a) Post-War and the creation of the SAWP Program

During the post-war era, Canada continued its racialized immigration policies with a quota-based system with preferred classes that allowed for immigration from non-white countries only if they had a relative in Canada. But even in 1957, the Minister of Immigration, stated that agricultural immigrants were the "most preferred" (Harper and Constantine 2014, 19).

In 1962, any facially discriminatory provisions were removed and in 1967, Canada introduced a points system that would privilege "high-skilled" immigration, emphasizing education, work experience, and English language proficiency. The farm-owners began to complain about the preference for skilled workers in the immigration policy, as farm work was not classified as skilled. They began to lobby for a temporary worker program or a two-year contract labor sponsorship program. In 1966, the Canadian government entered into negotiations with Caribbean countries and decided to double the number of Caribbean domestic workers and also allow for seasonal workers from Jamaica (Kelley and Trebilcock 1998, 361). That year the Seasonal Agricultural Worker Program, SAWP, was launched with 264 workers from Jamaica. The same year, the name of the immigration department was changed to Department of Manpower and Immigration, indicating the dual objectives of providing labor and permanent population to Canada.

The SAWP program was unique in many ways. It was established through bilateral agreements of Memorandums of Understanding (MoUs) with the sending country. The SAWP workers were allowed to work in Canada for only eight months and for a specific farm-owner in a specific farm. They could not bring family members and had to live in housing provided by the farmers. They were the only migrants with no access to citizenship. The SAWP program that was instituted in the sixties has remained largely unchanged as I describe later in this chapter.

b) Other temporary worker programs

In the mid-1950s, the Cabinet allowed for importation of "colored domestics," who were single, between the ages of 18-40, and had no children, from the Caribbean, under a one-year contract landed immigrant scheme (Kelley and Trebilcock 1998, 336). The women were forced to work under exploitative low-wage conditions and subject to racial, class, and gender stereotypes. However, so long as they were of "exceptional merit," they had access to full permanent residence after a year of work. The Caribbean domestic scheme began the transformation of the domestic work sector from a predominantly white labor pool to a racialized sector which came to be dominated by Caribbean and later Filipina women (Macklin 1994).

In 1973, the domestic workers scheme was formally included as part of the temporary worker program and access to permanent residence (that had been awarded after one to two years of contract labor in the prior system) was eliminated. After numerous protests and extensive lobbying by Filipino and Caribbean organization as well as women's rights groups who complained about the extensive sexual and labor exploitation that foreign domestic workers suffered, a new Foreign Domestic Worker program was introduced in 1981 where domestic workers could apply for permanent residence after two years (Kelley and Trebilcock 1998, 400). However, the application involved strict conditions to show evidence of integration in Canada (Macklin 1994).[18] In 1992, the program was modified to the Live-in Caregiver Program. The Program imposed a live-in condition where caregivers had to live in the residence of the employer and have uninterrupted employment for two years before they could apply for permanent residence. Since 2010, there have been several changes to the program, including removing the live-in requirement, creating two streams for preferred caregivers with faster access to permanent residence, and putting a freeze on new applications in 2017.

Seeing the success of SAWP, Canada created a formal temporary worker program called the Non-Immigrant Employment Authorization Program (NIEAP) in 1973 to get foreign workers in sectors other than agriculture and domestic work (Sharma 2006). All three programs (SAWP, the domestic worker program, and NIEAP) were similar in binding the worker to a single employer for a specific period of time, and the workers were not allowed to bring their families.

c) The Seasonal Agricultural Work Program (SAWP)

The preceding discussion on Canada's immigration trajectory highlights how immigration policy became intertwined with agriculture as it became a state tool to import cheap foreign labor to sustain the agricultural sector. But, it also features a state engaged in efforts to hierarchize between desirable and undesirable citizens based on race. The SAWP program is emblematic of the competing objectives of the state – on one hand wanting to remain

[18] The criteria for domestic workers to apply for permanent residence was based on seven criteria. These included tangible criteria such as employment history and financial means but also problematic subjective criteria such as "social adaptation" and "personal suitability" that were criticized by workers' rights groups.

competitive in the agricultural sector in a global marketplace and on the other, wanting to limit who becomes a citizen based on race (and class). The analysis of the SAWP program's structure, administration, recruitment, and contractual arrangement that follows reveals exactly how the state constructs TFWs as desirable labor but undesirable citizens.

Structure and Administration

The changes in immigration law in the 1960s were made to increase *permanent* immigration and SAWP was the only seasonal *temporary* migration scheme that was specifically drafted for the agricultural sector. SAWP was initially meant to be a stopgap interim program, with the government reluctant to commit to the program even for the following year. The government maintained that they were not sure if the workers would be needed the following year, thus explaining their temporary stay and stated outright that the permanent residency bar was to ensure that they remain in the agricultural sector (Choudry et al. 2009, 60–61). As the SAWP program became regularized and their numbers began to increase, the government was forthright in explaining that their lack of access to residency was to ensure a tied worker supply: "If we gave them residency they wouldn't be obligated to stay in the agriculture sector" (Choudry et al. 2009, 61). The SAWP program has continued, without any pause and with very few changes since its inception and celebrated its 50-year Anniversary in 2016.

The program has become permanent, sustaining the agricultural sector with precarious, unfree labor for the past 51 years. Workers have come year after year to work on Canadian farms, spending most of their lives in Canada away from their families, without any prospect of permanent settlement. The SAWP system ensures a transitory work force that provided labor renewal without the Canadian state bearing any costs of labor welfare, such as pensions, unemployment insurance, and labor retraining (Satzewich 1991). The sending state still shoulders the responsibility for the families left behind and for the workers after their retirement or during the low season. Although explicit racial discrimination in immigration law had been removed, the SAWP program is a paradigmatic example of how Canada's immigration policies continues its race-based discrimination by drawing distinctions between undesirable "migrants," who are from the poorer classes of the Global South providing exploitable, transitory labor, and desirable immigrants, who are deemed to have cultural and economic value and are provided easy access to Canadian citizenship (Sharma 2006; Baines and Sharma 2002; Satzewich 1991; Preston, Vosko, and Latham 2014).

Soon after its inception, the SAWP program was expanded to include Trinidad-Tobago, Barbados, and many of the other Caribbean countries (Grenada, Antigua, Dominica, St. Christopher-Nevis-Anguilla, St.Lucia, St.Vincent and Montserrat in 1976). In 1974, the Canadian Government started to recruit workers from Mexico, who currently constitute the largest percentage of SAWP workers. The SAWP worker program has been consistently increasing. Ontario has always had the largest number of SAWP workers at around 60 to 65 percent of total SAWP workers, followed by Quebec and British Columbia at 12 to 16 percent of the total each. All other provinces take in less than three to four percent of all SAWP workers.

SAWP was incorporated as a three-tier framework. At the highest, global level, the program is regulated by international agreements of Memorandums of Understanding (MOU) between Canada and the sending government. The MOUs outline the arrangement where workers are allowed to enter Canada under governmental supervision each year for a period not exceeding eight months and is reflected in the generic employment contract for workers from each country (see Appendix 4 for Mexico and Jamaica employment contracts). Agencies of the sending governments administer the recruitment and paperwork of the workers. In Mexico and the Caribbean, workers are recruited by the State Employment Service and the Caribbean Ministries of Labour, respectively. A recent agreement with the International Organization for Migration (IOM) has led to the IOM doing the recruitment and paperwork in Guatemala. Each sending government sends a number of consular officers to Canadian provinces, whose duty is to ensure that the employers and the Canadian government are following the dictates of the MOU. They also function as points of contact for the SAWP workers to make complaints against the employers. Unlike in Spain and in certain parts of the United States, there is no representative body of the workers in Canada or in the sending country, which coordinates recruitment.

At the national level, the departments in charge of immigration and employment share administrative and policy-making responsibilities. This has been the system since the beginning of the importation of foreign migrant workers. Until 1966, the two departments were Department of Labour and the Department of Citizenship and Immigration. Between 1966 and 1987, the Department of Manpower and Immigration and the Canada Employment Commission dealt with most of the administrative duties (Satzewich 1991, 146–47). Currently, the Department of Citizenship and Immigration and Employment and Social Development Canada (ESDC), formerly the Department of Human Resources and Skills Development (HRSDC), manages the larger particulars of the program. The employment department, ESDC, ensures that any temporary foreign worker program, including SAWP, is responsive to Canadian labor market changes.

Until 1987, SAWP employers, like employers of other temporary foreign worker programs, had to directly apply to the ESDC (which was called HRSDC then) for obtaining foreign workers. Since 1987, the federal government has delegated its recruitment and management functions to provincial, private, non-profit organizations that are composed of members of the farms that employ SAWP workers. In Ontario, the organization authorized by ESDC is the Foreign Agricultural Resource Management Service (FARMS). It currently functions as a non-governmental organization made up of a board of directors who represent growers of the different commodity groups participating in the program. The growers pay a user fee to FARMS. FARMS and their equivalent organization in each province (e.g. FERME in Quebec) coordinates with the ESDC and the sending governments by providing names of workers they want to get back as well as the specific requirements of the farmers. Through FARMS, employers submit a human resources plan to ESDC each year demonstrating their inability to find Canadian labor. ESDC provides positive Labour Market Impact Assessments (LMIA) if they are convinced that Canadian labor cannot fulfill the labor shortage. FARMS then uses the LMIAs to get worker permits for the recruited workers.

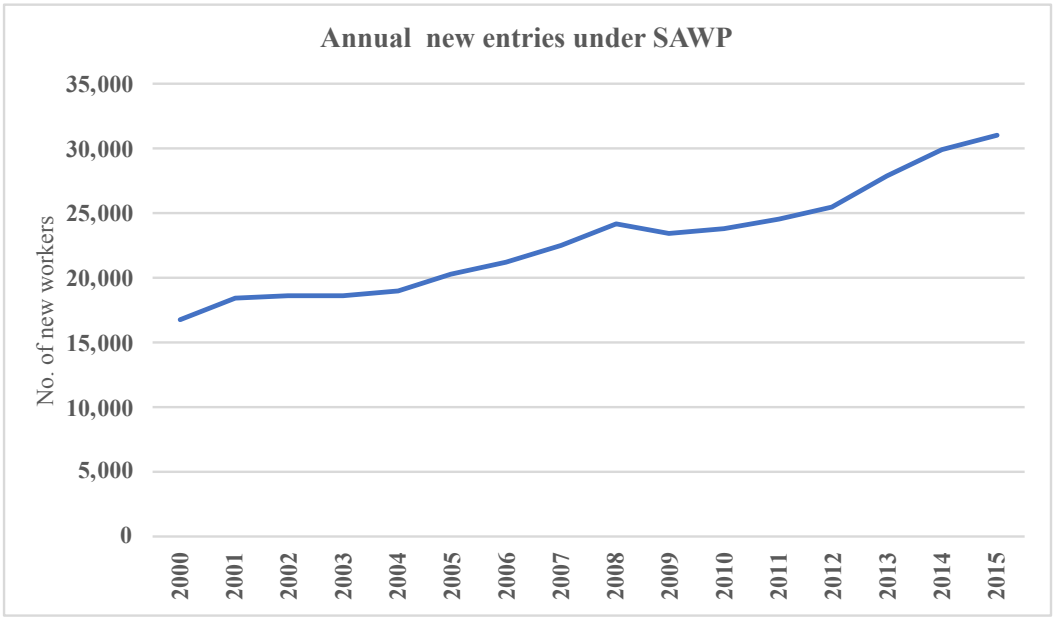
SAWP workers arrive in Canada during harvest season and work up to 8 months a year after which they are forced to return (Faraday 2012, 6). They are also "repatriated" before the completion of their contract if they experience any injury or if their labor becomes economically unnecessary due to weather and crop conditions (Faraday 2012, 39–40). In addition to limiting their time of continuous stay, one of the crucial ways in which temporariness is secured by preventing family reunification: workers cannot bring their families with them. This restriction is imposed either by direct law or indirectly through strictures such as proof of enough financial funds. Previously, before FARMS took over the administration, the SAWP program had quotas. The number of SAWP workers numbered around 4,000 through the 1970s and 1980s (Canadian Labour Congress and Flecker 2011). After the incorporation of FARMS and the privatization of administration, the number of SAWP workers became based on employer demand. The number of SAWP workers soon rose to 25,000-30,000 by the mid-2000s (see Table 1 and Figure 3).

Table 1: SAWP workers entering annually in Canada
(Source: OECD 2017, 21; CIC 2013)

	2000	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**
Annual entries under SAWP	16,710	18,509	18,622	18,698	19,052	20,281	21,253	21,581	24,189

	2009	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**
Annual entries under SAWP	23,393	23,914	24,500	25,414	28,000	30,000	31,000

Figure 3: SAWP workers entering annually in Canada



Recruitment

Although recruitment of workers is supposed to be done by officers in the sending countries, over 70 percent of workers are selected by Canadian farm employers through the "naming process" (Canadian Labour Congress and Flecker 2011, 6). Farmers give the names of workers they want back which are sent by FARMS to the officers in the sending countries. Farmers are known only to name those workers who serve their interests in every way. Even workers who have filed a valid workers compensation claim for injury in the workplace are usually not called back. One worker that *IAVGO* represented noted the following about punitive actions against workers who file workplace injury complaints:

> He never got a chance to come back because once you refuse to work - they have a system back home. If you go home they said "you breached the contract." You sign a contract here and once you go home without your time is up - even though you meet injury and you cannot complete the tasks – they said you breached the contract so they don't send you back to the country [Canada] to work no more. [19]

Workers come back year after year if they have not made any complaints. The average stay is supposed to be seven years (Canadian Labour Congress and Flecker 2011, 6) but several workers have been coming to Canada for eight months every year for more than twenty years.[20] Mexican agricultural workers also have to submit a sealed evaluation completed by the employer to Mexico's Ministry of Labour in order to continue in the program.

Employers rely on cultural stereotypes and knowledge about political mobilizations in selecting workers from one country over another. The decision to include Mexican workers was racially motivated as complaints began to be made against Caribbean workers as being unwilling to work long hours and to accept work conditions docilely (Binford 2002). Caribbean workers could speak in English, had social networks with the larger Caribbean population, and also had a history of colonial relations with White Europeans, which may have led to less deferential attitude to authority and labor demands (Binford 2002, 10). The employers continue to actively deploy differential racialization tactics as they rely on their stereotypes of Mexican workers being easier to exploit and of Caribbean workers being more confrontational and demanding (Binford 2002; Preibisch and Binford 2007).[21] Farm employers also make similar racialized, stereotyped preferences even among Caribbean workers as they pit Trinidadians (especially of Indian descent) against Jamaicans and so on.[22]

Similarly, employers are known to prefer Guatemalan farm workers over Mexican farm workers on an assumption that Guatemalans are less likely to resist or denounce unfavorable working conditions and have less resources to do so (Valarezo and Hughes 2012; The Human Trafficking Project 2008). Mexicans are considered to be better at stoop labor and Jamaicans at orchard work. Research shows that employers try to separate the workers by nationality and

[19] SAWP worker, statement noted by *IAVGO* during legal representation of worker, produced in their presentations.
[20] Participant observation in one of *Justicia's* farm outreach activities.
[21] JB (*Justicia* member), interview with author, February 2017.
[22] JA (*Justicia* member), interview with author, July 2015; Participant observation.

gender, which impedes organizing. Kerry Preibisch has found that even in the same farm Jamaican men are made to work only in the orchard and Mexican women in the packing house to avoid workers socializing with one another (Expert testimony in *Peart v. Ontario (Community Safety and Correctional Services)* 2011 HRTO 2157 at para 92).

Contractual Conditions of work

The conditions of work are set out in the Bilateral Agreements that are reflected in the employment contracts that are standardized to each country (Appendix 4). The contract states that employers have to provide suitable accommodation at no cost, which is subject to inspections by a Canadian authority or by a sending country government agent. However, employers are entitled to deduct from workers' pay the cost of maintaining their accommodation and covering operational and meal costs at stipulated amounts. The workers are also eligible for worker's compensation and provincial health insurance. The employer can deduct any additional health coverage that is not covered by the provincial health insurance regulations. The contract mandates employers to deduct Canadian Pension Plan payments and Employment Insurance premiums from workers' wages, even though the workers cannot avail of either after their work permit expires. Since the workers spend eight months in Canada year after year, they often do not qualify for social and employment benefits within their home country (Expert Testimony of Kerry Preibisch accepted in *Peart v. Ontario (Community Safety and Correctional Services)* 2011 HRTO 2157).

The employers also have to ideally pay the return airfare of the worker from the capital city of his or her home country, but the contract allows for partial recovery from the workers. The contract ensures minimum wage, two rest periods of 10 minutes each daily, and a rest day after 6 days of work. Caribbean workers also get 30 minutes of meal break after 5 consecutive hours. Mexicans workers get the 30 minutes meal break if they are preparing their own meals.

Employers can terminate the contract “for non-compliance, refusal to work, or any other sufficient reason” and have the worker repatriated to his or her home country and the worker has to pay the full cost of travel (Appendix 4). Although, it is possible for the worker to find a new employer if the employer terminates the employment relationship before the expiry of the permit, in practice, the workers are sent back to their home country almost immediately. The Ontario Human Rights Tribunal has fond that “often workers who are deported are removed from the SAWP program or “rested” for one or two seasons or may get a less attractive contract in the future” (*Peart v. Ontario (Community Safety and Correctional Services)* 2011 HRTO 2157).

Complaints Mechanism and Role of Sending Government

Consular liaison officers from each country can monitor living conditions and ensure that the employer is fulfilling the contracts. They are supposed to moderate any disputes and help the workers with administrative process. Workers can also complain to their consular officers for breach of the agreement and request a change of employers. However, the officers often compel workers from making complaints and participate in successful repatriation of the workers to their home countries by physically taking the workers to the airport and ensuring

that they leave.[23] When a worker is "named" by an employer to be recalled back for the next harvest season, sending country government agents pressure the worker to give the employer what it wants even if the worker does not want to go back (Expert Testimony of Kerry Preibisch accepted in *Peart v. Ontario (Community Safety and Correctional Services)* 2011 HRTO 2157):

> [S]ending states also have castigated workers who damage their national reputation in the SAWP by underperforming, by going AWOL, or by violating Canadian laws. This usually involves deportation (if possible) and permanently removing the worker from future job placements in Canada. Dr. Preibisch cited examples where reprisals have been collective in nature. For example, when the Canadian High Commissioner to Jamaica threatened that Canada would turn to other sources of labour if the number of Jamaicans going AWOL under the SAWP continued to increase, the Jamaican government shifted recruitment to more rural areas and permanently suspended all workers who failed to be recalled by their employers. When three SAWP migrants were accused of smuggling drugs into Canada in 2003, the Jamaican Ministry of Labour threatened to punish the migrants' entire home parish by banning their participation in the SAWP for three years (Expert Testimony of Kerry Preibisch accepted in *Peart v. Ontario (Community Safety and Correctional Services)* 2011 HRTO 2157 at para 93).

Authorized recruiters, including the consular officers and international organizations like the International Organization for Migration (IOM), specifically warn the guest workers from talking to activists, unions, or even to consular representatives about any problems with the employer, should it lead to deportation or non-renewal of the contract (Basok, Bélanger, and Rivas 2013). The priority of the consular officers is to maintain or increase the number of workers from their country. The MOUs with sending countries do not ensure a specific quota of job placements in Canada. Sending countries therefore compete with one another for these placements. They are more motivated to maintain the image of the workers from their country as being compliant, industrious, and non-complaining than protect the rights of their workers (*See also Peart v. Ontario (Community Safety and Correctional Services)* 2011 HRTO 2157 at paras 81, 90-94). This is also reflected in the recruitment practices as the selection of workers is "based on the perceptions that the candidate is physically and mentally competent for the work, willing to acquiesce to employer demands, and unlikely to commit a crime, overstay his or her visa, or cause trouble." (Expert testimony in *Peart v. Ontario (Community Safety and Correctional Services)* 2011 HRTO 2157 at para 90).

In order for a SAWP worker to initiate a change in employer, the SAWP worker would first have to find an employer who has received an LMIA from the ESDC and is willing to hire them and apply for a new work permit. Only one worker revealed that he was able to change jobs and ensure that he gets good employers because the consular officer was a neighbor in his home country and known to him.[24] The other workers reported that the consular officers offer limited or no help (Also see Lee 2003). [25] The culture that has been created by the SAWP

[23] JC (*Justicia* member), interview with author, October 2016; Participant observation.
[24] FW1 (SAWP worker), interview with author, October 2015.
[25] JC and JA (*Justicia* members), interview with author, March 2017.

program inhibits workers from requesting a change of employers. In the words of one the workers that *Justicia* worked with:

> The biggest lesson I have learned in Canada is to just to do what the farmer says. Because, if you don't do what the farmer say, as I say, you're fighting for a plane ride home or you could get a chance at another farm, and maybe you can go live at another farm but it might be good it might be more worse. As we say in [my country], "you jump from the pot to go into the fire." So you might go somewhere more good, I might go somewhere more worse, you understand?"[26]

On the other hand, employers are able to transfer SAWP workers to other employers as standard practice to account for different farm and different growing seasons (Expert Testimony of Kerry Preibisch in *Peart v. Ontario (Community Safety and Correctional Services)* 2011 HRTO 2157).

Isolation, Racism, and Unfree Labor

The workers work in predominantly white rural communities where they experience racism and discrimination. Research shows that employers and community residents perceive SAWP workers in "highly racialized terms" (*Peart v. Ontario (Community Safety and Correctional Services)* 2011 HRTO 2157 at para 86). The racism faced by SAWP workers in the community and workplace is well-documented (Preibisch 2007; Preibisch and Binford 2007; Mojtehedzadeh, Keung, and Rankin 2017). Farmers are known to keep the housing out of sight of neighbors fearing complaints. Local Canadians avoid contact with workers by avoiding areas visited by the workers during their off-days. Townships in Southern Ontario have demanded anti-loitering legislation and have shown strong resistance to any proposal to house the workers in the townships.

Extensive academic scholarship on the SAWP program, specifically, and temporary foreign worker programs, in general, has highlighted the ensuing institutionalization of racialized exploitation, "unfree labor," and precarity and the numerous ways in which the dignity and rights of the workers are violated (McLaughlin and Hennebry 2013; Fudge and MacPhail 2009; Lenard and Straehle 2012; Satzewich 1991; Basok, Bélanger, and Rivas 2013; Hennebry and Preibisch 2012; Binford 2013; Nakache and Kinoshita 2010).

In summary, the preceding presentation of the immigration history and structure of the SAWP program highlights three aspects that contribute to the political environment for legal mobilization by TFWs. First, immigration is entangled with the agricultural sector as the state has deployed immigration policy to import foreign labor to meet the seasonal demands of the agricultural sector. Second, at the same time, the Canadian state has attempted to meet this demand by giving preference to "desirable" immigrants who were, historically, white Europeans. As European labor supply declined, Canada turned to poor, racialized workers from the Caribbean and Mexico for its seasonal agricultural labor needs. Finally, the unique barriers that TFWs face - lack of access to citizenship, precarious working conditions, isolated living conditions - stem from the intersection of the historical construction of racialized TFWs

[26] SAWP worker, statement noted by *Justicia*, May 2016.

as undesirable citizens and the neoliberal need to maintain a steady supply of cheap labor in agriculture.

IV. Conclusion

Agriculture occupies an important place in the national identity of Israel and Canada. The settlement of Europeans in Canada was based on cultivating on usurped Indigenous land and the creation of Israel was rooted in the Zionist principle of "causing the desert to flower" (Tzfadia and Yacobi 2011). Agricultural nationalism has led to the creation of a special status for the agricultural sector that is rendered economically viable through state subsidies and through the seasonal temporary foreign workers program. Although the political and historical context in Canada and Israel are manifestly different, analysis of Israel's foreign work program in agriculture illustrates a similar trajectory where the political economy of agriculture intersects with the state's ideological and political apparatus to produce a foreign worker program under immigration law that closely corresponds with Canada's SAWP. TFWs in both countries ensure a ready supply of cheap, seasonal labor as no citizens want to perform strenuous agricultural work without a guarantee of year-round employment. As noted earlier, TFWs are presented as a "triple win" as they benefit host countries, provide employment to "low-skilled" foreign workers, and boost remittances for the sending countries. Furthermore, TFWs are not seen to pose a demographic threat to the receiving nation since TFWs are not allowed to make a claim toward permanent residence.

Despite the rhetoric of the triple win, TFWs represent a case of "unfree labor." It is clear from the historical discussion I have presented in this chapter that TFWs have always been subject to exploitation, marginalization, and precarious employment in the two countries. Israel and Canada have responded to critics of TFW programs by placing the blame on recruiting agencies or bad employers or poor enforcement, but rarely have they acknowledged how immigration law itself produces the precarity of TFWs. It is ironic that TFWs are the basis to prop up agricultural nationalism but they themselves are denied access to becoming citizens of the receiving state. Traditional advocates of labor protection have also had a dubious role in creating the precarity of TFWs and often ignored the plight of TFWs.

The historical background on TFW programs makes apparent that TFWs face many structural barriers that impede legal mobilization to claim rights and status. Despite the odds, TFWs have engaged in the important endeavor of collective legal mobilization. In the next two chapters, I discuss how the various factors for mobilization I presented in Chapter 1 – political environment, legal environment, and support structures – came together to enable TFW mobilization in Israel and Canada, respectively.

Chapter 4
Rights of others: Constitutional rights for foreign workers in Israel

I. Introduction

Israel represents a crucial case for legal mobilization of temporary foreign workers. Israel has a formal temporary foreign workers program to support labor demand in the agriculture, construction, and caregiving sectors. The Israeli Supreme Court is the only court in the world that has found the "binding arrangement" system (work permits tied to employers) unconstitutional.

In particular, an effective advocate has emerged in *Kav Laoved*, an Israeli labor law NGO that has brought numerous cases of exploitation of temporary foreign workers before courts, including the impact litigations before the Supreme Court. This chapter describes the story of and reasons for the successful legal mobilization of foreign workers in Israel by *Kav Laoved* and interrogates the role of foreign workers, or lack thereof, in legal mobilization.

The previous chapter presented a background of the program explaining how the nation-building of a Jewish state and global markets played a role in the development of the temporary foreign worker program in Israeli agriculture. The rest of this chapter is organized as follows. In section II, I provide a description of the type of legal mobilization that occurred in Israel including an overview of the important binding arrangement case and actions that foreign workers themselves have taken towards collective mobilization. This sets the stage for inquiry into the conditions that led to successful legal mobilization of TFWs' rights in Israel. In the subsequent sections, III and IV, I describe the political environment and the legal environment, respectively; both together constitute the opportunity structure for legal mobilization in Israel. Section V offers an examination of the resources available for mobilization by describing the operations and strategies of *Kav Laoved*. Israel's legal mobilization is driven by the lawyers of one organization, *Kav Laoved*. It stands as a case where Israeli elites use the law for advancing the rights of TFWs, but where there is limited evidence of worker mobilization. I conclude this chapter with a discussion on the implications of such a type of legal mobilization.

II. Legal Mobilization in Israel

Israel stands as a unique paradigm for extensive legal mobilization on behalf of temporary foreign workers. Firstly, it is the only example of a successful change to the strictures of the temporary foreign worker program through litigation in courts. Secondly, they have all been spearheaded by one organization: *Kav Laoved* - Workers' Hotline (not to be confused with another organization called *Hotline for Migrant Workers*).[27]

[27] The history and origins of *Kav Laoved* are discussed under the section for support structures.

Kav Laoved has filed numerous petitions in the Israeli Supreme Court (also referred to as the High Court), often in partnership with other organizations and lawyers, some of which have met with success. In 2006, the Israeli Supreme Court granted *Kav Laoved*'s petition for the right to change employers for Israel's non-citizen guest workers, becoming the only court in the world to recognize a constitutional right to change employers for migrant laborers (*Kav Laoved vs. the Government of Israel* H.C. 4542/02 (2006)).

a) The Binding Arrangement case - The right to change employers

In 2002, *Kav Laoved* brought the petition against the binding arrangement along with several other human rights organizations. They were represented by the staff lawyer from the legal clinic at the Tel Aviv University's Faculty of Law. The immediate impetus, as stated in the decision, was a government order (no. 1458 of 17 February 2002), allowing 6,000 foreign workers from Thailand for agricultural work even as the government had widely publicized a "Closed Skies" policy, which barred all foreign workers from working in Israel. The Supreme Court was presided by the liberal chief justice, President Aharon Barak, the Vice President Justice Cheshin and Justice Levy. Justice Levy penned the majority opinion and Justice Cheshin wrote a concurrent opinion.

The petitioners appealed to the Court for an interim injunction that would halt the government order on the basis that it violated the rights enshrined in the Basic Law of Israel that was applicable to *everyone* within Israel. They argued that the binding arrangement was a serious violation of the human rights of foreign workers – their dignity, liberty and their rights under employment law – and it makes them "the property of their employers." In addition, the arrangement infringes the basic right to freedom of occupation and leads to the "creation of a class of inferior workers, which is tantamount to a form of modern slavery." Since the worker essentially is the property of his or her employer, it denies the autonomy of the worker and the inherent right to human dignity.

Furthermore, the petitioners argued that the arrangement weakens the bargaining power of the workers and prohibits them from engaging in their freedom of employment contract, results in their absolute dependency on the employer, and puts them in conditions of exploitation and duress. They provided evidence to show that the large amount of debt accrued by the workers to arrive in Israel compels them to work for the employer under any conditions. This allows the employer to exploit the workers and gives employers the power to take away their passports, keep them in conditions of imprisonment, not pay wages, and engage in violence and inhumane treatment of the workers. If the TFWs were to realize their inherent freedom to be released from an employment contract, when faced with circumstances of exploitation and abuse on the part of the employer, wrokers automatically lose their status and become criminals who are liable to be arrested and deported at any time. Thus, essentially, their basic right to be released from an employment contract, a right given to every worker in Israel, is violated. Not only does this fear of losing their job prevent them from accessing medical insurance, but it also deprives them of any chance to bring their cases before the courts and tribunals. The organizations further argued that the arrangement also significantly affects the conditions of work of Israeli employees in those industries where foreign workers are employed.

As a remedy, the petitioners suggested a sectoral work permit that would tie the workers' legal status in the country to a particular industry, as opposed to a specific employer. They provided evidence to show that this practice was prevalent in other European countries and allowed for better market competition. It would also benefit employers by allowing them to employ other workers in place of those who left. The state's interest in supervising the foreign workers in Israel could be realized by means of a registry to which the foreign workers report their change of employment. This arrangement would "properly balance the various considerations and interests."

The Israeli government, as respondent, emphasized the need to control illegal migrants, which required it to supervise the entry and employment status of foreign workers. Interestingly, the government also criticized the temporary worker program and stated that it only provides "*immediate* economic advantages for employers and the economy." It showed that it has harmful consequences in the long-term, including changes to the employment and wage structure in the industry, harm to poorer Israelis who compete with the foreign workers for employment, loss of foreign currency, creation of a dependence on imported cheap manpower, and other social problems such as alleged criminal activity and increased visibility of a foreign population. However, the government went on to argue that it is precisely these reasons, which make it important to restrict the mobility of foreign workers. The government stated that the program did allow for changing employers under certain conditions.

The government also argued that freedom of occupation is only given to citizens and residents of the State of Israel. Any violation of basic rights to dignity and liberty of the foreign worker is constitutional as it is done pursuant to statute and there are sufficient procedures to take into account the 'human and public interest' by balancing between competing interests.

Employer groups had also intervened in the litigation to emphasize the labor shortage and need for foreign workers. They also argued that there was no exploitation and there were regulations to discipline exploitative employers. They maintained that the program was not to benefit foreign workers but employers dealing with acute labor shortages and that changing the nature of the work permit would adversely affect employers. They pointed out that sectoral work permits would give undue influence and power to manpower companies, who would be licensed to monitor and provide alternative employment to foreign workers within an industry. The sectoral arrangement would increase the dependence of the foreign workers on the corporations and reduce even further their bargaining power. It would also distort the employment relationship "by creating an artificial distance between the worker and his direct employer."

In determining the facts, the Court relied extensively on literature and reports of foreign worker programs in other countries, especially reports by the International Labour Organization (ILO) and reports by government agencies, which acknowledged the exploitative conditions that foreign workers endured.

Justice Levy's majority decision ultimately relied on principles of *labor and employment law* that are enshrined in the Israeli constitution as opposed to non-discrimination/equality, as seen in the litigations in Canada and Hong Kong. He stated that sending the workers home without

their paying off their debts was a "*moral* economic blow." Overall, the decision relies on past precedent that interprets the concept of human dignity, the "central value" of Israeli Constitutional law, as freedom of human action, which in turn involves the freedom to a labor employment contract. The binding arrangement imposes a harsh consequence when a worker engages in terminating his contract, a labor right that he possesses. Thus, the Court decided that the binding arrangement violates the workers' inherent right to liberty and "human freedom of action" and "denies the autonomy of the free will." It "tramples the basic right to be released from a work contract." It takes away a basic economic bargaining power from a party to employment relations who is already weak and this, the majority decision asserted, is a *moral* defect. The majority decision also relied on the nature of meaningful consent in an employment contract when all the choices available to the worker impinge on the worker's liberty. Although the Court did not rule on the question of whether foreign workers have the right to "freedom of occupation" that is enshrined in the Basic Law, the majority decision pointed out that it cannot be said that the foreign workers do not enjoy this constitutional right and the universal application of the Basic Law implies that, at the very least, workers enjoy the core values that are enshrined by the freedom of occupation provision in the Basic Law.

The decision stated that while the Ministry of Interior (the branch that formulates immigration law) has broad discretion, the harm caused by the means used (the binding arrangement) is not proportionate to the benefits and neither is there a rational connection between the binding arrangement and desired policy goals. In fact, the Court found that the binding arrangement increases the workers' incentives to become undocumented to be able to change employers and work in better conditions. The concurring opinion by Justice Levy also relied on the basis of the dignity of the workers, to state that they cannot be reduced to chattel or property.

However, the court acknowledged that the nursing and caregiving industry have specific concerns because the employers (the elderly and those in need of care) themselves are vulnerable which "justifies placing certain obstacles in the path of person working for them to stop them resigning from their work with them" (para 59). Nevertheless, the Court ruled that caregivers cannot be forced to work under an exploitative employer and they cannot be subject to the binding arrangement as is.

In addition to labor and employment law, both majority decisions made a passing reference to the obligation to treat foreigners as equal and with respect by quoting from the Bible:

> 'And if a stranger dwells with you in your land, do not oppress him. The stranger who lives with you shall be like one of your citizens, and you shall love him like yourself, for you were strangers in the land of Egypt' (Leviticus 19, 33-34 [30]).

While the reference to equal rights of foreigners appears to be extensive and almost conferring de facto membership, it is apparent from the above analysis that the generosity of the court is limited to labor and employment rights.

b) Other cases

In 2006, *Kav Laoved* petitioned to limit the amount of commissions paid by migrant workers to secure work in Israel. The Court decided that the State must provide an update regarding

enforcement of regulations pertaining to recruitment agencies and promote agreements with sending countries. As a result of this petition, Israel and Thailand signed the Thailand-Israel Cooperation on the Placement of Workers (TIC) agreement in 2009 aimed at setting a new recruitment arrangement in the agricultural sector, supervised by the International Organization for Migration (IOM). The agreement allows agricultural workers to enter Israel under a permanent permit for 63 months (Nathan 2011, 14).

In April 2011, the High Court found unconstitutional the Israeli government's "procedure for the handling of a pregnant migrant worker." The procedure forced pregnant workers to choose between termination of employment or sending the baby abroad in order to qualify for visa renewal. The High Court ruled that the procedure "harms the worker's constitutional right to parenthood" (HCJ 11437/05, *Kav LaOved v. Ministry of Interior* [2011]). On the other hand, the High Court sided with the National Labor Court in deciding that caretakers who work twenty-four hours a day are not eligible for compensation for extra hours beyond the eight-hour day (HCJ 1678/07 *Gloten v. National Labor Court* [2009]).

In 2015, *Kav Laoved* launched a major class action on agricultural "work-study" students for 100,000,000 NIS, alleging fraud against one of the most prominent recruiters of foreign student workers in agriculture, Agrostudies (Kav Laoved 2015).[28] In their petition, *Kav Laoved* asserts that Agrostudies is another manpower agency that provides cheap labor to the agricultural sector. The "tuition fees," they allege, should be viewed as a brokerage fee, which is illegal by law and contradictory to the bilateral agreement with Thailand, since the students are not in any academic program and they only made to perform manual labor in the farms alongside the TFWs. They argue that the agencies collect large sums of money under the guise that it is an academic institute but essentially it is a way to "bypass the restrictions regarding the number of workers legally authorized to work in the sector." The case is still ongoing.

c) Collective Action by Workers

In the remainder of this section, I discuss the ways in which TFWs in Israel have attempted to mobilize but have faced significant barriers in doing so. It should be noted that legal mobilization is a function of the sector in which the workers are employed along with the cultural, political, and social background of the workers.

Agricultural Workers

Outreach to foreign agricultural workers remains one of the most critical barriers to legal mobilization. Israel is unique in having an organization like *Kav Laoved* that is dedicated and committed to providing specific labor law assistance to agricultural workers. The organization has allocated a special open day for providing exclusive legal help to agricultural workers every week, which involves having Thai interpreters and caseworkers, who have knowledge of the specific legal needs of agricultural workers. They also conduct outreach to farms once a month.

[28] KA (*Kav Laoved* caseworker), interview with author, November 2016.

However, unlike in the other cases, *Kav Laoved* is the *only* organization that does *any* outreach to foreign agricultural workers. In Canada and the U.S., non-legal labor organizations (such as unions and workers centers), immigrant rights groups and cultural and religious groups are also involved in organizing and reaching out to foreign agricultural workers. Although such groups are often unable or unwilling to provide full legal assistance, they play an important role in getting workers together from different farms for various events, which creates a potential for organizing of the workers and provides a venue for giving legal help using volunteer lawyers and paralegals. Such groups are absent in Israel. Moreover, *Kav Laoved* has only two organizers involved in outreach and is reliant on the availability of interpreters as there is no employee that speaks the language of the Thai workers.

Furthermore, despite the availability of legal help, workers are unable to readily access the *Kav Laoved* offices in the cities and end up paying large sums of money to get a taxi from their farm to the office.[29] Although Israel has an excellent public transport system, the workers are often unaware of how to use the system. In addition, usually the day-off for the workers is on Sabbath when the public transport system is closed. The *Kav Laoved* organizers often make farm visits during Sabbath, but the number of farms they can visit in one trip is limited.

While *Kav Laoved* has had remarkable success in courts on behalf of agricultural workers, it was not part of any mobilization by the foreign workers. The removal of the binding arrangement to this day has not affected the workers in any significant way as they are still unable to change jobs and are still plagued by access issues. *Kav Laoved* litigates fewer cases for agricultural workers than caregiver workers in labor courts because of the access issues. *Kav Laoved* had 20 cases in the week I visited the offices, two of which turned into lawsuits before the lower courts. Although this might seem a large number, this is still less than the 100 or so caregivers' cases they saw that week. *Kav Laoved* has helped a few agricultural workers to find alternative employment but the numbers are still low.

As stated above, the binding arrangement ruling has had little impact on the day to day realities of the foreign workers for multiple reasons, a point that was emphasized in several of my interviews. The workers still rely on the manpower companies for changing employers. The employment contract, instead of being with employers, is now with "manpower companies," who have even less incentive to monitor the conditions of the contract. The workers are reliant on these companies to change employers who often resist changes or transfer workers from one exploitative employer to another. A recent *Human Rights Watch* report talks about a case where all the Thai workers in a particular Moshav farm went on strike demanding a change in employer but the manpower agency refused to help stating that they would have to find alternative employment themselves (Human Rights Watch 2015). *Kav Laoved* represented the workers and negotiated better pay and working conditions but the strike leaders were soon fired. The manpower agency transferred them to two other farms, one after the other, which had worse conditions. Ultimately, *Kav Laoved* had to find them employment with a kibbutz. An explanation for the limited impact of a top down legal ruling in Israel is that there is no collective mobilization of workers themselves, a point I stress in detail in subsequent sections and chapters of this dissertation.

[29] KE (*Kav Laoved* lawyer), interview with author, November 2016.

While the overturning of the binding arrangement allowed *Kav Laoved* to at least find a new employer for these workers, it is still very difficult for workers to change employers, especially since agricultural workers are so isolated that they are unable to search for alternative employment even when their employers breach their contracts. The farmers also lobbied on the basis that the removal of the binding arrangement has affected their right to make a living (Kemp and Raijman 2014). As a result, the Ministry of Interior has only half-heartedly implemented the ruling by creating a "Bureau system" where a government bureau was given charge of the permits, but they continued to be provided such that the workers remained with a particular employer. In 2011, the sector-based work permits for caregivers were geographically limited; a new Bill limited the number of employers they could transfer. The workers continue to accrue high levels of debt just to reach Israel, which makes them reliant on having continuous employment under any conditions.

Moreover, the labor conditions for temporary foreign workers have only marginally improved because of legislative inaction (Kav Laoved n.d.).[30] For example, after much lobbying by *Kav Laoved*, an ombudsman office was created to protect rights of foreign workers. Yet, the office has limited personnel and no resources. *Kav Laoved* initiated a case to provide more funding for the office.

There have been cases where workers have organized and gone on strikes. When *Kav Laoved* finds out about a strike, *Kav Laoved* organizers go to the farms to inform the workers of their rights and they also offer their services as mediators with the employers. Sometimes employers are happy about the intervention of *Kav Laoved* as *Kav Laoved* is able to converse in "the same cultural language" with the employers, i.e. they can talk to the employers as Israelis do since often the employers are frustrated with the way Thai workers communicate, which they find to be different from the "Israeli way."[31] However, the workers are reliant on a singular organization to claim their legal rights.

Overall, the workers continue to be subject to wage-theft, an exploitative workplace, and poor housing conditions. According to *Kav Laoved*, they received 1,372 appeals and complaints in 2014 from foreign workers who had arrived in Israel under the bilateral agreement system (Center for International Migration (CIMI) and Israel Population and Immigration Authority 2016). 32 percent of the complaints related to wage issues, and 25 percent concerned the conduct of the employer or the employment agencies, such as substandard accommodation. In 2015, the complaints increased to 1,557, of which, 33 percent concerned the conduct of the employer or the manpower company. The percentage of wage theft complaints remained the same. Workers usually reached the point of complaining to *Kav Laoved* only under extreme conditions, for example, when faced with the threat of leaving or losing the job or being forced to change employers.[32] Abuse of foreign workers has been covered extensively in the media and has drawn policy attention by lawmakers (see for example Goldlist-Eichler 2015 and Udell 2014). The unfair treatment of workers has also noted in multiple research reports (See

[30] Ibid.
[31] KC (*Kav Laoved* caseworker), interview with author, November 2016.
[32] Ibid.

for example Kemp 2010).

The recent *Human Rights Watch* report documented how the foreign agricultural workers are forced to work long hours in excess of the legal maximum, in unsafe working conditions, and housed in makeshift and inadequate accommodations (Human Rights Watch 2015). The report interviewed several workers about their working conditions summarizing:

> "A Thai man working in a farm in the north of the country told Human Rights Watch that he felt "like dead meat" after a working day that typically began at 4:30 a.m. and ended at 7 p.m. A colleague of his described employers watching them working in his fields through binoculars and treating them "like slaves." Several groups of workers said they typically worked 12 hours per day, seven days per week, and received only four days' vacation per year" (Human Rights Watch 2015, 2).

Why has the legal change not translated to substantive change for the workers? In Canada, as the next chapter demonstrates, advocacy organizations use even the minimal panoply of right that apply to foreign workers to encourage workers to make claims, support them through their claims-making process, and use these individual cases for direct action and create a discourse that addresses the broader structural problems that affect all workers. Thus, legal mobilization without organizing and mobilizing workers themselves can have very minimal impact on the ground.

Student/Intern Workers

In recent years, agricultural farm owners have been using students from other countries who arrive on work study permits. These students work alongside the Thai workers, but they often know English, are more self-aware of rights and issues, and are less dependent on the employment. For example, a few years back, about 50 Burmese student workers organized themselves in a farm, where *Kav Laoved* had done no outreach, to complain about the working conditions. It was only after this action by the Burmese student workers that *Kav Laoved* became aware of the issues concerning the work-study students.[33] The *Kav Laoved* organizers had seen a few non-Thai workers when they were assisting *Human Rights Watch* with their report, but the strike made them realize the unique issues affecting the student/intern workers. These students are also more willing to take risks. The *Kav Laoved* organizer described how a group of Senegalese student workers contacted the *Kav Laoved* office to request a meeting at the farm.[34] Concerned about the employers as well as the Thai workers who worked with them, they met the *Kav Laoved* organizer behind a gas station. It is this group of students who helped spur the ongoing class action I described earlier. The first Senegalese student to complain was a woman who sent an email to the recruitment company.[35] She was soon fired, and she complained to *Kav Laoved*. When *Kav Laoved* tried to meet her behind a gas station, she was arrested by immigration officers and taken to detention. She was released and allowed to stay for two months so that she could give her testimony in the class action, where she was designated the named plaintiff.

[33] KE (*Kav Laoved* lawyer), interview with author, November 2016.
[34] Ibid.
[35] Ibid.

The students have a complex relationship with the Thai workers. They are supervised and trained by the Thai workers. However, employers take them aside and pay them separately. The Thai workers feel that these students make more money than them, which they resent deeply but are also happy about the knowledge of rights and issues that the students share with them.[36] It can be speculated that the presence of the student workers increases the legal consciousness of the Thai workers and their willingness to take risks to make legal challenges.

Caregivers

Kav Laoved, to use the words of one of the litigation lawyers, is "disproportionately attuned to the caregiver sector."[37] Caregivers usually understand and speak in English. Many of them have learned Hebrew as well. Caregivers have more networks, are located in urban areas, and have easier accessibility to *Kav Laoved* offices. They have the language skills and have been coming to Israel and residing for long lengths of time since the early 1990s. One of the directors at *Kav Laoved* confirmed that workers' rights consciousness is dependent on the length of their stay in Israel.[38] Caregivers are also very active on the *Kav Laoved* Facebook pages and have easy access to know-your-rights pamphlets. During the caregiver open days at the *Kav Laoved* office, I observed that there was rarely any sitting room. *Kav Laoved* has more interpreters for caregivers (even if they are not often needed) from the Filipino and South Asian communities, than for Thai workers. Similar to Hong Kong, the caregivers are aware of how the program works in different countries and many of them aspire to come to Canada because of the access to permanent residence and multicultural policies. The little success that a campaign to unionize TFWs achieved was with caregivers. Caregivers also uniquely raise gender and women's rights issues that *the Kav Laoved* lawyers personally align with and find support for among many liberal women's rights organization.[39] It is not surprising that the outreach to the caregivers has been more successful and they form a substantial part of the TFW cases for *Kav Laoved*.

The above discussion of the nature of legal mobilization in Israel establishes the background to examine what conditions allowed *Kav Laoved* to mobilize the courts on behalf of the workers. It highlights the lack of worker mobilization among TFWs in the agricultural sectors, even compared to other TFW groups. As a result, TFWs in other sectors are able to asserts their rights more successfully. In the following sections, I analyze the political environment, legal environment, and resources available to agricultural foreign workers in Israel to explain the type of legal mobilization that occurred in Israel.

III. Political environment

This section describes the political environment around immigration and citizenship and attitudes towards foreign workers. The political environment not only influences the courts as

[36] Ibid.
[37] KG (*Kav Laoved* lawyer), interview with author, November 2016.
[38] KA (*Kav Laoved* caseworker), interview with author, November 2016.
[39] KG (*Kav Laoved* lawyer), interview with author, November 2016.

it sets the boundaries within which the courts can freely overrule legislative acts, but also sets the strategies for advocacy organizations.

a) Agricultural nationalism and citizenship regime

Israel was created as a Jewish state after a 1948 Declaration on the Establishment of Israel, which was instituted subsequent to a United Nations Declaration. Only 35 percent of Israel's population in 1948 was native born. In 2016, Jews constituted 74 percent of Israel's population, 25 percent of whom are foreign born.[40] Thus, Israel is oddly both an ethno-nationalist as well as an immigrant state, where Jewish immigration is an essential characteristic of the Zionist aspect of the Israeli state. However, despite Israel factually being constituted through (Jewish) migration, the discourse firmly disavows the language of "migration." As the Supreme Court Justice Elyakim Rubinstein expressly stated: "The country is perceived as a *medinat aliya*, meaning a country of *shvut* [return], not a country of immigration" (*Haaretz*, June 30, 2005). There is, therefore, openly explicit and formal demarcation between Jews and non-Jews (Rosenhek 2000: 53). Thus, even during the most benign, less xenophobic period of the 1980s and 1990s, foreign workers were still cast as "categorically excluded others" (Willen 2007). In other countries such as in Europe and North America, there is legal or social prohibition against supporting egregiously exclusionary or discriminatory policies and practices, even in immigration law.

Despite the ecumenical attitude that seeks to embrace Jews from all cultures and parts of the world, the society is deeply hierarchical, where the Ashkenazim (Jews of European descent) occupy a higher social stratum than the Mizrahim (Jews of Oriental descent) and other newcomers (recent Jews from Eastern Europe and Russia) (Drori 2009, 23). In addition, Arab/Palestinian citizens of Israel occupy the lowest strata of rights and social acceptance. Institutional arrangements, structural inequalities, and societal conflicts reflect this stratification, which complicates the political environment for foreign worker advocacy. Elite, liberal Israelis who work in the radical NGOs fighting for the rights of foreign and Palestinian populations are often Ashkenazi and so are their supporters who mainly live in the richer city of Tel Aviv.[41] Palestinians, Palestinian Israelis, and Jews who occupy the poorer and socially inferior strata display the most opposition to foreign workers (Raijman et al. 2008; Raijman 2010).

In the 1990s, with the large population of undocumented and documented foreign workers, asylum-seekers and their families, it seemed possible that Israel could have moved toward a more civic nation-state. This could have provided some resolution to the Israel-Palestine conflict as rights and citizenship would have become equally shared irrespective of religious and ethnic affiliation. However, after the deportation campaign, described in the history of the foreign worker program in Chapter 3, and the relentless anti-immigrant stance taken by the government, there appears to be no scope for access to citizenship for foreign workers or of political and social equality.

[40] Central Bureau of Statistics, State of Israel. 2016. *Media Release: 68th Independence Day - 8.5 Million Residents in the State of Israel*. http://www.cbs.gov.il/www/hodaot2016n/11_16_134e.pdf.
[41] RA and RB (academic researchers), interview with author, November 2016.

In the previous chapter, I also established that agricultural settlement formed an essential part of state creation in the early years of the formation of Israel and continues to be integral to Zionist principles. The agricultural sector is therefore seen as essential to the identity of the Israeli state and is protected through extensive subsidies and regulatory benefits (Bartram 2011).

Israeli farms are divided into Moshavim (individual owners who are collectively organized) and Kibbutzim (collectivist farms). The Kibbutz farms work as a collective and are considered to be relatively less exploitative than the Moshav, which started as cooperative farming villages as part of the Zionist ideology but soon devolved into privately owned farms (Kaminer 2016). Changes in the economy and gains in political mileage of the Moshavim have resulted in the Moshavim, which predominantly rely on foreign labor, becoming the predominant form of agricultural farms. The Moshav farms are collectively organized under the umbrella "Moshavim movement." Several members of the movement have held important positions in the government Ministries and leadership positions in the Labour and other parties. The Moshavim Movement has had a monopoly on recruitment and control of the foreign workers since the 1970s. Several of the interviewees pointed out that manpower companies and the employers would not be able to engage in their exploitative operations without state officials turning a blind eye (also see Kemp and Raijman 2014).

The agricultural employers in Israel are well organized and have much influence in the Knesset, as about one-third of Knesset members have identified officially with the agricultural lobby (Bartram 2005). Furthermore, several manpower companies are owned or managed by Knesset members and their families.[42] The Labor Party in Israel has also been deeply involved in making policies for the development of agriculture and has strong allies in the Moshav movement. This comports with evidence from other countries where labor parties and unions have had a strong anti-immigrant bias to protect the welfare state and the rights of citizens.

b) Attitude towards TFWs

The opposition to the foreign worker program spans the spectrum from labor and social welfare state advocates to xenophobic nationalists who see foreign workers as a threat to the Jewish character of the state. As a result, several departments in the government have generated reports that criticize aspects of the TFW program. To bolster their arguments, they also point to the exploitative conditions under which the foreign workers live. The opposition to the binding arrangement, for example, came from several quarters. Financial institutions like the Central Bank of Israel opposed the agreement because it institutes a powerless labor force and prevents labor market competition, which in turn artificially changes the competitive market price of whole labor sectors (Kemp 2007). The Minister of Labour opposed the binding arrangement for similar reasons but from a labor rights perspective and has even demanded a limited amnesty for undocumented workers (Kemp 2007 referring to the 2001 report by the *Special Committee for the Evaluation of the Magnitude of Labour Migration*). In its decision against the binding arrangement, the High Court of Israel extensively relied on two Israeli government documents: a) the State Comptroller's Annual Report for 1998 and b)

[42] LB (lawyer) and RC (academic researcher), interview with author, November 2016.

a 2006 report by the Advisory Committee for Examining the Immigration Policy of the State of Israel.

Ironically, the primary document used in the binding arrangement case, the State Comptroller's Annual Report for 1998, was drafted as a result of increased anti-migrant worker sentiment in the legislature and public. In 1996, the government deemed that large numbers of foreign workers were undesirable "from social, economic and security viewpoints" and decided to reduce the number of foreign workers in Israel as policy. The State Comptroller's report documented the high amounts of debt accrued by workers to manpower companies and agents. It highlighted how employers breached the Minimum Wage laws and underpaid the workers to keep costs low. It also stated that "the work and subsistence conditions offered to foreign workers are poor" and many of them lived in crowded accommodation and "unpleasant living conditions." The Court also relied on a more recent 2006 report prepared by a government committee, the Advisory Committee for Examining the Immigration Policy of the State of Israel, that recommended the cancellation of the foreign worker program. Given that there were official government reports on the problems with the foreign worker program, the decisions of the Supreme Court are not as radical as it may appear. It also shows how the political environment plays an important role in the decisions of constitutional courts.

The reports (and the Supreme Court decision of 2006) showed that restrictive binding arrangement increased exploitation and vulnerability and encouraged workers to become undocumented so that they could leave their employers. By becoming undocumented, they could remove themselves from direct state control (via the employers) and gain social space to develop community life and form social organizations and even make demands from the state and polity, as was done by African and Latin American migrant worker groups in Tel Aviv (Raijman, Schammah-Gesser, and Kemp 2003). Rosenhek (1999) has similarly argued that "illegality," where there is a large undocumented community, can be a "resource" for migrant workers as they are able to escape occupational bondage, remain in the country for longer, get married and have families, and establish social and community ties (Rosenhek 1999; See also Kemp and Raijman 2014). One of the aims of temporary foreign worker programs is to control undocumented migrant populations. Thus, it was in the Government's interest to change policies if the TFW program was not achieving its essential goal. The Supreme Court thus crafted its argument to show that its decision comports with the aims and goals of the government.

Thus, the foreign worker program exists precisely because it is not by definition a "demographic threat," since the workers will leave the country, a fact emphasized in the government reports for TFW programs (Averbukh 2016, 91). Employers emphasize the fact that foreign workers do not pose a threat to Jewish ethno-nationalism and are a better alternative than Palestinian workers. In a protest demanding more foreign workers, farm owners held up signs that stated "Better Thai Workers than Palestinians" (Lefkovitz 2002).

In 1999, the Government of Thailand threatened to file a multi-million dollar lawsuit against the government of Israel, the Moshav Movement, and local manpower agencies for failing to honor their contracts with Thai workers and keeping them in exploitative "sub-human

conditions" (Bar-Moha 1999). Although this single decision cannot be used to exaggerate the influence of the sending state on TFW programs, it was one more factor pressuring the Israeli government. There was also pressure from international and European governments to improve the conditions of TFWs. The Israeli government was, therefore, already attuned to the fact that it had to change some policies to maintain its diplomatic relations and international political status, even before the Supreme Court decision.

This is in contrast to the official attitude to the Seasonal Agricultural Worker's Program (SAWP) in Canada, which is lauded as a successful, controlled guest worker program that benefits all the actors: Canadian employers, the sending countries, and the workers. As the next chapter will illustrate, most of the criticisms are leveled against poor enforcement of the existing laws to protect workers, while the laws themselves have substantive approval. Even activist groups that advocate for access to citizenship and family reunification rights and diminishing the power of employers, do not demand the cancellation of the program as they view it as an entry mechanism for racialized workers from marginalized classes in the Global South and a counterpoint to the privileged "skilled" worker migration streams.

The positive interim ruling forcing the Israeli government to enter into a bilateral agreement with Thailand can be attributed to years of newspaper, government, and international reports on the abusive power of the manpower companies. In 1996, the Israeli Manpower Contractors Law (1996) was passed. It explicitly forbids Israeli companies from charging broker's fees from the workers for recruitment. The recruitment companies would avoid the law by charging the workers at the sending country such as Thailand and Philippines (Kemp and Raijman 2014). As early as 1999, the Ministry of Labor and Social Affairs condemned the manpower companies as mocking the laws and the Ministry. Even the U.S. Department of State, after lobbying by Israeli NGOs, condemned the practice as creating "debt bondage" and demanded that the Israeli state respond to the human rights violations (Kemp and Raijman 2014). The State Comptroller has repeatedly condemned the manpower companies as being one of the most profitable industries in Israel but where the state of Israel is only harmed not benefitted. Numerous newspapers have reported on the exploitation by manpower companies. It was, therefore, not surprising that the Supreme Court condemned the practice and demanded the Israeli government to take steps.

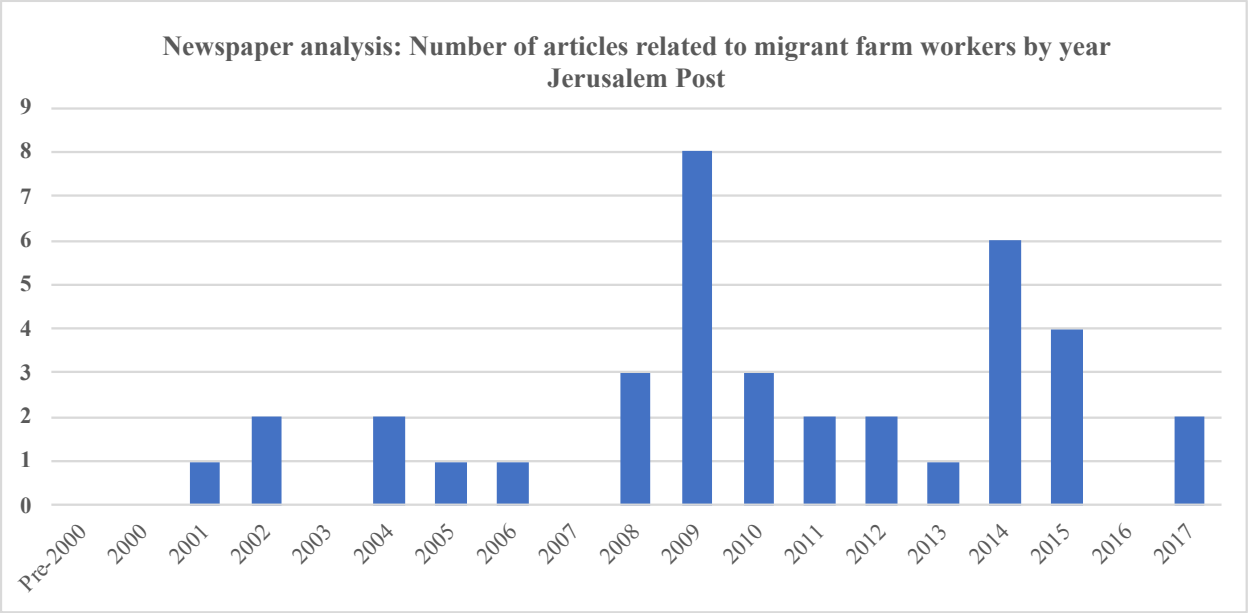
Irrespective of the attitude towards the program itself, the foreign workers themselves are not embraced as part of the community. The duration of residence of foreign workers is expected to be temporary and short. The visible presence, especially in cities, has created an anti-migrant worker discourse that describes the foreign workers as a demographic threat to the Jewish character of the Israeli state. As in other countries, Ajzenstadt and Shapira (2012) show that a criminal migrant discourse has also developed that characterizes the workers as thieves, drunks, or gamblers. Thai workers, because of their isolation and perceived docility, have so far been immune to this discourse.[43] Nevertheless, there have been several criminal cases brought against Thai and Filipina caregivers on the basis of drug use and abuse of employers, where the judges have displayed anti-immigrant and racialized language (Ajzenstadt and

[43]KD and KC (*Kav Laoved* lawyer and caseworker), interview with author, November 2016.

Shapira 2012). Thus, the foreign workers are simultaneously regarded as indispensable for a neoliberal economy and a threat to the nationalistic state (Kemp 2004).

In order to triangulate the assessment of the political environment and identify public attitudes towards temporary foreign workers, I undertook a newspaper report analysis (as described under the methodology section in chapter 2). I analyzed news stories that refer to foreign or migrant or Thai agricultural or farm workers in Israel, which have appeared in a major English language publication, The Jerusalem Post, which has its content readily available via the Lexis Nexis database. The Haaretz is the other major publication, which has some content in English. However, access to its archives is not readily available on an online database. Thus, unlike the analysis of Canadian media in the next chapter, the Israeli media analysis is limited since it only covers English language articles from one major news source. Nevertheless, it offers interesting insights on the media discourse around the foreign worker program. Coding and frame details can be found in Appendix 2. To maintain consistency, the same codes are applied in the analysis of newspaper articles in the Canadian case study. Figure 4 represents stories related to the coverage of the migrant farm workers program over time.

Figure 4: Number of Jerusalem Post articles related to migrant agricultural workers by year



For the most part, the foreign worker program did not get much attention beyond one to three articles annually. There was a peak in 2009 because tensions rose when a newly created unit in the Immigration Authority deported unauthorized migrant workers at the same time that farm owners were demanding even more migrant workers (Lappin 2009). In 2014, the war on Gaza resulted in a Thai migrant worker's death from rocket shelling. This raised concerns for safety for Thai farm workers as the Thai government got involved.

Figure 5: Attitude towards TFW programs in The Jerusalem Post articles

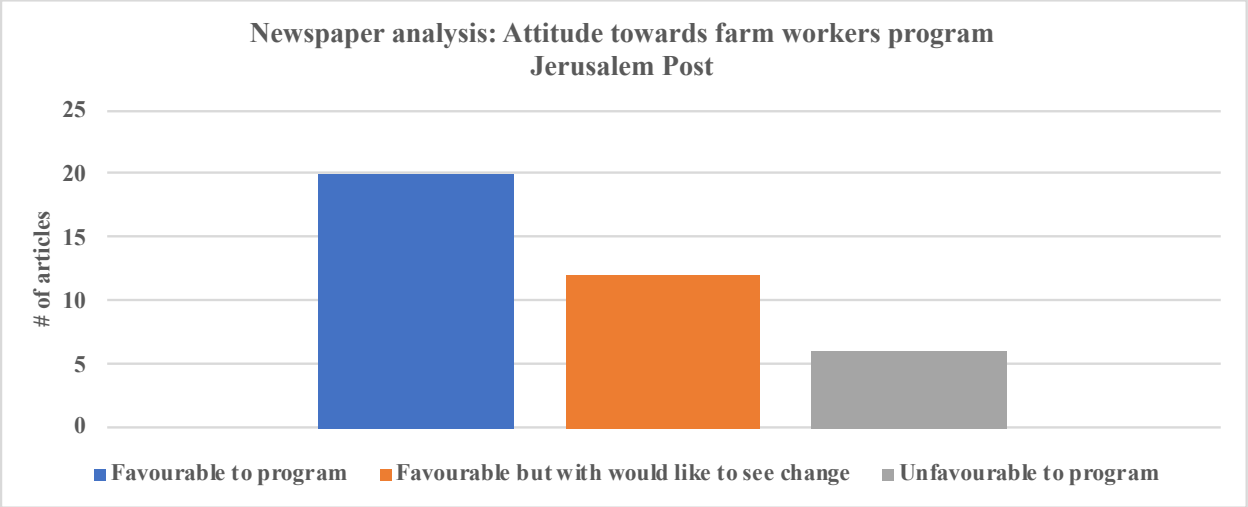
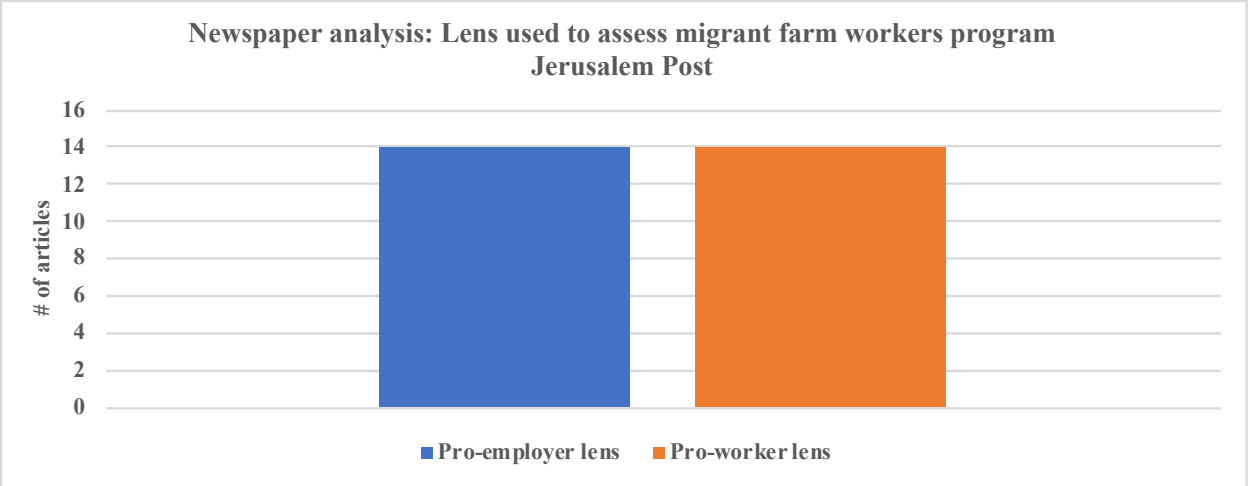


Figure 6: Lens used to assess TFW programs in The Jerusalem Post articles



The above two charts (Figure 5 and Figure 6) suggest that the *Jerusalem Post* articles reviewed the program favorably for the most part. However, most of the articles were driven by anti-Palestinian sentiment. As expected, a pathway to citizenship was never addressed and the workers were not seen as replacing Israeli workers. For example, the earliest story on migrant farm workers from 2001 titled, "Farmers fight over Thai workers" represents a theme that repeats itself over the next decade and a half. The 2001 article is concerned with the departure of Thai farm workers from agriculture to other sectors due to poor working conditions. At its heart, however, the fundamental concern the article expresses is a shortage of sufficient migrant farm workers in agriculture:

> "In light of the closure on Palestinian territories, hundreds of Thai workers have been wooed from their employers' fields by promises of better pay, Israel Shmidt, director of the Organic Agriculture Organization, told The Jerusalem Post yesterday.

> Due to a lack of Palestinian laborers many businessmen have offered Thai workers what seems to be better wages he said. In reality they are offered nothing more than slavery….
> The only problem is that Israelis do not want to take these jobs (a spokesperson) noted. The shortage of field workers has hurt the sector this year, with a growing lack of able hands. At least 10,000 new workers are needed immediately." (Muscal 2001)

The *Jerusalem Post*, perhaps more strongly than the left leaning paper, the *Haaretz,* evinces a strong pro-employer bias. Stories in the next two to three years cover the protests by farmers to pressure the government to increase the number of farmworkers. In a story in February 2002, the farmers carried protest sign such as "Give Us Workers" and "Better Thai Workers than Palestinians" demanding an additional 6,000 migrant farm workers (Lefkovitz 2002). A similar story in 2004 highlights the demands of a group of farmers "who traveled to Jerusalem to demand the government admit thousands of additional Thai workers and repeal the 8 percent tax farmers must pay for employing them" (Kreiger 2004). A 2008 article reflects that the subsidies that were put in place in the 1970s to support the agricultural industry (and identity) of the state of Israel were not as competitive as the American and European farm subsidies. Combined with increasing food prices and the undulating pressures of conflict, the article argued that Israeli farmers had to rely on migrant (non-Israeli) farm workers (Derfner 2008).

One article however laments the loss of Israelis working in agriculture and sees the foreign worker program as a necessary evil: "Having Israelis work in agriculture is a Zionist ideal. But the reality is that most Israelis don't want to do it" (Editorial 2008).

Apparent in many of the stories is the sentiment against Palestinian workers who used to work as agricultural workers before the first Intifada. It becomes evident from the reading of the media stories that Israelis were trying to maintain the goals of agricultural citizenship while trying to remain competitive in a global marketplace. The Israeli state is also trying to achieve these competing objectives while expanding settlements reliant on farming in southern Israel in proximity to their Gazan neighbors whom they view as posing a threat to their sovereignty (Kreiger 2005; Udasin 2014).

The working conditions were however criticized by half the articles, especially the activities of manpower (recruiting) firms (Lappin 2011; Hartman 2009; Friedman 2009; Udell 2014). *Kav Laoved* emerges as the most prominent voice on behalf of migrant workers with many articles referring to *Kav Laoved*'s cases and submissions before the Knesset (Hartman 2009; Berkowitz 2014; Kamisher 2017). In 2009, a story covers *Kav Laoved*'s bringing forward a charge of severe mistreatment of 12 Thai migrant workers against a farm employer who grows environmentally friendly produce. The media and *Kav Laoved* described the situation as "modern day slavery" as the employer denied the workers' basic human rights (Friedman 2009).

IV. Legal Environment

The legal environment consists of access to legal institutions, the laws that would apply to

temporary foreign workers, and historical legacies of rights and judicial activism around these rights. Israel has easy access to the constitutional court and specialized labor courts that encourage legal mobilization. While citizenship and immigration laws and social rights laws are defined narrowly as only for Jews or citizens, Israel has a broad gamut of labor laws that apply to all workers, irrespective of citizenship. These expansive labor laws have translated to rights legacies. Israel has a long history of considering labor rights as universal rights that can be availed by any worker in Israeli jurisdiction. In section II, I described the binding arrangement case before the Supreme Court (also called High Court) in detail to illustrate the kind of arguments that resonate before the Court. Israel has an activist constitutional court in general, and specifically in the arena of labor laws.

a) Access to Courts

The Supreme Court in Israel sits as both the high court of appeals for criminal and civil cases from the lower courts, and as a High Court of Justice (HCJ). The latter function is unique to Israel as the Court not only exercises judicial review over actions of all state agencies but also functions as the first and final instance allowing for direct petitions. A person (or a public interest organization) who believes that a state agency violated his/her legal rights may petition the court directly without going through the lower courts. The merits of the petition are reviewed by a single judge who may directly issue an *order nisi* (a non-binding interim ruling) demanding that the respondent (the State) appear in court. The order is often accompanied by an interim order preventing the state from further action for a specific period. Three judges will sit for a full hearing where the parties, including the respondent, can file affidavits and give oral submissions. Depending on the respondent state's explanation, the Court then decides to either dismiss the petition and nullify the order nisi or accept the petition and make the order permanent. In some cases, the first judge may also order a preliminary hearing of three judges before an order nisi is issued, in which the respondent's arguments are heard before the full hearing (Dotan 1999, 1062). In addition to procedural access, it is also inexpensive to file a petition in the Court. Importantly, the Court also does not penalize the losing party with costs. In this dissertation, I use both terms, the Supreme Court and High Court, to refer to this Court.

Israel also has one of the most liberal requirements for parties to petition the High Court. The broad right of standing allows for any public interest organization or NGO or individual petitioner to challenge state action even when they are not the directly injured party.[44] As a result, NGOs and individual petitioners are able to even challenge Israeli state action in the Occupied Territories. The lawyers I interviewed stated that the Court has become relatively less accessible in the past few years due to increased costs of petition and rejection of more cases in the first stage.[45] Nevertheless, the costs of a constitutional litigation remain much smaller and the access is much easier than in other jurisdictions.

Israel also has specialized courts to deal with specific issues. In addition to military tribunals

[44] HCJ 910/86 Ressler v. Minister of Defence 42(2) PD 441 [1988] (Isr.); HCJ 3239/02 Marab v. IDF Commander in the West Bank slip op. ¶ 46 [July 28, 2002] (Isr.).
[45] KD and KE (*Kav Laoved* lawyers), interview with author, November 2016.

and religious courts, Israel has specialized labor courts (Israel Ministry of Foreign Affairs 2015). The labor court system consists of regional courts and the National Labour Court, which functions as the appellate court for labor matters. The labor courts, especially the National Labour Court, have generally been progressive and liberal in protecting workers' rights and preventing employers from subverting employment standards (Davidov 2008, 2005). Despite its powers being limited jurisdictionally and in terms of prescribing remedies, the National Labor Court has been "much more active than the legislature or the Government" in protecting foreign workers (Davidov 2005, 20). They have thus been the primary source for ensuring enforcement of labor laws for foreign workers and non-unionized labor, as the government resists increasing resources for inspections and protecting foreign workers' rights (Davidov 2005).[46] *Kav Laoved* devotes considerable time and resources in petitioning the labor courts and is often met with successful decisions.[47]

All these factors, coupled with judicial activism over the Basic Right laws (the quasi-constitution of Israel, discussed further in the next section) have resulted in high levels of legal action by NGO advocates and other concerned parties. In general, this facilitates a much higher degree of legal mobilization as part of social movement strategy than in other jurisdictions.

b) Applicable Laws

This sub-section and the next on rights traditions serve to outline the opportunities in law for legal mobilization. As explained in Chapter 2, where I propose my conceptual framework for legal mobilization, the absence of a particular recourse in the law, in the face of certain rights being excluded for litigants, does not necessarily prevent advocates from moving the court to demand those rights. Demanding new rights is part of the jurisgenerative process that social movements and advocates engage in, even when chances of success are low. However, the presence of a strong regime of protection for a particular right will inform the strategy of legal advocates, as explained below.

The laws are divided into constitutional laws that outline the basic rights available to all under Israeli jurisdiction and other specific laws that, in principle, should comport with the constitutional rights but in practice, can be exempted by the Supreme Court in its scope and application. These laws include those related to foreign workers, citizenship and naturalization laws, labor rights laws, and social welfare rights laws.

Constitutional Law

Israel does not have a ratified constitution legitimated through a referendum or public consultation. In 1992, the legislature enacted the Basic Law: Human Dignity and Liberty which including rights to life, property, privacy, dignity, freedom of movement, and due process of the law. The Supreme Court, under Chief Justice Aaron Barak, ruled that the Basic Law had constitutional status and legislation cannot infringe the rights contained, giving the

[46] KA, KB, KD and KE (*Kav Laoved* lawyers and caseworkers), interview with author, November 2016.
[47] KA and KB (*Kav Laoved* lawyers), interview with author, November 2016.

Court the jurisdiction to interfere in state action.[48] The Court also adopted the tests of "reasonableness" and "proportionality" to balance the state's goals with protection of rights, which gives the court far-reaching jurisdiction to interfere with state action. Any state action that infringes the Basic Law has to have a rational connection to the government's stated purpose (the "rational means test"); must use the least restrictive means to achieve the stated goal (the "least injurious means test"); must use alternative measures if they significantly reduce the infringement of the rights even if it achieves a slightly diminished version of the stated goal ("proportionate means").[49]

Another quasi-constitutional provision, the Basic Law: Freedom of Occupation was passed and amended in 1994, which has been interpreted as the freedom to engage in one's occupation of choice, as opposed to a right to work. The Freedom of Occupation law has an "override" clause, which allows the legislature to override the Court's decision with a special majority.

Absent from the list of rights protected in these two laws are several important human rights, such as equality, freedom of expression and freedom of religion, which were specifically not included because of political opposition during the debate for the law (Sapir 2009, 365).

Foreign Workers Law

The Foreign Workers Law[50] obligates employers to get medical insurance for the workers, ensure reasonable accommodation and provide the worker with the employment contract and regular pay slips. The employer is also obliged to report monthly to the Minister of the Interior on the workers' wages, payments, and deductions. The employer can make eligible deductions from the workers' pay. The ones mentioned in the Law include a) contributions that the employee (and employer) have to make for the employee's social benefits (1C) b) deductions for accommodation (1Eb) and for medical insurance (1Dc) within a maximum limit prescribed by the Minister (the employer will have to pay the rest of the amount to ensure compliance with the Wage Protection Law), and c) a fund for the worker, with a prescribed amount (700 NIS), which will be paid to the worker, along with interest, three months after he or she has left Israel (1K). The Law also sets out the amount the employer has to pay to get a work permit (NIS 350) and for annual fees (less than NIS 3,000) for keeping a foreign worker. The Law also stipulates the penalties for unlawful employment and for providing unlawful night lodging to anyone without a valid permit as per the Entry into Israel law.

Foreign workers are not allowed to marry or have romantic relationships with other foreign workers or have romantic partners, even with Israeli citizens, because of the stipulation that there cannot be other family members of the workers in Israel.[51] Having family members in Israel is grounds for revocation of the permit which will lead to detention and deportation

[48] CA 6821/93, *United Mizrachi Bank Ltd. v. Migdal Cooperative Settlement*, P.D. 49(4) 221.
[49] HCJ 2056/04 Beit Sourik Village Council v. The Government of Israel 1, 23 [2004] (Isr.) (citing HCJ 987/94 Euronet Golden Lines [1992]).
[50] *Israel: Law No. 5751-1991, Foreign Workers Law* [Israel], 1 May 1991.
[51] KH (*Kav Laoved* lawyer), interview with author, November 2016.

(Ben-Israel and Kav Laoved 2013, 17). The basis for the law is to ensure that foreign workers do not make roots in Israel and will depart as soon as their contract is over. Until the decision of the High Court in 2011, women foreign workers were deemed deportable if they were found to be pregnant.

Citizenship Laws

The citizenship laws are governed by the Citizenship and Entry into Israel Law, Law of Return and the associated Law of Nationality. The Law of Return and Law of Nationality discriminate and demarcate membership into the state on the basis of religion. The laws confer on Jews both the right to immigrate to Israel and to enjoy comprehensive national and civil rights, a privilege that is denied even to citizens who are non-Jewish.

A temporary order under Citizenship and Entry into Israel Law suspended the naturalization of spouses of Israeli citizens if they were from the Occupied territories and then extended the exclusion to spouses from Lebanon, Syria, Iraq, and Iran in a formal amendment in 2007.[52] Even though it violated the civil rights and rights to family of Israeli citizens (especially Palestinian/Arab citizens) and the constitutional rights to the same under the Basic Law, the Supreme Court upheld the law's constitutionality in 2006 and 2012 on the basis that it was justified by security concerns.[53] One of the members of the majority, Justice Cheshin, in a separate opinion disagreed with Justice Barak's opinion that there is a constitutional right to family life, since the case involves foreigners and there is no automatic right to citizenship for foreigners.[54]

Citizenship and permanent residence status laws are thus not even subject to judicial review and other rights guarantees. Foreign workers have less opportunity than citizens to challenge these laws.

In 2002, *Kav Laoved* did file a petition asking for residence status for a caregiver who had been residing in Israel since 1994, had no social connections with Philippines, and even had a partner in Israel, so that she could use the national healthcare for a serious illness.[55] Not only was the petition denied but also the statute was amended to state that foreign workers could never be considered residents, regardless of the length of stay. *Physicians for Human Rights* challenged the amendment, but their petition was denied (see next section on support structures).[56]

In Israel, the Court, despite making strong claims to the protection of human rights for all, has been traditionally reluctant to grant rights to people who do not belong to the national/ethnic

[52] The Citizenship and Entry into Israel Law (Amendment No. 2) 5767-2007.
[53] H.C. 7052/2003 Adalah v. Minister of Interior, P.D. 61(2) 202 (2006); H.C. 466/2007 MK Zhava Galon v. Attorney General (2012).
[54] H.C. 7052/2003 Adalah v. Minister of Interior, P.D. 61(2) 202 (2006) at paras 130-132 (Justice Cheshin).
[55] KH (*Kav Laoved* lawyer), interview with author, November 2016; 1427/02 Beth Torres- National Insurance (Labour Court of Tel Aviv).
[56] HCJ 494/03 Physicians for Human Rights – Israel v Treasury Minister [2004] 59(3) PD 322.

collective because of fear of threats to the legitimacy of the Jewish state (Sitbon 2013). Advocacy groups are unable to rally sufficient public or legal support to modify citizenship laws and as a result, avoid taking such cases to court except to publicize sensational and extreme cases (Drori 2009).

Labor Laws

Israel has a relatively strong labor rights regime, as is seen in the binding arrangement case described earlier in this chapter. All employees, irrespective of status, are covered by labor and employment laws, as per the Supreme Court and the plain language of the statutes. The National Labour Court dutifully enforces labor laws. The National Labour Court has sanctioned employers for holding employees' passports and has also created special procedures to make it easier for foreign workers to petition their case, recognizing that their period of stay in Israel can often be shorter than the length of normal legal proceedings (Davidov 2005, 20).

Social Welfare Laws

Migrant workers have little or no access to social welfare. They are excluded from the National Medical Insurance Law. The Law of Foreign Workers mandates employers to buy private medical insurance but it also allows the employers to deduct up to a certain amount.[57] Organizations have pointed out that the private insurance is "far inferior" to the national insurance (Ben-Israel and Kav Laoved 2013). It does not cover pre-existing conditions or pre-natal care unless the insurance was bought nine months before the worker becomes pregnant. It also expires after three months, if the worker is forced to stop working. Coverage is lost when the worker changes employers and the injury or disease is attributable to the previous employment, in which case it is treated as a pre-existing condition. In many cases, especially when there is serious injury or disease (including occupational cancer), the private insurance forces the worker to return to their country of origin. This practice is common in Canada as well and is referred to as "medical repatriation." In general, the insurance companies "systematically evade their obligation to fund medical treatments" for foreign workers (Ben-Israel and Kav Laoved 2013, 23).

Foreign Workers are covered for limited cases of childbirth, work-related injuries, and employer insolvency under the National Insurance Law (Mundlak 2008, 9). They are not entitled to unemployment insurance, non-work-related accident compensation, and disability and old age allowance even when they have resided in Israel for several years, as is the case with many caregivers.

Social rights have a residency requirement and many of the laws explicitly exclude foreign workers from ever being characterized as residents, regardless of their length of stay.[58] *Physicians for Human Rights* challenged the law on the basis of a right to health and right to social security in the Basic Law, which is also subsumed under their constitutional right to

[57] Law of Foreign workers, section 1D(c).

[58] 2003 Economic Arrangements Law; Article 2A, National Insurance Law.

human dignity.[59] The Supreme Court ruled against them saying that foreign workers are not entitled to social rights beyond a minimal threshold that protects dignity and bodily integrity. Although the case involved a right to health insurance, Justice Barak expanded the case to interpret the constitutional right to social security that is protected under the Basic Law. He ruled that not all the welfare entitlements are covered by the constitution and residency requirements are justifiable to conserve resources and preserve equality for citizens.

c) Rights Legacy

As mentioned earlier, one of the factors that could affect legal mobilization are historical legacies on how rights are framed (Bloemraad and Provine 2013). The first major case that *Kav Laoved* litigated before the Israeli constitutional court challenged the binding agreement. The elaborate High Court decision provides an understanding of which legal frames and arguments have persuasive power in the Israeli courts.

The Israeli High Court has been lauded for being an activist court and for bringing in a rights revolution in Israel (Epp 1998; Hirschl 2009). Judges in the Court, unlike in other countries, have been legal academics or bureaucrats (usually from the Ministry of Justice) who have never practiced as lawyers. Many of the judges, especially during the era of Aharon Barak were progressive in protecting rights and in expanding the rights under the Basic Law (Epp 1998; Hirschl 2009). It has been speculated that this has led to the judges being less entrenched to special interests such as political parties, corporations, and powerful lobbies (Dotan 1999, 1064).

On the other hand, several scholars have argued that the activism is only to the extent to bolster the legitimacy of the Israeli state as liberal and rights protecting and that the Court plays "judicial acrobatics" allowing petitioners to win some cases while ceding to the state in critical cases (Harpaz and Shany 2010; Shamir 1990). While there are obvious reasons for some amount of "judicial acrobatics" to ensure that its rulings are not overruled by the legislature, it is possible to discern certain patterns from its cases concerning temporary foreign workers.

Labor and employment rights-based cases against powerful employer lobbies and manpower companies have the greatest purchase in the Court. In cases that implicate vulnerable citizens, the foreign worker petition usually loses as seen with caregivers where the Court balances the interests of the need for care of the elderly and disabled with the basic rights of caregivers. So, while the High Court found unconstitutional the Israeli practice of deporting pregnant women workers (HCJ 11437/05, *Kav LaOved v. Ministry of Interior* [2011]), it did not agree that caregivers who work twenty-four hours a day were eligible for compensation for extra hours beyond the eight-hour day (HCJ 1678/07 *Gloten v. National Labor Court* [2009]) as this would increase the economic pressure on the employers. The *Kav Laoved* lawyer who argued the case was initially confident about winning the case as it was poorly decided and there was a liberal judge on the panel.[60] However, as soon as she began to argue before the court, she

[59] HCJ 494/03 Physicians for Human Rights – Israel v Treasury Minister [2004] 59(3) PD 322.
[60] KG (*Kav Laoved* lawyer), interview with author, November 2016.

realized that judges were hostile to the idea of interfering in the caregiver system. The fact that care-givers are involved in providing services to a vulnerable population in Israeli society, the elderly and the disabled, makes judges less inclined to make decisions which would change the status quo and make the services expensive.

Non-discrimination or equal protection does not have the same purchase it has in other jurisdictions examined in this dissertation. The Court also shows extreme deference to the state in citizenship and social welfare rights cases. This fits with the criticisms of the Court as being strategic in protecting rights against the state and as being unwilling to challenge the state on issues that face staunch opposition from the state. Concerns of foreign workers straddle two rights regimes, labor and immigration. The Israeli Court has been willing to protect labor rights, which has always had resonance in the Israeli political discourse but has avoided any issues that would touch the controversial topic around immigration and citizenship.

V. Support Structure

Since foreign workers have limited access to legal and political institutions and are confronted by several barriers to organize and claim rights, support organizations form an essential role in legal mobilization. This section outlines the landscape of organizations that advocate for the rights of foreign workers and then proceeds to describe the operations and strategies of *Kav Laoved*, the singular organization that has led the legal mobilization for foreign workers in Israel.

a) Legal mobilization organizations

Background

Studies show that litigation in the Israeli Supreme court by NGOs has higher success rates than those by individual petitioners (Epp 2011; Sapir 2009; Dotan 1999). NGOs are "repeat players" in the system, have more acquired expertise, resources to invest in fact-finding, and more experience and ability to conduct successful out-of-court settlements.

Two features mark the organizations involved in legal mobilization in Israel. First, lawyers have played a key role in forming and being a part of NGOs in Israel. Second, many of the human rights organizations were formed to protect Palestinian human rights and were founded by anti-occupation activists.

The first Israeli human rights NGO, the *Association for Civil Rights in Israel (ACRI)*, was established in the mid-1970s. It continues to advocate for rights of minorities, including Arab citizens and migrants, and for human rights in the Occupied Territories. It has supported joint petitions with many of the cases filed by *Kav Laoved* on behalf of migrant workers.

Other well-known human rights NGOs were established between 1988 and1992, around the time of the first intifada, including *B'Tselem*, *Hamoked*, *the Public Committee against Torture in Israel*, *Physicians for Human Rights Israel* as well as *Kav Laoved*. *Physicians for Human*

Rights has been at the forefront of advocating for social rights for foreign workers and taking injured workers compensation and healthcare cases before the courts. The increase in NGOs in the early 1990s was also motivated by the growing importance of human rights in the Israeli discourse (with the Basic Law and the constitutional revolution), Israel's ratification of the major international human rights conventions in 1992, and the global rise of the international human rights movement at the same time.

The founder of *Kav Laoved*, described by various interviewees as a "visionary," is considered to have altered the labor market for poor workers and was one of the first vocal advocates for the labor rights of foreign workers, as early as 1993. She worked as a typist in the 1980s and was an anti-occupation activist.[61] She founded *Kav Laoved* in 1991 to assist unionized Palestinian workers. Their work was mainly related to wage theft to help workers reclaim wages. *Kav Laoved* restricted their mandate to wage theft to ensure that they "would not step on the toes of Palestinian unions who represented Palestinian workers."[62]

In the late 1990s, many of the organizations began to include advocacy for foreign workers in their mandate. Two of the major organizations were *Kav Laoved* and *the Hotline for Migrant Workers* (now called *Hotline for Refugees and Migrants*). *Kav Laoved* (also known as Workers Hotline) and *Hotline for Migrant Workers* had different mandates from the beginning.[63] *Kav Laoved* advocated only for labor rights and *Hotline for Migrant Workers* mainly dealt with detention and status issues. They aligned closely on many matters such as trafficking but *Hotline for Migrant Workers* was the only organization that went to detention centers and advised workers on their rights and provided services for them to maintain their status. *Kav Laoved* was the more legalistic of the two and by the early 1990s had adopted legal mobilization as an important strategy. Currently, *Hotline for Migrant Workers* has focused all its resources on asylum cases and does not involve itself in TFW issues.

Operations

Kav Laoved has currently four in-house lawyers with a coordinator and a steering committee for every labor sector. The sectors are divided according to status (Israelis, Palestinians, migrants) and by labor type (caregiving, agriculture, construction, others). *Kav Laoved* assists all non-unionized workers, including Palestinians, Israelis, undocumented and asylum seekers along with TFWs. They do individual case work before the labor court and engage in impact-based "principled"[64] labor law proceedings before the labor courts and Supreme Court. The sectors that work with TFWs and undocumented workers litigate and advocate for "issues at the intersection of labor and immigration."[65] Each labor sector also has one or two organizers, who are primarily involved with outreach, organizing the volunteers, and coming up with common issues that affect the workers in that sector, and recommending further action to the lawyers, committees, and Advisory Board.

[61] KH (*Kav Laoved* lawyer), interview with author, November 2016.
[62] Ibid.
[63] KD (*Kav Laoved* lawyer), interview with author, November 2016.
[64] KG (*Kav Laoved* lawyer), interview with author, November 2016.
[65] Ibid.

Kav Laoved receives complaints via a telephone service, email, and open days during which workers come to the NGO offices. Particular days are allotted to each labor sector. During the allotted days for caregivers and agricultural workers, *Kav Laoved* ensures that there are interpreters and trained volunteers to assist with the unique needs of the TFWs. *Kav Laoved* also maintains a Facebook page where workers can ask questions. The advocates at *Kav Laoved* confirmed that Facebook and social media have changed the landscape for advocacy and rights education in the last few years, as the numbers of workers coming to their offices has drastically increased.[66] Labor rights trainings and leaflets are other important tools of outreach. In addition, *Kav Laoved* is the only organization that conducts monthly or biweekly trips to agricultural farms for outreach to agricultural workers directly.

Kav Laoved publishes numerous reports internationally and domestically and makes numerous representations before the Israeli Parliament and UN agencies. In many of the impact litigation cases, the *Kav Laoved* lawyers work in a coalition with like-minded legal NGOs like *ACRI*. *Kav Laoved* did not have a lawyer within the organization during the early days. Most of their work involved ensuring that migrant workers received their wages and was done through negotiations with employers. The organization also relied on a pool of like-minded labor lawyers to whom cases were referred. The Binding Arrangement case, which was the first constitutional litigation case for *Kav Laoved*, was litigated by Einat Albin of Tel Aviv University legal clinic. Yuval Livnat was the first lawyer that *Kav Laoved* hired in 2003. Hany Ben-Israel became the lead litigation lawyer (Director of Litigation) after Yuval Livnat left in 2005. She left *Kav Laoved* last year and the position is now filled by a labor rights lawyer. Hany emphasized although she was a "director, she did not direct as such" and cases were taken up in a collaborative fashion.

The lawyers often do not have direct contact with the workers at the initial stages, but some lawyers take interest in direct advocacy. Hany, for example, stated that she would sit in the front desk of the office once a week and work with the volunteers, coordinators, and organizers in talking to the workers directly. But not all lawyers are involved in the frontline work. They rely on the organizers to raise issues of concern to them in the meetings.

Strategy

Kinds of cases

Kav Laoved is well-known among all actors, including political parties across the spectrum, as the primary advocacy organization for workers. Unlike other organizations like *ACRI* or *B'Tselem*, *Kav Laoved* has escaped the "vilification" of being an advocate for non-Jewish populations like the Palestinians or asylum-seekers or foreign workers. According to the longest serving litigation director, the success of *Kav Laoved* lies in its single-minded focus on labor rights.[67] Kav Laoved has scrupulously avoided taking an anti-occupation stance. Although it represents Palestinian workers as well, they are known as an organization that

[66] KF (*Kav Laoved* lawyer), interview with author, November 2016.
[67] KG (*Kav Laoved* lawyer), interview with author, November 2016.

only deals with labor violations. As a result of Israel's socialist and pro-labor roots, *Kav Laoved* is "treated with more empathy" than organizations that challenge citizenship rules of the Israeli state.[68] Although recruitment and employer agencies, which are known to have deep relationship with prominent Israeli politicians, have an antagonistic relationship with *Kav Laoved*, the issues taken by *Kav Laoved* are not considered as "explosive" as the ones that deal with Palestinian or refugee rights.[69] Maintaining a "firewall" between labor rights and citizenship rights has helped their success on labor rights.

Kav Laoved has only briefly pursued detention or status cases, but they do help workers find alternative employers so that they can maintain status. They also often call the Ministry of Interior on specific immigration cases to request discretionary suspension of detention or request time to process cases. *The Hotline for Migrant Workers*, which has its offices in the same building, deals with detention and status cases, but they do not conduct any outreach to the farms.[70] Most of their clients are workers in Tel Aviv and other urban areas. In addition, since 2005, the focus of their advocacy has shifted to asylum claimants.[71] Social rights cases are usually initiated by *Physicians for Human Rights*. *Kav Laoved* limits its focus to labor rights.

The Advisory Board, composed of academics and advocates from other organizations, also plays a role in deciding which cases to litigate. The decision to initiate a constitutional challenge to the binding arrangement, for example, was made by the Advisory Board as they found that the binding arrangement was a unique "pathology" that affected all workers.[72] As a *Kav Laoved* lawyer stated: "Content is influenced by the personality of the people working there"[73]

Although the litigation team relies on issues raised by the frontline organizers and coordinators for their impact litigation, the interests of the individual lawyers plays a significant role.

As stated earlier, status and citizenship were not issues that *Kav Laoved* sought to pursue. These issues were left to other organizations such as the *Hotline for Migrant Workers*. There was some discussion among supporters of *Kav Laoved* about *Kav Laoved*'s position to ignore status issues in its labor rights advocacy of migrant workers, even as the question of status was paramount in the exploitation and vulnerability of the workers. For example, one of the academics on the Advisory Board expressly told the founder of *Kav Laoved*: "it is the lack of status that is the pathology and not labor rights."[74] As early as the 1990s, she pointed out that it was counterproductive to ignore status and residence issues as they would determine how successfully *Kav Laoved*'s advocacy for other rights got enforced and limited. Nevertheless,

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[68] Ibid.
[69] KF (*Kav Laoved* lawyer), interview with author, November 2016.
[70] KE (*Kav Laoved* lawyer), interview with author, November 2016.
[71] RE (academic researcher), interview with author, November 2016.
[72] KG (*Kav Laoved* lawyer), interview with author, November 2016.
[73] Ibid.
[74] RC (*Kav Laoved* board member), interview with author, November 2016.

the founder of *Kav Laoved* and the more labor-oriented members of the Advisory Board maintained that *Kav Laoved*'s interests should be focused on labor issues.

Until the next litigation director was hired, the focus of *Kav Laoved* was entirely on labor rights. The new director received his doctoral degree from New York where he had the chance to interact with immigrant rights organizations and had a good friend who was undocumented.[75] When he became the first in-house lawyer for *Kav Laoved*, he was determined to raise status and residence issues. He personally took on deportation cases, campaigned against the deportation campaign and Closed Skies policy, and initiated a labor court case to recognize the de facto residence status of long staying foreign workers so that they can avail of all the social entitlements that Israeli citizens have. However, the Israeli government's deportation campaign took a personal toll on the director as he found the organization overwhelmed by the deportation cases. The organization also had to cut its budget and soon *Kav Laoved* abandoned its brief interlude with status and residence issues.

The litigation director that followed had a keen interest around the gendered dimension of care-work. She had written a position paper before she began in *Kav Laoved* and was influential in introducing gender analysis to *Kav Laoved* cases. Under her administration, *Kav Laoved* took on several difficult cases on behalf of caregivers. She explained how policy procedures worked against migrant workers. For example, she was the first to focus on how migrant workers were affected by the regulation that forbade them from marrying other migrant workers citing that it violated the law for workers to have immediate family members (spouses and children) in the country. This policy was used by employers to remove caregivers from their position and to stop paying wages. Caregiver employers who were accused of sexual harassment or wage theft would claim that the caregiver was intimately involved with another foreign worker to escape criminal prosecution and lawsuits. She had four such cases, which were ultimately settled (the caregivers were allowed to get another job) before they were litigated. Furthermore, she also raised the issue that only serious sexual harassment cases end up in criminal proceedings and any harassment or sexual assault accusations against elderly employers, which were common, would not be pursued. Under another initiative by this director, *Kav Laoved* got more involved in international advocacy.

The current litigation director's focus is on Labor Court cases. *Kav Laoved* has, therefore, become more restrained in taking cases before the Supreme Court.

Role of organizers and out-of-court strategies

Key issues often get generated from the organizers or case-workers who work directly with the workers. The organizers however have to convince the legal team about the importance of certain cases.

When the organizers discovered the issues surrounding the work-study students, they found that the legal team was not initially interested.[76] As one of the organizers put it: "the lawyers

[75] RD (lawyer), interview with author, November 2016.
[76] LB (lawyer), interview with author, November 2016.

want a phenomenon, not a story." The organizers met up with Burmese and African student workers and began to document their stories. They then went to specific farms with Ugandan work-study workers to listen to their cases. They took important testimony of a Ugandan student who had resigned from the program as well as an Israeli student who was in one of the villages to help the student workers, who said that "the program was a scam." Even after they had documented fifty cases, the lawyers had still not stepped in. They finally got the former litigation director to make a visit to one of their meetings behind a gas station to listen to the student workers. However, there was still no case initiated and she was more interested in the trafficking aspect of the cases. But, they had enough evidence to have the litigation team to help with a position paper before the Knesset. It took one and half years before the class action was initiated at the behest of a persistent Senegalese student worker who was ready to become the test case.

Individual petitions, even for changing employers or losing status, get settled out of court because of the reluctance of the Interior Ministry to be involved in a major lawsuit. Most of the cases initiated by *Kav Laoved* get settled after conversations with the employers.

In general, litigation does not happen in an evidentiary vacuum as soon as a constitutional rights issue is raised. *Kav Laoved* organizers, who are the main point of contact with the workers, collect information from the workers on how an issue affects them. They undertake several field visits for outreach to the workers to get more data. They also conduct surveys among the workers who visit them in their offices.

Individual cases are brought before the labor courts and a corpus of cases is created to show how the current laws impede access to rights protected under the Basic Law before an impact litigation is initiated. For example, the caregiver petition in *Gloten* was initiated after recording hundreds of caregivers who had complained about wage theft, absence of vacation hours, and overtime work.[77] There were 60 cases of workers before *Kav Laoved* of those who lost status because of binding agreement, before the constitutional petition was initiated. Similarly, the petition against the recruitment practices of manpower companies was filed to show how the removal of the binding arrangement has been ineffectual because of the debt that the workers had and the role of the companies in preventing workers from changing employers.

As a former *Kav Laoved* litigation director put it: "Principled cases follow individual cases."[78] During the week I visited the *Kav Laoved* offices, there were 20 intakes of agricultural workers, two of which turned into a lawsuit before the labor court. But on an average, there are about two lawsuits per month on behalf of agricultural workers and most of them get settled out of court. The numbers for caregivers are usually two or three times that of agricultural workers. The case against Agribusiness on behalf of work-study students could not have transpired without the organizers discovering the issue, documenting more than 50 cases, and insisting that the lawyers do something about it, as described earlier.[79]

[77] RB (academic researcher), interview with author, November 2016.
[78] KG (*Kav Laoved* lawyer), interview with author, November 2016.
[79] KE (*Kav Laoved* lawyer), interview with author, November 2016.

Impact litigation also usually follows months of concerted lobbying effort to have members of parliament or employer groups to take into account their concerns, and after several reports and news media articles raising the issue have been drafted.

Other motivations

Dor and Hofnung (2006) highlight that although litigation in Israeli courts is often an act of political participation for groups that are left out of the legislative process (Dor and Hofnung 2006), which would include Palestinians and foreign workers, it is a conventional, institutional form of participation. In addition to participation, courts in Israel also function as a forum for NGOs to communicate with the authorities and, at the same time, to act in protest against state action. Examples include hardline settlers groups' filing petitions against the Israeli government's withdrawal from the Occupied Territories or the dozens of petitions filed by anti-occupation advocates to demand that Israel apply the fourth Geneva Convention (protection of civilians) in the Occupied territories; both groups are well-aware that they have no chance of success (Dor and Hofnung 2006, 143–45).

In contrast, there was no indication from any of my interviewees that they were filing petitions even when they have no chance of success. In fact, the binding agreement petition and other petitions filed before 2005 were filed because of the liberal reputation of the court and the expectation that the court would rule in their favor against the State. The lawyers stated that the Court has become more conservative recently and they are trying to reduce the number of public interest petitions by rejecting them at the first stage. Nevertheless, they feel that the Courts offer an avenue for success in a context where they do not expect the hardline nationalistic government of Netanyahu "to do anything in favor of foreign workers."[80]

Media attention has long been proposed as one of the primary reasons for litigation strategies and a goal that retains its importance even when the litigation is lost (NeJaime 2011). Yet, it does not appear to be the primary motivator in *Kav Laoved*'s legal operations.[81] *Kav Laoved*'s media strategy revolves around its reports and highlighting specific cases of exploitative conditions of workers. As described earlier, impact litigation in the High Court followed months or years of media and legislative action and generating several reports that were submitted as evidence in the cases.

Two of the *Kav Laoved* lawyers explained how the litigation helps to "push the government" into being accountable. One of the lawyers said that the threat of litigation in the High Court pushes the Ministry of Interior into settling with the worker. For example, there have been several cases where the worker lost status because of unjust termination by the employer on the basis of egregious, unsupported accusations. In one such case, a live-in-caregiver was accused of having a migrant worker boyfriend when she wanted to file a case of sexual harassment. In another, agricultural workers were branded as troublemakers or drug/alcohol users or even sexual predators when they tried to demand lost wages or ask for better

[80] KA, KD, and KE (*Kav Laoved* lawyers and caseworker), interview with author, November 2016.
[81] LB and RA (lawyer and academic researcher), interview with author, November 2016.

conditions. Even in less egregious cases, there is often not much time for the worker to find alternate employment when he or she loses a job. In all these case, *Kav Laoved* has forced the Minister of Interior to settle by threatening a full lawsuit. According to an interviewee, it sometimes just takes a phone-call although in other times, it can take months of writing letters. As a result of its litigious reputation, *Kav Laoved* also has employers willing to quickly settle, especially in wage theft cases. Again, it often takes just a phone call and quick mediation to reach a settlement.

It has also been argued that Israeli NGOs file petitions to increase their legitimacy before the public as fighting for a "cause." The ex-legal director of *Kav Laoved*, on the other hand, unequivocally said that the legitimacy of *Kav Laoved* comes from the mere fact that they represent *all* workers, Israeli, Palestine, and foreign. They have also scrupulously avoided talking about citizen or status unlike the *Hotline for Migrant Workers* or passing judgment on Israeli occupation.

In summary, the strategies of *Kav Laoved* comport with some of theories on legal mobilization in Israel, but for the most part, they do not align with all the strategic motivations of other similar organizations in Israel. The reasons are rooted in the unique position occupied by temporary foreign workers and the program itself, which raises issues that cannot be easily compared with the advocacy interests of other groups. These reasons include the political environment in which the TFW programs function, the isolation of the foreign workers in agriculture, the strategic decisions made by *Kav Laoved* to retain their legitimacy, and lastly, the lack of mobilization among workers themselves.

b) Union Organizing

The court actions are not seen as an organizing tool. This is perhaps because *Kav Laoved* sees itself as legal service provider and not as an organization that organizes workers, which is delegated to unions.[82] *Histradut*, the single and largest union, has shown little interest in organizing migrant workers. The exception has been the *Histadrut*'s branch in Tel Aviv, Yaffo, which initiated organizing of migrant caregivers in Tel Aviv in 2002 and made unsuccessful unionization attempts over two or three years using informational pamphlets, rights workshops and meeting caregivers in their residential areas (Albin and Mantouvalou 2016, 336–37).

In 2009, a new trade union, *Koach La'Ovdim*, was formed and they attempted unionizing both caregivers and agricultural workers using different strategies than *Histradut*. The main actors involved in the unionizing foreign workers had worked in programs in various developing countries including Nepal and had a more global viewpoint.[83] They had their greatest success in Jerusalem with Nepali caregivers even taking leadership roles. But after five years, when the leaders had to leave Israel, the caregivers union was unable to continue. *Koach La'Ovdim* has since moved to organizing other Israeli workers. The *Koach La'Ovidim* organizers expressed that the foreign workers had different ideas of a union's role and did not desire to

[82] LA and LB (lawyer and academic researcher), interview with author, November 2016.
[83] RA and RB (academic researchers), interview with author, November 2016.

engage in the kind of unionizing that either *Koach La'Ovdim* or *Histradut* had in mind (See also Albin and Mantouvalou 2016, 336).[84] Nevertheless, the workers themselves seemed to show great interest in coming together for protests and advocacy, despite the barriers they faced, include difficulty in traveling and fear of employer reprisal and deportation.

As Albin and Mantouvalou indicate, the lack of interest in unionizing or making legal claims should not be interpreted as passivity or lack of activism (Albin and Mantouvalou 2016, 336–37). Advocates in other countries, such as Canada, U.S., and Hong Kong, have abandoned the union model to organize foreign workers and prefer a workers' action center (WAC) model. The WAC model puts, front and center, the workers choice and agency in deciding what strategies to use. Advocates in Israel have not followed this path and still retain the more traditional union-centered approach (Mundlak and Shamir 2014). Israel also does not have a permanent ethnic community that shares the culture of the Thai workers, whose resources can be relied on. While there are sufficient resources for litigation, there are no resources as in Canada which have made immigrant outreach their primary plank. This is understandable given the closed, ethnonationalist nature of the Israeli state. Legal mobilization thus takes place independently of workers mobilization, with the former being a big success story and the latter being very limited in Israel.

VI. Conclusion

Israel represents the "positive" case in this dissertation in that one of the three pillars of TFW programs was successfully challenged in the courts. The success can be attributed to several factors.

Firstly, the problems within the temporary foreign worker program are cast entirely as a labor issue disaggregated from issues of immigration and citizenship status. The "major failures" identified by *Kav Laoved* are lack of effective enforcement and employers and employment agencies shirking their responsibilities (Kav Laoved 2014). Racialization and citizenship status are absent or peripheral to the analysis and strategy of the organization. This strategy has been effective in ensuring the legitimacy of the organization and their legal mobilization efforts. The strategy also fits with legal and political opportunities available in using Israel's strong labor rights regime and notion of universal labor rights. Thus, disaggregated labor rights have functioned as a significant basis for legal mobilization.

Secondly, citizenship and status claims are *a priori* foreclosed because of the nature of the Israeli state. As a result, the TFW program will, for the foreseeable future, remain temporary and the workers will continue to function as marginalized persons. Disaggregated rights are, therefore, the main, if not the only, result that can be achieved and the only recourse for legal mobilization. The groups that engage in legal mobilization steer clear of demanding status, especially since from their point of view, there are so many other concerns within the program that need the enforcement of the existing applicable laws. The Foreign Worker Law curbs creation of family and long-term stay, and the draconian deportation initiatives have prevented foreign workers, with the limited exception of caregivers, from forming communities and

[84] Ibid.

enjoying de facto permanent residence. As a result, there is no organizing among workers to demand status.

The third distinction deals with the nature of the TFW program in Israel. Israel follows the same trend as with all other countries in increased precarity of labor (for both citizens and non-citizens), increased privatization of the state regulatory function to employers and intermediaries, and indiscriminate support for market logics along with increase in deportation and disciplinary actions against non-citizens. The latter is starker because of an overwhelming anxiety to safeguard the demographic supremacy of Jews in Israel. As Kemp (2007) shows, both kinds of state mechanisms - reduction in welfare state protections and increase of disciplinary, anti-non-citizen politics - operate in a complementary fashion and is exemplified in the TFW program. Profit maximization and nationalistic control over labor migrants, including preventing them from become rights-bearing residents, serve each other intimately even though protectionist state logic can have a contradiction with market logic. Kemp (2007) argues that it is this operation that is crucial in "reinforcing the legitimacy of state induced racialization" in Israel.

The Israeli-Palestine conflict also forms a significant, unique backdrop to Israel. Palestinian workers have traditionally occupied many of the low-wage sectors. Their antagonism to foreign workers competing for their jobs stems not only from a fear of loss of employment but also the policy of Israel to use the TFW program to reduce the demographic of Palestinians within the country. If a solution to the Israel-Palestine conflict emerges, the TFW program will have to be significantly reduced or cancelled to allow for equal Palestinian citizenship to emerge.

Fourth, the TFW program fills real labor shortages in many of the sectors, especially caregiving and agriculture, where even wage increases may not induce Israeli workers to take these jobs. In the context of Israel wanting to maintain its reputation of having a liberal rights regime, it is not surprising that Courts and sections of the political elite are interested in extending a broad range of rights but not citizenship rights to the workers. Coupled with the foreclosure of citizenship from the workers, the "numbers versus rights dilemma" (Ruhs and Martin 2008) is of least concern in Israel. The numbers are set by an actual labor shortage in sectors where Israelis are willing to work. Increase in labor or social rights (the only rights that can be expanded for foreign workers) may increase costs, as proposed by some scholars, but the pressing need to cover the labor shortage to maintain the viability of the sectors will overcome the issue of costs as there are no other options. The political and economic clout of the powerful employers and manpower companies remains the only challenge to expanding rights, which can be resisted through other opposing interests, as shown in the binding arrangement case.

The triple-win paradigm also has no purchase in Israel, unlike in Canada and other countries, where guest worker programs are considered useful and "good" from an aggregate perspective. In these countries, the implementation and enforcement of rights is the major concern, not the benefits of the program. In Israel, the foreign worker program is seen to be antithetical to the Jewish state by nationalists and to the social welfare state by those on the left. Overall, it is seen to be a socially harmful but an economically necessary, solution. The

numerous government reports recommending cancellation of the program, which not only show harm to the Israel state and Israeli but also to the foreign workers themselves, illustrate the lack of enthusiasm for the TFW program and resistance to accept any "win" in the TFW program. Yet, the economic and political reality of keeping certain sectors economically viable while preventing Palestinians from integrating into the economy makes the program more critical than in other countries in the case study.

Points three and four, however, give the High Court much independence and liberty to decide and propose remedies that balance the interests in favor of the workers. Given the conflicting attitudes towards the foreign worker program in general and substantive public and legislative opposition towards the practices of employer and manpower agencies, the Court can pass favorable judgments that support the foreign worker without risking a serious backlash. This, however, does not imply an indiscriminate openness to the interests of foreign workers or non-citizens. In caregiver cases, where the employers themselves could be vulnerable, the Court has decided on the side of the Israeli interests. Similarly, the Court has been unwilling to extend constitutional entitlement to anything other than labor rights, thus exempting foreign workers from social welfare or citizenship rights entitlements.

Lastly, while the issues described earlier uniquely define the political environment, in all other ways, Israel is an ideal type for legal mobilization. The reasons lie in the easy access to the constitutional court, availability of unique, interim remedies with the Court, judicial activism in critical areas relevant to migrant workers (particularly labor), and an established community of right-protecting NGOs who use the courts extensively as part of their advocacy strategy. The NGOs and the courts reinforce each other's role in making Israel a fertile ground for legal mobilization.

However, Israel is also unique in that the legal mobilization functions independently of worker organizing, which is essentially absent in Israel. As a result, the workers themselves are not engaging in jurisgenerative politics and are unable to translate the law-in-books to law-in-action and create new meanings of the rights that have been successfully won. The lack of collective mobilization of foreign workers also explains the limited impact the favorable ruling in the binding arrangement case on the day to day life of workers. After detailing the Canadian case in the next chapter, I elaborate on the implications of limited worker mobilization in Israel.

Chapter 5
Status Now or Never? The persistent SAWP program in Canada

I. Introduction

Canada's immigration policy has always favored permanent settlement. Temporary labor immigration was only used for sectors that struggled to fill labor shortages from the Canadian labor force and was marginal until the 2000s. The agriculture sector, however, is exceptional in consistently having temporary workers enter under the program since the 1960s. Canada has one of the longest and most acclaimed temporary foreign worker programs for agricultural workers called the Seasonal Agricultural Worker Program (SAWP), which has been in continuous existence since 1966, and the numbers have been rising ever since. The SAWP program is unique, among most other TFW programs, in offering no access to permanent residence for the foreign workers who use the program. Unlike in Israel, there has been no constitutional challenge to any of the strictures of the program. Driven largely through the support of the solidarity organization *Justicia for Migrant Workers (Justicia)* and the legal clinic, *IAVGO*, legal mobilization against the SAWP program in Ontario has centered on using the law as a tool to collectively organize workers and to introduce subversive discourses in the law to challenge the SAWP program.

In this chapter, I begin with a discussion of the type of legal mobilization by SAWP foreign workers in Canada. Subsequently, in sections III and IV, I present an analysis of the political and legal environment that creates the opportunity structure within which legal mobilization by TFWs occurs. I argue that the historical development of the SAWP program together with the political and legal environment shaped the strategies and configuration of the resistance to the SAWP program. Section V offers a deeper explanation of the legal mobilization strategies and approaches adopted by support organizations, *Justicia* and *IAVGO*, which favor worker mobilization. I conclude this by reiterating the importance of the legal mobilization of SAWP workers that took place in Canada.

II. Legal Mobilization in Canada

On the 50th anniversary of the SAWP worker program, in 2016, hundreds of foreign workers participated in *Justicia*'s Harvesting Freedom campaign, where they traveled from Windsor to Ottawa over six months, organizing, outreaching, and advocating to political actors through direct action.[85] Despite the fact that mobilizing for status could jeopardize their jobs, TFWs came in significant numbers to support *Justicia*'s initiative. The workers participated in media interviews and gave statements before the Parliament. They organized and cooked food for the caravan participants and even took leave from work to participate in activities. The media coverage on the campaign was likely an important factor that has spurred recent legislative action on temporary foreign worker programs in agriculture. The workers expressed the desire to have someone listen to their problems and were excited by the opportunity provided by the campaign. A public statement by a SAWP worker reflects this sentiment:

[85] Participant Observation during *Justicia's* Harvesting Freedom campaign, October 2016.

> "And even now my boss is still allowing me to spray but I don't have a chemical license. But I still do it anyway because he say I got to do it otherwise I go home. So, those are the things I'd expect somebody to be listening to, you know, somebody can be looking into, you know, - where the changes can be made. Trust me. Whoever is not tired, whoever is in the upper seat, look into this because a lot of us are being abused, abused, dearly; while we are just trying to earn an honest wage to take care of our family."[86]

The Harvesting Freedom Campaign is not an isolated example of workers' collective mobilization. TFWs have engaged in several direct action campaigns with *Justicia* that have leveraged individual cases by SAWP workers to collectively mobilize and make sure that worker voices are heard. Through *Justicia*'s campaigns, workers have met with MPs, given testimony before government committees, and made media appearances. Though there has not been a constitutional challenge to the SAWP program, *Justicia* uses legal cases as opportunities to introduce subversive discourses into the court transcripts and media stories. Their most recent campaign has been the provocative demand for "Status Now," or permanent residence for TFWs on arrival.

The details of the legal mobilization in Canada is interspersed through the remainder of this chapter in subsequent sections.

III. Political environment

In this section, I explicate the political environment for collective legal mobilization by TFWs in Canada. I construct the political environment through the nature of agricultural citizenship in Canada, the exceptions for the TFW programs with Canada's citizenship regime, and the attitude towards SAWP programs as manifested in newspaper reports. I argue that the political environment creates the institutional and discursive constraints that TFWs maneuver around for collective legal mobilization.

a) Agricultural nationalism and Citizenship Regime

In his *Second Treatise of Government*, John Locke provides the rationale behind the quintessential labor theory of property applicable to land occupation. Usage and de facto sovereignty are not enough to establish ownership and occupation. A specific form of labor that cultivates the soil and puts it to productive use generates ownership and "legitimate" occupation (Koskenniemi 2017, 380–82). Locke's definition of property delegitimizes Indigenous forms of political society and land use and creates a political theory for settler appropriation (Tully 1993). Cultivation of wild land transforms people from being "needy and wretched" to being civilized and worthy of being part of the citizenry. Uncultivated land is unoccupied land, which was stated by Grotius as early as the 16th century:

> If within a territory of a people there is any deserted and unproductive soil...it is the right for foreigners even to take possession of such ground for the reason that

[86] FW1 (SAWP worker), public statement by worker during *Justicia's* Harvesting Freedom campaign, October 2016.

> uncultivated land ought not to be considered occupied.' (Grotius 1901, Bk II, Ch II, Sec. 17).

This Lockean theory of occupation and settlement was adopted by English jurists and intellectuals who encouraged agricultural settlement in North America (Tully 1993). Farming was mythologized as "virtuous labor," "wise stewardship," and representing the "virtues of smallholder property rights" and Christian values (McDonald 2016, 57,66), though, ironically, Anglo-Canadian farmers were entirely reliant on Indigenous and migrant labor to sustain the cultivation (McDonald 2016, 69, 73). These myths persist to this day and inform agricultural and immigration policies.

In chapter 3, while sketching the historical development of the SAWP program, I illustrated how, despite the rhetoric of agricultural citizenship, finding agricultural labor proved to be a particular challenge throughout Canadian history and immigration policies were inextricably linked to promoting agricultural migration. It was due to the strength of the farm owners lobby that the SAWP program was initiated and continued.

The Canadian agriculture industry is sustained not only through foreign labor but also subsidies. The literature on the neoliberal nature of agricultural production highlights the acrobatics involved in sustaining agriculture, which includes limiting labor regulation and providing all means to ensure lowered costs of agricultural production through subsidies and cheap migrant labor (McDonald and Barnetson 2016, xiv–xv). Ensuring food security that is resistant to the vicissitudes of the global economy provided one motivation. However, the myth of the yeoman farmer cultivating wild land and providing food that spurred colonization is still maintained. The imagined self-sufficient small farm that provides consumers the opportunity to "eat local" through local labor provides the façade for a politically and economically powerful sector that is driven by neoliberal logics (DuPuis and Goodman 2005). In fact, small farms have continued to become less viable. Larger farms with higher revenue have significantly higher operating revenue margins (Statistics Canada 2012). In 1991, there were 727 large farms (1,120 acres or larger) in Ontario, a number that increased to 1,547 in 2011 (Statistics Canada 2012; London Free Press 2012). Farm families are in the top 10 percentile in terms of wealth and are at least three times wealthier in terms of net worth compared to the average Canadian family (Country Guide 2011; Painter 2005). Most rural Canadians are not a part of the agriculture industry.

Government expenditures are estimated to be 26 percent of the agricultural GDP in 2016-2017 (Agriculture and Agri-Food Canada 2016). In the 1990s, subsidies surpassed income for the farmers (Solomon and Elliott 2002). The crop industry, especially the horticultural industry, is sustained through foreign farm labor and are a "structural necessity" (Basok 2014). The SAWP program is considered the "lynchpin" of the horticulture industry, essential to maintain the economic output of the industry (Mussel 2015, 24). The expenses incurred in employing foreign labor (permit payment, housing, flight) are compensated by the fact that foreign workers are "unfree," tied workers, who stay under precarious immigration status and can be easily exploited (Basok 2014). SAWP workers constitute 20 percent of Ontario's farm labor force.

The agriculture sector continues to emphasize the importance of the SAWP workers. Canadian Agricultural Human Resource Council (CAHRC) has estimated that vacancies in the agriculture sector have doubled to 59,000 workers and expects that it will double again in ten years to 114,000 workers (Canadian Agricultural Human Resource Council 2017). CAHRC has pointed out to the government that on-farm job vacancies are "exceptionally high" at seven percent (the national average being 1.8 percent) despite the current numbers of temporary foreign workers in the industry. CAHRC shows that despite "vigorous recruitment efforts … these are the jobs that cannot be filled by Canadians":

> These important international agriculture workers which make up 12% of the overall on-farm workforce, are in fact, *the choke-point for the sector, securing so many Canadian jobs up and down the value-chain*. (emphasis added) (Canadian Agricultural Human Resource Council 2017, 4)

The federal government has identified the agriculture sector as a key growth industry and is currently reviewing the Primary Agriculture stream of the SAWP program. Consultations with farm owners are ongoing and the government has also asked migrant worker organizations to participate in the consultations. The expectation is that the SAWP program is going to be further expanded to accommodate agriculture sector growth.[87]

Canada's immigration policy has always favored permanent settlement. Temporary labor immigration was only used for sectors that struggled to fill labor shortages from the Canadian labor force and was marginal until the 2000s. Between 1996-2005, an average of 26,000 temporary foreign workers entered Canada annually. However, since 2006, the number of temporary residents has surpassed the number of permanent immigrants, as depicted in the following charts (Figure 7 and Figure 8).

Nevertheless, Canada is considered to "conspicuously" lack a nativist tradition with some of the "most open immigration policies globally (Hampshire 2013). While the specificity of immigration policies may be under debate, immigration issues do not generate the kind of social upheaval and polemical debate as seen in other countries. The country has also adopted an explicit multicultural policy designed to welcome and integrate immigrants from diverse cultures. Thus, compared to the other cases, Canada stands out as a country which openly embraces immigration and access to permanent residence for TFWs is not a controversial topic.

[87] JA (*Justicia* member), IA (*IAVGO* member), and FW1 (SAWP worker), interview with author, May 2017.

Figure 7: Yearly Permanent Residents in Canada by category, 1990-2016
(Source: IRCC/CIC 2008-2016)

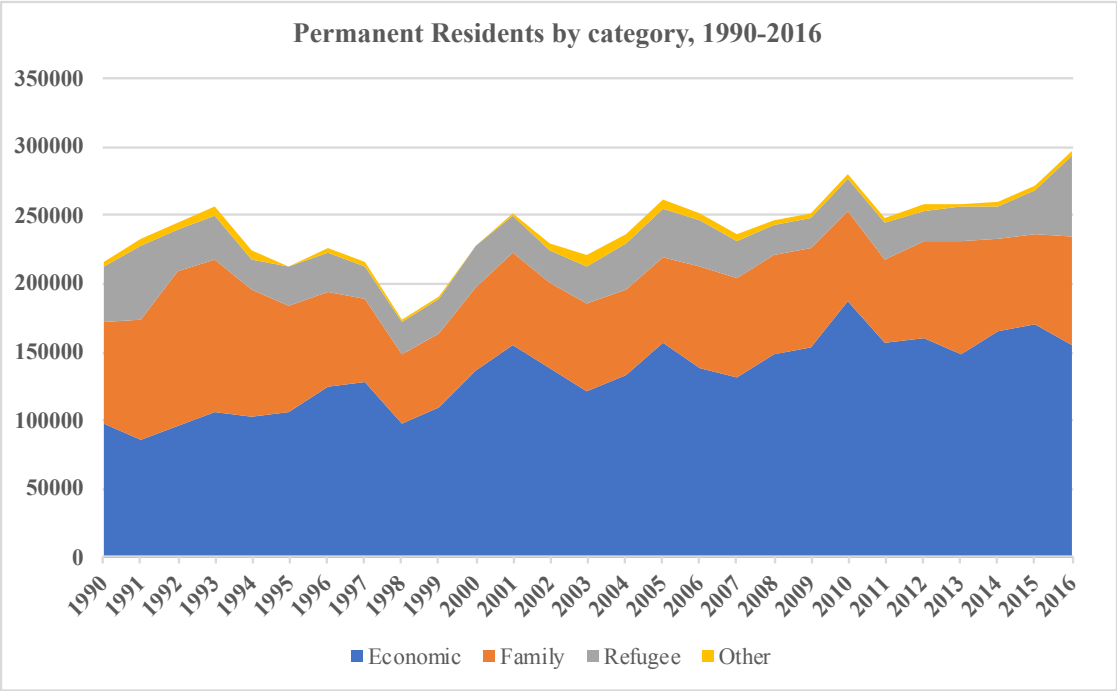
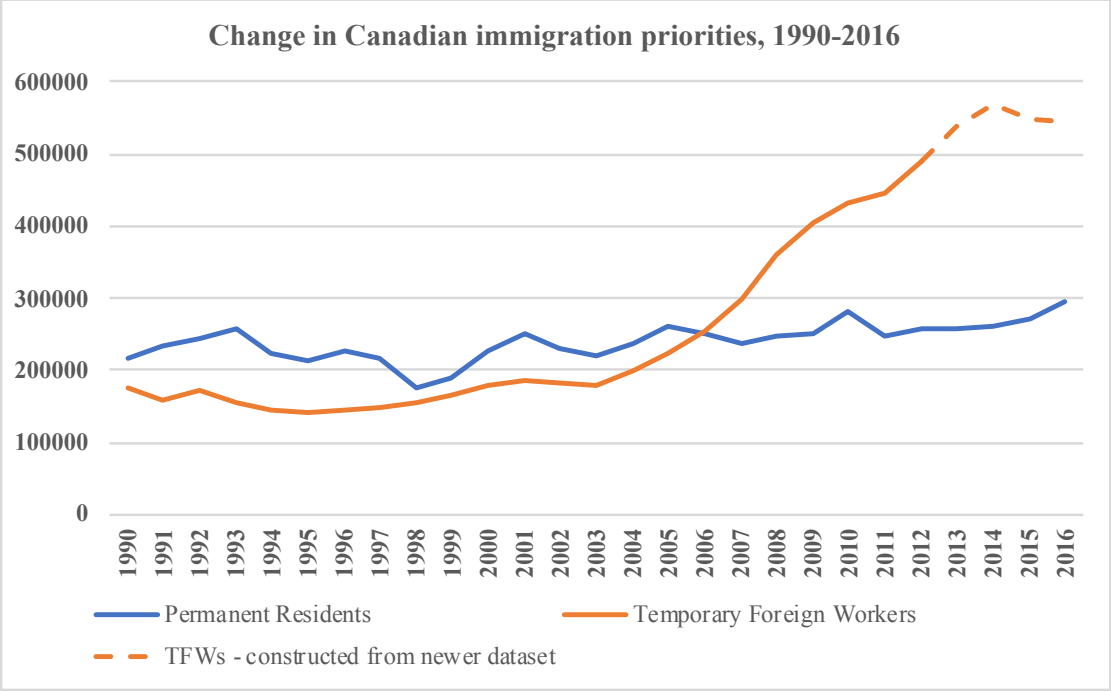


Figure 8: Yearly Permanent Residents versus TFWs, 1990-2016
(Source: IRCC/CIC 2008-2016)



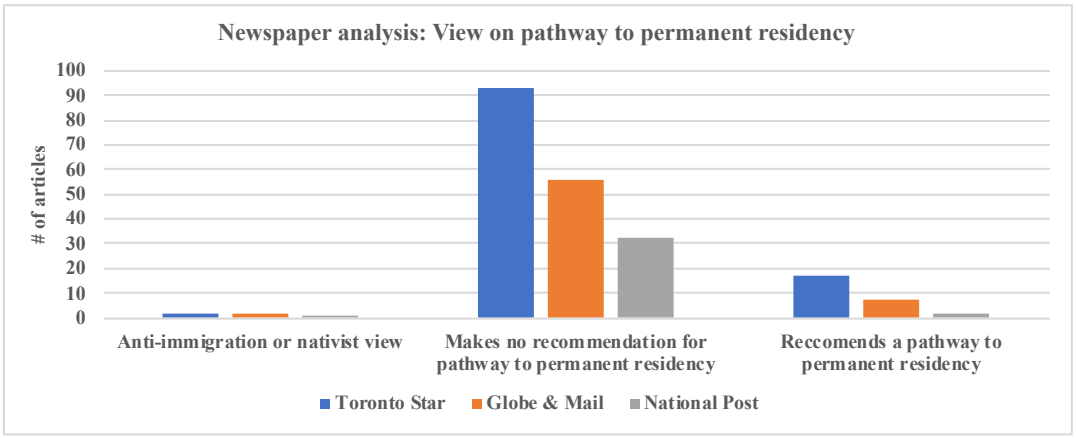
b) Attitude toward TFWs and the SAWP program

The SAWP program in general is perceived as a "model program" (Basok 2007; Abella 2006; North-South Institute 2001; Verduzco 2007; International Organization for Migration 2002; Carter 2015). The program has been lauded for being "well-managed," the high numbers of workers going back and returning, the positive impact on sending countries, for providing "satisfactory" employment conditions, "the active involvement of farm employers in program design and administration," and for "the involvement of the origin country government in recruiting and monitoring workers' conditions while in Canada" (Basok 2007; Abella 2006).

As per the methodology explained in chapter 2, I conducted a media (newspaper report) analysis in order to assess the political environment facing TFWs for legal mobilization. I analyzed the attitude and opinions towards migrant farm workers based on stories that appear in three major Canadian newspapers by circulation, The Toronto Star, The Globe and Mail, and National Post. The frames and coding used to analyze the articles can be found in Appendix 2.

The newspaper report analysis suggests that, in general, the SAWP program, as it stands, is seen favorably in the landscape of Canadian immigration programs. Among all the SAWP related articles in the three newspapers, only five express or have quoted anti-immigration or nativist views. On the other end, only a small number of articles are concerned with questioning the fundamental issues with the SAWP program such as a lack of a pathway to permanent residence for migrant farm workers. Only 26 articles directly address the question of pathway to residence for SAWP workers (see Figure 9).

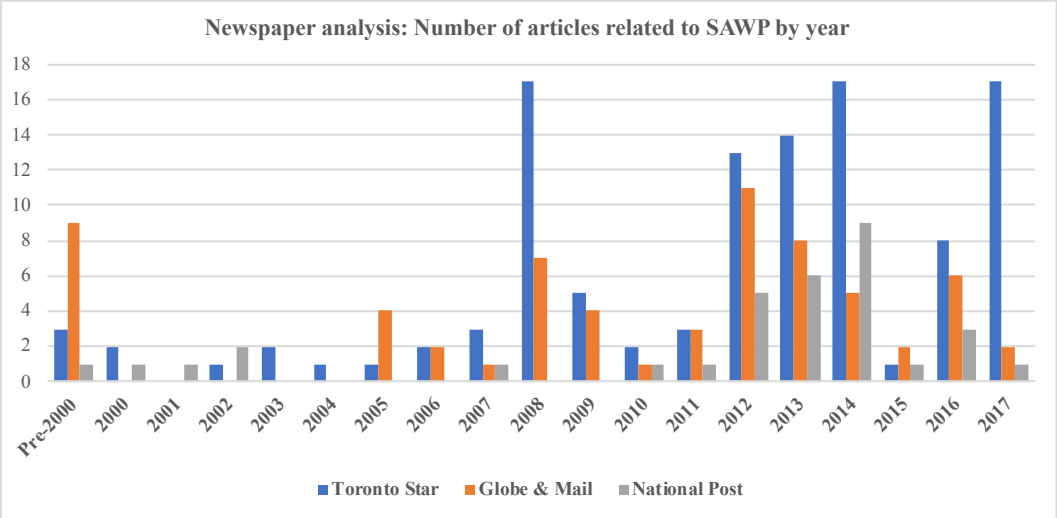
Figure 9: View on pathway to permanent residence for SAWP workers



Overall, The Toronto Star has the most extensive coverage of stories on migrant farm workers. Between 1985 and 2017, the Toronto Star had 108 stories focused on migrant farm workers among a total of 413 relevant and unique stories on temporary foreign workers in general. Comparatively, the Globe and Mail had 64 stories focused on migrant farm workers and the National Post had 35 stories (see Figure 10). Until 2008, there were few articles on the SAWP program. The increase in articles in 2008 onwards can be explained by the fact that Stephen

Harper's conservative government had expanded the temporary foreign worker (TFW) program across several sectors and 2008 aligns with first time that the number of TFWs exceeded the number of permanent immigrants arriving in Canada. The TFW programs generated extensive debate especially during some high-profile cases of abuse of TFWs and the replacement of Canadian workers with TFWs. Although these cases did not involve SAWP workers, the SAWP program was mentioned in the general category of TFW programs.

Figure 10: Number of newspaper articles related to SAWP by year



Before the year 2000, TFW programs, in general, and SAWP, in particular, were viewed favorably in almost every article. Most articles saw the merit in bringing in low-wage earning migrant workers to work on farms to lower the cost of agriculture and offer Canada a competitive edge in a global economy. Only 10 percent of articles were critical of the SAWP program. 23 percent were unequivocally positive about the program and around 65 percent approved the SAWP program but with reservations about conditions for workers which needed to be improved (see Figure 11). Many articles, especially in the National Post, a right leaning publication, have argued in favor of the SAWP program because it meets a labor demand without displacing Canadian workers. The emphasis on the so-called "triple win" – economic benefits for Canada, higher wages for the worker relative to what they would earn in their home country, and remittances for the sending country – was emphasized in articles even when they were critical of working conditions of migrant workers. For example, a Globe and Mail article notes:

> Agricultural employers who depend on the flexible labor of seasonal workers contend they're the backbone of a sector that simply wouldn't survive without them.
> "The core of the farm would be gone," said Ken Forth, a farmer and president of the Foreign Agricultural Resource Management Service. He brings in about 16 Jamaican migrants every year to work on his Ontario broccoli farm as seasonal agricultural workers…
> As essential as these workers are to Canada's economy, the money they send home is a crucial financial boost: Of the roughly $89-million sent in remittances from Canadians

to Mexico, 75 per cent comes from seasonal agricultural workers. (Paperny and Bascaramurthy 2012)

Figure 11: Attitude towards the SAWP program

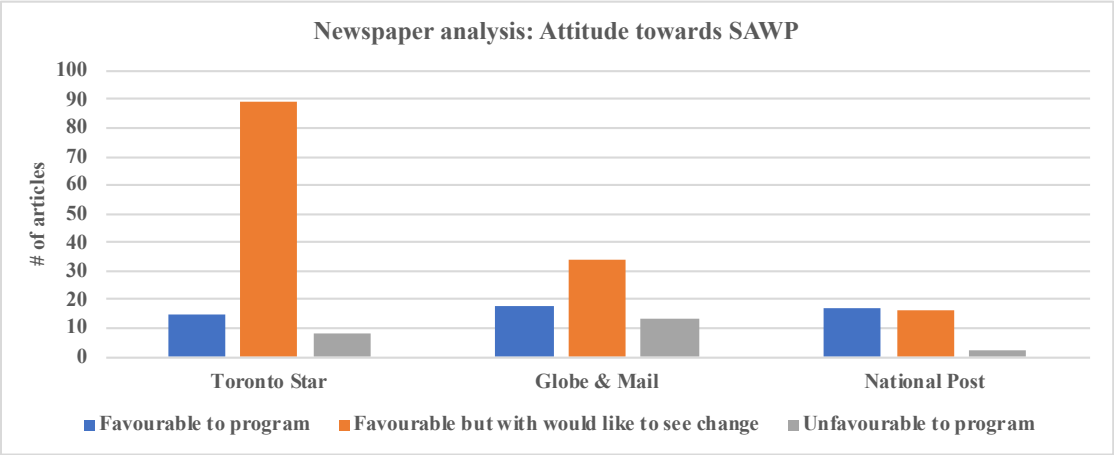
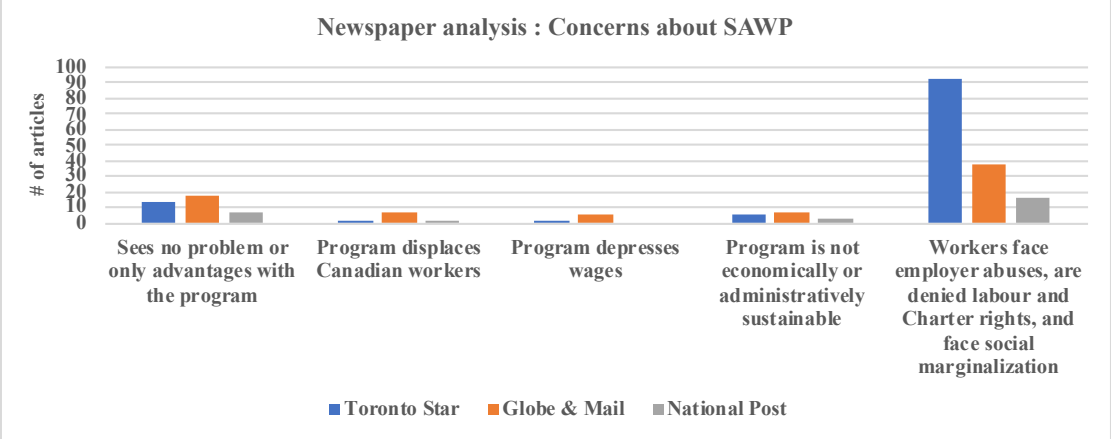


Figure 12: Concerns about the SAWP program



Since the mid-2000s, the papers began to actively report on the oppressive working conditions faced by SAWP workers (see Figure 12). Consider the Globe and Mail article about the condition of British Columbia (B.C.) farmworkers from 2005:

> B.C. farms that bring temporary workers to Canada on a federal program will be inspected before the next growing season after a group of Mexican laborers said conditions on a Lower Mainland farm were worse than in Mexico and demanded to go home (Woodward 2005).

The articles have also reported on workers' rights groups calling for bolder reforms that address systemic issues such as changes in labor law to grant migrant farm workers the ability to unionize or changes in immigration law to grant migrant farm workers a pathway to permanent residence. Many of these articles followed a particular incident, e.g. an accident

involving SAWP workers, and many quote *Justicia.* The Toronto Star has the most number of articles highlighting the abuses of workers by employers, their inability to bargain with the employer, and racism faced by migrant workers in daily life. The Globe and Mail takes a middle ground approach which presents Canada's national interests but also highlights concerns with the program as it exists because of abuse of workers under current working conditions. The National Post appears to be least concerned about changing the structural conditions that workers face and most strongly advocates for farm owners and their need for a thriving migrant worker program to sustain the agricultural sector in Canada. For example, in February 2012, ten seasonal agricultural workers were killed and two seriously injured when a van transporting them collided with a truck. Toronto Star and Globe and Mail wrote articles calling attention to unfair working conditions and the immigration law that prevents workers from organizing to bargain for fairer conditions. The National Post, in contrast, limited its commentary on safer transportation conditions for workers (Boesveld and Cross 2012).

In 2017, the Toronto Star ran a series of articles on the SAWP program. In its most comprehensive article, it cast a spotlight on the concerns faced by SAWP workers and analyzed the various options, including open work permits and access to permanent residence. The Toronto Star series show that some farm employers have started supporting the case for permanent residence for seasonal agricultural workers, but the Federal Government remains resistant. Federal Immigration Minister Ahmed Hussein expressed serious reservations about making SAWP workers permanent residents:

> "There is no evidence to indicate that migrant farmworkers would continue working for agricultural employers if they became permanent residents upon arriving in Canada, or meet the level of skills, language ability, education or work experience that are known to be key to a newcomer's success in Canada" (Keung 2017 quoting Federal Immigration Minister Ahmed Hussein).

The federal governments under both the Liberal Party and the Conservative Party support the program strongly and have refused to acknowledge the systemic problems with the program. Any criticism has been focused on the actions of abusive recruiters who charge workers unfair fees and few exceptional "bad apples" among employers. The solutions, therefore, have focused around greater inspections of the bad apples as opposed to systemic change. As a Toronto Star noted:

> The federal Liberal government, chastised last year in an auditor's report that found a lack of oversight of Canada's controversial temporary foreign workers program, is stepping up employer inspections and naming and shaming those caught breaking the rules (Wright 2018).

In his analysis of several media reports, Bauder (2008) shows that the dominant narrative in the political discourse is that of the economic necessity of migrant workers in agriculture. He also points to particular sub-narratives about the foreign worker. The foreign worker is constructed as being particularly skilled and suited to agricultural work compared to Canadian workers. A further romanticized sub-narrative presents the foreign worker as enthusiastically and actively choosing the lifestyle and the program and reveling in the nomadic, transient nature of the program (Bauder 2008, 109). Although several other reports point to the unhappiness and insecurity under which foreign workers function in Canada, the sub-narrative

of the enthusiastic, consenting foreign worker persists. Yet another narrative emphasizes the benefits to the worker and his poverty-stricken family and the benefits his remittances have for the sending country, while a concomitant negative narrative constructs the foreign worker as a "social problem" prone to criminalization and causing harmful social changes within the community.

Bauder (2008, 114, 112) argues that the positive narratives such as the economic necessity of foreign workers and the "self-sacrificing off-shore worker" legitimate "the presence of offshore workers as a value-generating labor force … while excluding these same workers from the rural community where they might claim social rights, entitlements and a sense of belonging." As long as they return to their countries, the positive, self-sacrificing worker narrative dominates. But, if they try to establish ties and residence, then they are represented as "social problems." Proponents of Canada's temporary agricultural worker programs typically speak romantically about the personal connections that are built between migrant farm workers and farm operators. The idyllic, even charitable, characterization of the personal relationship between farmers and farm workers masks a fundamental power imbalance.

It is not surprising that the legislature has been reluctant to change the SAWP program. In the past decade, advocacy on behalf of foreign workers by various groups has increased and so have media reports on the conditions under which agricultural farm workers work. Nonetheless, the focus of recent political debates has been on the larger issues with temporary foreign workers that includes highlighting not just the exploitation but also the nativist discourse of foreigners taking Canadian jobs. As a result of intense debates about the larger temporary foreign worker program which had expanded under the Harper government, the new Trudeau government was compelled to initiate a Parliamentary Committee review of the TFW programs (HUMA Committee 2016). The report that the Committee published only peripherally addressed the SAWP program, but it included recommendations for open work permits and access to permanent residence for all TFWs. The previous provincial government of Ontario had proposed a provincial program to give access to permanent residence to some agricultural workers, but had conditions that excluded seasonal workers (Ministry of Citizenship and Immigration 2017). As of 2017, the federal government has initiated a review of the SAWP program and is currently having consultations with farmers and worker associations across 14 cities in Canada (ESDC 2017).[88] Initial reports suggest that the review is to decide on whether to expand the SAWP program or not. The four issues under consideration are Program Eligibility, Housing, Labor Market Impact Assessment (LMIA) processing, and Wages and Deductions. Permanent residence or open work permits are not being considered.

Discourse of lack of legal consciousness

There is a prevailing notion that SAWP workers lack legal consciousness and do not desire to pursue legal challenges. This is based on the political environment, the arguments of the opposing counsel in the legal cases and my observations of coalition meetings and legislative inquiries,. The rights violations of SAWP workers are attributed to lack of institutional access

[88] ESDC-Canada, email response to *Justicia* and *Migrant Worker Alliance for Change*, May-June 2018.

and linguistic and cultural barriers that limit their access to legal knowledge. Both the federal and provincial governments and many labor advocates, including the United Food and Commercial Workers union (UFCW) on occasion, find either that the SAWP workers have sufficient rights but are not properly enforced or that better labor laws and enforcement mechanisms would be sufficient to protect the SAWP workers. One study found that about 85 to 93 percent of 570 workers interviewed in Ontario did not know how to file a workers compensation claim for injuries or make health insurance claims (Hennebry, Preibisch, and McLaughlin 2010). However, legal consciousness is more than a person's knowledge of the law-on-the-books. It is also about how legality is *understood* as "they engage, avoid, or resist the law and legal meanings" (Ewick and Silbey 1991). A worker may be conscious that he is not being awarded his "fair" work conditions and his entitlements, which may vary from their legal formulations. In my observation during outreach at farms, many workers seemed to be aware that they can get benefits and support if they are injured and they asked for pamphlets that outline workers compensation benefits.

Farm workers work in social isolation in remote farms that are far from walk-in legal clinics and legal help centers. They rely on transportation provided by their employers to go anywhere and fear employers' finding out about any health problems or complaints. The only other alternative is for workers to cycle through dangerous roads (which has resulted in several accidents) or rely on prohibitively expensive private transportation. Even when they manage to make it to the nearest town or legal clinic, Spanish-speaking workers further face linguistic barriers. Workers have publicly testified how the work hours and lack of transportation impedes them from filing claims as the following statement from a worker before the Ontario government indicates:

> If you're doing it in a community like Simcoe, or even Chatham, your day starts at about 7 o'clock in the morning and ends at about 7 p.m. You're probably an hour, or maybe 45 minutes, away from a main town, so information, getting to the place, having the ability to fill out the forms—and also, if you do try to fill out a form, you're probably going to be disbarred from the program.[89]

The above statement was publicly supported by other front-line legal support workers from clinics and Workers Action Centre (WAC) during the 2014 proceedings Standing Committee of the Ontario Government to consider various labor and employment acts.

Similarly, the workers are acutely aware of the racist treatment and conditions of indentured servitude that they face. For example, a worker stated the following before an expert advisory committee:

> …as a [names home country] worker, as a black guy working on a farm, he will get treated like if he is a slave. Workers are treated like if he is a dog - he will work very hard. Now if a Canadian worker or someone who comes from America, and you have a high color, you will get treated different. Them will get it more easy work. Canadian get driving work, or they will get leave to tend the belt - away from the kiln, which is very easy. Now a farmworker who is a black guy, he will get more out in the cool or

[89] FW2 (SAWP worker), submission before the Standing Committee of the Ontario Government to consider Bill 18, changes to various labor and employment acts, 30 October 2014.

> out in the hot sun, reaping the crops, picking up the heavy load, right? That's the difference, Black workers get treated like we are (inaudible). Black workers get treated like no one cares about us, right? Because if a white man come and he does the work, he gets treated like he's a king, you understand? He gets more preference. He want a day off, he will get a day off. If we say we need a day off, then the farmer will say, "you can't get a day off, you came here to work," you understand?
> […]
> [W]hat I'm saying is that the times that we live in, this is a more modern way of slavery work. But there is a difference, they don't have a whip - they just don't have a belt on you, so it's different, but, it has got more money ...A lot of the conditions are the same, because as I said, we just don't live on a chain, because if we raise our hands to hear the boss or close the boss, then right away it's a flight home ...[90]

Moreover, even when workers have collective legal consciousness and legal knowledge, they can face severe retaliation when they mobilize. Over hundred guest workers staged a wildcat strike in an Ontario farm after numerous complaints about living conditions and unpaid wages.[91] The farm owner filed for bankruptcy and all hundred workers were "repatriated" back to their home countries. In any case, as Adrian Smith puts it, the narrative of legal consciousness "is narrow and limiting to the extent that it refrains from measuring the level of devotion to essential legal relations within "ordinary" constructions of legal consciousness" (Smith 2005). It ignores the structural inequality in the SAWP program and "facilitates the privileging of growers' claims and interests" (Smith 2005). The description of legal mobilization shows that workers are conscious of the injustice done to them. The presence or absence of knowledge of the laws, as such, is an irrelevant consideration, when they are unable to access their legal rights. The alleged lack of knowledge of rights has instead been used to justify the continuation of existing policies even in the face of evidence of the structural barriers.

Some commentators have accused organizations such as *Justicia* of being self-serving and ideological in their call for granting immediate permanent residence to SAWP workers, arguing that the workers want better labor conditions and have no legal consciousness or desire to pursue permanent residence. But a survey of Mexican and Jamaican agricultural guest workers in Ontario found that 60 percent indicated they were interested in gaining permanent residence in Canada if they could (McLaughlin and Hennebry 2013). Furthermore, *Justicia's* demand for "Status Now" is supported by organizations like the *National Alliance of Philippine Women in Canada* (*NAPWC*) who have demanded that temporary live-in caregiver programs be "scrapped" pointing to the de-skilling, social alienation, poverty, assumption of "low-skills" and "temporariness," and racism that persist even after the caregivers become permanent residents. *NAPWC* demands that qualified Filipino women should still have access to migration but that they should be given immediate permanent resident status (National Alliance of Philippine Women in Canada (NAPWC) 2006; Canwest

[90] FW6 (SAWP worker), submission by worker as *IAVGO* client before the expert advisory committee. Minutes available at http://iavgo.org/migrants-and-precarious-workers/.
[91] Justicia for Migrant Workers. "Government Stands on the Side of Agri-Business and Deports Migrant Workers." *The Women's Press*, June 2011.

News Service 2010). Other groups advocating for temporary foreign workers in general also support campaigns for permanent status on arrival as they see it as a frame that asserts the workers' rights to be treated equally and fairly and as being eligible to be part of the *demos.* [92] They pragmatically expect that the demand might at least result in *access* to permanent status for workers after a certain number of years of employment.

In summary, the political environment analysis in Canada suggests the SAWP program is mostly seen favorably. Even though overall there is support for immigration, the fact that SAWP workers have no access to permanent residence is justified through the discourse that the workers are here by choice, that they benefit their home countries by sending remittances, and that the workers themselves are not interested in making rights claims or changing the program. Most policy solutions to better the working condition of SAWP workers has involved monitoring and punishing bad employers, instead of examining fundamental structural issues with the SAWP program. However, there is push back against this discourse from several advocacy groups and their supporters.

IV. Legal Environment

In this section, I argue that the difficulties of access to various levels of courts, the almost unfettered jurisdiction of the federal government over immigration law, and the limited impact of provincially driven labor and anti-discrimination laws, together, result in a configuration of the legal environment that offers limited opportunities for TFWs to challenge the SAWP program in courts.

a) Access to Courts

After the *Canadian Charter* came into force in 1982, Canada ushered in a new era of constitutional law activism and Charter litigation (Hirschl 2004; Epp 1998). However, constitutional litigation is a much more onerous process in Canada than Israel. The Canadian Supreme Court functions as an appellate court. Constitutional challenges have to, therefore, arise from lower courts and are resource-intensive. Appeals are also not automatically heard as the Court decides on its docket and the cases it is willing to hear, based on a written submission where only limited evidence can be proffered. No amici submissions are allowed in the leave process. As a result, litigants often have to decide whether it is even worth pursuing a case if leave (permission for a hearing) is so elusive and uncertain. The costs, time, and requirement to seek leave impose prohibitive barriers on litigants (Dauvergne 2012).

Furthermore, as a federal state, the division of power between the federal government and provinces leads to what has been termed as "jurisdictional futbol" (Hennebry 2010). Section 91.25 of the Canada's Constitution Act of 1867 gives the Federal Parliament the exclusive authority over Naturalization and Aliens. Furthermore, within this jurisdiction, early jurisprudence established the primacy of the Federal Government (*Union Colliery of BC Ltd v. Bryden,* [1899] AC 580; *Re Munshi Singh* [1914] B.C.J. No. 116). However, provinces still retain residual power to decide on the rights of non-citizens. The early case of *Quong Wing v.*

[92] Strategy meeting of the Coalition for Migrant Worker Rights Canada (CMWRC), May 5, 2016.

R (1914), 49 S.C.R. 44 upheld a Saskatchewan law that prohibited any "Japanese, Chinaman or other Oriental person" from employing a "white woman or girl." In *Cunningham v. Tomey Homma* [1903] 9 AC 151, the Privy Council upheld a B.C. law that prohibited Japanese Canadians and Chinese Canadians from voting in the provincial elections. Although, such laws would now be found to be discriminatory under the Canadian Charter of Rights and Freedom, labor, employment, and social rights fall under provincial jurisdiction and so, SAWP workers are governed by the relevant law in each province.

Provincial statutory bodies in employment and discrimination law have exclusive jurisdiction and claimants do not have an automatic right to access courts until the case has been lodged and processed through the tribunal system. In Ontario, the Human Rights Tribunal of Ontario (HRTO) adjudicates all claims of discrimination and workplace harassment made by non-unionized claimants.[93] The Workplace Safety and Insurance Board (WSIB) and its associated tribunal, the Workplace Safety and Insurance Appeals Tribunal (WSIAT), deal with all issues of workplace injuries. Claimants are foreclosed from making courts claims until the matter is resolved by the WSIAT. Claimants can raise constitutional questions before the HRTO and the WSIAT, but the tribunals do not have the jurisdiction to provide remedies that can alter the federal law. As a result, court proceedings that can potentially have consequences for all SAWP workers, nationally, are foreclosed. The WSIAT and the HRTO also do not have authority to award costs.[94] In general, enforcing rights for SAWP workers involves navigating a "complex terrain" of administrative tribunals and courts in both federal and provincial jurisdictions presenting a significant challenge for legal mobilization on behalf of TFWs necessary for structural changes.

b) Applicable Laws

Constitutional Law

The *Canadian Charter of Rights and Freedoms* (*Charter*) was passed by the Canadian Parliament in 1982 and guarantees the civil, political and equality rights to all persons in Canada in the policies, practices and legislation of all levels of government. Section 15 of the *Charter* came into effect in 1985 and guarantees equality before the law and "the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability." Section 15 also extends to other grounds of discrimination that are similar or analogous to those explicitly set out in the section.

Canadian courts have been reticent in challenging provisions in immigration law. Despite its initial promise, the *Charter* has "failed" non-citizens because very few non-citizens' rights claims have reached the Supreme Court of Canada and even when non-citizens' cases reach the Court, they are not framed as rights claims (Dauvergne 2012). In the first case involving

[93] This differs between provinces. In Saskatchewan, for example, the human rights body only takes the initial complaint and does not adjudicated. If a resolution is not reached through mediation, complainants can file a claim directly at the court.
[94] It is ambiguous whether the HRTO can award in egregious abuse of process.

discrimination against non-citizens under the *Charter*, the Supreme Court held that no one in Canada can be discriminated against on the basis of nationality. The Court said "[l]egislating citizenship as a basis for distinguishing between persons [...] harbours the potential for undermining the essential or underlying values of a free and democratic society" (*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143). The case involved a white, male, British lawyer who had Canadian permanent residence who challenged a British Columbia law that allowed only Canadian citizens to be called to the bar. Since *Andrews,* the Court has held Immigration law to be immune from *Charter* review except in certain refugee cases and cases of deportation to torture. The only case involving foreign workers that has reached the Supreme Court is (*Ontario (Attorney General) v. Fraser* 2011 SCC 20 [*Fraser*]).

Several organizations in Canada, such as *Justicia* and the United Food and Commercial Workers Union (UFCW), have long campaigned for collective bargaining rights for agricultural workers in Ontario, emphasizing the vulnerabilities that guest workers in the sector face. Until 2001, Ontario's *Agricultural Employees Protection Act* ("*AEPA*") excluded all farm workers (foreign and citizen) from the *Labour Relations Act* ("*LRA*"), which included the right to unionize and collective bargaining rights without fear of employer retaliation. The Act was found unconstitutional in 2002 (*Dunmore v. Ontario (Attorney General)*, 2001 SCC 94). The AEPA was amended in 2002 to allow farmworkers to form associations and engage in negotiations with employers but did not provide a right to insist on a collective bargaining agreement. The campaign for collective bargaining rights culminated in the unsuccessful high-profile strategic litigation challenging the constitutionality of the Ontario law (*Ontario (Attorney General) v. Fraser* 2011 SCC 20 [*Fraser*]). The Ontario government's factum focused on the benefits of the program to migrant workers by stating that the guest workers "earn substantially more for their work in Canada than they could for equivalent work in their home countries" (Factum of the Appellant, Attorney General of Ontario, Oct 27, 2009). The Supreme Court majority ignored the issue of guest workers entirely except to explicitly state that they were "*not deciding on the rights, or lack thereof, of foreign seasonal agricultural workers and their families, who are regulated under federal legislation*" (Majority decision, *Fraser,* emphasis added).

The Supreme Court gave standing to UFCW as representatives of the guest workers, on the basis that guest workers faced barriers to access and valid fears of reprisal from their employers. The Canadian court system thus provided *formal* legal opportunity. However, the disregard of the issue of foreign agricultural workers on the basis of jurisdiction implies that for the Supreme Court, it is "natural and inevitable" that the "foreign seasonal" workers would have different rights, thus perpetuating the production of temporariness and non-citizenship in legal discourse.

Labor and Employment Laws

In all provinces, until recently, farm workers were excluded from key employment legislation such as the Employment Standards Act, Occupational Health and Safety and Workers Compensation Acts, and Labor Relations Act. Farming operations were included in the Ontario Health and Safety on June 30, 2006 (Ministry of Agriculture, Food and Rural Affairs 2005). Alberta included agricultural workers in their occupational health and safety act only in

2016 (Government of Alberta 2016). The application of the Employment Standards Act on farm workers depends on the kind of operation. The kind of work that SAWP workers engage in is excluded from overtime, public holidays, and rest periods. Only workers engaging in harvesting are eligible. The exemption of agriculture from several laws epitomizes the way in which agricultural exceptionalism is maintained by the state. In principle, the SAWP bilateral agreements with source countries provide for additional rights for SAWP workers, such as minimum wage and rest periods (see Appendix 4).

Breach of Employment Standards have to be made by individual workers at the Ministry of Labour, Workers Compensation Claim at the Workplace Safety and Insurance Board (WSIB), and breach of employment contract has to be filed as a civil claim. Workers are unwilling to file employment and anti-discrimination law claims unless they have no recourse, i.e. when they have lost their employment and are going to be repatriated:

> Many workers are absolutely aware of their rights, but the issue is that the Employment Standards Act does not protect you from being fired, for unjust dismissal. If you file a claim, your employer knows immediately, and in our experience, workers then lose their jobs. Over 90% of workers make claims after they've left their job because they want to keep their job. [95]

Provincial authorities sometimes engage in blitzes in workplaces where they do housing and employment standard investigations, thus protecting workers from having to make individual complaints and risk reprisals. Manitoba has been especially successful in finding employer violations through a Special Investigation Unit targeting workplaces with temporary foreign workers (Friesen 2014). A 2012 inspection by the Unit of approximately 25 farms employing foreign workers found 56 percent of farms were non-compliant with provincial employment standards. Violations included not paying the Labour Market Opinion rate, not recording hours worked, failing to pay workers regularly, and not calculating overtime wages properly. Manitoba also passed the Worker Recruitment and Protection Act (WRAPA) in 2009. The Act a) regulates agents that recruit migrant workers to the province by requiring them to hold a license, and b) requires that employers register with the province before they can recruit a foreign worker. Farms wishing to hire workers through the SAWP must register with the province to ensure that employers have a good history of compliance with labor laws and employment standards prior to hiring workers. It also provides Employment Standards Manitoba with a current list of employers in the province who have applied to hire migrant workers, a procedure that facilitates monitoring of employer compliance.

Ontario is currently attempting to emulate Manitoba's policies. However, though the inspections help in improving living and working conditions for workers, they do not address the structural problems of the SAWP program and also do not aid in the mobilization of the workers against the SAWP program.

Since the *Fraser* decision upheld the *AEPA*, foreign farmworkers in Ontario, where the largest number of migrant workers live and work, have been precluded from meaningful union

[95] Ladd, Deena, submission from the *Workers Action Center*, Toronto before the Standing Committee of the Ontario Government to consider Bill 18, changes to various labor and employment acts, 30 October 2014.

activity. Other provinces such as British Columbia (B.C.) protect unionization of agricultural workers. In a 2009 ruling, the B.C. Labour Relations Board certified a bargaining unit of SAWP workers working for Greenway Farms (Russo 2011). Greenway had argued against the certification on the basis that the federal government had exclusive jurisdiction over SAWP workers and the memorandum of understanding covered all rights and obligations in the SAWP program. They had further argued that allowing the certification would "wholly undermine and negate" the SAWP structure and affect the operations of the consular officers from the sending countries and Canada's international relations (Greenway Farms Ltd. and United Food and Commercial Workers International Union, Local 1518 and Attorney General of Canada and Attorney General of British Columbia, (29 June 2009), bclrb No. B135/2009). The B.C. Labour Relations Board addressed the structure of the SAWP program directly and found that the SAWP agreement did not preclude additional rights for workers and neither did it preclude the operations of the consular officers as their role was administrative in nature and they could not be considered to be the exclusive agents of the workers. However, on the same day as the decision, the workers themselves moved to decertify the union when they found out that Greenway would not bring back the pro-union workers the next year. The case illustrates the limitations of provincial enforcement mechanisms in the face of the restrictions within the SAWP program that does not allow for labor mobility and access to permanent residence and gives employers freedom to "name" and select workers for employment.

Tigchelaar Berry Farms v. Espinoza, 2013 ONSC 1506 is the only court case that involved a constitutional Charter claim against the SAWP program. The claimants challenged the common occurrence where the employer had terminated SAWP migrant workers before their contract date and removed them from Canada without notice. The workers' Charter claims were struck down by the Ontario Superior Court.

Provincial Anti-Discrimination Laws

In addition to the *Canadian Charter of Rights and Freedoms,* each province has a separate human rights code. While the *Canadian Charter* applies to any federal, provincial, and municipal law or regulation as well as to any governmental activity, provincial human rights legislation prohibits discriminatory practices in both the private and public sectors with respect to certain economic activities, including employment, housing and publicly available services. Provincial human rights codes are enforceable only by means of special procedures and remedies. In Ontario, claims based on violations of the Ontario Human Rights Code are heard at the Human Rights Tribunal of Ontario (HRTO). Unlike court proceedings under the Charter, claimants incur no costs in filing a complaint of discrimination. The HRTO has the power to grant damages in the form of monetary compensation and also demand specific performance from employers and the government to remedy discriminatory acts. The HRTO is subject to judicial review by the Divisional Court of the Ontario Superior Court of Justice. The Ontario Human Rights Commission (OHRC) forms the other wing of the Ontario human rights system with a focus to address the root causes of discrimination, The Commission engages in outreach, cooperation and partnership to advance Ontario's human rights code.

Even though HRTO deals with discrimination claims, there is no process to provide public interest standing for organizations; therefore, claims have to be made by specific workers. As

a result, systemic issues in the SAWP program cannot be addressed. For example, UFCW filed a claim alleging that the Foreign Agricultural Resource Management Services (FARMS) engages in discriminatory treatment since it allows farm employers to stipulate the gender of the worker required in recruitment *Raper v. Foreign Agricultural Resource Management Services (FARMS)* 2015 HRTO 269. The HRTO ruled that it has no jurisdiction to deal with such claims.

The HRTO has ruled on five cases made by SAWP workers. *Monrose v. Double Diamond Acres, 2013 HRTO 1273* dealt with a SAWP worker alleging that the employer had terminated him because he had challenged the employer when he made racist taunts (calling them "monkeys") against the worker. The HRTO ruled that the employer was discriminatory when he made racist comment and that termination was a reprisal against the worker's complaint. This case was initiated on behalf of Monrose by *Justicia*, which supported the worker through the proceedings and one of the lawyers for *Justicia* represented the worker.

In *Francis v. Great Northern Hydroponics* 2017 HRTO 336 a SAWP worker, who was represented by the *IAVGO* legal clinic, claimed discrimination on the basis of her disability, gender, and lack of citizenship. The employer had terminated her when she asked for accommodation for her injuries. The case is still ongoing but in a preliminary hearing, the tribunal addressed her SAWP status, stating:

> The applicant's lack of meaningful choice in this matter *was compounded by the fact that she was a seasonal migrant worker,* who was suffering from an injury, and had been repatriated to Jamaica, where her access to the justice system in Ontario was even more limited. *The unique and exceptional vulnerability of seasonal migrant workers*, and the barriers that exist for them to access and enforce their legal rights in Ontario, has been recognized in the jurisprudence of this Tribunal (para 55).

In *Jamjai v. Greenwood Mushroom Farm Inc*., 2013 HRTO 96, the claimant was a foreign worker in a mushroom farm and claimed discrimination on the basis of citizenship because of the housing rules that were imposed on her but not on citizen workers. The HRTO accepted that the case had merit and could be heard by the tribunal but no final decision was rendered.

Peart v. Ontario (Community Safety and Correctional Services) 2011 HRTO 2157 was an important case brought by *Justicia* on behalf of Peart, who had died in a tobacco farm and was denied a coroner's inquest. *Justicia,* through Peart's family, argued that the *Coroners Act* was discriminatory and that there should be mandatory inquest into deaths of farm workers. They relied on the fact that not a single death of a seasonal farm worker has been investigated by the coroner in the history of the program, despite farm work being recognized as hazardous work. The HRTO found that the *Coroner's Act*, while setting out a neutral requirement on its face, has a disproportionate impact on the group of SAWP workers on prohibited grounds of discrimination, particularly on the grounds of citizenship and race. However, surprisingly, the tribunal found that the absence of mandatory inquest does not result in substantive inequality for this group.

Despite ruling against *Peart* in the case, the HRTO made important findings with respect to SAWP workers:

> The point is that, due to the significant barriers, costs and delays encountered by SAWP workers in seeking to initiate a transfer to another employer, the contract employer wields disproportionate power over the SAWP worker well beyond what Canadian citizens and permanent residents experience in their employment relationships. It is this disproportionate power wielded by employers under the SAWP that is one of the primary factors in identifying migrant farm workers as a vulnerable group (para 138)…
>
> However, [the evidence on repatriation of SAWP workers show] that some of the reasons for repatriation would be (and may in fact be) illegal or discriminatory (para 139)…
>
> I accept the evidence before me that, because of the "closed" employment relationship and risk and fear of repatriation, SAWP workers are reluctant to make complaints about their employers, including health and safety complaints, are more willing to continue working while sick or injured, and are less able to resist work demands placed upon them, including both the nature of the work being performed and the incredibly long hours of work required. I also accept the evidence before me that the conditions in which SAWP workers live and work also may place them at greater risk of experiencing health issues, and the evidence regarding other vulnerabilities experienced by this group (para 273)…
>
> SAWP workers are a uniquely vulnerable group. In my view, the primary factor contributing to the vulnerability of SAWP workers resides in the "closed" nature of their relationship to their employers in Ontario, and the risk and fear of being repatriated with the resultant consequences on their livelihood. I am well aware that this case is not a challenge to the SAWP itself, *and accept that such a challenge to a federal program is not within my jurisdiction. Nonetheless, the structure of the SAWP is such as to create one of the primary conditions of vulnerability for this group* (para 273, emphasis added).

Hosein v. Ontario (Community Safety and Correctional Services) 2018 HRTO 298 is another significant case that is ongoing before the HRTO. On October 19, 2013, the police engaged in investigations to find the culprit behind a vicious sexual assault in Bayham Township at the heart of the agricultural belt in Southern Ontario where hundreds of SAWP workers are employed. The police had the suspect's DNA and his general description as being black, five feet ten inches to six feet tall. The police went to the nearby farms and did an expansive DNA collection sweep of more than 100 Caribbean SAWP workers and targeted only SAWP workers in the farms. The workers ranged in age from 22 to 68, their heights were from five feet to six feet six inches and weights from 110 to 328 pounds. Other identifying features were disregarded. The police even took the DNA of Caribbean SAWP workers of Indian descent and workers who did not remotely match the description.

Despite intensive mobilization *Justicia's* counsel could file the case before the HRTO only after the two-year limitation period had passed. HRTO conducted a preliminary hearing on the acceptability of the application and decided that the case should be heard despite the delay. The HRTO found that the workers were misled by the consular liaison officer and the employers from filing court actions. The SAWP workers were also unsure about the law and process and were under the impression that the police review board, the Office of the

Independent Police Review Director, OIPRD, investigation was the only good remedy available to them. The HRTO found the workers' fear and apprehension to be reasonable under the circumstances. Their "social isolation, intermittent residency in Canada, fear of reprisal and the express direction by their employer / supervisory staff and a liaison officer to refrain from associating with advocates like *Justicia*, imposed significant barriers to them learning of their rights and in acting in a timely manner to bring the two lead Applications." The HRTO noted the above concerns as follows:

> The evidence was also uncontested that the supervisor had expressly warned workers not to "form a group" and not to engage with [*Justicia*], and that [*Justicia*] representatives were ejected when they were discovered at the bunkhouse. I accept that LaRosa honestly believed that there would be reprisal if he was attentive to and engaged with [*Justicia*] because the supervisor was "always around" and workers had to "hide" to do anything. I also accept LaRosa's evidence that he was emboldened in 2015 and "felt brave" enough to participate in the instant proceedings as part of a large group, with the assumption that the farmer would be unlikely to fire them all (para 232)…
>
> [T]he migrant farm workers were not only unsophisticated regarding legal matters, but as foreigners with intermittent stays in Canada they also faced practical limitations in ascertaining their rights while outside of Canada (para 248).

Cases like *Francis, Monrose,* and *Jamjai* have limited impact as they only highlight discriminatory practices by individual employers. It is also difficult to bring these cases since the claims in both *Francis* and *Monrose* could only be initiated after the workers had been terminated from employment and because they managed to remain in the country after termination. *Peart* and *Hossein* reveal innate problems with the SAWP program, which prevents SAWP workers from getting a coroner's inquiry in the event of death and provides impunity to employer (*Peart*) and the racism and "othering" that is produced by the SAWP program (*Hossein*). The cases, thus, have the potential to have broad consequences on the functioning of the SAWP program. But both cases are unique. In *Peart,* the worker had died but had family members in Canada who could initiate the complaint. Also, *Peart* lost the case at the HRTO. *Justicia* filed an unsuccessful judicial review appeal at the Divisional Court of Ontario and did not get leave to appeal to the Supreme Court. *Peart* was financed by Legal Aid Ontario as an important test case and the lawyers working on the case willingly accepted legal aid rates to litigate the case despite working in a prominent law firm. The failure of *Peart* to receive a Supreme Court hearing reveals the hurdles in engaging in transformative constitutional litigation as a strategy to challenge the strictures of the SAWP program.

Hossein is an ongoing case but it has the advantage of the respondent being the Ontario Provincial Police as opposed to an employer. It received extensive media attention because the case dealt with racial profiling by the police. It was, nevertheless, a drawn-out ordeal for *Justicia* to find workers who would be ready to be named claimants, like Hossein. Since many of the workers returned to their countries, gathering evidence was an arduous process often done over the phone. These factors resulted in *Justicia* missing the limitation period to file the claim. The fact that the HRTO applied its discretion in disregarding the limitation period speaks to the importance of the claim, but in the context of police racial profiling. It is doubtful that it will have any impact on the SAWP program, except as a tool to highlight the

conditions of SAWP workers. Nevertheless, *Justicia* used the proceedings in *Peart* to demand that FARMS reveal data on SAWP worker deaths and medical repatriations, which was granted by the HRTO. Several academic experts testified on behalf of the SAWP workers in the *Peart* and *Hossein* hearings. The decisions in both cases provide an official, adjudicated public transcript on the systemic issues in the SAWP program that are a result of the federal government's actions. The media attention received in both cases cannot be understated since the SAWP workers, being an isolated community, ordinarily receive limited media coverage. Thus the legal strategies in both cases aided political mobilization, increased media attention, provided a space for airing grievance and symbolic resources towards empowerment and reshaping identity, all of which were benefits that the workers gained even when they lost the case (McCann 1994, 2006; NeJaime 2011).

As noted earlier, the Ontario Human Rights Commission (OHRC) is an independent commission in the Ontario Human Rights system that reports on systemic issues of discrimination. In response to the DNA sweep of the SAWP workers, OHRC has made a submission to the police review board, OIPRD. The Commission alleged that the Ontario Provincial Police had engaged in racial profiling and expressed concern that the workers were disproportionately targeted because of racial stereotyping (Ontario Human Rights Commission 2014a). The Commission pointed to the particular vulnerability of migrant workers because of their status. The Commission has also raised concerns of gender-based discrimination about the fact that employers in Ontario hire, almost exclusively, men to work on their farms as part of the SAWP program (Ontario Human Rights Commission 2014b). Nevertheless, the provincial legal system has limited means to legally challenge the SAWP program as the jurisdiction rests with the federal government.

c) Rights Legacy

The *Canadian Charter* is lauded as an ideal representation of a bill of liberal rights that represents historical rights priorities of a liberal, multicultural Canada (Manfredi and Kelly 2009; Epp 1998). The *Charter* is deemed to have unleashed a rights revolution in Canada as public interest groups promptly turned to the *Charter* to force rights-expanding legislation (Epp 1998). Though there have been wide-ranging protections extended such as in freedom of association, freedom of expression and religion, and Aboriginal rights, the *Charter* has had limited impact on immigration-related claims.

Procedural fairness and rule of law claims have been the most resonant in the Supreme Court (Dauvergne 2012). As a result, procedural guarantees such as right to fair hearings and to know the evidence are well-protected. In fact, the concept of procedural fairness is so strongly prioritized that the Court has suggested that indefinite detention and deportation to torture would be permissible so long as procedural fairness and rule of law is protected (Dauvergne 2012).

The concept of freedom and autonomy, which was relied on in the Israeli cases, is narrowly interpreted to mean that while the government cannot inhibit freedom, it is under no obligation to take positive steps to ensure full freedom and autonomy (Petter 2010, 33).

The equality jurisprudence of the Charter has been criticized by many scholars (Dauvergne 2012; Hamilton and Shea 2010; Majury 2002; Jackman and Porter 2008; Galabuzi 2005). The Court has been unable to resolve socio-economic and other intersectionality claims using s.15 of the Charter. As discussed in the previous section, equality discourse has been a failure in extending rights to non-citizens. The lack of resonance of socioeconomic rights has led to an impoverished labor and welfare rights protection.

Several scholars have derided the erosion of labor citizenship in Canada (Fudge 2006; McLaughlin and Hennebry 2013; Vosko 2000; Smith 2015). Although freedom of association has had an expansive interpretation, substantive labor rights claims have limited resonance.

The preceding discussion of the legal environment illustrates the many barriers – institutional and discursive – that limit the possibilities of mounting a constitutional challenge to the SAWP program in Canada but still permit the use of the law strategically as part of a larger political mobilization strategy.

V. Support Structure

This section focuses on the organizational resources available to SAWP workers to assist in mobilization. Though there are no cause lawyer driven organizations in Canada that target TFW causes, solidarity organizations like *Justicia* and legal clinics like *IAVGO* prioritize worker mobilization in legal mobilization efforts providing further evidence of worker mobilization and oppositional consciousness in SAWP workers.

a) Legal Clinics

Ontario's legal aid system for providing legal service to low-income individuals consists of 73 community legal clinics and 17 specialty legal clinics with salaried staff and lawyers as well as a "legal aid certificate" system, which compensates private lawyers for taking poverty law cases (Legal Aid Ontario n.d.). The specialty legal clinics focus on specific areas of law that affect large numbers of low-income individuals, such as refugee law, workers compensation, and housing or focus on particular marginalized groups such as Aboriginal people, immigrant minorities, persons with HIV/AIDs, and so forth. Immigration cases are limited to refugee claims, humanitarian and compassionate grounds claims for refugees, domestic violence cases, and cases involving children (Legal Aid Ontario n.d.). Clinics also represent low-income, non-unionized workers in employment issues that include harassment, unemployment insurance, workers compensation, and wage-theft. Clinics are entirely funded by Legal Aid Ontario, a legislated publicly funded provincial nonprofit with a mandate "to promote access to justice throughout Ontario for low-income individuals" (Legal Aid Ontario n.d.).

Individual representation forms the bulk of the work of legal clinics, although clinics, mainly the specialty legal clinics, engage in advocacy work and strategic litigation. Many of the legal clinics in Southern Ontario represent farm workers in employment law related claims. For example, a legal clinic in the Niagara region successfully represented 102 migrant workers to challenge a law that denied Employment Insurance (EI) parental benefits for guest workers (*De Jesus v. Canada,* [2013] F.C.J. No. 1270 (FCA) [*De Jesus*]). SAWP workers are taxed for

Employment Insurance (EI) (the equivalent to unemployment insurance in the U.S.). Yet, they cannot use the insurance when they are unemployed, after their seasonal contract has expired, since a mandatory clause requires the workers to be in Ontario and looking for jobs to get insurance benefits. SAWP workers have paid 8.966 million dollars into Employment Insurance as tax, which they cannot benefit from (UFCW Canada 2014). One of the volunteers for *Justicia,* discovered a legal loophole as she was filling forms for migrant farm workers during a farm outreach.[96] She realized that even if they cannot avail themselves of EI benefits, SAWP workers could get parental benefits for 35 weeks with a possible extension to 61 weeks from the time a child was born to the worker or adopted by the worker. Unlike the standard unemployment benefits, the parental benefits had no Ontario residence requirement. She promptly got in touch with legal clinics and other organizations, including UFCW, which had satellite help centers (Agricultural Workers Alliance support centers) to assist the workers in filling benefit forms. The workers quickly responded to her discovery and soon the right to "baby benefits" (as they called it) was being demanded by numerous non-English speaking foreign workers with limited education across remote farms.[97]

After a few years of organizing, the legal clinic serving the Niagara region decided to file a class action to provide for unpaid parental benefits to SAWP workers, which was successfully litigated. The class action was covered extensively by the media and closely followed by the workers themselves. As a result of the case, employment insurance of SAWP workers has come under public scrutiny and the law is under consideration. Employers and some groups want the law to be changed so that the SAWP workers do not pay into EI at all. But the workers and their advocates do not share this view to employment insurance. The workers do not want to lose out on the contribution by the employers and the state to the EI program. The workers instead want full EI benefits, especially in between the seasonal contracts.

In addition to EI, workers' compensation claims form a major category of legal claims on behalf of SAWP workers. Agriculture ranks as the fourth most hazardous industry in Canada with respect to rates of fatal injury and as the highest in terms of absolute numbers of fatalities (Canadian Agricultural Injury Reporting (CAIR) 2016). Injuries among agricultural workers is twice as high as the Ontario provincial average and more than twice as high as injury rates in mining (Richmond, Randy 2016). Many SAWP workers end up getting injuries that result in their medical repatriation and are unable to work in Canada or in their home country.

The leading clinic involved in workers' compensation cases on behalf of SAWP workers is the *Industrial Accidents Victims Group of Ontario* legal clinic (*IAVGO*). For over 40 years, *IAVGO* has represented thousands of injured workers and survivors in appeals before the Workplace Safety and Insurance Board (WSIB) and Workplace Safety and Insurance Appeals Tribunal (WSIAT), which constitute the administrative bodies for workers' compensation. Unlike in the United States, workers' compensation cases have to be exclusively adjudicated in the administrative body and not courts. In Ontario, *IAVGO* is the only legal clinic that has a specific mandate to represent migrant workers, including SAWP workers. *IAVGO* prioritizes

[96] JA (*Justicia* member), interview with author, November 2015. Participant observation during a Justicia meeting, June 2015.
[97] *Ibid*

migrant worker cases as one of their strategic objectives.

Several staff members of *IAVGO* have individually engaged in farm worker outreach since the late 1990s, but *IAVGO* officially made migrant agricultural worker community work a priority in November 2005.[98] *IAVGO* staff regularly travel to farms and provide educational workshops and materials to migrant agricultural workers regarding workers' compensation, human rights and occupational health and safety. Many of their outreach trips to rural Ontario are done alongside *Justicia*. *IAVGO* has established a dedicated bilingual (Spanish and English) toll-free phone line to serve the migrant agricultural worker community in Ontario.

IAVGO currently represents about 30 agricultural migrant workers (mainly SAWP workers) and/or survivors, in their claims for workers' compensation benefits. In addition to workers compensation claims, *IAVGO* also directly represents them in human rights claims related to discriminatory treatment in their workplace or in the workers compensation system before the Human Rights Tribunal of Ontario.

Although the legal mobilization by *IAVGO* is limited to enforcement of existing laws or for changes in provincial labor or health laws, their use of advocacy and SAWP worker organization as part of their legal case-work makes the impact of their work resonate beyond the immediate remedies they achieve for individual cases. Importantly, even in their legal work, they adopt discursive frames in their submissions that situate the case in the broader structural and institutional issues that impact the worker. They also actively try to get workers' involvement in direct action activities, lobbying, and attending impact litigation hearings. This is unlike legal clinics in countries like the U.S., which are prohibited from lobbying and unlike *Kav Laoved* in Israel, which does limit organizing and does not mobilize the workers themselves to engage in political action.

Unlike the majority of legal clinics, *IAVGO* is organized as a collective structure with no executive director or hierarchy. Lawyers, legal case-workers, organizers, and support staff collectively make all decisions. As a result, community organizing of workers and advocacy are given equal importance as legal work, even though the number of clients served is the primary consideration for financial funding from Legal Aid Ontario. The non-lawyers play an essential role in organizing workers. *IAVGO* allocates an annual amount of its operational expenses for outreach travel and to fund a worker-led group called *Injured Workers for Justice* (*IW4J*). *IW4J* is a group composed of injured workers supported by the case-workers and organizers of *IAVGO*. *IW4J* independently organizes meetings, direct action, and lobbying for better rights for injured workers. Since *IW4J* is Toronto-based and most seasonal farmworkers live and work in farms outside Toronto, there are no SAWP workers in the group. Nevertheless, they call on SAWP workers to join them in major activities, during the off-days for SAWP workers. The workers' travel is paid for through *IAVGO* funding.

As mentioned, *IAVGO* works closely with *Justicia* in all their work with migrant workers. *IAVGO*'s outreach has been successful because of a long history of advocacy "*alongside*

[98] IB (*IAVGO* member), interview with author, May 2016; *IAVGO* internal documents.

racialized workers."[99] *IAVGO*'s "Know Your Rights" guidebook for migrant farm workers in multiple languages is regularly distributed across farms every weekend during harvest season. Workers regularly approach volunteers at the grocery stores away from the farms (where farm worker activists from *Justicia* or *IAVGO* wait during the workers' off-day) and ask for the pamphlets. The pamphlets function as an inroad for activists to talk to the workers, engage with their issues, and provide information on how to organize, mobilize, take leadership, and even volunteer with *Justicia.*

IAVGO, as an established legal clinic, has advantages of credibility and legitimacy, which they use to advocate for better rights for SAWP workers. They usually make leading submissions on questions of workers' compensation policy and law and regularly meets with senior levels in Ontario ministries, especially to the Ministry of Labour and to senior management at the WSIB.[100] *IAVGO* also co-hosts conferences and webinars highlighting the problems faced by SAWP workers.

As a result of their long-standing work for injured workers, they have the legitimacy to provide expert evidence in other cases, during which they focus on systemic issues with the SAWP program including employer oppression. The statements that follow reflect important interventions by *IAVGO* on behalf of SAWP workers:

> "Many workers do not know about workers' compensation and/or when it would protect them. It is our experience that many employers do not provide this information to workers; to the contrary, many employers actively seek to dissuade workers from knowing their rights to workers' compensation. "[101]

> "In the few cases where migrant agricultural workers claim and receive workers' compensation, their entitlements are severely limited. Migrant agricultural workers are unable to benefit from retraining programs to which all other workers in Ontario have access. Further, their entitlement to loss of earnings benefits is extremely limited; they are treated as if they are able to work and live in Canada even though in reality their employers have repatriated them to another country and they are legally forbidden to work in Canada. Unless they are totally disabled, migrant agricultural workers are only entitled to very temporary loss of earnings. *Many of our migrant agricultural worker clients are repatriated to a future of poverty and ill health* because of their injuries." [emphasis added][102]

> "[The Human Rights Tribunal of Ontario] formalistic analyses result in the erasure of social and historical context relevant to [Seasonal Agricultural Workers], necessary for a substantive equality analysis and required in the human rights context …. [The

[99] JB (*Justicia* member), interview with author, October 2016.
[100] IA and IB (*IAVGO* members), interview with author, November 2015; Participant observation during *IAVGO* board meeting, May 2016; Affidavit of *IAVGO* case worker filed in *Peart v. Ontario,* 2011, Court File No. 377 /14.
[101] *IAVGO* expert report Law Commission of Ontario report on vulnerable workers and precarious work, December 2012.
[102] *IAVGO* counsel report in case submission to WSAIT, February 2018; Affidavit of *IAVGO* case worker filed in *Peart v. Ontario,* 2011, Court File No. 377 /14.

> Human Rights Tribunal of Ontario] must take into account the barriers in accessing justice and services by members of racialized and other disadvantaged communities and the historical mistrust of institutions to resolve race based complaints."[103]

IAVGO's advocacy work and legal submissions highlight the issue with forcing the migrant farm workers to return after the annual season, a condition that is unique to TFWs in agriculture. They highlight that this feature of the immigration program prevents them from availing of the basic rights that Canada, as a liberal state, is supposed to give to everybody within its jurisdiction. The temporal restrictions imposed on farm workers ensure the discontinuance of health coverage as soon as the work permit expires and make the labor welfare rights that the workers are supposed to have ineffectual. All workers who get injured are supposed to get workers' compensation based on the wage loss they incur as a result of their being unable to work. If they are able to work in another job in Ontario, the wage loss is reduced by the amount of wages they are deemed to receive from this hypothetical, alternative job in Ontario. The workers' compensation board treats SAWP workers as if they are citizens who are eligible to work in Ontario after their injury. An *IAVGO* caseworker clarifies:

> "For example, a migrant farm worker suffers a serious back injury. He is repatriated to Jamaica. He cannot return to work in the SAWP because the job is too heavy. So he is not making the money he usually would. But, the workers' compensation board tells him that, if he could work in Ontario, he could be a cashier. And so the board refuses to pay him any loss of earnings payments." [104]

After decades of such wage loss calculation, *IAVGO* filed a constitutional complaint before the workers' compensation tribunal, WSIAT, arguing that this practice is constitutionally wrong and discriminatory under the Ontario Human Rights Code and the Canadian Charter of Rights and Freedoms. WSIAT, because of its exclusive jurisdiction over workers compensation cases, can address constitutional issues even though it is not a court. In a September 2017 decision, the WSIAT finally ruled that the practice by the Workers Compensation Board (WSIB) of reducing loss of wages based on work available in Ontario contradicts the principles behind workers compensation as it cannot be considered as meaningful "available work" (WSIAT Decision No. 1773/17). WSIB is currently requesting a second hearing at the WSIAT to present their case and challenge the ruling.

Other successes include small but positive changes in workers compensation adjudications. The WSIB amended its policies to include probable Employment Insurance payments in migrant workers' pre-accident earnings rate and to increase the small amount of loss of earnings benefits repatriated workers get from four to 12 weeks. The WSIB now holds educational meetings with doctors practicing in areas known to have the largest migrant agricultural worker populations. The Board also developed an educational pamphlet for Ontario doctors specific to the needs of the workers.

Despite workers compensation claims being only limited to tribunal proceedings, *IAVGO* has

[103] Affidavit of *IAVGO* case worker filed in *Peart v. Ontario,* 2011, Court File No. 377 /14.
[104] Submission by *IAVGO* caseworker before Standing Committee on temporary foreign workers and non-status workers, May 2009.

pursued a few cases in the Ontario courts and the Supreme Court. SAWP workers lose their health coverage as soon as their work permit expires, even if they are seeking healthcare for an injury suffered during the period of their valid employment on a Canadian farm. *IAVGO* launched a constitutional case in the Ontario courts to challenge this application. On August 9th, 2012, nine Jamaican migrant workers were driving to work when their employer's van swerved to avoid an oncoming car (Marketwired Newsroom n.d.). The ensuing accident killed one passenger and severely injured the others. The incident received coverage in all the major newspapers. Their employer attempted to return two of the workers to Jamaica after the accident despite their serious medical conditions and before they could receive adequate healthcare. The workers were picked up by advocates from *Justicia* before they could be deported and their case was used by *Justicia* and *IAVGO* as an important example to show the precarity of the workers. They were supported by family members of the workers. *IAVGO* took their cases to the Health Services Appeal and Review Board of Ontario and won a landmark decision extending their coverage. The Ontario Health Minister successfully challenged the decision at the Superior Court (*OHIP v. Clarke & Williams*, 2014 ONSC 2009). Although *IAVGO* lost the case on the basis of executive supremacy of the Ontario government to decide on the scope of health coverage, the clinic continued their advocacy for health coverage in their subsequent submissions in other cases and before legislative committees by using a single line from the case calling for the government to ensure there is no gap in coverage:

> [I]f there is a gap in the parameters of the SAWP that do not ensure health care coverage for seasonal workers who are required to remain in Ontario for legitimate medical reasons after the expiration of their work permit, then that gap should be filled, either by requiring the employers to obtain supplemental health insurance or through an agreement negotiated between the Federal and Provincial governments (*OHIP v. Clarke & Williams,* 2014 ONSC 2009; Affidavit of IAVGO case worker filed in *Peart v. Ontario,* Court File No. 377 /14)

The case is another example of the courts being unable and unwilling to extend the rights of SAWP workers, ceding to the legislative and executive branches in all matters dealing with temporary foreign worker rights. Nevertheless, the case resulted in several SAWP workers, including the two named claimants (Clarke and Williams) actively participating in public forums and direct action activities organized by *IAVGO* and *Justicia* that received extensive media coverage.

IAVGO provided a joint amicus submission before the Supreme Court in the *Fraser* case. The joint factum of *IAVGO* and *Justicia* is worth noting.[105] Unlike UFCW and the other claimants, *IAVGO* and *Justicia* argued for a right to sectoral bargaining (all SAWP workers as a unit, instead of SAWP workers in a single farm) along with right to strike as an alternative meaningful model for labor relations in the agricultural sector. The claim collectivizes all SAWP workers on one side and all farm employers on the other on the understanding that the individualized bargaining unit (separated by farm owner) does not capture the structural impediments faced by all workers, irrespective of the employer. I highlight the relevant paragraphs from *IAVGO*'s factum:

[105] *Justicia* and *IAVGO*, Factum of Interveners, in *Ontario (Attorney General) v. Fraser* 2011 SCC 20.

> The Interveners further submit that "agricultural worker," itself, is an immutable characteristic because of its roots in, and proliferation of, indentured servitude. Such proliferation is seen in the structures of the federal Seasonal Agricultural Worker Program (SAWP) and other Temporary Foreign Worker Programs (TFWP) and, by extension, the agricultural industry. The essential dignity interests of migrant agricultural workers are undermined by the severe inequality and exploitation perpetuated by these structures. They are subject to stereotyping that limit the kind of work they are permitted to do in Canada (para 11 of the Factum)…
> Single-employer, single-location collective bargaining constitutes the dominant model in the private sector in Ontario. The dominant model unduly restricts the freedom of association of migrant agricultural workers and as such does not provide an effective and meaningful model for labour relations in Ontario's agricultural sector (para 20 of the factum).

In addition, the arguments challenged established discourses around SAWP workers that personalize the "vulnerability" of workers framing them as individuals with less agency, knowledge, and legal consciousness as opposed to subjects of systemic inequality. The factum argues that the solution to systemic inequality is "redistribution of power":

> In this appeal, while the Respondents describe agricultural workers as "vulnerable," they must not be seen as inherently so. *An advanced equality analysis recognizes the essential human dignity and worth of these workers as individuals with voice and agency*. While "vulnerability" has been understood as a personal characteristic, in the agricultural labor context it is a result of unequal power relations and systemic barriers…
> It is true, as recognized by the court below, that agricultural workers need statutory supports for organizing and collective bargaining because they are poorly paid and face difficult working conditions; and some have low levels of skills and education, low status and limited employment mobility. *However, it is through systemic inequality, including and especially government action - not the inherent "vulnerability" of agricultural workers - that these workers, and in particular migrant agricultural workers, are unable to organize and bargain collectively*. [emphasis added] (paras 14 and 18 of the factum)…
> Therefore, any remedy must include a redistribution of power and a removal of systemic barriers (para 15)

Labor relations discourse, especially in agriculture, frames workers' rights violations as arising from the unequal bargaining power between employers and workers. The news analysis in the earlier section provides support for this labour relations discourse, where the main issue with the SAWP program is cast as a problem with "bad apple" employers. *IAVGO* and *Justicia*, in contrast, frame the rights violation as arising from government action and from systemic inequalities such as racialization, lack of citizenship status, and the political economy of agricultural labor migration:

> [I]t is through government action (at both provincial and federal levels) that these workers are subjected to systemic barriers to equality and freedom of association. In particular, SAWP, other TFWP and under-inclusive federal and provincial

> legislative schemes deplete workers' social capital and make organizing and collective advocacy more difficult. (para 25)…
> We submit that even less deference should be afforded to the legislature because governmental actions have created many of the systemic inequalities that undermine the ability of agricultural workers to collectively bargain without laws to safeguard the right. The government has a history of ignoring the voices, history and equality interests of migrant agricultural workers….
> The failure of the government to conduct meaningful consultations and seriously weigh alternatives is even more stark in the instant case because agricultural workers … generally lack a strong political voice. (paras 27-28 of the factum)

In all cases before the courts, organizers use *Justicia*'s*,* help in arranging for workers to attend the hearings. The workers find it a transformative experience and see their actions as having meaning:

> I felt something … sitting there in the Supreme Court. These big judges were actually listening to my problems, the voice of the workers. It was a great experience.[106]

They also engage in direct and disruptive action before and during the court sessions. During *Fraser,* workers participated in a march to the Prime Minister's house and a demonstration before the Canadian Parliament.

More importantly, *IAVGO*'s work is not limited to high-level political lobbying. They work closely with workers, community organizations, unions, and other legal clinics in advocating for fairness for injured SAWP workers, which includes focusing on their precarious immigration status. *IAVGO*'s affidavit in the *Peart* case notes:

> [Racialized migrant workers'] exceptional vulnerability [is] a vulnerability created by the government programs in which they work.[107]

IAVGO is a member of the Migrant Workers Alliance for Change, an Ontario based coalition of organizations that do advocacy or provide services for migrant agricultural workers. In addition, *IAVGO* also has students volunteering for credit from their law schools or working for them in summer and articleship (post law school mandatory apprenticeship) positions. The law students engage in *IAVGO's* work for migrant workers and the student training helps create a new generation of lawyers who are attuned to the fundamental problems in the SAWP worker program.

In addition to grassroots and policy-level work, *IAVGO* also works with academics to provide research data and create reports that can be used for advocacy. Their Migrant Worker Health Project is a compilation of "over a decade of research into the barriers facing migrant workers in accessing health care and WSIB benefits."[108]

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[106] FW5 (SAWP worker), public expression by worker on experience of a court hearing in a *Justicia* meeting, June 2016.
[107] Affidavit of *IAVGO* case worker filed in *Peart v. Ontario,* 2011, Court File No. 377 /14.
[108] Affidavit of *IAVGO* case worker filed in *Peart v. Ontario,* 2011, Court File No. 377 /14.

Law and social change literature privileges constitutional litigation as the paradigm for change, especially for change in legislation. Yet, *IAVGO* uses workers compensation as a tool for social change even though workers compensation is focused on claims of individual workers in a purely tribunal setting and does not engage with immigration law. The clinic also focuses on worker organizing, and advocacy for changes in immigration law. The discourse used by *IAVGO* and *Justicia* stands as an example of an innovative strategy for alternative legal mobilization that can still make rights claims for non-citizens and mobilize SAWP workers. Subversive frames that challenge the hegemonic structures find limited resonance in political institutions and are often sidelined. Yet, by challenging the root causes of SAWP vulnerability in traditional legal and legislative forums, *IAVGO* has maintained its legitimacy in institutional forums. In addition, their framing and active involvement of workers has not only increased the legitimacy of *IAVGO* and *Justicia* among workers, but also led to workers, who live in isolated conditions and who voices are rarely heard, actively participating in organizing activities and taking leadership positions.

b) Solidarity Organizing: Justicia for Migrant Workers

Ontario has advocacy groups that mobilize foreign workers directly. The primary advocacy group is *Justicia for Migration Workers* (*Justicia or J4MW*), a volunteer group made up of labor organizers, lawyers, academics, and migrant workers. *Justicia* started organizing with migrant workers in Ontario in 2002 to promote the rights of seasonal migrant farm workers. In April 2001, Mexican workers employed in a farm in Leamington in Ontario began a wildcat strike against the early repatriation of twenty co-workers and harassment by the employer. Union representatives, labor activists, and students interested in the labor movement traveled to Leamington to help the workers and to investigate the matter. This event resulted in several changes to the resource landscape for mobilizing SAWP workers in Ontario. The investigative missions were conducted under the auspices of UFCW, the union, but was conducted by activists who later founded *Justicia*. Soon UFCW opened its first migrant worker support center in Southern Ontario in 2002 and employed some of the same *Justicia* activists involved in the investigative missions.[109] These activists found that UFCW was not appropriately representing the interests of the SAWP workers. The union did not support the call for access to permanent residence for the workers, which the activists determined was a core factor that engendered the racialization and discrimination of SAWP workers. They assessed that the union's organizing strategy would not work for SAWP workers since their precarity was caused by immigration law and not just labor conditions. They found that the UFCW ultimately prioritized the interests of the Canadian workers and did not share the concern of the migrant workers who did not want the SAWP program to be entirely cancelled. *Justicia* was formed in 2002 to address the unique precarity of migrant agricultural workers. Studies have found that the union model does not work in organizing migrant labor for reasons stemming from their precarity, uncertainty, and lack of permanence (Milkman 2006; Gordon 2005). Other forms of organizing such as workers' action center models or community-centered organizing have proven to be more effective. Furthermore, the interests of unions do not match with the interests of workers who straddle labor and immigration. Unions also have a historical legacy of being anti-immigrant.

[109] JB (*Justicia* member), interview with author, March 2016.

In contrast to unions, *Justicia* is a volunteer-led collective made up of labor and migrant rights advocates, lawyers, union leaders, academics, foreign workers, and activists who share the common vision of being allies striving "for a movement that is led and directed by workers themselves" (*Justicia* 2017). Their main work is outreach to migrant workers in rural Ontario by visiting farms and listening to their problems and talking to them about their rights and issues of classism, racism, and transnationalism through a popular education framework and conversational model. They facilitate individual and group discussions that "center workers' knowledge and experiences" (*Justicia* 2017). The organization estimates that they have had 778 interactions with individual workers over the course of 36 visits to communities where migrant workers live.

Justicia uses several strategies from legislative lobbying to disruptive action, from legal rights education to worker organizing, and from helping workers with their individual legal cases to large-scale mobilization with involvement of workers. Across all strategies, the core value that the organization seeks to preserve is that their strategies and interests are migrant worker driven. Although many of the organizers in *Justicia* have labor, anti-colonial and anti-racism perspectives, they see themselves as advocating ideologies and policies that "are driven and shared by workers."[110] They see themselves as *allies* and partners of the workers who act as conduits to express the needs that workers themselves express. For example, one organizer described how *Justicia* members recruit workers:

> "Workers come to talk to us (during their trips to the farm areas) and tell us the problems that they are having and ask if we can help them. We ask them what are they doing, what conversations they are having with their co-workers, and what would *they* like to do."[111]

My observations during my farm visits with *Justicia* matched the organizer's comments. It is rare that *Justicia* members give speeches about what is wrong with the system or offer, what would be, an academic, sophisticated analysis of race, immigration, and employment. They ensure that it is the workers giving the speeches and it is only in the end, that one of *Justicia*'s organizers collates the workers' opinions and provides a comprehensive perspective of the issues. Even when *Justicia* is asked to give submissions before legislative committees or international delegations or the media, they ensure that the workers (who are driven from the farms for the events) provide most of their testimony.

The primary demand of *Justicia* is removing the precarious immigration status of foreign workers, which they argue is the root cause of the indentured nature of SAWP workers. As such, they directly engage with immigration law to highlight the racial, class, and nationality discrimination institutionalized by programs such as SAWP. However, they are acutely aware that demanding status and mobility could deny underprivileged, racialized workers from the global south the opportunity to migrate and find employment in the first place.[112] For *Justicia,*

[110] JD (*Justicia* member), interview with author, October 2015.
[111] JE (*Justicia* member), interview with author, September 2016.
[112] JA (*Justicia* member), interview with author, October 2015; Strategy meeting of the Coalition for Migrant Worker Rights Canada (CMWRC), May 2016.

the question of permanent residence status is *not just* about political membership. They see the demand as a "claim against colonialism, against racism, and for equality."[113]

Many of the cases before the HRTO and WSIB were initiated by *Justicia* on behalf of workers. *IAVGO* is reliant on *Justicia*'s activities that identify injured workers and guide them to the legal clinic. Many of the workers have the direct phone number of one of *Justicia*'s lead organizers and often call the organizer directly to ask for help with a case either for themselves or for their friends or acquaintances. They also get in touch with him when they find out they are being repatriated to their home country. *Justicia* members then go directly to the airport to see if they can make alternative arrangements for the workers, and if not, they listen to the workers and note their testimony on what has transpired in their case. Even if *Justicia* is not able to do anything for them, many of the workers expressed gratitude that the activists were coming to see them off at the airport and listen to their stories.

The organization has formally intervened and supported workers in several high-profile legal cases to expose injustices faced by migrant workers. *Justicia* offers support is in the form of media advocacy, protests, and other direct action to highlight specific cases and issues faced by foreign workers. For example, they supported the workers in *O.P.T. v. Presteve Foods Ltd., 2015 HRTO 675 (CanLII)*, where the employer faced criminal charges over the sexual harassment of migrant women from Thailand and Mexico. With the support of the family of Livingston Peart, a migrant worker who died while working at a farm, *Justicia* spearheaded the campaign for a coroner's inquiry into his death by helping Peart's family initiate a claim at the HRTO (*Peart v the Ministry of Community Safety and Correctional Services,* where the HRTO considered whether the *Coroner's Act* was discriminatory against migrant farm workers).

In *OHIP v. Clarke & Williams,* 2014 ONSC 2009, *Justicia* guided the two workers to *IAVGO* to appeal the Ministry of Health's decision to terminate their OHIP coverage when their employment ended due to injuries sustained at work. *Justicia* was also instrumental in highlighting the case in the media and legislature. A *Justicia* volunteer, who was a lawyer represented the SAWP worker in *Monrose v. Double Diamond Acres Limited*, 2013 HRTO 1273, a racial discrimination case.

In *Fraser*, *Justicia*, along with *IAVGO*, was directly involved in setting the discourse and language of the factum that they submitted before the Supreme Court (described in the previous section). *Justicia* was also responsible in bringing SAWP workers to the Supreme Court for court proceedings and organizing vigils and demonstrations in Ottawa. *Justicia* is currently applying for funding to set up a biweekly mobile legal clinic in the Leamington area in Southern Ontario where lawyers, organizers, and legal case workers can provide both labor and immigration advice to workers. Thus, even though *Justicia* is not a legal organization and in fact is skeptical about the use of law as counterhegemonic tool, it has been singularly responsible for the legal mobilization of SAWP workers in Ontario.

[113] JA (*Justicia* member), interview with author, October 2015.

Justicia is also responsible for highlighting the DNA racial profiling case and in bringing the case to the HRTO. As soon as *Justicia* learned about the DNA sweep of SAWP workers, *Justicia* visited the workers and launched a media blitz and direct action campaign. The incident was condemned by several individuals and organizations, including Black Lives Matter and other anti-racism organizations, Caribbean community organizations, and civil rights organizations. The public scrutiny resulted in a review of the action by the Office of the Independent Police Review Director (OIPRD), the independent ombudsman organization in charge of reviewing Ontario Provincial Police action. The OIPRD released its decision, two years after the incident, finding that the police had not engaged in racial or migrant worker profiling, to the disappointment of *Justicia* and the other organizations. In the meanwhile, the organizations demanded a case before the court and the HRTO. Because of their outreach into the SAWP worker community, *Justicia* was the only organization that had the capability to investigate the possibility of a court case. *Justicia* faced several hurdles. Since the annual farming season ended a few weeks after the incident, the profiled workers were forced to go back to their home country. Some of the workers did not return to Canada for work in the subsequent years and many of the workers that returned were moved to other farms. When *Justicia* finally managed to reach the workers the following year to initiate the case, the workers were reluctant to pursue the case, afraid to be the named litigant. The workers also wanted to wait for the results of the OIPRD investigation. Furthermore, the Jamaican consular liaison officer gave false assurance to the workers that the matter was being "handled" and cautioned them from raising the matter with *Justicia* or anybody else. *Justicia* volunteers were forcibly removed from the farms when they visited the workers. It should be noted that two of the SAWP workers testified to these events during the recent HRTO hearing (*Hosein v. Ontario (Community Safety and Correctional Services)* 2018 HRTO 298 paras 249-251). In the subsequent year, when *Justicia* visited the workers again, the workers were fed up of waiting for so long and were ready to fight the case and found safety in numbers. Gathering evidence was a logistical nightmare for *Justicia.* Volunteers (including myself) would have to make several trips to farms and gather evidence without the consular officers or employers finding out.

Justicia ensured that the various legal options were shared with the workers to ensure that the workers had meaningful choice in the legal strategy. One of my observations included a presentation by a volunteer from the HRTO's support center. About 25 to 35 migrant farmers who had been part of the DNA sweep were present. I observed that, after an energetic discussion about rights and justice, the workers decided that they wanted to file a human rights claim, even if it was not anonymous. They expressed their frustrations with the injustices they suffer and they were very vocal about how they felt during the sweep. Workers were willing to pursue the case while acknowledging that they might lose or not receive any financial compensation. To quote one worker "so that others after us do not face the same." The *Justicia* members made connections with police brutality, the "Black Lives Matter" (BLM) movement, and a recent human rights tribunal case where, after seven years, women temporary foreign workers had won an unprecedented settlement as compensation for repeated sexual harassment by their employer. The reference to BLM resonated with the workers as they were already having conversations among themselves about the police brutality in the United States and the activism of the Black activists. All the workers in that meeting agreed to be claimants in any proceeding against the DNA sweep. This illustrates how legal action can be a tool in

organizing through its ability to generate "reciprocal" emotions – feelings of connection with others who have the same grievance (Abrams 2011). The community and rights consciousness generated by the process served future organizing and mobilization efforts and these workers became active in other *Justicia* campaigns such as Harvesting Freedom and in representing *Justicia* before UN and legislative committees (for other examples, see Abrams 2015; Volpp 2014; Beltrán 2015).

Reaching workers who had left Canada after their employment period proved to be a challenge. Despite poor communication, *Justicia* managed to get evidence through *WhatsApp* and phone. Finally, after evidence from 54 workers were collected, the case was filed by one of *Justicia's* volunteer lawyers who offered to act as counsel for *Justicia* on a pro bono basis. Even during the hearing, *Justicia* had to co-ordinate with workers in Jamaica and Trinidad to offer evidence by phone. In the HRTO's interim decision in the case, the HRTO cited that *Justicia's* visits were likely the only support available to migrant workers:

> From the expert's opinion on the absence of support agencies nearby (compared to Leamington) and the two migrant workers' evidence, it is clear that Justice for Migrant Workers' ("J4MW") visits were likely the only support available to migrant workers in the Tillsonburg area. Jamaican migrant workers were actively discouraged from engaging with J4MW by their country's Liaison Officer and *all* workers were similarly discouraged by the employer or the employer's representative. The workers heeded those directions for fear of immediate repatriation or for fear that future call backs would be jeopardized (para 25 of *Hosein et al v. Ontario (CSCS)*, 2018 HRTO 298).

Justicia had also been invited to participate in the Legislative and Parliamentary committee reviews of the Temporary Foreign Workers Program and Employment Standards Act and has appeared before the United Nations Committee on the Convention Against Racial Discrimination (CERD) to provide testimony on the plight of farmworkers in Canada. In all their public appearances, *Justicia* organizers emphasize the precarious status of migrant farmworkers and do their best to ensure that SAWP workers can themselves testify. *Justicia* is also a member of a number of transnational and international alliances, including the Food Chain Workers' Alliance and the Annual Tri National Labour Conference.

While there are other coalitions such as Migrant Workers Alliance for Change (MWAC) engaged in policy and legislative advocacy, *Justicia* remains the primary organizing resources for foreign workers to mobilize and participate in advocacy.[114]

[114] Other organizational resources for migrant farm workers are limited. Migrant Workers Alliance for Change (MWAC), is an Ontario based coalition of organizations that either undertake advocacy or provide services for migrant agricultural workers. They mainly engage in lobbying and media support. MWAC includes the Caregivers' Action Centre, Migrante Ontario, the Workers' Action Centre Legal Assistance Windsor, No One is Illegal, and Parkdale Community Legal Services. There is also national level coalition of all organizations working for migrant workers. Community, church, and ethnic organizations provide services for the workers but do not engage in advocacy or legal mobilization.

c) Union Organizing

As stated earlier, agricultural workers have limited rights to unionization. Even when agricultural workers have the legal right to organize, such as in Manitoba, they are discouraged by employers and by their governments from participating in unions and threatened with risk of losing their employment (Migrant Worker Solidarity Network 2016). The Migrant Worker Solidarity Network in Manitoba reports that "UFCW has recorded several instances of workers being identified as union sympathizers and subsequently excluded from participating in the SAWP program." No agricultural worker in Ontario is unionized. UFCW's success in unionizing a unit of SAWP workers in British Columbia was short-lived, as discussed earlier.

Additionally, Canadian unions, until the beginning of this century, did not address immigration status-based precarity of workers (Smith 2017). The primary focus of any labor rights campaigns on behalf of foreign workers was mainly to ensure that foreign labor did not undercut Canadian workers through unfair labor practices by employers. Nevertheless, the UFCW's campaigns to ensure inclusion of workers from excluded sectors into labor and employment acts has helped foreign workers. UFCW was also involved in the campaign to include agricultural workers under the Ontario Health and Safety Act (UFCW Canada 2006). Since 2000, UFCW has changed its tactics and engaged in several initiatives to protect foreign workers' rights. *Justicia* is considered a "key force that propelled the trade union, United Food and Commercial Workers of Canada (UFCW), into servicing migrant farm workers in Ontario" due to their frontline engagement with workers (Valiani 2014). During the 2001 wildcat strike by Mexican workers in Leamington the United Farm Workers of America (UFW) funded a short-term Global Justice Care Van Project (GJCV), a series of trips by students and activists to farms and towns in the region to investigate the concerns faced by SAWP workers and generate media attention about the TFW program in agriculture (Shapiro 2006).

In 2003, UFCW created advice and help centers called Agriculture Workers Alliance (AWA) Support Centre in several towns through Ontario to advise workers on labor issues such as workers compensation claims, wage issues, health and safety training, unfair treatment and unsafe housing and working conditions. The AWAs however provide no advice or support with immigration issues. Now, the UFCW participates in legislative consultations on labor rights for migrant farmworkers and supports other advocacy efforts, including transnational collaborations. However, the union gives limited support to *Justicia* and other organizations in their call for immigration status for SAWP workers.

VI. Conclusion

The political environment in Canada is marked by strong approval of the SAWP program. The restrictions on mobility and permanent residence are seen as essential to sustain the agriculture sector. The problems endured by SAWP workers are seen as a result of poor monitoring of a few bad employers who abuse the system. The solution is deemed to be better enforcement of disaggregated rights as opposed to changes to the SAWP program. In Israel, the temporary agricultural program is contentious in popular and political discourse. By contrast, in Canada

the SAWP program is seen as a model "triple win" program that benefits the Canadian agriculture sector, the workers, and the sending countries. Even though permanent immigration is still perceived as ideal, the SAWP program is deemed to be necessary and the "minimal" rights violations are regarded as justifiable to bolster the essential agriculture sector. In short, agricultural citizenship trumps labor citizenship ideals.

The legal environment offers very limited opportunities to challenge the SAWP program. Immigration law is immunized against judicial intervention because of the plenary power given to the federal government. The devolution of labor and social rights to the provincial level implies that cases that deal with SAWP workers do not reach the Supreme Court. The provincialization of issues ensures that structural aspects of the SAWP program cannot be challenged in courts. The complexities of dealing with tribunal-level adjudication of SAWP workers' rights obstructs legal mobilization against the SAWP worker program and makes court action prohibitively expensive and resource-intensive.

Unlike in Israel, there is no legal organization that specifically engages in legal mobilization of foreign workers. Ontario's workers' compensation clinic, *IAVGO*, is the only legal organization that has a long-standing, continuous program to target workers' compensation issues for migrant workers. However, they are limited in their mandate to workers' compensation cases and do not deal with immigration issues. *Justicia* is a volunteer-driven organization that prioritizes organizing and political mobilization. There are no cause lawyers and cause based legal organizations that have targeted the SAWP program.

Nevertheless, the subversive framing of status now serves as a tool for mobilizing workers. In contrast to Israel, foreign workers and their allies in Canada are engaged in direct advocacy and organizing. According to *Justicia,* the SAWP program perpetuates a racist, colonial immigration system that has historical roots where immigrants from privileged nations and higher economic status are accorded citizenship rights.

By making immigration status a core demand, the actors engaged in mobilization against the SAWP program have adopted a subversive, radical discourse that does not resonate with current Canadian legal and political institutions. In Israel, *Kav Laoved* scrupulously avoids questions of immigration and citizenship. *Kav Laoved*'s demands therefore have achieved resonance and legitimacy at the institutional level. According to framing scholarship, legal rules and norms form the dominant space where hegemonic ideas are articulated and disseminated (Ferree 2003). Hence, frames that resonate with institutionalized interpretations of temporariness and citizenship will find more resonance amongst lawmakers and provide opportunities for policy change in a particular direction. Such frames offer potential for success of a particular kind-namely, immediate concession that does not upset the apple-cart. In the case of temporary foreign workers, law constructs temporariness and non-citizenship, which in turn creates a "cognitive framework" (Albiston 2002) that shapes the meaning of what rights guest workers should and will have. Subversive frames that challenge the hegemonic structures find limited resonance in political institutions and are often sidelined. Thus, *Kav Laoved* was able to achieve labor mobility as a constitutional right of foreign workers in the Israeli context by emphasizing a discourse of labor citizenship. The frame for equal labor rights is a resonant frame, in contrast to claims for citizenship or permanent

residence which challenge the notion of the Jewish ethno-national state. This success, however, comes at the expense of the interests of those "marginalized by the status quo" and at the expense of transformative, radical change.

Canada's multiculturalism and citizenship regime provides for certain avenues of discourse, especially because other temporary foreign worker programs allow for access to permanent residence. Claims for status for SAWP workers do not challenge the very nature of the Canadian state but the repercussions of the demand do challenge Canada's positioning as an important player in the global agricultural economy and the core Canadian identity derived from notions of agricultural citizenship. The genuine labor shortage in agriculture mitigates the number versus rights concern and ensures that foreign labor migration will not be affected if the structural disadvantages in the SAWP program are removed.

Justicia's demand for "Status Now" and reasoning is supported by several allies and organizations. The political mobilization has generated interest in domestic and international fora such as the OHRC and UN CERD. Given the concern about the current Trudeau government about Canada's image as a multicultural rights-protecting state, it is likely that the federal government will initiate a process to make changes to the SAWP program.

The use of transformative frames by *IAVGO* and *Justicia* that emphasizes the structural inequities even in hegemonic institutions highlights the deep-rooted marginalization and institutional issues that affect migrant workers. Despite challenging the root causes of SAWP vulnerability in traditional legal and legislative forums, *IAVGO* and *Justicia* have maintained their legitimacy in legal forums as well as among workers. *Justicia* and *IAVGO*'s language of structural hegemony has been recorded in court decisions and legislative discussions even when the cases have been lost or have had minimal impact on the SAWP program. The transformative frames are therefore now part of a public transcript enshrined in the legal institutions.

Justicia and *IAVGO* have used the cases to engender activism among the claimant workers and to garner support from other workers. My findings on the collective mobilization of the workers challenges four assumptions that prevail in immigration and citizenship scholarship. Firstly, it challenges the general assumption of a lack of legal consciousness and the passivity of TFWs, since more than half the workers affected have publicly challenged the state. Secondly, it questions scholarship that justifies limited rights for TFWs on the basis of voluntariness and consent or benefits that temporary migrant workers receive. My research on SAWP worker mobilization in Canada shows how the foreign workers *resist such* binaries and constructions of choice and temporariness. Thirdly, the way the workers articulated their grievances shows how immigration law functions in practice, as law-in-action, in the lived realities of the workers. In their own words, the workers point to the institutionalization of racism and class-based oppression of workers from the Global South.

Lastly and significantly, the examples show that the law can be relevant for subordinated groups, even as they are being subordinated by the law. The workers and their advocates are producing a unique jurisgenerative discourse that invokes liberal, legally supported ideas like equality, anti-discrimination, and human rights while simultaneously using expressions

conveying multi-racial solidarity, anti-imperialism, and socialist worker ideology. Several critical race theorists have clarified how the language of legal entitlements can be a powerful tool even while resisting the law. As Patricia Williams eloquently states "[rights] is the magic word of visibility and invisibility, of inclusion and exclusion, of power and no power." The process of articulating legal rights is a powerful mobilizing tool, even if legal forums offer limited recourse for relief.

Chapter 6
Permanent Temporariness: Temporary Foreign Worker programs in Hong Kong, the United States, and Europe

I. Introduction

In this chapter, I present the legal mobilization by TFWs in my shadow cases of Hong Kong and the U.S. I also provide an overview of the TFW programs in European countries for further background on TFWs and avenues for future research.

In Hong Kong, I consider the mobilization by domestic workers, the largest community of temporary foreign workers in the country. Even though domestic work falls outside the agricultural sector where my primary cases of Israel and Canada focus, Hong Kong represents an interesting case because cause lawyers mounted a constitutional challenge on behalf of domestic workers to challenge their lack of access to permanent residence. In the U.S., I focus on mobilization by H-2A migrant farm workers. There has been no constitutional challenge to the TFW program in the U.S. but, by all indications, workers engage in active mobilization from below.

For each of the cases of Hong Kong and the U.S., I present an analysis of the political environment, the legal environment, and how various support organizations have used political and legal opportunities for legal mobilization. I argue that in Hong Kong, the favorable legal environment afforded the possibility to mount a constitutional challenge against the permanent residence restrictions faced by domestic workers but the restrictive political environment, shaped by Chinese-Hong Kong relations, led to the decision being overturned by the Court of Final Appeal. Foreign domestic workers were not involved in the constitutional challenge but they have independently, and in the absence of lawyers, engaged in creative legal mobilization. In the U.S., the legal environment and difficult access to courts, like in Canada, has meant that there has not been a constitutional challenge to the H-2A program. Further, the political environment is informed by polarized views on immigration and the presence of a large community of undocumented workers. Both cases demonstrate that legal mobilization from below can take innovative forms and be used effectively to introduce new meaning of rights in legal institutions.

TFW programs have had a resurgence in Europe in the 2000s after essentially fading out in the 1980s. They provide the backdrop for the transnational movement of migrant labor, diffusion of highly controlled immigration programs, and the global acceptance of the inevitability of TFW programs and the triple-win narrative that is supported by all international organizations. After providing a description of the TFW program in a number of European countries, I highlight the singular case of a challenge to the TFW program in German Courts to show that European courts offer limited opportunity for TFWs. Lastly, I present Spain as a unique case of a TFW program with expansive protections for the rights and agency of TFWs. In doing so, I make a case for the validity of my conceptual framework in providing an explanation for the mechanisms that led to the Spanish TFW program and the possibility of mobilization that the program engenders.

II. Hong Kong - Shadow Case for Constitutional Legal Mobilization and "mobilization from below"

a) Background

According to a report by the Research Office of the Legislative Council Secretariat, in 2016, there were 352,000 foreign domestic workers in Hong Kong representing nine percent of the total workforce, working in 11 percent of local households (Legislative Council Secretariat Research Office 2017).

While other non-citizens are entitled to permanent residence after residing in the city for seven consecutive years, Hong Kong's foreign domestic workers are excluded from applying for permanent residence (International Trade Union Confederation (ITUC) 2012). In August 2011, five domestic workers challenged the residency law that discriminated against domestic workers (*Vallejos and Domingo v. Commissioner of Registration* (FACV 19, 20/2012)). Surprisingly, the Court of First Instance of the High Court (CFI) ruled in favor of the applicants, finding that existing legislation restricting foreign domestic workers from qualifying for permanent residence contravened the Hong Kong Basic Law. The government filed an appeal from the CFI judgment in the Court of Appeal (the Court). On March 25, 2013, the domestic workers lost their final appeal at Hong Kong's Court of Final Appeal (CFA).

The government prosecutor argued that there was precedent in discriminating against specific groups of migrants by pointing to the previous British administration's treatment of Vietnamese refugees in Hong Kong in the 1980s and the ineligibility of foreign students from claiming residence status. Unlike other foreign workers, the prosecutor argued, domestic workers are not "ordinarily resident." The Court agreed with the prosecutor and found that domestic workers could not be deemed to be "ordinarily resident" because of the requirement that their visa is limited (although it is renewable). The Court ignored the sociological evidence showing the social integration of the domestic workers, the support from employers, and the lack of harmful effects of providing permanent residence.[115] It relied on an old precedent from the 1970s (before the existence of the 1997 Hong Kong Basic Law constitutional document) to make a circular point that because these workers were temporary, they could not be permanent at any point.

> [E]ach time a FDH [Foreign Domestic Helper] is given permission to enter, such permission is tied to employment solely as a domestic helper with a specific employer (in whose home the FDH is obliged to reside), under a specified contract and for the duration of that contract. The FDH is obliged to return to the country of origin at the end of the contract and is told from the outset that admission is not for the purposes of settlement and that dependents cannot be brought to reside in Hong Kong…
> 89. It is clear, in our view, that these distinguishing features result in the residence of FDHs in Hong Kong being qualitatively so far-removed from what would traditionally be recognized as "ordinary residence" …
> (Judgment, *Vallejos v Commissioner of Registration* [2013] 4 HKC 239)

[115] VA (lawyer), interview with author, January 2014.

The arguments of the prosecutor and the final decision of the Hong Kong Court were based on a presumption stemming from the consensual nature of the labor relationship, where the migrant domestic worker is deemed to have entered into the labor argument fully aware of the limitations of her citizenship and labor rights. The initial CFI decision personified the interests of some of the Hong Kong elites to portray Hong Kong as a "global city" that protected global human rights standards and western liberal principles while the Court of Final Appeal's decision reflected governmental neo-liberal conservatism and the influence of Mainland China. The Court in the end opted for stratification over equality.

Even though the case was lost, it still raises the intriguing question as to what spurred the constitutional legal mobilization. I apply my proposed framework outlined in chapter 2 to analyze the process that led to the constitutional challenge on behalf of domestic workers. I show how, despite the political environment and a highly mobilized foreign domestic worker (FDW) community, a cause lawyer independently spearheaded the case. I also discuss how the FDW groups have utilized the law in innovative ways as part of their organizing and mobilizing, which functions independent of the legal support structure constituted by lawyers and legal organizations.

b) Political Environment

Hong Kong is a unique case. Because of its independence and autonomy from the ruling government of China, it resembles the independent city-states common during Renaissance and in Ancient Europe. The city of Hong Kong has special administrative status and has autonomous executive, legislative, and judicial power. It was a British Crown colony between 1842 to 1997.[116]

Hong Kong immigration policies are shaped by three narratives that are of relevance to foreign workers: the notion of the desirable "Hong Kong resident," the demographic discourse of "problem of the people," and the reputation of economic success (Ku 2004). These narratives have continued from the colonial era when the Hong Kong government replicated British immigration law. British immigration law that is codified in colonial Hong Kong law demarcated between desirable and undesirable immigrants (similar to Canada). Undesirables included, for example, "vagabonds or bad characters without visible means of subsistence" (Registration Ordinance of 1844), those who "become a source of danger to the peace, order, and good government of the colony" (Banishment Ordinance of 1903), or the "large proportion of the immigrant population which is either incapable of being absorbed into useful occupation for any length of time or has no such desire" (Deportation of Aliens [Amendment] Bill of 1949) (Ku 2004, 333). This narrative has been used to deny access to residence to migrants from mainland China and other Asian countries.

[116] Between 1981 and 1997 it was designated as British dependent territory like Gibraltar, Bermuda, and the Falkland Islands, among others.

Ku (2004) further shows how the "problem of people" was an integral part of the discourse of state building. The phrase was used in official documents to emphasize demographic concerns and social problems stemming from immigration and to endorse methods of control and restriction. It manifested in a restrictive interpretation of the "right of abode" (right to permanent residence), that was supported by the courts until 1997 (Tam 2012).

The growth of the manufacturing economy in the 1960s and 70s led to a shortage of domestic help as Chinese women left the sector for the "less demeaning" factory work and the service sector (Constable 1997, 541). The shortage was filled by Filipina workers who came to work on two-year contracts with a specific employer. Domestic workers have only a two-week period to find another job at the end of their contract or if the employer dismisses them, even if they have reported violations or instances of discrimination against their employer. Since 2003, all foreign domestic workers (FDWs) have to live-in with their employer. There is a plethora of scholarship on the exploitative conditions and racism that the FDWs face (Constable 2007; Lindio-McGovern 2012; Parreñas 2004; Bell and Piper 2005; Hong Kong Human Rights Monitor 2001; Ullah 2015). The FDWs are an integral part of Hong Kong society and their temporary status is deeply entrenched even when several workers have spent decades in Hong Kong.

The *Vallejos* case generated intense debate and controversy in Hong Kong. The case stands as an example of how assertions for status and new rights can embolden a backlash movement that social movement actors have to account for (Rosenberg 1991; Lemieux 2009; McCann 2006). Political parties and trade organizations affiliated with the government along with nationalist groups and some media sources opposed any changes to the current law by arguing that it will be prohibitively costly to provide for social welfare for domestic workers if their status is equalized with other foreigners. Further arguments were made that the domestic worker contract is consensual and Hong Kong citizens will lose their jobs to domestic workers if they are allowed full labor mobility and permanent residence (Drew 2011; Ip 2013).

The FDWs were also not perceived to be ideal candidates for becoming Hong Kong residents, as several protests against the case turned violently racist (Asia Sentinel 2011; Asia News 2013; Shadbolt 2013). The media and public discourse was rife with racist (especially against Filipinos), classist, and protectionist rhetoric. Many of the domestic workers feared for their lives as they were subject to name-calling and racist attacks throughout the city.[117] Even liberal pro-democracy groups balked at the idea of families of Filipinos and Indonesians moving into Hong Kong as political parties raised the specter of being "flooded" by Filipinos, creating unemployment for "local" Hong Kong residents draining the welfare system (Asian Pacific Post 2011; Asia Sentinel 2011). Most of Hong Kong's establishment, including management and labor, were united against inclusive domestic worker's rights. The Chinese government also had a stake in the decision as they wished to prioritize the migration of Chinese workers. Thus, access to permanent residence was opposed by pro-democracy groups, relying on a discourse of "Hong Kong belonging," *and* pro-China groups.

[117] WA and WD (domestic workers), interview with author, March 2016.

Despite knowing the political environment, the cause lawyer and his legal team unilaterally chose to use the law to challenge the lack of access to permanent residence. The legal environment in Hong Kong has created a support structure landscape that mitigates towards constitutional litigation.

c) Legal Environment and cause lawyering "from above"

The Basic Law of Hong Kong, which serves as the constitutional document for Hong Kong, provides a path to permanent residence to all residents except for FDWs. The Basic Law came into effect on 1 July 1997 during the handover of sovereignty by the United Kingdom (U.K.) to China. It outlines a long list of rights for all Hong Kong residents. Hong Kong's constitutional document specifically states that the provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labor conventions as applied to Hong Kong are in force and shall be implemented in domestic laws.

Hong Kong courts have the independence and authority to interpret, on their own, the provisions of the Basic Law, even though the power of final interpretation of the Basic Law is vested in the Chinese Standing Committee of the National People's Congress (NPCSC). Nevertheless, the transition is not supposed to have diminished legal activism and in fact, the new Basic Law strengthened the space for legal mobilization through cause lawyering (Davis 2005; Yap 2011; Tam 2012, 2010). Several cause lawyers have received training in other common law jurisdictions, especially the U.K. and provide legal support to international human rights groups based in Hong Kong (Tam 2010). Cause lawyers are also helped by a generous legal aid system that supports impact litigation.

In addition to the Basic Law in 1997, a Court of Final Appeal, CFA, was established. Prior to the CFA, final appeal of cases had to be made at the U.K. Privy Council and was often made by barristers based in England (Tam 2010). The CFA allowed for local lawyers to take ownership of appellate cases and litigate in court themselves, building experience and a core corpus of lawyers engaged in public policy and human rights litigation. Post-Tiananmen, the mid-1990s also witnessed the movement of several lawyers from Canada and the U.K. to establish a human rights practice in Hong Kong (Tam 2010). The cause lawyer in the *Vallejos* case was part of this migration and is a renowned human rights lawyer.

The presence of the Basic Law and the establishment of the CFA also led to the creation of an activist judiciary (especially the CFA judges) who took seriously their role of interpreting the Basic Law and being a constitutional check on the government (Tam 2010). Since 1997, the CFA ruled against the government in a series of cases including, in "right of abode" cases with claimants from mainland China (Tam 2012, 161–62). The right of abode cases established a precedent, which, the lawyers hoped, could be used to extend the right to FDWs, even though there was a long history of cases regarding FDWs before the court where it had mostly ruled in favor of the Immigration Department (Fung 2014).[118]

[118] VA (lawyer), interview with author, March 2016

The claimants for the *Vallejos* case were carefully selected to present the best case for permanent residence. One of them had a long-term relationship with a Hong Kong resident; another had worked as a domestic worker for decades and had a 12-year old child who had never left the country; a third was also a long-time domestic worker who had worked in prominent households in Hong Kong over the years.[119]

Hong Kong has a highly mobilized FDW population, who have formed several unions along ethnic lines (Lindio-McGovern 2012). These organizations played no direct role in the litigation. The primary counsel only consulted with some of the FDW leaders just before the applications, in order to warn them about the repercussions the case might have on FDWs.[120]

Thus, Hong Kong supports the conclusion from the Israel case study that constitutional legal mobilization is dependent on the support structure and legal environment and can take place independent of involvement from the affected group, whose interests are represented in the litigation. However, unlike in Israel, the political and discursive environment in Hong Kong was staunchly against a positive judicial ruling for the TFWs. It is not surprising that the CFA ruled against the domestic workers in the *Vallejos* case, even if it had to rely on a tenuous interpretation of the law. This fits with the scholarship on law and social change which considers courts to be engaged in strategic decision making where application of the law is balanced with the interests of the legislature and political environment (Whittington 2005; Epstein and Jacobi 2010). It also comports with the reticent court theory in the scholarship that argues that courts do not embody the counter-majoritarian, rights-protecting role, unless there is support from some powerful political interest (Dahl 1957; Garoupa and Ginsburg 2012; Whittington 2005).

d) Mobilization from below

FDWs, in general, are mobilized and organized within several countries and transnationally (Lindio-McGovern 2012; International Domestic Workers Federation n.d.; Piper 2010; Bell and Piper 2005) and have collectively pressured the International Labour Organization (ILO) to pass an exclusive Domestic Workers Convention in 2011. Hong Kong, especially, has several FDW organizations that advocate for themselves, domestically and transnationally.

There is low level of unionization in Hong Kong (International Trade Union Confederation (ITUC) 2012). There is no right to collective bargaining or protection of rights of strikers. Roughly, 23 percent of the workforce is unionized but less than one percent of workers are covered by collective agreements, and even these agreements are not legally binding (International Trade Union Confederation (ITUC) 2012). Despite the limited power of unions, Hong Kong is one of the few cities in the world where FDWs have formed very active labor unions, usually demarcated along nationality such as the Filipino unions, Indonesian unions, and so forth. In addition to local unions, there are also transnational domestic worker groups based in Hong Kong. The Federation of Asian Domestic Workers' Unions (FADWU), created

[119] Ibid; WB (domestic worker), interview with author, March 2016.
[120] VA (lawyer), interview, Interview with author, March 2016; VB (lawyer), interview with author, February 2016.

by six organizations of migrant domestic workers from various source countries, has even affiliated with the Hong Kong Trade Union Confederation in 2011. FADWU was very influential in the drafting of the ILO domestic workers convention.

Domestic worker NGOs and trade unions have won victories to increase minimum wages and include domestic work under the Employment Ordinance, making the city the "most preferred destination" for migrant domestic workers in the Asian region (Briones 2011; Wee and Sim 2005). FDWs are covered by general workplace laws (which are minimal for all workers) and have won a few court rulings in their favor (Bell and Piper 2005). The government claims to have a zero tolerance approach towards abuse of domestic workers, with a promise that complaints are investigated "vigorously" and heavy fines can be imposed. However, the barriers faced by the domestic workers in Hong Kong cannot be understated. Even though at least 26 percent of all domestic workers have been found to suffer from severe employer abuse, barely one percent of domestic workers brought cases forward (Hong Kong Human Rights Monitor 2001; Ullah 2015; Pu 2018). FDWs have only a short two-week period to find another job if the employer dismisses them after they have reported violations against their employer. However, cases take up to 15 months to reach the District Court or Labour Tribunal by which time the remedies are meaningless.

Despite the barriers, the workers have used the law as a tool for mobilization. Hong Kong domestic worker organizations see legal mobilization as part of their public protest strategy as it provides a "public transcript" even though they are well aware that the system is geared towards the Hong Kong employer (Lindio-McGovern 2012). Organizations such as the *Mission for Migrant Workers* ("*Mission*") provide legal training workshops which include mock labor tribunal sessions, training on rights, labor contract law, and on maintaining and documenting evidence from the time the guest worker begins work. The organizations document and publicize the cases for the domestic workers. When the *Vallejos* case was ongoing in Hong Kong, most of the domestic worker organizations supported the case, even when they expected to lose the case.[121] The *Vallejos* case and the worker activism received high levels of media coverage with the win at the lower court and the subsequent loss was reported in international newspapers including the New York Times, the British Broadcasting Corporation, the Economist, Le Monde, and Der Spiegel. The foregoing examples illustrate how social movements use legal institutions to generate public response and political support (McCann 1994, 2006).

Law can be a powerful mobilizing tool even in the absence of lawyers. My interviews in Hong Kong reveal how the workers and front-line activists learn lawyering skills and conduct themselves as paralegals in helping other workers with their cases. In early 2000s, Hong Kong began to encourage Indonesians, especially from rural areas, to take domestic worker jobs. Initially, the Indonesian workers, unlike the Filipino workers, had no mobilizing capacity. Further, their rural, undereducated background was a hindrance in gaining knowledge of their rights specially in contrast to the large, urban, politically active, and educated population of Filipino workers. There were no lawyers to help them. By 2010, with the help of the *Mission* and the Filipino unions, about 200 Indonesian women had learned the laws and procedure in

[121] WC and WD (domestic workers), interview with author, March 2016.

the various legal institutions and were running legal helplines for other Indonesians to help with their cases.[122] In February 2018, the workers themselves, as part of the Indonesian workers union, initiated a high-profile civil and criminal suit against an employer who had subjected a worker to grave physical and emotional abuse. The workers have used the case to highlight the slave-like conditions FDWs face and to demand minimum wage and standard working hours, which are denied to even several Hong Kong residents and citizens.

The workers also have their own understanding of citizenship and the "right to have rights." Workers that I interviewed carefully articulated the distinction between a "desire to stay permanently" and the demand to not be discriminated against. As one worker stated:

> "All other foreign workers who work in Central [downtown] in the offices and all of the white, expat, foreigners had access to Right of Abode. Nobody asks them if they wanted to stay permanently. We have no choice even. We cannot even see our family when they are sick."[123]

In summary, though the constitutional case challenging the permanent residence restrictions faced by FDWs was driven top-down by cause lawyers, FDWs in Hong Kong have wrested agency from lawyers and legal organizations by engaging the law themselves. My presentation of the Hong Kong case makes evident that FDWs are highly mobilized and have used the law on multiple occasions as a tool to expand their set of rights and, importantly, insert their voices in the legal transcripts. In other words, the FDWs in Hong Kong are constituting citizenship with new meanings of rights and using the law agentically.

III. United States - Shadow Case for mobilization "from below"

a) Background

Until World War I in the U.S., the 1885 Foran Act explicitly forbade the import of contract "inadmissible aliens" for labor but it was lifted during the War for farm-workers from Mexico, who were subject to temporary resident permits with restrictions on labor and residential mobility. The first official TFW program in North America, the *Bracero* program, initiated in the 1940s after World War II, was set in place in the U.S. through a bilateral arrangement with Mexico (Meissner 2004; Calavita 1992; Massey and Liang 1989). Mass migration to cities from rural areas and shortage of labor because of the War spurred the TFW programs in U.S. To discourage permanent stay, the employers would send workers' pay to Mexico by money order and would personally deport them after the contract ended as per a performance bond with the government. Admissions under the Bracero program ranged from annual levels of over 450,000 workers in the 1950s to less than 200,000 workers towards the end of the program in the sixties (Meissner 2004). Poor enforcement resulted in widespread abuse of workers by employers (Calavita 1992; Massey and Liang 1989; Meissner 2004; Calavita 2006). After much outcry about the exploitation and the ineffectualness of the Bracero program, it was dismantled in 1964.

[122] WB and WD, interview with author, April 2016.
[123] Ibid.

After the termination of the Bracero program, the H-2 sections of the Immigration and Nationality Act began to be used by employers to import foreign workers for seasonal farm work. The H-2 program had been created in 1943 for the Florida sugar cane industry to hire Caribbean workers in the sugar cane industry (Bauer 2013) and continues to this day. Interestingly, the current Trump administration is seeking to revive and expand the Bracero program to import temporary foreign workers from Mexico as a policy to counter the presence of a large undocumented Mexican population in the U.S.:

> "…we were working on a program that could provide a legal guest worker program in the U.S., that would provide their citizens the opportunity to float freely, *seasonally*, *temporarily*, into the U.S. for the work and come back to visit their families in their homelands here" (Secretary of Agriculture Sonny Perdue quoted in Luna 2017).

The H-2 programs were further expanded as a measure to curb undocumented labor. In 1986, the Congress passed the 1986 Immigration Reform and Control Act (IRCA) that expanded the TFW programs, while making undocumented labor "illegal" (Garcia 2002).

The "H" category of nonimmigrant visas is now used to admit all types of temporary workers, with H-1 constituting the bulk of the "skilled" workers and H-2A and H-2B visas constituting "low-skilled" guest workers. The H-2A and H-2B programs allow for the temporary admission of foreign workers to perform agricultural and nonagricultural service or labor, respectively. Both visas are for a maximum of one year. An employer can apply to extend an H-2A worker's stay in increments of up to one year, but the worker's total period of stay as an H-2A worker may not exceed three consecutive years. The worker cannot be readmitted as an H-2A worker until he or she has been outside the country for three months (Bauer 2013). The workers have no access to permanent residence.

Employers must pay their H-2A workers the Adverse Effect Wage rate and must provide workers with housing, transportation, and other benefits, including workers' compensation insurance. No health insurance coverage is required except if the Affordable Healthcare Act applies. H-2B workers are provided the prevailing wage rate. In practice, both H-2A and H-2B earn substantially less that the federal minimum wage. Unlike H-2A workers, H-2B workers are denied access to legal and other basic services and benefits. H-2B regulations do not require employers to provide workers' compensation or other injury insurance coverage (Bauer 2013).

Employers who want to hire workers through either program must first apply to the Department of Labor (DOL) for a labor certification. After receiving the labor certification, they submit a petition to Department of Homeland Security (DHS), on the approval of which, foreign workers who are abroad can then go to a U.S. embassy or consulate to apply for an H-2A or H-2B nonimmigrant visa from the Department of State.

In 2013, over 45 percent of DOL H-2A job certifications were issued in five states: North Carolina, 12,400; Florida, 10,000; Georgia, 9,300, Louisiana, 6,600; and Washington, 6,300 (Rural Migration News- UC Davis 2014). The H-2A program has seen significant growth, with the program increasing by over two times in the past decade (Martin 2017). The H-2A program has grown fastest in California, with the number of jobs certified rising from 2,600 in

2006 to over 11,000 in 2016 (Martin 2017). Table 2 indicates the annual H-2A and H-2B workers entering the U.S. between 2007 and 2015. Most seasonal workers (under the H-2A and the H-2B programs) are Mexican nationals (OECD 2017). The U.S. has one of the largest number of seasonal foreign workers in agriculture in the world (OECD 2017). They nevertheless form only seven percent of the equivalent agricultural labor force, which thrives on undocumented labor.

Table 2: Foreign workers in the U.S.: Annual entries of seasonal foreign workers requiring a permit, 2007-2015 (rounded to nearest thousand)
(Source: OECD 2017)

	2007	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**
H-2A program	51,000	64,000	60,000	56,000	55,000	65,000	74,000	89,000	108,000
H-2B program	130,000	94,000	45,000	47,000	51,000	50,000	58,000	68,000	70,000

Beyond the "H" nonimmigrant category, J-1 visa for exchange visitors can also include low-skilled workers in programs for au pairs, camp counselors, and students engaged in summer work and travel. There are no specific programs for domestic workers in the U.S. However, a narrow exception is carved out for live-in domestic workers who enter the U.S. essentially as dependents of diplomats and international agency workers (A-3 and G-5 visas respectively). Some domestic workers also rely on H-2B and J-1 visas.

b) Political Environment

The history of U.S. immigration laws in the 1800s and the early 1900s shares similarities with Canada in categorizing immigrants into desirable and undesirable categories, racist quotas that favored white immigration, and institutionalized oppressive control mechanisms such as harsh deportation policies, discriminatory laws, restrictive access to citizenship, and criminalization and stigmatization of non-citizens (Ngai 2004; Romero 2005; Motomura 2006; Kanstroom 2007). Like Canada, the U.S. is thought of as a country with open immigration policies. Unlike in Canada, non-citizens in the United States are officially characterized as "aliens," a term that has neutral connotations under some contexts but has also created a racialized discourse that "others" non-citizens, especially with the popularization of the "illegal aliens" discourse beginning in the 1870s and continuing to this day. The U.S. did not follow Canada in actively embracing inclusivism in the 1970s and 1980s. In fact, beginning in the 1980s, a strong nativist discourse began to gain ground in the U.S., which has become fervent under the current Trump administration (Perea 1997; Sanchez 1997). Canada has fewer conditions on naturalization than the United States (fewer years of residence, for instance) and distinctively defines itself as a "multicultural" state in its constitution and laws and conspicuously lacks a nativist tradition (Hampshire 2013).[124]

At the same time, there is an opposing discourse of America being a land of immigrants (Motomura 2006) with a Constitution that gives all persons the right to be free from

[124] Hampshire (2013)'s observes that in Canada, immigration is relatively depoliticized, public opinion is moderate, constitutional protections are strong, narratives of national identity include immigration, and businesses demand labor migrants.

discrimination on the basis of nationality. There exists a powerful coalition of interest groups including business interests, ethnic groups, and liberal advocates that actively push for expansionist immigration policy and for increasing legal immigration, especially for economic growth (Freeman 2006).

The result of this tug-of-war has been a strong support for temporary economic migration and TFW programs in the low-wage sectors. The U.S. government continues to see TFW programs as the solution against undocumented migration. During the process to incorporate a Comprehensive Immigration Reform in 2011-2013, several proposals were made that emphasized TFW programs. S.744, which was endorsed by the U.S. senate, planned to further entrench temporary statuses by providing "Registered Provisional Immigrant" (RPI) status for undocumented persons. One of the bills proposed a new H-2C program where TFWs would be able to adjust their status to permanent resident after four years or through employer sponsorship before four years (Garcia 2006). However, none of these proposals were passed.

In recent years, the stringent policies of the Trump administration have resulted in a reduction of migration across the Mexican border and a dramatic increase in the vulnerability of undocumented persons in the country. Farm owners are therefore facing a shortage in labor supply and are relying on the H2-A program to fill the shortage (Martin 2017). The Trump administration recently issued a press release promising to "[streamline,] [simplify], and [improve]" the H-2A temporary agricultural visa program for the benefit of farmers (U.S. Department of State 2018). I have already noted that the Trump administration hopes to revive the Bracero program to bring in temporary foreign workers from Mexico to offset the presence of a large undocumented Mexican population in the U.S.

c) Legal Environment

TFWs have the protection of most of the labor laws such as: the Fair Labor Standards Act (FLSA), which provides wage and hour protections for employees; the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), which provides pre-employment and employment protections for qualifying agricultural employees; and, Title VII of the Civil Rights Act (Title VII), which provides employee protections against, among other things, discrimination based on national origin, race, religion, and sex. AWPA-covered workers have a private right of action to bring a claim in court against agricultural employers, agricultural associations, and farm labor contractors regardless of their immigration status. Since the enactment of the Trafficking Victims Protection Reauthorization Act of 2003 (TVPRA), victims of labor trafficking have had a private right of action to bring a case against their traffickers in federal court. The National Labor Relations Act of 1935 (NLRA) regulates labor organizations and provides certain collective action and union organizing rights to employees in the private sector regardless of immigration status. In practice, however, these laws are ineffectual in improving the conditions of exploitation of H-2 workers as shown by the extensive scholarship (Bauer 2013; Garcia 2006; Chang 2008; Rathod 2011; Hahamovitch 2011; Calavita 1992; Luna 2017; Semler 1983; Griffith 2006)

There have been no constitutional challenges on behalf of TFWs, although there have been several notable constitutional cases that involved undocumented persons. The Supreme Court

has been reluctant to rule against the government in immigration cases, much like in Canada. The successful cases have relied not on the personhood rights of non-citizens but on oblique arguments, the most prevalent one being that of separation of legislative powers (the preemption doctrine). Other successful cases implicated procedural fairness, statutory interpretation, the rights of other citizens, or involved egregious violation of rights that could be deemed as a worse wrong-doing than being undocumented or a deportable non-citizen (Motomura 1990). The courts, therefore, provide no legal opportunity for TFWs to make claims to challenge the TFW program strictures.

Citizens who were former Braceros brought a class action in 2002 against the governments of Mexico and the United States.[125] As part of the bilateral agreement, deductions were made to the paychecks of Braceros, which was supposed to be invested in savings accounts. However, many workers were not able to access these accounts and the class action was initiated to recover the money that was due to them. The California federal court dismissed the lawsuit as several defenses were mounted against the class action, including sovereign immunity of nations and the statute of limitations (Garcia 2006). However, there is a possibility that the action could be reinitiated as a California legislation extended the statute of limitations. While this case may appear to be a collective legal mobilization by TFWs, as Garcia (2006) points out, they could only make the claims to enforce a basic right to recover owed money *after* they became citizens.

d) Legal Mobilization

Some advocacy groups have tried to innovatively use the law to push for rights for TFWs by filing complaints under the North American Free Trade Agreement (NAFTA), with the Department of Labor, and at other venues. All these cases have involved claims of ineffective enforcement of existing labor laws. For example, the Farmworker Justice Program filed a complaint under NAFTA's North American Agreement on Labor Cooperation (NAALC) in 2003 for enforcing labor laws to protect H-2A workers. In 2005, the Brennan Center for Justice and the Northwest Worker Justice Project filed a NAALC complaint, on behalf of H-2B workers to enforce their right to counsel (Garcia 2006). But most of these cases have been unsuccessful at even reaching the adjudication stage, as U.S. federal laws regarding TFWs are weak. As a result, unions and organizations have little faith in the NAFTA process and have been reluctant to actively pursue such cases (Garcia 2006). Some organizations such as the Farm Labor Organizing Committee in North Carolina (FLOC), the United Farm Workers Union, and the Coalition of Immokalee workers have engaged in campaigns on behalf of undocumented and H-2A workers that have resulted in agreements with farm-owners associations to better protect the labor rights of workers. Organizations like the Southern Poverty Law Center (SPLC) have filed class action lawsuits against employers alleging labor violations of H-2A and H-2B workers.

Despite the large numbers of H-2A workers in the United States, they are relatively insignificant compared to undocumented workers in the agricultural workforce. Therefore, most of the organizations campaigning for the rights of non-citizens in the agriculture sector

[125] *Cruz v. United States*, 219 F. Supp. 2d 1027, 1051 (N.D. Cal. 2005)

such as the famous Coalition for Immokalee Workers, concentrate their efforts on undocumented workers. The *National Guestworkers Alliance* (*NGA*) is one of the few organizations in the U.S. that exclusively campaigns for TFWs.

After Hurricane Katrina ravaged the Louisiana area in 2005, local employers successfully appealed to the U.S. Federal Government for foreign guest workers. Several foreign guest workers arrived in New Orleans for reconstruction and food production, even as African-American workers were being denied employment. The employers paid the workers less than half the minimum wage and housed them in terrible conditions.[126] The *NGA* was formed to help organize the foreign workers and, using the help of legal clinics, they launched several cases on behalf of the workers.

The first case that the *NGA* brought before the courts, in 2009, involved Decatur Hotels.[127] The lawsuit against the Hotel was initiated after months of agitation by the workers, which resulted in cruel reprisals by the employer, collusion of the employer with U.S. immigration officers to threaten and deport protesting workers, and physical restraint of the leaders in jail-like conditions. The legal claims in the case were based on breach of labor and employment standards and breach of the employment contract, which are standard claims in any employer exploitation case. However, the workers, lawyers, and activists found that the judges did not understand the unique issues that the guest workers faced.[128] For example, one of the judges chose to conclude that the foreign workers were getting benefits from their employers as they could visit sex workers and strip bars in Louisiana's famous Bourbon Street.[129] In general, the judges had no understanding of the lack of mobility of the workers and the dependencies created by the guest worker visa program. *NGA* organizers realized that the standard claims that were used in the case, such as breach of employment contract, did not address, what they felt was the core issue, the right of foreign workers to not be subject to "unfree labor."[130]

Consequently, in the next case in which Indian guest workers had mobilized against an exploitative employer named Signal International, the workers and *NGA* members decided to not frame the issue as merely a workers' rights issue.[131] They wanted to emphasize in the factum that their visa status tied them and "bonded" them to the employer. The lawyers decided to use a novel constitutional claim based on the anti-slavery 13th Amendment of the U.S. Constitution. The claim constructed the foreign workers status as creating conditions of slavery and indentured labor. These were arguments that had not been used before in any case (Pope, Kellman, and Bruno 2010). The counsel for the workers faced much opposition from the legal community who thought that it was not a good strategic move.[132] Nevertheless, the legal team went ahead and won an unprecedented settlement (albeit not on the 13th

[126] NA and NB (*NGA* members), interview with author, October 2014.
[127] *Daniel Castellanos-Contreras, et al. v. Decatur Hotels, LLC et al,* Case Number 06-4340 (Eastern District of Louisiana)
[128] NA and NC (*NGA* members), interview with author, October 2014.
[129] Discovery documents in *Daniel Castellanos-Contreras, et al. v. Decatur Hotels, LLC et al,* Case Number 06-4340 (Eastern District of Louisiana)
[130] NA and NC (*NGA* members), interview with author, October 2014.
[131] *David v. Signal International, LLC,* Civil Action No. 08-1220-SM-DEK (Eastern District of Louisiana).
[132] NA (*NGA* lawyer), interview with author, October 2014.

Amendment claim).[133] Meanwhile, the workers involved in the case used the opportunity to speak to lawmakers and embark on a march to Washington D.C., while highlighting their constitutional legal claim to be "free" of their "unfree labor status" (Yarrison 2008).[134] Thus, the workers, with the help of a supportive legal team, managed to incorporate their own normative understanding of their situation and controlled how their claims were framed and articulated within a formal legal institution.

Unlike in Canada, the *NGA* could not rely on the discourse of access to permanent residence. The anti-immigrant political environment in the U.S. forecloses such claims. Moreover, advocacy groups, even if they are solidarity based, have to consider the interests of the large vulnerable and subjugated undocumented population. Therefore, they have to resort to exploitation frames that do not necessarily challenge the sovereignty of the state to control borders. Nevertheless, the use of the 13th amendment is still a radical departure as it was used to show how the bonded situation of the workers was a result of their restrictive immigration status. Similar to *Justicia* in Canada*,* the legal strategy relied on input from the workers and the legal team used the 13th amendment to incorporate workers' own understanding of rights into their arguments in courts.

Even though I have present a limited analysis of the U.S. case, the above discussion makes apparent that the limitations within the American legal environment have impeded any constitutional challenge to the TFW programs in the country. Polemic discourses on immigration, the dominance of market citizenship (over labor citizenship), and the presence of a large undocumented population that draws most of the mobilizing attention, has contributed to maintaining the TFW program in its current form granting only minimal rights to H-2A and H-2B workers in the U.S. Opportunities for legal mobilization have been limited though workers have mobilized in creative ways with the assistance of support groups like the *NGA*.

IV. Temporary foreign worker programs in Europe

European countries have some of the largest TFW programs among OECD countries. This section provides a background of TFW programs in Europe to highlight the similarities in the dynamics of the political environment that have resulted in the entrenchment of TFW programs. As such, the conceptual framework that I introduced in chapter 2 can potentially be applied to analyze the mechanisms of legal mobilization in European countries. I illustrate how such an application can take place through a discussion of the cases in Germany and Spain.

a) Historical Background

The first phase in the history of TFW programs began in the 1880s and continued until the Great Depression (Hahamovitch 2003). The earliest foreign workers programs (called "guest worker" programs) were initiated to ensure short-term labor supply in agriculture while excluding foreigners from the citizenry (Hahamovitch 2003, 70, 74–76). The term "guest

[133] *David v. Signal International, LLC,* Civil Action No. 08-1220-SM-DEK (Eastern District of Louisiana).
[134] NC (*NGA* member), interview with author, October 2014.

workers" is rooted in the Prussian *gastarbeiter* programs in the 1880s which were created, when rapid industrialization resulted in rural-urban migration as Prussians sought secure, non-seasonal jobs (Hahamovitch 2003, 70, 74–76). Despite there being an overall surplus labor, rural farm-work suffered from high levels of labor shortage as Prussians were unwilling to do seasonal work. As part of the program, ethnic Poles were recruited from other countries in Europe to work in the Prussian farms. The program subject them to yearly deportation after the harvest season to stave the virulent, anti-Slav xenophobic sentiment in Prussia (Hahamovitch 2003, 70, 74–76). In order to keep the guest worker separated and temporary, they were given special IDs, banned from speaking German and organizing meetings in their language, and threatened with deportation if they organized collectively (Hahamovitch 2003). Like the Thai workers in Israel and the Caribbean and Central American workers in Canada, the recruitment was gendered (only men) and racialized. Workers could not bring their family and were subject to working under linguistically, culturally, and physically isolated conditions in remote farms in a foreign environment, under the constant threat of deportation.

Hahamovitch (2003) describes guest worker programs as "state-brokered compromises" to balance "employers' demands for labor and nativists demand for restrictions." Hahamovitch (2003) convincingly points out that there is a legal difference between slaves, indentured laborers or coolies, and these temporary migrants. Unlike slaves, foreign workers were paid a wage and *could leave*, at least by law; unlike indentured laborers, who could stay after the expiration of their contracts, guest workers *were expected to leave* after the contract ends. These programs offered employers workers "who could still be bound like indentured servants but who could also be disciplined by the threat of deportation." The system appealed to employers, nativists, and union-leaders and created the "perfect immigrant." As noted previously, the TFW programs that we see today are extensions of immigration programs and policies of the late nineteenth and early twentieth centuries (Hahamovitch 2011).

Postwar Programs

The World Wars spurred guest worker programs in Europe to replace drafted citizen workers and for post-war reconstruction. World War II necessitated these programs again after the great depression (Hahamovitch 2003). After World War II, countries such as the UK (and Canada) created *their* fledgling TFW programs out of refugees and displaced persons. They accepted refugees and displaced persons on the basis that they would work for one year in specific occupations. These programs later became fully functional TFW programs.

The 1960s saw the biggest increase in TFW programs. Citizens of European Economic Community (EEC) member countries got the right to complete freedom of movement and the right to work anywhere. Employers, however, preferred guest workers to free laborers, especially in seasonal and "precarious" industries (Hahamovitch 2003). Although there was a labor surplus in their country, the citizen workers preferred yearlong employment in factories over short-term contracts in the farms. The guest worker programs responded to the need of agricultural employers to have labor just during the harvest season. This period also saw the creation of TFW programs through bilateral treaties. West Germany signed guest worker treaties with Turkey, Northern African countries, Portugal, Yugoslavia, and a few other countries.

The pre-1980s programs were employer controlled in countries such as Germany and this led to high levels of undocumented migration as guest workers managed to convince their employers to offer direct employment to their family members and friends and they overstayed their visas and established large immigrant communities. Migrants were expected to accept relatively poor wages and conditions, make little demand on social infrastructure, and not get involved in labor struggles (Castles 1986). The increase in the undocumented population as a result of the guest worker programs and the economic upheavals after the 1970s oil crisis led to the cancellation of guest worker programs.

The guest worker programs were resuscitated in the late 1990s again during a time when anti-immigrant parties gained ground in Europe. The parties resisted incorporation of immigrants into their countries and protested against permanent immigration. TFW programs offered an alternative to balance employer demands and labor shortages in low-wage sectors with restrictive permanent immigration policies (Hahamovitch 2003; Castles 2006).

TFW programs post-2000

TFWs in Europe are primarily employed in the agricultural sector, where demand is seasonal, though in few cases it also includes the seasonal tourism sector. Though foreign workers are also employed in the non-seasonal construction and domestic work sectors, the agricultural sector remains the largest employer of TFWs. The employment of seasonal foreign workers is limited to a few months of the year and the workers are typically not eligible to apply permanent residence or to avail social benefits.

Table 3: Foreign workers in the Europe: Annual entries of seasonal foreign workers requiring a permit, 2007-2015 (rounded to nearest thousand)
(Source: OECD 2017)

	2007	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**
Norway	3,000	2,000	2,000	2,000	3,000	2,000	2,000	3,000	2,000
Poland	N/A	N/A	N/A	73,000	N/A	N/A	N/A	176,000	321,000
Finland	14,000	12,000	13,000	12,000	12,000	14,000	14,000	14,000	12,000
Austria	33,000	40,000	36,000	31,000	18,000	13,000	15,000	7,000	7,000
France	19,000	12,000	7,000	6,000	6,000	6,000	6,000	7,000	7,000
Sweden	2,000	4,000	7,000	5,000	4,000	6,000	6,000	3,000	4,000
Italy	65,000	42,000	35,000	28,000	15,000	10,000	8,000	5,000	4,000
Spain	16,000	42,000	6,000	9,000	5,000	4,000	3,000	3,000	3,000
Belgium	17,000	20,000	10,000	6,000	6,000	10,000	11,000	N/A	N/A
Germany	300,000	285,000	295,000	297,000	168,000	4,000	-	-	-
United Kingdom	17,000	16,000	20,000	20,000	20,000	21,000	20,000	-	-

Table 3 indicates the number of seasonal TFWs in several European countries. It should be noted that a significant number of seasonal workers are nationals of other countries in Europe. As the EU membership has expanded, the need for permits from new members has been eliminated; therefore, the overall number of seasonal foreign workers requiring permits has gone down (OECD 2017). Poland is the exception in that it is enjoying an economic boom and

meeting its economic need for seasonal foreign workers mainly from Ukraine. TFWs are employed in the agricultural, construction, and domestic work sectors in Poland (Kahanec et al. 2013).

Spain, and to some extent Italy, in response to the economic recession, scaled back its seasonal foreign worker program sharply. Most of the foreign workers in Spain are from Morocco. Moroccans also make up a significant portion of the foreign workers in Italy and France. The TFW program in Spain, which represents a special case in Europe, is discussed in some detail in the next subsection.

Germany, which had the largest seasonal foreign worker program in Europe, until very recently received most of its seasonal TFWs through bilateral arrangements from Poland and Romania. In 2009, Polish workers made up 63 percent of seasonal foreign workers followed by Romanians who comprised 30 percent of the workers (Bunte and Muller 2011, 39). Seasonal workers were allowed to work only in agriculture, hospitality, and the carnival industries, with the agricultural sector accounting for the majority of the seasonal worker demand (Bunte and Muller 2011, 35). Between 2005 and 2009, over 90 percent of seasonal foreign workers requested were by employers in the agricultural sector (Bunte and Muller 2011, 40). Workers were allowed to remain in Germany for only six months and their period of stay did not count towards residency or for receiving access to social welfare (Bunte and Muller 2011, 38). Unlike other European countries, the German TFW program was designed to avoid circular migration, so it did not guarantee the workers' return in subsequent years, though employers could ask for the same workers if they chose to. The German system established regulation for basic labor and social standards of employment for TFWs. However, the bilateral agreements did not specify mutual obligations between sending countries and Germany, leaving TFWs with no country representative to bring grievances to. Despite the careful design of the TFW program in Germany, much like everywhere else, exploitation of seasonal workers was rampant (see for example Hoffman and Heike 2014). After Poland, Bulgaria and Romania joined the EU, the workers from these countries no longer required permits. The seasonal foreign worker program in Germany, therefore, dropped off significantly and in 2013, Germany temporarily suspended its seasonal foreign worker program. The UK, too, has suspended its seasonal foreign worker program since 2014.

Sweden receives most of its foreign workers for agriculture from Thailand. In Norway, a third of the foreign workers come from Vietnam. Otherwise, the program in Norway and also in Finland has remained stable in the last decade.

In general, the current TFW programs in Europe are drafted with the explicit policy of ensuring return, which is supported by regional and international organizations. Studies that have analyzed TFW programs in Europe using institutionalist approaches show that the TFW programs are a result of decision-making by employer and business groups and bureaucratic avenues (Geddes 2015; Guiraudon 2000). Transnational and international organizations have also endorsed TFW programs. Countries are encouraged by the European Commission to adopt an "incentive-based" approach (Wickramasekara 2011). The triple-win aspect of TFW programs is emphasized even by the United Nations (Wickramasekara 2011 quoting the 2006 UN Secretary-General's Report to the United Nations' High-level Dialogue on International

Migration and Development). The International Organization for Migration (IOM) plays an active role facilitating circular migration through recruitment in sending countries and negotiating arrangements (International Organization for Migration 2010).

The International Labour Organization (ILO) could potentially offer the strongest censure of TFW programs because of its mandate, but it has been curiously circumspect in addressing any of the core issues with TFW programs and has restrained itself to only provide guidelines for minimal labor protections. It recognizes that migrant workers are concentrated in labor sectors that are considered the "bargain basement of globalization" (ILO 2004 para 138). At the same time, the ILO does not address access to permanent residence in its recommendations in its primary documents as a way to protect the TFWs from permanent precarity (Wickramasekara 2011). It also appears to encourage circular, temporary migration in its Multilateral Framework on Labour Migration (MFLM), where it recommends "adopting policies to encourage circular and return migration and reintegration into the country of origin, including by promoting temporary labor migration schemes and circulation-friendly visa policies" (International Labour Organization 2005 Guideline 15.8). Wickramasekara (2011) acknowledges the problematic aspects of such an endorsement, however she argues that the ILO recognizes "the emerging reality where states are increasingly reluctant to admit workers on a permanent basis" and seeks to ensure at least minimum standards of protection for migrant workers. Thus, TFW programs are now globally accepted, even by organizations that have labor rights and global justice as their mandate, as a viable policy to ensure a transnational labor supply that can respond to economic changes.

Unions have played an uneven role in supporting TFW programs. In many countries and until recently, unions have been stridently anti-immigrant. However, there have been some exceptions such as in France in the 1960s and 1970s, where the unions played an important role in making sure that unauthorized workers are given full resident status and in successfully mobilizing the French court for family unification and citizenship rights (Joppke and Marzal 2004; Kawar 2012).

b) TFW Mobilization

Germany: The role of courts

Two recent studies on legal mobilization on behalf of non-citizens have examined the role of European courts and the support structure in extending constitutional rights (Kawar 2015; Bonjour 2016). Both case-studies have examined legal mobilization in the context of the right to family unification for long term residents in France and Germany and present interesting insights into the interplay between courts and legal and political organizations. Although, the non-citizens in the cases may have arrived as guest workers, the cases themselves cannot be taken as examples of legal mobilization involving workers who were actively in the TFW programs at that time. As pointed in earlier chapters, the barriers to mobilization, the political discourse, and legal opportunity structures differ in fundamental ways for long-term non-citizen residents and for those in TFW programs.

However, a 1978 German case involved the right of TFWs to have automatic extension of their work permits, which would ensure stable continuous residence (Joppke 2001).[135] Basing the decision on contractual reliance, the highest Court found a legally enforceable expectation of renewal of permit if the government had renewed the worker's permits in the past but only if there was no explicit law denying renewal. Thus, because there was no "clear indication of non-renewability," the worker had a right to renewal of permit. The Court also stated that past residence created a right for permanent residence.

The new German guest worker permits rectified the loophole in the law - that allowed the German Court to rule for automatically renewable permits - by explicitly stipulating *maximum* periods and forced rotation schemes. To get full mobility labor rights, the worker should have permanent resident (PR) status and legal employment with pension contributions for five years. However, those with temporary non-renewable work permit (like seasonal guest workers) are never eligible for a PR permit or for family unification. This preempts the court from rendering expansive interpretations of the law. In general, the new guest worker programs in Europe are heavily regulated, clearly and narrowly defined, and based on a high level of state involvement (Castles 2006). There are no evident legal opportunities to challenge the program in courts.

Despite the restrictive political environment, it is possible that there are instances of TFWs and supporting organizations engaging in legal mobilization from below. However, without additional research, I cannot make any conclusive claims about TFW mobilization in Germany.

Spain: A different TFW program

Spain presents an interesting case as it provides for much more generous rights for TFWs than other European countries, even permitting limited access to permanent residence. Unions and worker groups play a major role in organizing workers and mobilizing for their rights.

Unlike other European countries, Spain was a country of emigration until the 1990s, until it rapidly became a destination of migration for Latin Americans and North Africans. By 2004, there were 2 million people who were foreign-born with authorization and 1.2 million unauthorized immigrants (Arango and Jachimowicz 2005). At the same time, economic growth and demographic changes led to labor shortages, especially in agriculture. A quota or contingent system was introduced in 1993 that allowed for provinces to take in a certain quota of foreign workers by providing regular work permits for existing undocumented migrants or importing foreign workers through bilateral agreements. Employers had to go through a labor assessment process where they had to show labor shortage that could not be met by citizens before they could hire foreign workers. The quota system was formalized as the Collective Management of Recruitment in Country of Origin in 2009 through an amendment of the 2000 immigration law (Spanish National Contact Point (EMN), Requena, and Stanek 2010).

[135] Decision of 26 September 1978 (2 BvR 525/77)

Spain has bilateral agreements with several countries including Morocco, Columbia, Ecuador, Dominican Republic, Ukraine, Poland, Romania, and Bulgaria (Lopez-Sala et al, 2016). Moroccans, Columbians, Ecuadorians, Ukrainians, and Romanians form the bulk of foreign workers in Spain. Seasonal foreign workers constitute around 27 percent of the agricultural labor sector (Avallone and Lopez-Sala, 2016). Huelva province hires the largest number of foreign workers with substantial numbers in Andalucia and Catalonia (Corrado 2017).

Seasonal work is governed by type "T" permits with a maximum duration of nine months within a 12-month period. It provides for a more secure residence status after four years of employment and subsequent access to citizenship (OSCE 2006, 117). Although workers have access to free movement within Spain, they can only work for employers who have applied under the quota system. Family reunification has a one-year waiting period clause until which a foreign worker cannot sponsor his or her family (OSCE 2006, 126). This effectively excludes seasonal workers from having their families join them. However, there are exceptions built in for emergencies and workers who have been engaged in seasonal work for several years in progression.

Spain has instituted several initiatives to encourage return of seasonal foreign workers including economic development, settlement, and retraining programs in the home countries. Foreign workers are required to register their exit to ensure a return the following year (OSCE 2006, 126). Moreover, workers can access social benefits such as pensions, vacation benefits, workers compensation, and unemployment insurance in their home countries. Uniquely, they can also pursue wage claims and other labor related claims in their home countries. In the remainder of this section, I use my proposed framework to explain the reasons for the creation of a relatively expansive TFW program in Spain that appears to prioritize the agency and rights of the TFWs.

Spain does not have the long history of turbulent immigration policy-making that other countries have had. It did not even have a comprehensive immigration and citizenship law until 2000, when the comprehensive *Ley de Extranjeria* was enacted and which solidified the above-mentioned policies in the Spanish TFW program. In 1985, a weakly drafted *Ley de Extranjeria* was passed, which imposed sanctions on undocumented migrants and restrictions on migration, such as limiting work permit renewals and disallowing family reunification (Gonzalez-Enriquez 2009). The 1985 law was deemed a response to pressure from other European countries that wanted to prevent Spain from being an entry point for undocumented migrants. However, at that time, foreigners constituted less than 0.5 percent of the population and were mainly Western Europeans, although there were cities which had at least 30 percent residents of Moroccan origin who were most directly affected by the law (Gonzalez-Enriquez 2009). As a result of mass protests in these cities, the Moroccan residents were given a special access to citizenship. As such, the 1985 law remained essentially a law-on-the-books until the 2000 immigration law.

In general, Spanish political rhetoric has been relatively less xenophobic compared to other European countries and there is limited pro-nativist discourse against foreign workers (Gonzalez-Enriquez 2009). Undocumented foreign workers are only seen as problem because they affect control of the informal sector, as opposed to disrupting a nationalist project.

Periodic regularization, not mass deportation, is seen as the proper response. Foreign workers do face xenophobia and racism in Spain and are subject to removals, but official political discourse, compared to other European countries, has not tried to instigate mass xenophobia and removals. Spain also does periodic exceptional regularization of undocumented persons (1991, 1996, 2000, 2001 and 2005), which allows undocumented persons who have been resident for at least three years to "regularize" their status with a permanent residence permit (Arango and Jachimowicz 2005). It has benefitted both documented and undocumented foreign workers. Despite all the generous provisions in the T program, numerous workers choose to become undocumented and wait for a regularization program (Lopez-Sala et al 2016, 38).

Another reason for the active TFW mobilization in Spain is that unions provide TFWs strong support. Despite being relatively less unionized than Sweden or Germany, Spain's unions are unique in being at the forefront of migrant workers' rights since the inception of its foreign worker program. As immigration is relatively new to Spain, Spanish unions have not gone through a nativist or nationalist anti-immigrant phase that unions in other countries have experienced. Spanish unions have explicit policies against racism and xenophobia (ILO 2005). The unions were influential in providing for labor protections in the 2000 *Ley de Extranjeria*. In the passage of any new legislation that affect workers including foreign workers, a "tripartite social dialogue processes" is engaged, in which the two national trade union confederations, Unión General de los Trabajadores (UGT) and Confederación Sindical de Comisiones Obreras (CCOO), as well as the national employers' associations and the government participate (Kristin 2012). This process has been significant in providing access to all labor rights for foreign caregivers and easing the renewal of permits for seasonal foreign workers.

The unions provide legal assistance to migrant workers, organize local and national forums, and outreach in farms. Both UGT and CCOO have a network of information centers (UGT's Guia de Immigrantes y refugiados and CCOO's *Centros de Informacion para Trabajadores Extranjeros*) in regions with large immigrant populations that help all migrants with permits, visas, and work-related issues (ILO 2005). They also help with settlement and integration. The unions also organize protests calling for regularization and access to permanent residence for foreign workers (ILO 2005). Moreover, all migrant workers do not flock to the larger unions (Caruso 2016). Migrant workers have also formed their own smaller unions such as the Association of Moroccan Migrant Workers in Spain (ATIME).Foreign workers can thus be members of unions and form their own unions.

The Spanish labor unions have special designated representatives that exclusively work with seasonal agricultural foreign workers (Martin 2016). UGT has a migration department and migrant secretariats in the four regions of Spain where migrant workers are most present. Both the large worker confederations meet with their counterparts in the sending country, especially in Morocco and Latin America, and collaborate with migrant workers associations such as ATIME. UGT, for example, has offices in Morocco, Ecuador and Columbia to assist workers before they arrive in Spain (ILO 2005).

To summarize, the case of TFW mobilization in Spain analyzed through my conceptual framework, suggests that a limited pro-nativist political discourse complemented with strong organizational support from unions has provided TFWs in Spain a great deal of agency where they could potentially mobilize "from below." Further research is required to conduct a deeper analysis of the legal environment and corroborate this preliminary analysis with primary data from Spain. The case of Spain also provide policy suggestions for how other countries can configure their TFW programs to cede workers agency and assure humane working conditions while also meeting the national economic needs. I follow up on policy implications of my research in the concluding chapter of this dissertation.

V. Conclusion

In this chapter, I have presented the shadow cases of Hong Kong and the U.S. The shadow cases provide some validation to my proposed framework, which emphasizes how interplay between political environment, legal environment, and support structures produce different configurations of TFW mobilization.

Hong Kong is an example where cause lawyers took advantage of the legal environment to mount a constitutional challenge against the permanent residence restriction faced by foreign domestic workers. The case was successful in a lower court but was overruled on appeal by the Court of Final Appeal. My research found that the new ruling reflected the restrictive political environment in Hong Kong, thereby overturning gains from the legal win. At the same time, foreign domestic workers themselves engage in a rich array of political and legal mobilizing. They are active in unions, receive transnational organizational support, leverage legal cases around labor violations and are able to insert their preferred discourses in the "public transcript." In short, they engage in jurisgenerative practices (Cover 1983; Siegel 2004; Abrams 2015).

The U.S. has not experienced a constitutional challenge to the TFW program because the legal environment makes it difficult for TFWs and their advocates to access courts and expect a favorable result. Additionally, the political environment in the U.S. manifests divided opinions on immigration, favors strong market tendencies, and pays most political attention to undocumented workers. Together, this creates conditions that have led to embracing, and indeed, expanding the H-2A and H-2B TFW programs in their current form. In terms of organizational support, the *National Guestworker Alliance* (*NGA*) is a unique dedicated organization working on TFW mobilizing. The *NGA* is committed to worker mobilization and reflects worker discourses when labor exploitation legal challenges are brought before the court.

Finally, the political environment in Europe is shaped by very restrictive and highly regulated immigration policies. Driven largely by a desire to remain competitive in agricultural sector, TFW programs supply cheap and ready labor to perform seasonal work that citizens do not want to perform. Though Europe seems to provide better labor protections than the U.S., Canada, Israel, or Hong Kong, TFWs have limited personhood or agentic rights resulting in limited mobilization. Spain stands as an interesting exception in Europe as the TFW program potentially allows TFWs to engage in active collective mobilization. It is propped by a

political environment that shuns nativist discourses and by strong union support for TFWs. My study of Europe sketches a forward-looking research agenda that can strengthen the theories and frameworks derived in this dissertation.

Chapter 7
Rethinking Temporariness, Reconstituting Citizenship through Legal Mobilization

I. Introduction

At the start of my dissertation, I set out to understand how TFWs mobilize to engage the law. I argue that TFW programs exist at the confluence of a state's desire to uphold agriculture citizenship, remain competitive in a global marketplace, address concerns of food security, and also maintain universal liberal rights. Ordinarily, TFWs, given their rights-limited status and their precarity in relation to their employers, would not be expected to mobilize collectively. Yet, in the cases of Israel and Canada, I showed that they do mobilize the law collectively. Through an extensive investigation of the different approaches of legal mobilization by TFWs in the two countries, I explicated the various processes through which the support organizations, workers' actions, and the legal and political environments intersect to create the conditions for mobilization.

Additionally, the preceding chapter extended the analysis to shadow cases in the United States and Hong Kong. I also presented a brief assessment of the TFW system in Europe and postulated on mobilization opportunities. The comparative case study I undertook in my dissertation represents an opportunity to extend and deepen the existing academic scholarship on citizenship theory, social movements, and legal mobilization.

II. Role of support organizations and worker mobilization

My in-depth study of legal mobilization in Israel and Canada has shown the centrality of advocacy resources (support organizations) in any type of legal mobilization. The role and characteristics of organizational support predicates the type of legal mobilization and the extent to which workers are mobilized as part of the legal mobilization. Cause-based legal organizations are more likely to use constitutional challenges. This stands in contrast to grassroots and solidarity-based organizations that often perceive impact constitutional litigation as a waste of resources and as ceding power to legal institutions. Yet, they strategically use the law as a tool while ensuring that they maintain control of their message, so it is not deradicalized.

My study of the pathways to legal mobilization and the role of advocacy organizations also demonstrates the need to understand the operations and strategy of the resources much more deeply than the manner in which "support structure" is presently conceptualized in legal mobilization scholarship. The study of legal mobilization is enhanced by the use of social movement methods to understand organizational resources.

a) Cause-Lawyering and Constitutional Legal Mobilization

Legal mobilization in Israel took the shape of impact litigation by a legal NGO, *Kav Laoved*, comprised of cause-lawyers. The TFWs in Israel did not engage in mobilizing activity before

or during the litigation, which essentially removed worker mobilization as a necessary factor for legal mobilization in the form of impact litigation. The litigation efforts and strategies were entirely led by *Kav Laoved* and its elite allies. As such, cause lawyering appears to emerge as a necessary condition for constitutional legal mobilization. The shadow case of Hong Kong lends credence to this conclusion.

Cause lawyering acts as a gate-keeping mechanism as the lawyers hold the ultimate power to decide which case to use for impact litigation, the evidence to present before the court, and the legal framing of the issue (Marshall and Hale 2014). *Kav Laoved* engaged in all these actions. The organization decided that, out of all the features of the Israeli Foreign Worker Program, the binding arrangement (employer-tied work permits) presents the appropriate issue to litigate. The lawyers decided to frame the argument as a labor rights issue, which has resonance in the Israeli Courts.

It is important to note that unlike other cause lawyers, *Kav Laoved* did not select the challenge against the tied worker permit merely out of ideology or a misplaced optimism in the court system. *Kav Laoved* is the only organization that does any outreach among Thai agricultural workers in Israel. As a result of representing individual cases of exploitation and labor rights abuse, they were keenly aware that the tied worker visa was an insurmountable barrier in resolving legal claims of the TFWs. Individual cases provided a formal record of the various rights violation against TFWs. Thus, while access to activist constitutional courts and legal organizations (legal opportunity structures) increases the likelihood of constitutional action, individual claims-making, among other factors described below, plays an important role in creating a record of rights violations that can be used as evidence before the court to prove how current laws impinge constitutional rights.

Furthermore, my research in Israel revealed how the epistemic community of cause-lawyers acted in collaboration to successfully pursue the impact litigation on behalf of TFWs. Many of the human rights organizations, including *Kav Laoved*, were formed between 1970 and 1990 by prominent anti-occupation activists to protect Palestinian human rights. They were all connected to the same movement and have similar roots. Both lawyers and judges are graduates from a handful of universities. Many judges were academics and had taught the lawyers leading the case. Conversely, many of the cause action lawyers have worked at the Supreme Court as clerks. In fact, the clerk of the judge who wrote the majority decision subsequently became the lead litigation lawyer in *Kav Laoved*. She drafted the decision for the judge knowing the kind of arguments that would hold purchase with him. Lawyers and judges in Israel thus circulate in the same social space. As such, organizations like *Kav Laoved* possess "institutionalized cultural capital" (Greenspan 2014), that they can use during their litigation in courts.

In Israel, despite the success in courts, the conditions for TFWs have only improved marginally and the underlying structural inequality continues. Why has the legal change not translated to substantive change for the workers? The Thai TFWs in Israel are not collectively mobilized. The workers have limited options but to approach *Kav Laoved* in their two offices in the country to ensure that the rights are implemented by their employers. Unions and *Kav Laoved* have struggled with outreach and organizing because of linguistic and cultural

differences with the Thai workers. In a relatively "monocultural" country like Israel, advocates face bigger challenges in outreach and organizing than in multiethnic countries like Canada or the U.S. Thus, legal mobilization without worker organizing and without collective action by workers can have minimal impact on the ground.

b) Mobilization-from-below

In Canada, by contrast, there are relatively more workers taking the lead in making individual or class action claims and many of those that do make claims in legal institutions engage in political action with groups like *Justicia* and *IAVGO*. In a more politically mobilized environment, even when constitutional protections are limited, workers are able to use laws that are deemed to have less ambitious scope, such as workers compensation, as a mobilizing tool. The advocacy groups in Canada use even the minimal panoply of rights that apply to foreign workers to encourage workers to make individual claims, support them through their claims-making process, and for direct actions, in order to introduce a narrative that addresses the broader structural problems affecting all workers.

Additionally, my Canadian case study provides evidence on how worker mobilization allows for political activism using the law irrespective of success in courts (NeJaime 2011), an insight that can be extended to TFWs in other sectors and countries. Even though a cause lawyer independently mounted the challenge on behalf of a few domestic worker clients in Hong Kong, the case was supported by most of the domestic workers organizations in that jurisdiction.[136] They used the case as an opportunity to mobilize tens of thousands of domestic workers and to highlight the exploitation and discrimination they faced in the media.[137] This assessment of the use of a law-as-an-end versus law-as-a-tool strategy and worker mobilization in Canada and Hong Kong, comports with the existing literature that highlights the limits of only using courts. My study extends this literature to the case of foreign workers, a group often considered to be impossible to mobilize legally and politically, in two understudied countries.

c) Comparing Mobilization Landscapes

My doctoral study also highlights the distinction between the Canadian and Israeli mobilization landscape. *Kav Laoved* does not use the "law and organizing" model that is now becoming popular all over North America, especially to mobilize non-citizen workers (Gordon 2005; Milkman 2010). It functions purely as a legal organization providing legal services to protect and enhance the legal rights of their client group. Advocates in Canada and the U.S. have also abandoned the union model to organize foreign workers and prefer a workers action center (WAC) model (Gordon 2005; Milkman 2010). The WAC model puts, front and center, the workers choice and agency in deciding what strategies to use. *IAVGO* legal clinic incorporates community organizing as part of their mandate.

[136] WA and WD (domestic workers), interview with author, March and April 2016.
[137] WC (domestic worker), interview with author, March 2016.

Justicia perceives itself as a radical left, volunteer-based, solidarity group, which has worker organizing as its prime directive and strategically uses the law as a tool. *Justicia* can be characterized as falling within the "solidarity" model as opposed to being just "rights based" organization, to use Keck and Sikkink's (1998) typology of organizations. Solidarity organizations consider themselves to be part of a "community of fate" with their constituent actors (in this case migrant workers) with an understanding that the voices of the workers are the true voices that need to be heard (Keck and Sikkink 1998; Keck 2007). They are, therefore, able to engage with workers in ways that resonate with the workers, which is particularly important for workers who do not share the same cultural and national identity as citizens.

For many organizations like *Justicia*, legal proceedings present a challenge in incorporating workers' voices. In addition to the resources and complexities in the legal process, activists often avoid legal cases because of fear of cooptation by lawyers, the lack of opportunity to involve the workers in the cases, and also because workers' narratives get depoliticized and transformed in the legal process (Ferree 2003).[138] Ferree (2003)'s concern of deradicalization is epitomized in *Kav Laoved*'s strategy. *Kav Laoved* used a deliberate strategy to not officially engage with citizenship politics, which is seen as too radical as it challenges the Jewish ethno-nationalist nature the of Israel state. Privileging a labor rights strategy has allowed them to access political and legal institutions and have their opinions heard and acted upon by institutional actors.

However, such was not the case with *Justicia* or with the U.S. based *NGA.* While litigation and the law can be counterproductive and de-radicalizing in many instances, my research shows that it is possible for workers and their advocacy groups to maintain control over the process. My study has provided evidence of the involvement of *Justicia* in legal proceedings before the Human Rights Tribunal of Ontario (HRTO) and the Supreme Court of Canada. *Justicia* members actively inserted their understanding of the root causes of the violations of rights of TFWs into the legal transcript. They pointed out that the precarity of TFWs is predicated on the racialized, structural inequality that is wrought by temporary labor migration. This strategy has also motivated TFWs themselves in articulating these concerns before the courts and political forums. Thus, while fear of co-optation and deradicalization of discourse is a valid fear in the use of the law for mobilization, my research has shown that there are ways in which organizations can strategically maintain their radical position while using the law.

d) Support Structure Theory in Legal Mobilization

By tracing the way in which the two types of legal mobilization in Canada and Israel occurred, my study provides notable insights into the different ways in which collective legal mobilization can occur. By drawing from social movement methodology, this research fills important gaps in the current legal mobilization literature that is often focused on singular factors or a single type of legal mobilization, and is unable to see the connections and

[138] JA and JF (*Justicia* members), interview with author, August 2015; NC (*NGA* member), interview with author, October 2014.

commonalities between various types of legal mobilization (Epp 1998; McCann 1994). "Support structure" literature argues that an activist judiciary and access to courts are not enough for rights-based legal activism (Epp 1998). But, it is a strong support structure for litigation – organized rights advocacy groups, legal professionals developing legal ideas and strategies, and resources and financing for litigation- that determines rights mobilizing in courts (Epp 2011, 1998).

The support structure in either country does not easily fit within this operationalization. Neither country has an impressive support structure for foreign workers. *Kav Laoved* is the *only* organization engaged in any kind of advocacy for foreign workers in Israel. Thus, even though the mobilization was lawyer-driven, concerns about movement coordination and co-optation by legal actors are not germane in this case. Moreover, internal organizational dynamics, which are often ignored in studies of legal support structure, are relevant. At *Kav Laoved*, the decision to focus on particular kinds of cases (even among TFWs) and make constitutional challenges depends on the interests of the litigation director. The first litigation director was interested in status and immigration claims and therefore pushed the challenges to the tied worker visa and to the recruitment process of agricultural Thai foreign workers. But the subsequent legal director was more interested in the plight of care-givers and brought challenges which focused on caregiver rights. The current legal director appears to be more interested in broad labor issues. The outreach organizers at *Kav Laoved* play a major role in bringing specific issues to the litigation team, but the ultimate decisional authority on how and when to use litigation rests with the lawyers.

In Ontario, *Justicia* does most of the outreach to SAWP workers. There is no legal team as such. Decisions to support and pursue particular cases are made on an ad hoc, collective basis and depend on the ability to get representation and willingness of workers to pursues claims. Many staff members of *IAVGO* legal clinic are volunteers at *Justicia* and it is not surprising that they use *Justicia's* discourses in their worker compensation cases. *Justicia* volunteers have an ideological bent towards direct action as opposed to constitutional litigation and perceive large impact litigations as usurping the limited resources they have and as catering to elite legal actors. Thus, they prefer to use the cases of individual claims-making by their worker members as part of larger political campaigns.

Collective legal mobilization for foreign workers can thus take place with minimal support structure, but the type of legal mobilization is determined by the strategy adopted by the advocacy organization. Constitutional change can take place due to the efforts of cause-based lawyers and legal organizations but the organizing and mobilization of workers is needed to translate law-on-the-books to law-in-action. Depending on the ideology and strategy of the advocacy group, it is possible to innovatively use the law without deradicalizing the political message.

III. Role of political environment

A significant contribution of my doctoral research has been using a social movement conceptual framework to explain the impact of the political environment on TFW mobilization. My study shows how the political environment affects the discursive terrain, the

constellation of political elite powers, and law and judicial decision-making. The political environment was assessed through a comparative historical analysis of immigration objectives and identification of the political discourse surrounding TFW programs.

a) Political Contestation and Mobilization Opportunities

The deployment of TFWs in the agricultural sector through state-run programs has a provenance of more than 130 years. Globally, the agricultural sector employs the largest numbers of foreign workers. International and transnational institutions endorse circular migration in this sector, even when they raise general concerns about rights and membership. Settler countries have relied on agricultural labor migration to occupy Indigenous land and build the nation. I show how the historical connections between nation-building, immigration policy, and agriculture have bolstered the privileges of the agricultural sector. TFW programs are an instance where "agricultural citizenship" (rights and privileges attributed to farm ownership) trumps ethnonationalistic concerns (by allowing entry of foreigners for labor), labor citizenship (by diminishing personhood based rights on the basis of labor), and even neoliberal power (by instituting anti-market protectionist policies). However, while agricultural citizenship remains important to sustain the myths around food production and national citizenship, the operation of the sector creates schisms in elite political interests that can be taken advantage of by the court as well as by support organizations.

If we compare attitudes towards the TFW program in Israel and Canada, the SAWP program is lauded by all political parties and institutional actors in Canada. Advocacy groups like *Justicia* therefore face barriers in canvassing support to change the SAWP program in courts and in political institutions. The exalted status of the SAWP program limits contentious legal action in the form of impact litigation. However, over time *Justicia*'s campaign for permanent residence using worker mobilization has garnered support from other advocacy organizations and can potentially engender a change in legislation under the current Trudeau government.

In contrast, the Foreign Worker Program in Israel was criticized by the left parties for eroding the welfare state and labor rights, as well as by parties on the right, for diluting the ethno-nationalist character of the state. It is only perceived as a lesser evil when compared to hiring Palestinian workers. So long as a labor supply was ensured, no constituency other than farm employers was wholly committed to maintaining the Foreign Worker Program. *Kav Laoved* was able to take advantage of this political contestation by framing the issue of the tied worker visa as being inimical to both the labor party supporters and the Zionist elites. Even though the left labor party has traditionally been supportive of the agricultural lobby, at least some members were moved by the appalling conditions of the TFWs. The court was able to rely on government reports that were drafted by ethno-nationalist actors opposed to the foreign worker program as evidence of the shortcomings of the TFW program. The final decision was therefore not as politically controversial even though the court was interfering with the sovereign, plenary right of the government to determine immigration. This fits with the scholarship on law and social change which considers courts to be engaged in strategic decision making where application of the law is balanced with the interests of the legislature and political environment (Whittington 2005; Epstein and Jacobi 2010).

In the case of Hong Kong, during the *Vallejos* case*,* there was almost universal opposition to providing permanent residence to foreign domestic workers, based on the perception that the domestic workers and their families would displace Hong Kong citizens in the labor force if they gained permanent resident status. The Chinese government also had a stake in the decision as they wished to prioritize the migration of Chinese workers. Since the various stakeholders were unanimous in their opposition to the foreign domestic workers, there was no opportunity to exploit divergent positions of the political power brokers. It was, therefore, not surprising that the *Vallejos* court ruled against the domestic workers, even if it had to rely on a tenuous interpretation of the law.[139] The contestation among different political interests, or lack thereof, affects the freedom that judicial actors have to change the TFW program and thereby, the ability to use the law to challenge the program.

b) Political Environment and the Law

Even in the presence of reputed cause lawyers, courts need precedents and legal discourse that allow the court to render a decision that overrules legislation to extend rights (See Bloemraad and Provine 2013). The legal discourse relies on historical and political contingencies.

The TFW issue presented an ideal scenario before the Israeli Court since Israeli jurisprudence had an established labor rights legacy recognizing the dignity of workers stemming from early Zionist principles and nation-building ideologies. Justice Levy's majority decision relied on the concept of human dignity, deemed as the "central value" of Israeli Constitutional law, to interpret it as freedom of human action, including the freedom to a labor employment contract. The binding arrangement was deemed to violate the workers' inherent right to liberty and "human freedom of action" by denying "the autonomy of the free will" of the workers. In addition, both the majority decisions made references to the Old Testament on the obligation to treat foreigners as equal and with respect, thus legitimizing the decision as embedding the values of a Jewish state.

Since TFWs straddle labor and immigration concerns, countries with strong labor protections can use the law to extend rights to foreign workers using the language of workers' rights. In Canada, labor rights are confined to the application of the constitutional right to freedom of association. As several scholars have pointed, labor citizenship or the notion that workers have universal entitlements and should have equal bargaining has been eroded over the years in favor of pro-market principles (Fudge 2006). There is limited constitutional rights legacy that protects substantive aspects of labor and employment law. Political discourse reflected in the law shows a strong protection for multiculturalism but there is no discursive opportunity to extend the concept of human dignity and autonomy to workers. Nevertheless, the political and discursive support for multiculturalism and immigration allows for claims of access to permanent residence. Canada already provides for access to permanent residence to skilled workers, caregivers and some "low-skilled" workers. Organizations like *Justicia* can therefore

[139] The CFA used precedent from the 1970s, years before the Basic Law was passed, to rule that just as a student cannot be considered to be "ordinarily resident" because of his/her immigration status, neither can a domestic worker.

use the language of discriminatory treatment for different migrants to counter agriculture protectionism.

However, courts are reluctant to challenge citizenship laws and use anti-discrimination protections to increase citizenship-based rights of non-citizens. As such, access to permanent residence is a frame that will not have purchase in courts but can be wielded effectively in political action. Court cases in countries like Canada can be used to show how lack of access to permanent residence infringes basic liberal rights of TFWs. *Justicia* has been successful in highlighting the exploitation of and discrimination against SAWP workers in the media and in legislative committees. Its Harvesting Freedom campaign demanding "Status Now" has received political support from some Members of Parliament. *Justicia* also takes advantage of the political contestation between opposition parties and the ruling Liberal party, which portrays itself as a rights-protecting, pro-immigrant government. As such, there is a strong possibility of changing the SAWP program to allow for access to permanent residence and labor mobility in the near future. Thus, Canada could stand as a paradigm of how legal mobilization from below can be used along with other tactics for political change.

c) Delimiting political environment by sector

My study also shows the importance of a sector-by-sector analysis in a TFW legal mobilization analysis and more generally, it demonstrates the need for a contextual, in-depth investigation of the political environment in legal mobilization scholarship. When applying to other sectors, the political environment has to be adjusted to account for attitudes to that specific sector, as conceptualized in this study's theoretical framework.

For example, an extension of my proposed framework into the domestic work sector will have to consider how the notion of "family" builds into the discourse of nationhood. Concern for working women, elderly, and the sick among its citizens has strong and almost unanimous political purchase in every country. It can be difficult to find political schisms to push for caregiver rights. Even in the binding arrangement case, the Israeli Supreme Court ruled that the right to labor mobility cannot be indiscriminately applied to foreign caregivers and has to be balanced with the rights of the vulnerable population of the disabled, elderly, and children. In another case, the Israeli High Court supported the National Labor Court's decision that caretakers who work twenty-four hours a day are not eligible for compensation for extra hours beyond the eight-hour day (HCJ 1678/07 *Gloten v. National Labor Court* [2009]).

However, in Canada, caregivers were able to mobilize and change immigration law to provide for access to permanent residence as early as the 1970s. In addition to massive direct action campaign in cities (where most foreign caregivers reside), Filipina and Caribbean caregiver groups were able to get political support from elite feminist groups in Canada and put transnational political pressure on Canada to affect the change in law. Thus, the political environment that foreign care-givers function under is markedly different from that faced by TFWs in agriculture, which in turn impacts the type of mobilization on behalf of care-givers.

IV. Citizenship Implications

My dissertation adds to citizenship theory in three ways. First, it disrupts prevalent myths about the agency of TFWs in "choosing" to be migrant labor through TFW programs. Second, it identifies the possibilities for meaningful change to TFW programs and advances an agentic theory on access to citizenship for TFW workers. Lastly, it adds grist to the conception of "citizenship from below" through the evidence of jurisgenerative practices of TFWs.

a) Challenging myths through mobilization

The popular discourse around TFW programs emphasizes the consensual nature of the labor contract and the benefits accrued to the workers' families and the source state. For example, the low-skilled labor migration programs are commonly described as a "triple win" situation, with wins for the migrants, the receiving countries, and the sending countries (Wickramasekara 2011; Castles and Ozkul 2014). This congratulatory rhetoric is reflected in the works of scholars like Ottoneli and Torresi who claim that "the hard toil, little leisure, and very reduced social space of these workers" are a "*part of an investment plan* that postpones the fulfillment of the most fundamental dimensions of emotional, social and civic life" and that temporary migration projects are rationally designed "*to further the migrants' aims*" (Ottonelli and Torresi 2012). Another scholar argues that putting "[workers] on the road to citizenship may well worsen their overall situation" (Bell 2006). Unequal rights may be justified, he contends, if it works to the benefit of the migrant workers and there is no other feasible alternative to improve their well-being. Other scholars argue that lack of legal consciousness among TFWs is the reason behind the poor conditions of workers, as they do not use the law to avail themselves of existing rights (see Smith 2005 for examples of scholarship).

The discourse in the scholarship and media reveals a strong undercurrent that emphasizes the voluntariness of guest workers in seeking these temporary arrangements in the host countries and, which assumes that the workers have no desire to be anything but temporary residents in the host country. Such arguments about what is good for "them" are arguably paternalistic and ignore the extensive research on the structural issues that bolster the neoliberal, hegemonic, patriarchal nature of the TFW programs (Anderson 2000; Hahamovitch 2003; Ehrenreich and Hochschild 2003). Importantly, the empirical evidence produced by my research shows that migrant rights groups across the world are themselves demanding the right to permanent status. Given the right opportunity, workers and their advocates have organized to make claims for rights available to citizens through both political and legal institutions.

My interviews with TFWs reveal workers as keenly aware individuals who understand that their precarious status is a result of lack of access to permanent residence and social and institutional discrimination. Workers in Hong Kong and Canada expressed that the desire to go back to their home country is caused by the legal prohibition against getting their family to the receiving country, experiences of racism and alienation, and other barriers to integrate. As such, even when workers state that they want to go back, they do so under a coercive environment that offers no other choice than to go back. Furthermore, the workers perceive the lack of "access to citizenship" as a discrimination issue, even when they desire to go back to

their home country. Even workers who do not want to change employers wish to have the right to change employers. My study shows that though workers may not want to act upon a particular right or entitlement, they are opposed to the lack of choice in accessing permanent residence or labor mobility and are aware of the precarity that the absence of the entitlement induces.

Some scholars argue that it is a net welfare loss if TFW programs were modified to remove the discriminatory and rights-inhibiting provisions. They argue that, as result of a negative welfare effect, if TFWs are given access to all rights, states will be forced to reduce the number of TFWs entering the country (Ruhs and Martin 2008). Due to the number-rights trade-off, it would be detrimental to the well-being of the migrant workers who would arguably be worse off in their country of origin (Klugman and Medalho Pereira 2009; Bommes and Geddes 2002; Ruhs 2008; Ruhs and Martin 2008). The cascading effect will also hurt the economy of the source country in the Global South, which relies on the export of its excess labor to other countries and the influx of the remittances from these workers. The conciliatory stance of the ILO and the UN perhaps reflects this oft-quoted rationale. A few advocacy organizations in Canada have also voiced their apprehension that demanding status and mobility could lead to a termination of the TFW program entirely. Such an end would deny underprivileged, racialized workers, from the global south, the opportunity to migrate and find employment. They argue that a demand for permanent residence distracts from more basic issues such as housing conditions, wage theft, access to healthcare, and so forth.[140]

However, this reasoning fails in several contexts. The agriculture sector, for example, faces a true labor shortage where citizens are reluctant to work in the seasonal, physically demanding sector that provides no mobility, skills, and benefits and is heavily subsidized by the state. Access to sectoral mobility, family unification, and at least a limited access to permanent residence will not create a prohibitive net welfare loss as postulated by the scholars. Tied work permits are a suboptimal solution even from an employer perspective as they transfer the costs of sponsorship, including visa fees, legal arrangements, repatriation guarantees, employers' legal liability for the action of the sponsoring workers, as well as costs of retraining onto the employers, which in turn creates exploitative conditions for workers (Abella 2006; Weinstein 2002). Furthermore, it does not explain the perpetuation of the SAWP program in Canada when other TFW sectors, which have greater predisposition to net welfare loss, such as live-in caregivers, have been given access to permanent residence after a certain number of years.

Moreover, despite their misgivings, advocacy organizations still support *Justicia's* campaign for immediate permanent residence for TFWs ("Status Now") because they strategized that the radical nature of the claim would at least change the law to provide for permanent residence after a few years of work. Also, as described in the earlier chapters, many other advocacy groups have adopted the radical frame of demanding that temporary worker programs be replaced with permanent immigration programs (also see Soni 2013; Lenard 2012). These groups argue that allowing for a subordinated legal or citizenship status for predominantly racialized and economically vulnerable groups perpetuates and even worsens the exploitation.

[140] JA (*Justicia* member), interview with author, October 2015; Strategy meeting of the Coalition for Migrant Worker Rights Canada (CMWRC), May 5, 2016.

From a normative perspective, others have argued that extending political rights to TFWs would dilute citizenship and democratic civil solidarity. Populations will transform from being democratic, interlinked communities to just "casual, temporary aggregates" (Bauböck 2011). These aggregates would be incapable of supporting self-governing democratic polities that can create long-term public policies, keeping in mind the interests of future generations and the flourishing of the general polity. As the temporary residents would primarily be interested in immediate, individualistic needs such as public infrastructure and order as opposed to representative governance and elections, according to this argument, a libertarian or a totalitarian system will emerge that will only ensure the promulgation of a laissez-faire, non-interference socio-economic system.

Such concerns about sustaining democratic polities in the face of economically minded temporary migration policies appears to be founded in broader concerns about neo-liberal public policy decisions. Neoliberalism creates a paradox in the migration context. While neoliberal policies have been instrumental in global stratification and the dilution of the *homo politicus* (Brown 2003), they are also migration friendly as they assign an economic value to labor migration. The examples of legal mobilization "from below" show that giving TFWs the ability to engage in mobilizing for their rights does not dilute political engagement. On the contrary, it expands the body politic and ensures that the rights of citizens are not diluted by neo-liberal policies.

My data and analysis thus challenges established myths about extending citizenship and rights of TFWs.

b) Mobilization and Jurisgenerative politics

My research brings new insights into mobilization by non-citizens and the unique ways in which this population engages in agentic action. My study highlights how *Justicia* used the radical frame of "Status Now" to provocatively demand that SAWP workers and other TFWs be treated the same way as skilled economic migrants and that they be given status on arrival. For *Justicia,* the demand for permanent immigration is critical even if it has no support from institutional actors, and it is easy to understand why.

Among foreign workers, SAWP workers are exclusively denied access to permanent residence, which they find to be an instance of racial and class discrimination. Secondly, citizenship and access to citizenship continue to matter for TFWs because without the right to citizenship, they are socially and legally constructed as being permanently "temporary." This is used to justify their unequal rights even in areas such as labor rights that have long been considered to be attached to personhood, not citizenship. These workers are the subject *of* a particular temporal discourse that they are just sojourners and can never be part of the broader national community.

The control of their movement and rights is justified by the linguistic attribution of transience ("temporariness"). This institutional discourse glosses over the fact that the "temporariness" is imposed by the state and is not an organic result. In fact, my research makes apparent that the

TFWs in countries as varied as Canada, Hong Kong, and Israel, across different sectors, seek out innovative ways to organize, mobilize, claim rights, and maintain their presence in their host countries for decades. Nevertheless, the social construction of "temporariness" highlights the differences between "guest" workers and citizens, legitimizes the differences, and makes it appear "natural and inevitable" that these workers will have restricted rights as compared to other workers (Dauvergne and Marsden 2011). Through extant TFW programs, the subjectivity of workers is erased and these workers are transformed into being mere economic commodities meant to solve economic concerns of the host and source countries.

The demand for status, as the workers and their advocates articulated, is therefore not just for formal citizenship but for the "right to have rights" (Arendt 1968). Thus, mobilization allows for foreign workers to constitute themselves as having the same privileges as citizens. Radical framing in individual claims as used by *Justicia* in Canada and the *National Guestworkers Alliance* (*NGA)* in the U.S. transforms an institutionalized, individualized action into a contentious collective action. Radical framing informs institutional actors (such as judges and political players) and challenges pre-existing biases about the TFW program. TFW mobilization can thus be characterized as performative citizenship or reconstituting "citizenship from below" (Abrams 2015; Santos and Rodríguez-Garavito 2005).

The concept of "jurisgeneration" (Cover 1983) can be used to further refine the theory around performative citizenship. The framework of jurisgenerative processes was put forth in Robert Cover's seminal piece in 1983 (Cover 1983) and has gained currency in recent work on social movements, cosmopolitan citizenship, and popular democracy (Lovell, McCann, and Taylor 2016; Benhabib 2007). The term "jurisgenerative" refers to a process where people contest and mobilize the law to create new meaning of rights (Benhabib 2004, 169, 181). By engaging in a jurisgenerative practice, they declare that they are not only subject to the laws but also engaged in being authors of those laws. When non-citizens engage in a jurisgenerative practice, in courts or in other democratic forums, they are recasting themselves as authors of laws with the Aristotelian "right to rule," which is considered to be a privilege that only citizens enjoy.

Jurisgeneration scholarship mainly inspects court decisions to identify new meaning of rights (see Benhabib 2004) and often excludes contentious rights politics where law is used merely as a tool to create new meanings of rights and for mobilizing activity. However, my dissertation demonstrates that so long as the institutionalized legal meaning is challenged, the actions still have jurisgenerative potential by breaking-down discursive barriers and ensuring the "permeability" of new frames in legal discourse (Benhabib 2004, 196). My research provides an important example of constructing "citizenship from below" by showing how TFWs are building unique citizenship conceptions and engaging in jurisgenerative practices in legal and political spaces (Volpp 2014; Abrams 2015; Isin 2008).

c) Towards an agentic citizenship theory

Scholars have engaged with the shortcomings in citizenship theory that the TFW programs lay bare. Theoretical articulations to address the democracy and citizenship gap in TFW programs have ranged from providing access to citizenship to workers after they have established ties

(Carens 2008), dissolution of TFW programs in entirety (Bauböck 2011), or disaggregating rights from citizenship and ensuring their effective enforcement (Song 2016; Bauböck and Guiraudon 2009) while allowing TFW programs to continue.

None of these solutions respond to the lived realities of TFWs. First, disaggregation of even basic labor rights has proven to be ineffectual due to the precarity and deportability of workers and the undue power that TFW programs give to the employer and the state. TFWs are reluctant to make even basic claims for worker's compensation or loss of wages. Supportive advocacy groups can sometimes break the barriers by offering political and practical protection from employer reprisals and deportation, but there is no guarantee that workers will have access to such support.

Second, TFW programs, especially in agriculture, are designed never to allow the worker to establish ties. Seasonal employment, residence in remote farms, and lack of family unification prevents workers from remaining in the country for sufficient time to establish community ties. TFW programs enable the production of an "economics of alterité" where the foreign worker's location in the host economy doing "unwanted" labor reproduces "otherness," racialization, and marginalization and marks them with stigma of being less worthy of citizenship rights (Calavita 2007).

Lastly, dissolution of TFW programs in low-wage sectors has adverse effects on the workers and the sending state. This would lead to a preference of only skilled, economically well-off workers (with open permits, family unification, and access to citizenship) from privileged countries, thus effectively reinstating pre-1960s colonial, classist and racist immigration policies. The Global North would be cut off for underprivileged, racialized persons from other countries, unless they can claim refugee status. Importantly, none of these policy suggestions consider the agency and autonomy of the workers and their right to decide their future and current conditions.

I have shown that TFWs can constitute themselves as "persons" with political agency and self-sovereignty. An agentic theory of TFW citizenship rights would focus on the right of workers to claim rights. In some countries like Israel, access to citizenship may simply not be possible. Yet, the Israeli Supreme Court found that TFW's have the right to dignity and autonomy, which is infringed by the absence of a meaningful right to change employers. In Canada, on the other hand, the SAWP program is the only program where foreign workers have had no access to citizenship for fifty years. As such, the dignity and autonomy of SAWP workers is diminished even in comparison to other TFW workers in Canada. An agentic theory of citizenship requires reformulation of the normative conceptions of citizenship, equality and non-discrimination, and the Marshallian triptych of rights hierarchy.

Right to have rights

Many current conceptions of citizenship link the "right to have rights" with formal membership status which in turn is linked with the right to be part of the political *demos*, narrowly conceived as the political right to vote or stand for elections. However, state membership status did not always include "citizenship" rights (the right to vote, equality rights

and importantly, being a part of the political *demos*). In France, there was an explicit distinction between those who had state membership (nationalité), and those who had citizenship (citoyeneté) and could vote or be part of governance; the latter excluded women and colonial subjects (Joppke 2006). In the early history of the U.S. (and perhaps till the Civil Rights movement) citizenship was a "thin" conception which included everybody but where women, African Americans, and other racialized groups had less than equal membership and did not even possess basic political membership (Cott 1998; Motomura 2006). State membership in France, the U.S., and other countries merely meant that one could not be expelled easily or that one had diplomatic protection in a foreign country (Joppke 2006). Citizenship (or state membership) and rights had no equivalence for the major part of the history of citizenship (Hansen 2009; Sassen 2006). Hansen (2009) confirms that, even ignoring the exclusion of minority groups, the kind of European social democracy, in which "all members of a nationally bounded society" enjoyed a positive right to a decent life, only lasted from approximately 1948 until 1973.

Three different notions are fitted into a single conception of "citizenship," which has achieved mythic importance in discourse and policy and is now a zealously protected, carefully rationed commodity. First, is the right to not be deported (membership status); second, is the narrowly defined political right as the right to vote and be elected; and third, is the broader right to belong to a political *demos*. By conflating all the three notions to deny citizenship to certain people, the personhood of excluded subordinated groups, such as TFWs, is effectively shorn out, and they are relegated to being commodities instead of self-sovereign members of a community with rights.

Alternative conceptions of citizenship, such as "citizenship from below," foreground the right to belong to a political demos, and as my cases of "legal mobilization from below" show, it is a right that does not rely on the state to provide entitlements but a status achieved by performing political action (Isin 2008; Sassen 2006; Abrams 2015). Current realities of migration demand a reimagining of the body politic to allow persons to organize and claim rights from a sovereign power that is exerting coercive power over them, irrespective of status. A reemphasis on citizenship's performative aspects allows for citizenship to be redefined "from below" and constituted by non-citizens and other people with subordinated status.

Nevertheless, the ability to be part of the political demos requires certain conditions that are denied to TFWs through labor mobility restrictions, physical isolation, and permissive deportability. Non-citizens should have a meaningful right to demand rights, through political and legal mobilization, without fear of deportation. There are several ways to imagine such an alternative. Practically, increasing the ability and capacity of TFWs to mobilize can be implemented in several ways, for example, by providing access to worker solidarity organizations and giving them the right to organize without fear of any reprisal. At the very least, TFWs should have the right to family unification and labor mobility which directly impacts their agency and access to a community. The almost unlimited power of states and employers to deport non-citizens should also be curtailed by allowing for long-term open permits with a presumption of renewal. We can conceive several other alternative constellations of policies and law that are predicated on the normative notion that all persons,

including TFWs, have the right to agency, to autonomy, and to engage as "citizens," at least in the country where they are physically present and earning a livelihood.

But how can TFWs be assured that their political demands in a foreign country will be considered equally with other interests? Immigration lawmaking stands as an exception to representative democratic legislating as it is shaped by transnational pressures and non-political actors like business lobbies. Non-citizens who are the subject of these laws have no role to play in the creation of law. TFW programs are pushed by employer lobbies acting in their economic interest and not in the interest of liberal principles. Bilateral agreements allow for TFW programs to be drafted without any input from workers. In the face of powerful prevailing forces, innovative governance arrangements are necessary. A promising example exists in Spain, where local provinces enter into bilateral agreements directly with sending countries in collaboration with worker associations in both host and sending countries. Such policies are unfortunately ad hoc; liberal states need to acknowledge their duty to protect the individual sovereignty and autonomy of all individuals and ensure the capacity of TFWs to engage in the polity as political persons.

Equality and non-discrimination

Liberal states claim to uphold personhood based non-discrimination rights but this remains aspirational even among citizens because of structural inequalities and power imbalances. The concept of labor citizenship is meant to recognize the equal rights of all workers irrespective of status but it has now been eroded in many states. At the very least, immigration policies should ensure equality among non-citizens. Immigration policies draw lines between "desirable" and "undesirable" entrants to a state. Overtly racist policies have been replaced by policies that indirectly reproduce racialized and class-based difference. For example, there are simply no normative grounds for liberal states to justify different panoply of rights for different TFWs based on "skills." Giving "skilled" labor the rights to citizenship, family, and mobility implies that the liberal state deems other workers to be mere neoliberal objects with no personhood.

Reimagining the Marshallian Triptych

Even considering disaggregation, the hierarchy of civil, social, and political citizenship has to be dismantled to account for realities of migration and globalization. According to the traditional hierarchy, civil rights are accorded to all accorded to all by virtue of being humans, social and welfare rights are locally determined by the community, and political rights are accorded on the basis of formal status. Many social and welfare rights, such as pensions, unemployment insurance, and basic income are inextricably linked with employment. TFWs should be able to avail themselves of these benefits even after they return to the country of their nationality. In some countries, such as Spain, unions are able to ensure that TFWs have access to pension, unemployment insurance, retraining and education, workers' compensation, and injury-related healthcare even after the end of their contracts. TFWs should be able to engage in the making of social and welfare policies that they are subject to for significant portions of their life. Education and healthcare are now considered to be basic rights that should be available to all persons, especially TFWs who are directly contributing to the host

state. As described earlier, political rights should be reconceptualized as a right of a person to politically mobilize independent of the right to vote or participate in government.

By showing the different pathways to mobilization, the study encourages a theory and practice that enhances the capacity of TFWs to politically and legally mobilize for their rights. Only then can workers be transformed from being mere economic commodities to being recognized as *homo politicus* (Brown 2015).

III. Further Research

This study has generated a new theoretical framework for impact litigation and worker mobilization from a comparative analysis of legal mobilization on behalf of temporary foreign workers in the agricultural sector in Israel and Canada. I have shown the potential for expanding the scope of its application in other countries (United States and Hong Kong) and in other sectors (Hong Kong).

The framework can be further refined with future research on programs in Europe. Spain, for example, presents an especially interesting case for further analysis. Unlike the countries studied in this dissertation, Spain is new immigration country, where a substantive immigration law was only recently instituted. Until the global economic recession, Spain had significantly large numbers of TFW agricultural workers. However, the Spanish program contained more generous rights than other TFW programs, without any legal mobilization. Spain, thus, could present an interesting contrast to test the applicability of my proposed framework. In general, it can be expected that as the global economy improves, TFW programs will see a strong resurgence.

In the United States, the H2-A program has expanded over two times in the last decade and is expected to expand even more rapidly. It remains to be seen if provisions of the program will be constitutionally challenged. The theoretical framework suggests that it is unlikely that a constitutional challenge to the H2-A program will be mounted in the United States. The Congress has plenary power in immigration law, labor protections are weak, and there is an alternative legal process through the Department of Labor. I also acknowledge that it is likely that Israel presents a singular deviant case. But even in that case, the deviancy of Israel allows for a fruitful comparison with Canada, which has generated a new theory on the processes and mechanisms affecting legal mobilization on behalf of TFWs.

One drawback in this research is that it has paid less attention to the intersectionality of class and immigration status with race and gender. Many studies on neoliberalism in law and on the impact of a capitalist political economy on workers restrict themselves to a class analysis, with the prominent exception of studies on mobilization of domestic workers that have paid due attention to gender aspects. Cedric Robinson introduced the concept of racial capitalism into class analysis and used it to provide an understanding of Black resistance and mobilization (Robinson 1983). For example, even the earliest temporary foreign worker program in Prussia was predicated on Poles and Slavs as "racially inferior stock" who have lesser rights and can be subject to exploitation (Hahamovitch 2011; Robinson 1983, 26). Labor from the Global South continues to be considered as "deportable labor" (Hahamovitch 2011). The concept of

"triple-win" is built on such racialized ideology where substandard rights for foreign workers are justified on the basis that sending countries and the foreign workers still stand to gain from the system. Organizations like *Justicia* in Canada point out to the racism inherent in immigration laws to mobilize racialized foreign workers, similar to how Robinson (1983) conceptualized Black mobilization. *Justicia* has introduced this discourse in legal institutions when providing evidence or amicus briefs before the Human Rights Tribunal of Ontario and the Supreme Court (*Fraser*). Research on mobilization and resistance, even in institutional arenas like the court, can significantly benefit from the incorporation of intersectionality and racial capitalism theories.

Utilizing a deep examination of two cases, my study offers novel insights on collective mobilization by temporary foreign workers, a population whose voice is rarely publicly heard. It offers empirical evidence, which challenges myths of lack of legal consciousness among TFWs, of the accepting attitude of workers towards TFW programs, and of their unwillingness to engage in contentious action. It suggests that research on the production of precarity by immigration law and policies must take into account the agency of the workers with an understanding that political and legal mobilization actions by migrant workers are exhibited differently across sectors and are distinct from mobilization actions by citizens. Research on new forms of citizenship and "mobilization from below" will particularly benefit from this study. In addition, my study has made an important contribution to both legal mobilization and social movement theory by clarifying the areas of intersection between the two theories and strengthening conceptualizations of support structure and the political environment.

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Appendix 1: Details of interviews and participant observation

Interview Schedules

I conducted semi-structured interviews. I used the multiple questions against each category as probes. I asked broad conversational questions about each category and used the probes to get specific answers if needed. I reframed the questions based on the legal knowledge and general educational level of the interviewee. I specifically examined how different actors strategize mobilization for migrant farm workers, their rejection or acceptance of constitutional litigation as a viable strategy, the interests and motivations behind the strategies, available resources including from other social movement actors, and their perception of legal and political opportunities.

Advocates

A. Introduction

a) Purpose of study; my background; confidentiality issues and obtain consent

Repeat Consent Form

b) *Personal:*

Background and how she/he got involved in domestic/agricultural migrant worker rights: When did you join the organization? What motivates you in your work?

B. Resources and Mobilization

a) Motivations, Goals, and Ideologies

Founding: Tell me about this organization began?
[Probes] Who was active in its founding? Why did they feel this organization was necessary? When was it established?

Purpose: What is the mission, purpose, or mandate?
[Probes] Has this changed over time? Why has this changed? Were there disagreements about the group's purpose? Is there any specific ideology or ethos within the organization on how to engage in advocacy and what kind of actions to take?

Org Structure: How are you organized?
[Probes] How many staff do you have? Volunteers? What kind of volunteers? Who is the staff? Are there any former temporary foreign workers (TFWs) or workers who had a precarious immigration status (PIW)? Do you have a Board? Who are the donors? How do you make decisions/strategize? Have the Board and donors expressed different goals/interests than the staff and organizers?

Transnational Links: Do you network with transnational organizations or engage in transnational action?
[Probes] Do you represent PIW/TFWs at the ILO, UN, World Social Forum, and strategic collaboration with international actors? Do you have connections with source country organizations?

b) Workers with precarious or temporary immigration status

Groups: What kind of PIW/TFWs do you help?
[Probes] What do they do? Who are their employers? Where do they live? What kind of status? What is their demographic?

Grievances and Services: What kind of services do you provide them? How do you access TFWs?
[Probes] How do you approach them or do they approach you? What kind of cases have you dealt with? What are the common complaints/concerns?

Walk me through a few of the memorable cases.

c) Strategies

Actions: What kinds of advocacy/activity/political actions do you do for PIWs/TFWs?
[Probes] Can you describe a few campaigns? Which ones were "successful"? How do you measure success? What kind of publicity are you looking for, if any?

Strategizing: How do you plan political actions?
[Probes] Who are the chief organizers? Do you collaborate with other groups? Which other groups? How do you collaborate? Do you ask the workers? What feedback do they give? How do you ensure their participation and support?

Legal action: What kind of legal work do you do?
[Probes] Rights workshops? Individual Cases? Do you want to do any? Do you support others who do?

Impact Litigation: Have you considered impact litigation/collective constitutional action?
[Probes] Why not? What constitutional rights are implicated, you think, by the situation of TFWs? What about other actors? Will you support them?

Strategies and goals/Stages of Mobilization: What are your immediate and long-term goals for this population of workers?
[Probes] What strategies do you prefer? What are your immediate and long-term strategies? Why these strategies? What impact do you think they will have? What barriers do you see in doing these actions? How will you overcome them?

d) Perception of Opportunities

What are the main problems with labor immigration programs such as TFW programs? What opportunities for change do you see?
[Probes] Why do you think these programs exist? Do you see any way to help them? What changes would you like to see? Why? What are the laws/regulations in their favor? Against their favor? Do the laws help workers with precarious immigration status? Can you mobilize the laws to help them? Are the courts receptive? Why not? What are the hurdles/barriers? What kind of political opposition do you see to changes in the laws? Do you think they can be overcome?

C. Questions to elicit other data

e) Construction of Citizenship of non-citizens
Understanding of rights and citizenship: What rights do these workers have?
[Probes] What rights do you think they should have? Why? Do these workers feel they are entitled to these rights?
Impact of stratified levels of status: How does your advocacy affect the other non-citizens or other citizens?
[Probes] Do you think the TFW programs/immigration laws are making it difficult for other non-citizens? Are they making it difficult for specific groups of citizens?

f) Mobilization Pre-History
How organized are the workers? How motivated are they for changes?
[Probes] How did they organize (or why have they not organized?)? What kind of political actions have they done before? Individually or collectively?

How many workers has the organization helped?
[Probes] How? What kinds of workers (with precarious or temporary immigration status) approach you? Do they feel confident? When do they feel confident? Do they start organizing with you? Have they been engaged in any political/legal activity before?

How receptive are they to your services?
[Probes] What do they want usually? Are you able to give them what they want? How do they articulate their claims? What do you respond?

f) Resources Landscape

Who are the other groups who work for such workers? What do they do?
[Probes] Who are the most prominent/well-known? Do you think they are effective? Who is effective/successful/has the best reputation? Why?
Which groups do you work with the most? Do you work with unions, religious groups, community organizations, and lawyers? Why?

<u>Additional questions to Lawyers and Legal Representatives</u>
In addition to the above (modified to suit the context), I will ask the following questions of lawyers and legal representative

a) Legal Opportunities
What are the significant cases that are relevant for such workers? Do you see them as barriers or as good precedent?
[Probes] What constitutional rights do TFW/PIWs have? Which ones do you think are violated? Can anything be done about the violations? Why/why not? What are the biggest barriers to accessing the law for such workers? What can be done?

b) Personal Motivations

Why did you choose this field?
[Probes] What are your most memorable cases? What do you see as the role of law? What do you think of constitutional impact litigation in general? Is it effective?

c) Constitutional litigation Strategy

Do you think there is anyway constitutional impact litigation is a viable strategy? Why/why not? [Probes] How would/did you plan/strategize it? What will be/were its effects? When is it a good strategy?

d) Details of specific constitutional/legal cases on behalf of TFWs (Mobilization DV)

Did you (attempt to) initiate any constitutional challenges to the guest worker programs? Can you walk me through the steps?
[Probes] Did any TFW or their advocates approach you? How did/will you initiate it? Why did you take/initiate the case? What was their motivation? How did you plan? How did you decide on the causes of action? Can I see your initial drafts of the factums? Who else did you collaborate with?

What happened at the court? Walk me through what happened at various stages at the courts.
[Probes] What arguments did you make? Why? What arguments did the other parties make? What was the judge's response? What was the decision? How do you feel about the decision? Did you appeal? Walk me through the appeal.

What do you feel about the outcome?
[Probes] Did you achieve anything for the workers? What were the barriers? What would you do different?

e) Other ways to mobilize the law
How else can PIW/TFWs mobilize/use the law?

Recruiting workers for interviews
Can I ask you to give these flyers to give to TFWs/PIWs who come to your office? I would like to interview them but I do not want you to ask them directly as they should not feel their services from you will be affected if they decline.

Workers

A. Introduction

a) Purpose of study; my background; confidentiality issues and obtain consent

Repeat Consent Form. Ensure that the worker understands that she or he should not reveal names or identifiable information. Ensure that the worker understands that she should tell me to stop recording when she is revealing identifiable, sensitive information.

b) ***Migration History:***

How did you come to Canada/US/Hong Kong?
[Probes] When did you first leave your country? How long have you been working as a [job]? What kinds of jobs have you done in foreign countries? Where all have you worked? For how long? Have you been gone back home? Do you have family back home?

B. Micro-Mobilization Pre-History (DV)

a) Grievances [also goes towards citizenship environment variable]

What are the problems you are facing at your workplace?
[Probe] What are some of the worst problems?
[State] Do not give me specific names or dates. Just describe in very general way, the problems you have faced.

What do you like about where you are?
[Probe] What would you like to see different?

What are the problems your immigration status is creating for you?
[State in the case of recorded interviews] If you are going to reveal any risky information, let me know, and I will stop the recording.

Do you think the immigration laws are fair?
[Probes] What would you like to see different?

b) Prior claims/activism

Have you protested or tried to change things? With others? Why/Why not?
[Probes] Have you heard of *other people* resisting these injustices/wrongs? In other countries? Do you think you can do the same here? Why not? What changes can motivate you to do something about your injustices/wrongs?

Have you done any legal claims before? Gone to court? Why/Why not?

Have you been part of a community or political group in your home country? In other countries?
[Probes] Have you done any public protesting? How do you feel about your actions? Why did you (not) do it?

[If they have done any acts of resistance transnationally or locally, I will ask them to walk through it]

[Probes] What kind of rights did you claim? Why these rights? Would you have asked for other rights? What was the turning point in your life that led you to take the step?
What did you think about your experience? Who did you collaborate with? Who were the most helpful? Who were the least helpful? What would have helped in increasing your participation?

c) Knowledge of rights
What rights do you have?

What rights would you like?
[Probe] Why do you think you should have those rights? Do you think you should have the same rights as citizens? Which rights?

Do you think you can do something to get the rights? Complain to someone? Go to a lawyer? How do you think they can help?
[Probes] Have you done it before? How about others?

d) Specific instances of legal mobilizations

Why did you make a legal claim/organize to mobilize for rights? Walk me through it.
[Probe] How did you start? Why did you decide to use the law? Did you approach someone? How did you know you could get help? What did they do? How many times did you meet? Did you go to a court? Did you get to a government office? What happened there?

What do you think of your experience? Will you do it again?

C. Resources

Do you know of any organization that helps workers like you? What is your impression of them?
[Probes] What kind of organizations/lawyers do you prefer? Why? Would you volunteer with them if you had the time?

If they started a campaign to change the program through law, would you be supportive?

D. Citizenship Environment

How do you like Canada/HK/US? Why/Why not?

Why do you think they (Canada/HK/US government) are not giving you all those rights (the ones the interviewee said she should have in questions)?

Do you think there is some way to make "them" (the government) change the policies? How?

Are there other non-citizens/immigrant groups (with different "papers")? How do you compare yourself to them?

What do you see (would like to see) in the future?

How much support do you think you will get if you ask for your rights?
[Probes] Will the community around you support you? Your employers? Canadian/American/Hong Kong citizens? Does their support matter?

E. Social and Political Capital

Do you have any friends? How do you hang out with when you are free?
[Probe] What do you like to do when you are free? What kind of people do you trust? Who do you feel the most camaraderie/belonging with?

How comfortable do you feel in the community around you?

Do you have any social networks here? How about internationally?
[Probe] Do you follow the activities of any organizations/groups? Do you spend time with any religious/community/political/friends groups? Do you receive/read any regular newspapers/ newsletters/books?

Do you access the Internet? Which websites do you follow?
[Probe] Any websites linked to rights and law?

How many organizations are you a member of?

Have you met with any politicians, consulate officials, and organizational leaders?

Appendix 2: Media Analysis

Canada

In order to assess the political environment and public attitudes towards seasonal agricultural workers and temporary foreign workers, I analyzed stories that appeared in three major Canadian newspapers, The Toronto Star, The Globe and Mail, and National Post. I selected these three newspapers because they are the top three English language newspapers by circulation according to News Media Canada (News Media Canada 2016). Media analysis is a useful way of assessing the political environment toward the seasonal agricultural workers program.

Starting from 1985, the earliest date from which electronically accessible articles are available, I searched for stories that refer to temporary foreign workers or migrant workers in the context of the seasonal agricultural worker program (SAWP) or agricultural and farm work. I scanned the stories discarding those a) that were unrelated to the program in Canada or b) that mentioned the program in passing while actually focusing on another story or c) that were duplicates.

I coded the stories along the following dimensions:

A. Attitude towards the seasonal agricultural workers program

Views the program favorably	1
Recognizes that the program is beneficial to Canada but thinks it needs to be improved	2
Views the program unfavorably	3

B. Lens used to assess the program

Pro-employer lens	1
Pro-worker lens	2
Administrative lens (i.e. how the program is administered by federal government or deals are negotiated with source countries or provinces)	3

C. Concern about problems in the seasonal agricultural workers program

Sees either no problem with or only (economic) advantages of the program	1
Worries that program displaces Canadian workers	2
Worries that the program depresses wages	3
Claims that the program is not sustainable in the long term	4
Focuses on employer abuse of migrant farm workers	5
Focuses on system/government problems such as unequal rights afforded to migrant farm workers e.g. the right to unionize or not having access to EI, CPP or unable to apply for citizenship	6
Focuses on social marginalization such as racism or isolation	7
National security risk	8

D. View on immigration applied to the program

Anti-immigration or nativist	1

Recognizes importance of migrant farm workers but either does not mention or is not keen on granting workers a pathway to immigration	2
Wants migrant farm workers to be have pathway to permanent residence	3

E. Reform suggested

None	0
Abolish program	1
Make administrative improvements under current program such as better monitoring of employer	2
Make substantive reforms such as granting workers the rights to unionize or granting ability to change employers	3
Grant workers path to permanent residence	4

Articles that expressed multiple views under each dimension are assigned more than a single code.

Israel

For Israel, I analyzed news stories that refer to foreign or migrant or Thai agricultural or farm workers in Israel, which have appeared in a major English language publication, The Jerusalem Post, which has its content readily available via Lexis Nexis database. The Haaretz is the other major publication, which has content in English. However, access to its archives is not readily available through an online database. Thus, unlike the analysis of Canadian media, the Israeli media analysis is limited since it only covers English language articles from one major source.

To mirror the media analysis I completed for Canada, I coded the stories along the following dimensions:

A. Attitude towards the seasonal agricultural workers program

Views the program favorably	1
Recognizes that the program is beneficial to Israel but thinks it needs to be improved	2
Views the program unfavorably	3

B. Lens used to assess the program

Pro-employer lens	1
Pro-worker lens	2
Administrative lens (i.e. how the program is administered by government or deals are negotiated with sending countries)	3

C. Concern about problems in the seasonal agricultural workers program

Sees either no problem with or only (economic) advantages of the program	1
Worries that program displaces Israeli workers	2
Worries that the program depresses wages	3
Claims that the program is not sustainable in the long term	4
Focuses on employer abuse of migrant farm workers	5
Focuses on system/government problems such as unequal rights afforded to migrant farm workers e.g. the right to unionize or not having access to	6

employment insurance or unable to apply for citizenship	
Focuses on social marginalization such as racism or isolation	7
National security risk	8

D. View on immigration applied to the program

Anti-immigration or nativist	1
Recognizes importance of migrant farm workers but either does not mention or is not keen on granting workers a pathway to immigration	2
Wants migrant farm workers to be have pathway to permanent residence	3

E. Reform suggested

None	0
Abolish program	1
Make administrative improvements under current program such as better monitoring of employer	2
Make substantive reforms such as granting workers the rights to unionize or granting ability to change employers	3
Grant workers path to permanent residence	4

Articles that expressed multiple views under each dimension were assigned more than a single code.

Appendix 3: Statistical Data Sources

Israel TFW Data

Most of the data for TFWs in Israel comes from a joint report by the Center for International Migration and Integration and the Population and Immigration Authority of Israel (CIMI 2016). The data is well-maintained and largely consistent. The state keeps track of regular (authorized) TFWs, irregular (unauthorized) TFWs, and tourists who overstay their visas. The data is supplemented by an annual report by an OECD expert group on migration, SOPEMI (Gilad 2017).

Figure A3.1: Foreign workers in Israel over time (Source: CIMI 2016 and Gilad 2017)
Note: Average no. of FWs was 62,700 in 1995 and 103,500 in 2000. The number has remained close to 100,000 since then.

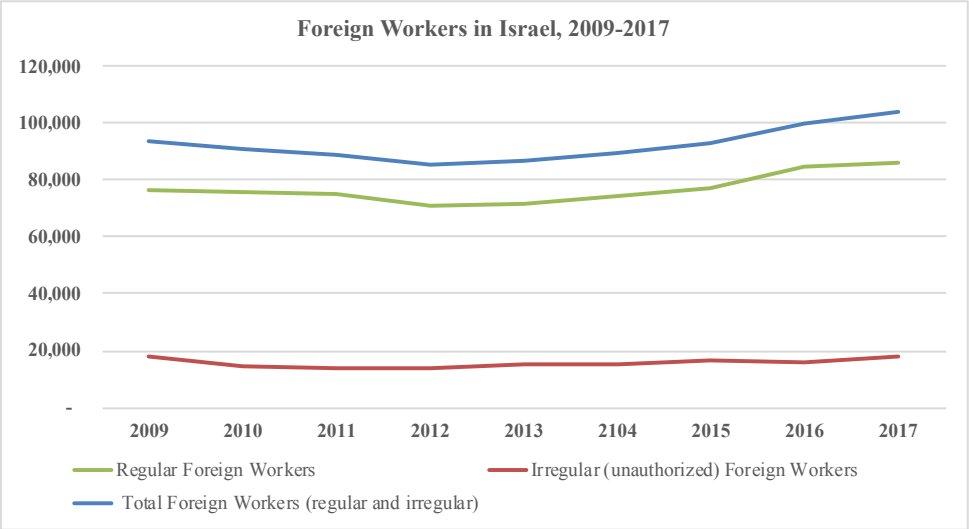


Figure A3.2: Agricultural labor force in Israel 1995-2017 (Source: Gilad 2017)

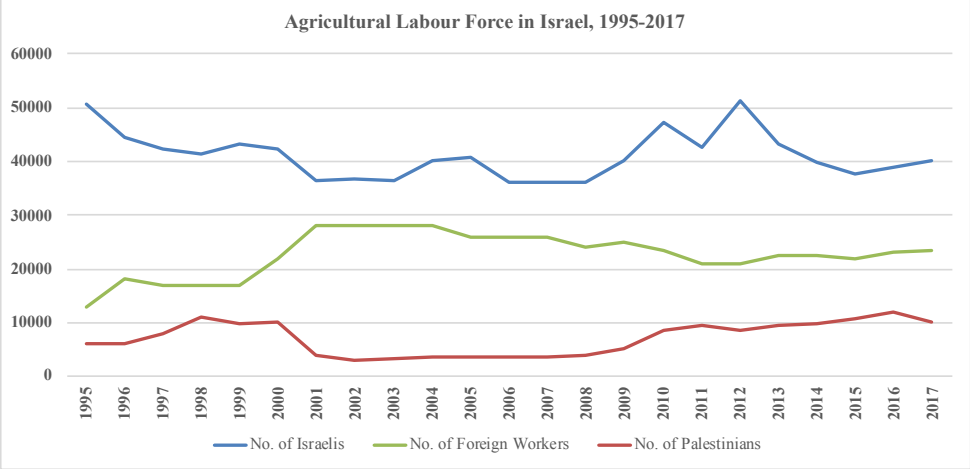


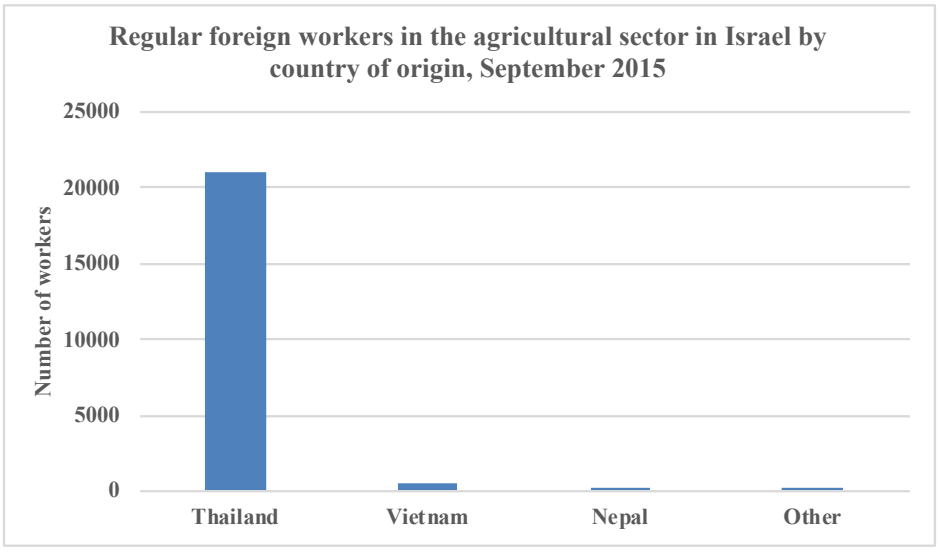
Table A3.1: Agricultural labor force in Israel 1995-2017 (Source: Gilad 2017)
Note: The foreign workers (FWs) numbers are quota numbers till 2007 and actual permit holder numbers from 2008;
The Palestinian workers numbers are quota numbers till 2011 and actual permit holder numbers from 2012.

	1995	**1996**	**1997**	**1998**	**1999**	**2000**	**2001**	**2002**	**2003**
No. of Israelis	50,600	44,500	42,200	41,300	43,100	42,200	36,500	36,700	36,300
No. of FWs	13,000	18,000	17,000	17,000	17,000	22,000	28,000	28,000	28,000
No. of Palestinians	6,000	6,100	7,800	11,100	9,900	10,000	4,000	3,000	3,200
% of FWs	19%	26%	25%	24%	24%	30%	41%	41%	41%

	2004	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**
No. of Israelis	40,200	40,700	36,100	36,200	36,200	40,100	47,100	42,600	51,300
No. of FWs	28,000	26,00	26,000	28,000	23,900	24,800	23,500	23,500	21,050
No. of Palestinians	3,500	3,500	3,500	3,500	4,000	5,250	8,500	9,500	8,429
% of FWs	39%	37%	40%	40%	37%	35%	30%	29%	26%

	2013	**2014**	**2015**	**2016**	**2017**
No. of Israelis	43,100	39,900	37,700	38,900	40,000
No. of FWs	22,346	22,618	21,973	23,074	23,254
No. of Palestinians	9,401	9,918	10,717	11,833	10,232
% of FWs	30%	31%	31%	31%	32%

Figure A3.3: Foreign workers in agriculture by source country in 2015 (Source: CIMI 2016)



Canadian TFW Data

Two Canadian federal agencies maintain datasets on the Temporary Foreign Workers Program that includes the Seasonal Agricultural Workers Program stream. One dataset is maintained by the Ministry of Immigration, Refugees and Citizenship Canada (IRCC formerly CIC), which releases annual numbers of total TFW permit holders in Canada. The second dataset is maintained by the department, Employment and Social Development Canada (ESDC), which releases the LMIAs that were issued on an annual basis. Employers might not recruit enough workers corresponding to all the LMIAs granted to them by ESDC; so, the number of LMIAs issued merely gives information of the upper bound of TFWs including SAWP workers who enter Canada in a given year.

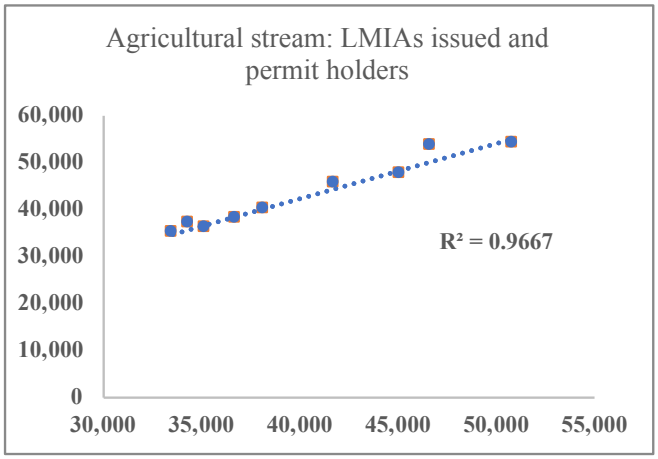
Unfortunately, none of the datasets give us consistent trend information on SAWP permit holders in Canada year over year. Since 2013, the IRCC dataset changed their information on SAWP permit holders and now only releases the annual number of work permit holders who are "agricultural workers." These workers include SAWP workers but also workers in the general agricultural stream (non-seasonal) which in turn includes high skilled and "low skilled" workers. The number of SAWP permit holders is not separated out.

Prior to 2013, the IRCC dataset indicated the annual entries under the SAWP program broken down between Mexico and the Caribbean. It also included the total number of temporary foreign workers in Canada on an annual basis. However, the pre-2013 dataset is not entirely consistent with the permit holders count after 2013 because it just accounts for entries of *new* SAWP workers into Canada excluding the number of SAWP workers who were already in Canada. The post-2013 dataset, however, includes both new arrivals and those already holding permits under the agricultural workers classification.

The only valuable information that can be gleaned from the pre-2013 IRCC dataset is that the number of SAWP workers entering Canada from year 2000 has steadily increased. Only 16,710 SAWP workers entered Canada in 2000. By 2013, there was a 52 percent increase with 25,414 SAWP workers entering annually.

The inconsistency in the IRCC dataset poses a conundrum because it obviates the ability to look at trends in SAWP workers present in Canada after 2012. To get a reasonable measure of this count, I examined the correlation between the positive LMIAs issued under the primary agricultural stream from the ESDC data and the number of work permit holders who are agricultural workers from the IRCC data. Since ESDC data only goes back to 2008, I assessed the correlation of the two between the overlapping years 2008 through 2016. Figure A3.6 is a graphical representation of the correlation between the LMIAs issued under the primary agricultural stream and the number of work permit holders who are agricultural workers. As is evident, the numbers are very strongly correlated suggesting that almost all the LMIAs issued to employers are used to invite SAWP workers to Canada.

Figure A3.4: Correlation between agricultural LMIAs issued and actual permit holders

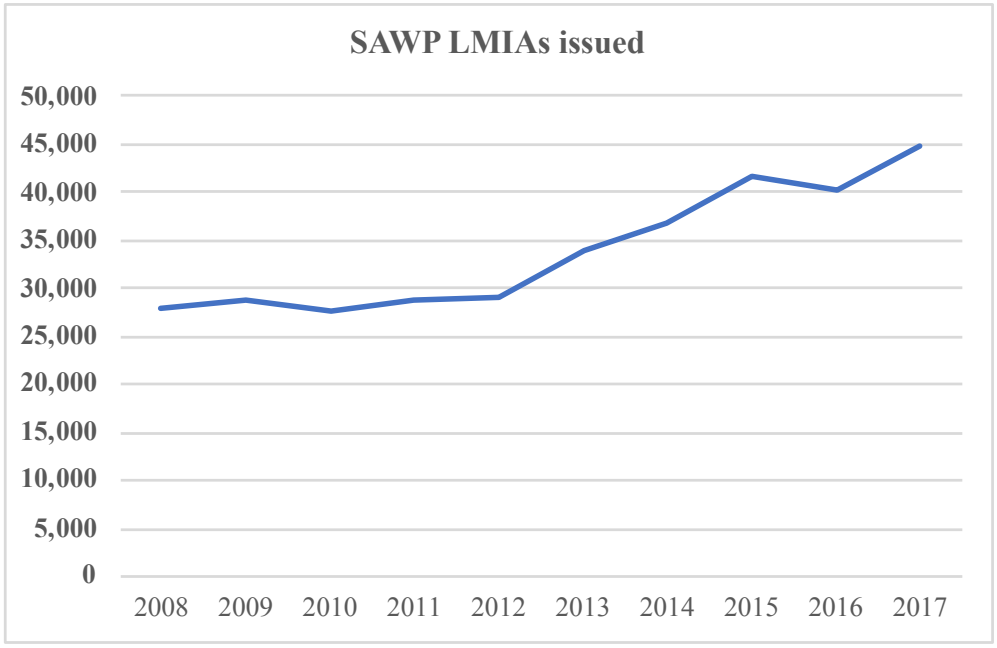


Based on this analysis, the positive LMIAs issued by ESDC under the SAWP program (shown in *Figure* A3.5) is a strong indicator of the SAWP permit holders present in Canada.

Table A3.2: Annual SAWP LMIAs issued
(Source: ESDC 2018)

	2008	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**
SAWP positive LMIAs issues	27,849	28,782	27,687	28,835	29,021	34,042	36,718	41,702	40,238	44,742

Figure A3.5: Annual SAWP LMIAs issued



The data suggests that the number of SAWP LMIAs has jumped 61 percent from 27,849 in 2008 to 44,724 in 2017. The change since 2012 is 54 percent indicating the most rapid increase in SAWP LMIAs took place in the last five years. This is clear from the graph in the above figure, which is much steeper after 2012.

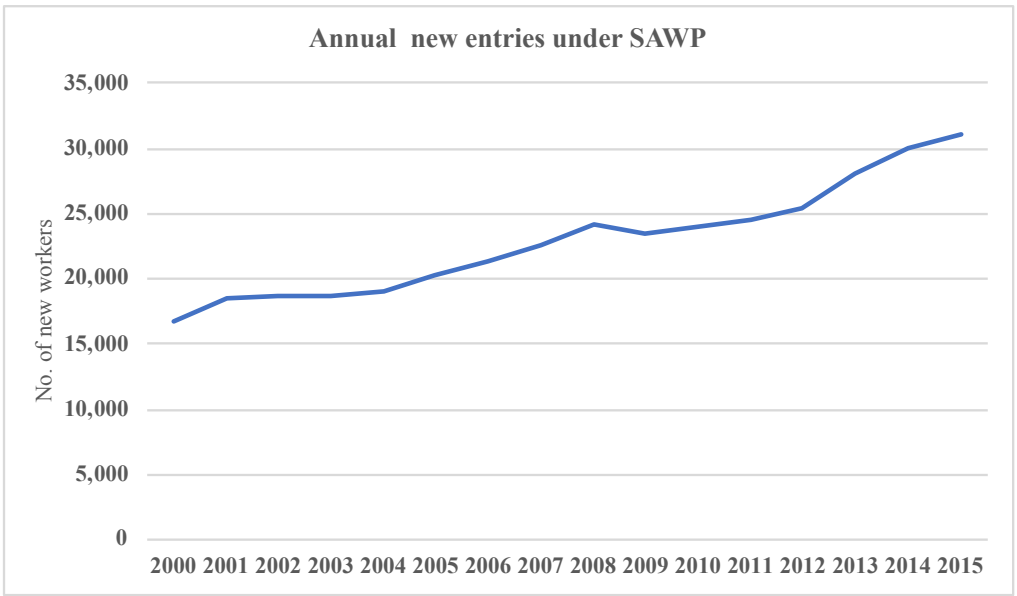
In addition, an OECD database also reports the number of seasonal worker entries per year up to 2015 (rounded to the nearest thousand). Since the only seasonal worker program in Canada is the SAWP program, I use the OECD data from 2013 to 2015 to extrapolate the pre-2013 IRCC dataset. Based on the OECD numbers, in 2015, there was a 22 percent increase in SAWP workers entering annually compared to 2012.

Table A3.3: SAWP workers entering annually in Canada
(Source: CIC 2013 and OECD 2017)

	2000	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**
Annual entries under SAWP	16,710	18,509	18,622	18,698	19,052	20,281	21,253	21,581	24,189

	2009	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**
Annual entries under SAWP	23,393	23,914	24,500	25,414	28,000	30,000	31,000

Figure A3.6: SAWP workers entering annually in Canada



Appendix 4: Temporary foreign worker employment contracts in Canada

Contract for the employment in Canada of commonwealth Caribbean seasonal agricultural workers – 2018

(Source: ESDC, 2018)

THIS CONTRACT made on the_____ (yyyy-mm-dd)
between _____(called throughout "the EMPLOYER")
and _____(called throughout "the WORKER")
and _____(called throughout "the GOVERNMENT'S AGENT")
having been duly authorized by the GOVERNMENT of _____(hereinafter referred to as "the GOVERNMENT") to act on its behalf (called throughout "the GOVERNMENT AGENT").
WHEREAS the EMPLOYER, the GOVERNMENT, the GOVERNMENT OF CANADA and the WORKER desire that the WORKER shall be beneficially employed in Canada in agricultural employment of a seasonal nature.

I Scope and period of employment

The PARTIES agree as follows:

1. The EMPLOYER will employ the WORKER assigned to them by the GOVERNMENT AGENT as approved by EMPLOYMENT AND SOCIAL DEVELOPMENT CANADA (ESDC)/SERVICE CANADA clearance order and the WORKER will serve the EMPLOYER at the place of employment subject to the terms and conditions herein mentioned provided, however, that such period of seasonal employment not be longer than eight (8) months nor less than 240 hours in a time of six (6) weeks or less unless ESDC/SERVICE CANADA has agreed that an emergency situation exists, in which case the PARTIES agree that the minimum period of employment shall be not less than a term of 160 hours. The EMPLOYER shall respect the duration of the employment contract signed with the WORKER(S) and their return to the country of origin by no later than December 15th with the exception of extraordinary circumstances (for example, medical emergencies).
2. In the event of an employment transfer, the total term of employment must not exceed a cumulative term of eight (8) months and the worker must return to the country of origin no later than December 15 with the exception of extraordinary circumstances (for example, medical emergencies).
3. The EMPLOYER agrees to employ the WORKER assigned to them from the date the WORKER arrives in Canada until _____ or until the completion of the work for which the WORKER is hired or assigned whichever comes sooner.
4. For the purpose of all deductions except statutory deductions, a working day is defined as one where the WORKER completes a minimum of four (4) hours of work in a given day. Said costs deduction withheld under this provision are to be made for the current pay period only.

5. To accommodate the cyclical demands of the agricultural industry, the EMPLOYER may request of the WORKERS and the WORKERS may agree to extend their hours when the situation requires it, and where the conditions of employment involve a unit of pay. WORKERS must not be required to work excessive hours that would be detrimental to their health or safety. Requests for additional hours of work shall be in accordance with the applicable Provincial/Territorial labour laws, customs of the district and the spirit of the program, giving the same rights to Caribbean workers as given to Canadian workers.
6. The EMPLOYER shall give the un-named WORKER a trial period of fourteen (14) actual working days from the date of the WORKER's arrival at the place of employment. For transfer workers, the EMPLOYER shall give a trial period of seven (7) actual working days from the date of arrival at the place of employment. Effective the eighth working day, such a WORKER shall be deemed to be a named WORKER. The EMPLOYER shall not discharge the WORKER except for misconduct or refusal to work during that trial period.
7. The EMPLOYER shall provide the WORKER and the GOVERNMENT AGENT, with a copy of rules and regulations of conduct, safety, discipline and care and maintenance of property as the WORKER may be required to observe. On arrival at the place of employment, the WORKER agrees to provide to the EMPLOYER a copy of the contract for the Employment in Canada of Seasonal Agricultural Workers signed by the WORKER and the GOVERNMENT AGENT. The EMPLOYER agrees to sign the contract and return it to the WORKER. The WORKER further agrees that the EMPLOYER may make and keep copies of the signed contract.

II Lodging, meals and rest periods

Part A: Lodging

For provinces and territories except British Columbia

The EMPLOYER agrees to:

1. Provide clean, adequate living accommodations to the WORKER at no cost to the WORKER. These accommodations must be equipped with laundry facilities including an adequate number of washing machines and, where possible, dryers. Such living accommodations must meet with the annual approval of the appropriate GOVERNMENT authority or other accredited bodies responsible for health and living conditions in the province/territory where the WORKER is employed, and the GOVERNMENT AGENT. Where accommodations are not equipped with laundry facilities, the EMPLOYER must provide weekly transportation to a laundromat at no cost to the WORKER, and will provide the WORKER with $5 per week towards laundry costs.
2. Provide the existing housing at no cost to the WORKER during the time in which the WORKER must wait in Canada between the end of the WORKER’s employment contract and the day of the WORKER’s return flight to their country of origin.

The WORKER:

3. Agrees that they shall maintain living quarters furnished by the EMPLOYER or the WORKER's agent in the same state of cleanliness in which it was received; and
4. Realizes that the EMPLOYER may, with the approval of the GOVERNMENT AGENT, deduct from the WORKER'S wages the assessed cost if any to the EMPLOYER to maintain the quarters in the appropriate state of cleanliness.

5. Agrees that the EMPLOYER may recover from the WORKER'S wages an amount to reflect utility costs recovery in relation to the employment of the WORKER in the provinces of Alberta, Manitoba, Ontario, New Brunswick, Nova Scotia, Prince Edward Island and Saskatchewan* only. The amount of the deduction is to be $2.26 Canadian dollars per working day. This amount will be adjusted annually beginning January 1, by a percentage consistent with the year-over-year wage increases, based on the average percentage increase between the lowest hourly wage rates identified on the National Commodities List for the current and previous contract years for work locations in the provinces identified above.

Note: In Saskatchewan, WORKERS employed by greenhouses and nurseries are exempt from this deduction.

For British Columbia only

The EMPLOYER agrees to:

6. Provide clean, adequate living accommodations to the WORKER. These accommodations must be equipped with laundry facilities including an adequate number of washing machines or the EMPLOYER must provide transportation, at no cost to the WORKER, to a laundromat on a weekly basis. Such accommodations must meet with the annual approval of the appropriate GOVERNMENT authority or other accredited bodies responsible for health and living conditions in the province/territory where the WORKER is employed. In addition, accommodations must also meet with the approval of the GOVERNMENT AGENT.
7. If the WORKER`S accommodation is not on the farm, the EMPLOYER will ensure that suitable accommodation is arranged for the WORKER in the community. The EMPLOYER will be responsible to pay the rent to the owner of the accommodation and allowed to deduct costs related to accommodation by way of regular payroll deduction the sum of $6.20 per working day beginning on the first day of full employment. The total amount paid for accommodation during the WORKER'S stay in Canada is not to exceed $826.00. The EMPLOYER will pay any costs for transporting the WORKER to the worksite.

The WORKER agrees:

8. To pay the EMPLOYER costs related to accommodation by way of regular payroll deduction the sum of $6.20 per working day beginning on the first day of full employment. The total amount paid for accommodation during the WORKER'S stay in Canada is not to exceed $826.00.

Part B: Meals

For provinces and territories except British Columbia

9. Where the WORKER and the EMPLOYER agree that the latter provides meals to the WORKER:

The EMPLOYER agrees:

a. to provide reasonable and proper meals for the WORKER during periods of transportation and employment, at a cost to the WORKER, as agreed in Section II, Clause 9b.

The WORKER agrees:

b. that a sum not to exceed $10.00 per day for the cost of meals may be deducted from the WORKER'S wages

10. Where the WORKER elects to prepare their own meals, the EMPLOYER agrees to furnish cooking utensils, fuel and facilities, without cost to the WORKER.

For British Columbia only

11. Where the WORKER and the EMPLOYER agree that the latter provides meals to the WORKER:

The EMPLOYER agrees:

a. To provide reasonable and proper meals for the WORKER during periods of transportation and employment, as a cost to the WORKER, as agreed in Section II, clause 11b.

The WORKER agrees that the EMPLOYER:

b. Will charge the WORKER the sum of $6.00 per day for one meal, $9.00 per day for two meals and $12.00 per day for the cost of three meals provided to the WORKER as long as the meals are prepared by an unrelated third party catering company and the meal plan is reviewed and approved by a qualified nutritionist. The WORKER will have the right, prior or during their employment, to accept or refuse the payroll deduction for this service.

12. Where the WORKER elects to prepare their own meals, the EMPLOYER agrees to furnish cooking utensils, fuel, time and facilities, without cost to the WORKER.

Part C: Rest periods

13. Provide after five (5) consecutive hours of employment a meal break of at least thirty (30) minutes and to provide two (2) rest periods of ten (10) minutes duration one such period to be mid-morning and the other mid-afternoon.
14. For each six (6) consecutive days of work, the WORKER will be entitled to one (1) day of rest, but where the urgency to finish farm work cannot be delayed, the EMPLOYER may request the WORKER's consent to postpone that day until a mutually agreeable date.

III Payment of wages

The EMPLOYER agrees:

1. To pay the WORKER at their place of employment weekly wages in lawful money of Canada at a rate at least equal to the following, whichever is greatest:
    a. the wage for agricultural WORKERS provided by law in the province/territory in which the WORKER is employed; or
    b. the rate determined annually by ESDC to be the prevailing wage rate for the type of agricultural work being carried out by the WORKER in the province/territory in which the work will be done; or
    c. the rate being paid by the EMPLOYER to the regular seasonal work force performing the same type of agricultural work;
2. That the average minimum work week shall be forty (40) hours; and
    a. that, if circumstances prevent fulfilment of Section III clause 2, the average weekly income paid to the WORKER over the period of employment is to be not less than an amount equal to a forty (40) hour week at the hourly rate for agricultural WORKERS provided by law in the province/territory; and
    b. that where, for any reason whatsoever, no actual work is possible, the WORKER, shall receive a reasonable advance to cover their personal expenses.

3. That when an EMPLOYER asks a worker to drive, the WORKER will be paid for their time and when WORKERS are required to relocate from one work site to another during the workday, travel time should be included as part of the working hours.
4. That a recognition payment of $4.00 per week to a maximum of $128.00 will be paid to WORKERS with five (5) or more consecutive years of employment with the same EMPLOYER, payable at the completion of the contract.
5. That Vacation Pay is to be paid according to provincial/territorial legislation.
6. The GOVERNMENT AGENT and both PARTIES agree that in the event the EMPLOYER is unable to locate the WORKER because of the absence or death of the WORKER, the EMPLOYER shall pay any monies owing to the WORKER to the GOVERNMENT AGENT. This money shall be held in trust by the GOVERNMENT AGENT for the benefit of the WORKER. The GOVERNMENT AGENT shall take any or all steps necessary to locate and pay the money to the WORKER or, in the case of death of the WORKER, the WORKER'S lawful estate. The WORKER or WORKER'S lawful estate shall have no further recourse against the EMPLOYER for any such monies paid to the GOVERNMENT AGENT.

For provinces and territories except British Columbia

7. That in the case of piecework, the WORKERS shall be paid wages at least equivalent to one hour of employment for every hour worked

For British Columbia only

8. That in the case of piecework, the EMPLOYER shall pay the WORKER the approved piecework rate as set out in the "Minimum Piece Rates - Hand harvested crops" published by the B.C. Ministry of Skills Development and Labour for harvesting. The worker shall be paid at least the equivalent of $_____ per hour for every hour worked harvesting on a piecework basis.
9. The EMPLOYER shall pay the WORKER _____ per hour for any period spent performing duties other than harvesting. (This hourly rate shall be no less than the most current minimum wage).
10. To allow ESDC/SERVICE CANADA or its designate access to all information and records necessary to ensure contract compliance.

IV Pay advances

1. The EMPLOYER may pay the WORKER in advance so the WORKER can purchase food and/or personal items. The EMPLOYER and WORKER must agree to this pay advance in writing, by signing a contract, and the EMPLOYER must make payroll deductions in accordance to Federal/Provincial legislation. The EMPLOYER can recover the net pay advanced during the first six (6) weeks of employment. In the event the WORKER leaves the place of employment prior to completing six (6) weeks of work, the EMPLOYER shall deduct the full remaining balance from the WORKER's final pay.

V Deductions from wages

Both PARTIES agree that:

1. In the event that the EMPLOYER purchases merchandise on behalf of the WORKER (for example, equipment) for the WORKER'S personal use, the EMPLOYER and WORKER may enter into an agreement to arrange for repayment by the WORKER, provided the following conditions are met:

a. the WORKER and the EMPLOYER agree that the amount for repayment must not include any interest;
b. both parties sign a document detailing the terms of the arrangement including reason for repayment, item(s) purchased if applicable, total amount of monies advanced by the EMPLOYER, repayment amount, repayment terms, and repayment method;
c. the GOVERNMENT AGENT, EMPLOYER and WORKER are provided with a signed copy of the above agreement; and
d. the EMPLOYER files a copy of this agreement in the event of a compliance inspection.

The WORKER agrees:

2. That the EMPLOYER shall deduct a portion of the WORKER'S wages and send this amount to the GOVERNMENT AGENT for each payroll period at the time of delivering the pay sheets required by Section VII. These deductions are to cover costs associated with the physical and financial protection of the WORKER while in Canada and to ensure the WORKER'S safe arrival to Canada from their country of origin. These costs include deductions related to:
    a. airfare between the WORKER'S home country and Kingston, Jamaica
    b. contributions to the National Insurance Scheme, as required by legislation in each country
    c. supplementary medical coverage for any periods when the WORKER is not eligible for provincial or territorial medical insurance and for any coverage in addition to that provided by the province or territory (Section VI)
    d. reasonable fees for required medical exams
    e. government administrative fees for provision of services such as preparation of documents; ground transportation; lodging during transit to and from Canada; orientation sessions; legal assistance; examination of worker accommodations; and, required background, security and criminal record checks.

WORKER'S consent:_____

3. That deductions under Section V, clause 2 can only be made with the consent of the WORKER, as indicated by initialing the space provided. If the WORKER does not consent to these deductions, the WORKER agrees to pay the cost of the specified goods and services directly.
4. That the total amount deducted under Section V, clause 2 shall not exceed $5.45 per working day.

The GOVERNMENT AGENT agrees

5. That funds collected will only be used to recover payments made on behalf of the WORKER as identified in Section V, clause 2.
6. To provide the WORKER, in writing, with a full accounting of how the funds deducted under Section V, clause 2 were used for each WORKER.
7. That where the total amount deducted from the WORKER'S wages exceeds the actual costs of the items identified in Section V, clause 2, the excess will be promptly returned to the WORKER by the GOVERNMENT AGENT.

The WORKER agrees that the EMPLOYER:

8. Will make deductions from the wages payable to the WORKER only for the following:
    a. those EMPLOYER deductions required to be made under law;

b. all other deductions as required pursuant to this contract.

VI Health and safety of workers

The GOVERNMENT AGENT and both PARTIES agree that:

1. If the WORKER dies during the period of employment, the EMPLOYER shall notify the GOVERNMENT AGENT and upon receipt of instructions from the GOVERNMENT AGENT either, provide standard burial or alternatively make a contribution towards the body's repatriation in the amount equal to what the burial cost would have been.
2. The EMPLOYER shall not require the WORKER to perform job duties for which they have not received complete and proper training, in accordance with provincial and territorial legislation, and the WORKER may decline to perform said duties, without penalty or consequence of any kind.

The EMPLOYER agrees:

3. That according to the approved guidelines and regulations in the province/territory where the WORKER is employed the EMPLOYER shall take the WORKER to obtain health coverage in a timely manner.
4. To obtain insurance acceptable to the GOVERNMENT AGENT to provide compensation to WORKERS for personal injuries received or disease contracted as a result of the employment, that complies with all laws, regulations and by-laws respecting conditions set by competent authority and, in addition, in the absence of any laws providing for payment of such compensation to the WORKER.
5. To report to the GOVERNMENT AGENT within twenty-four (24) hours, all injuries and illnesses sustained by the WORKER which require medical attention.
6. To ensure that arrangements are made for injured and ill WORKERS to receive medical attention in an expeditious manner.

The GOVERNMENT AGENT agrees:

7. That when provincial/territorial medical coverage is not immediately available, supplementary medical coverage will be arranged before the **WORKER** arrives in Canada.

VII Maintenance of work records and statement of earnings

The EMPLOYER agrees to:

1. Complete and deliver to the GOVERNMENT AGENT within seven (7) days of the completion of each payroll period, daily deductions and copies of pay sheets indicating all the deductions in respect of the WORKER’S wages.
2. Provide to the WORKER a clear statement of earnings and deductions with each pay.

VIII Travel and reception arrangements

The EMPLOYER agrees to:

1. Pay to the appointed travel agent the cost of two-way air transportation of the WORKER, as between Kingston, Jamaica, and Canada by the most economical means as expressed in the Memorandum of Understanding.
2. Make arrangements to meet or have the WORKER's agent meet and transport the WORKER from their point of arrival in Canada to their place of employment and, upon termination of employment to transport the WORKER to the starting point of their air travel to depart from Canada, at no cost to the WORKER, and all such transportation will be with the prior knowledge and consent of the GOVERNMENT AGENT.

The PARTIES agree:

3. That the WORKER will pay the cost of the work permit processing fee directly to Immigration, Refugees and Citizenship Canada.

WORKER'S consent:_____

4. In the event that at the time of flight departure a named WORKER is unavailable to travel, the EMPLOYER agrees to accept a substitute WORKER and the Supply Country shall maintain an adequate supply pool of WORKERS to assure that there shall be a WORKER on that departing flight.

For provinces and territories except British Columbia

The WORKER agrees:

5. Pay to the EMPLOYER on account of transportation costs referred to in Section VIII, clause 1 up to 50% of the actual cost of air travel (i.e. from Kingston, Jamaica to Canada and back) during the period of employment only and is not to exceed the maximum amounts set out in the chart below. Costs related to air travel will be recovered by way of regular payroll deduction of the applicable sum per working day, as set out in the chart below, beginning on the first full day of employment.

Arrival City	**Maximum amount that can be deducted**	**Maximum amount per working day that can be deducted**
Charlottetown, PE	$614.00	$5.11
Halifax, NS	$614.00	$5.11
Fredericton/Moncton/St-John, NB	$614.00	$5.11
St-John's, NL	$640.00	$5.33
Montreal, QC	$575.00	$5.00
Ottawa, ON	$457.00	$3.80
Toronto, ON	$447.00	$3.72
Winnipeg, MB	$665.19	$5.00
Calgary, AB	$500.00	$4.16
Regina/Saskatoon, SK	$405.00	$3.37

The PARTIES agree:

6. For WORKERS in Quebec, the cost of the Quebec acceptance certificate - CAQ will be reimbursed to the EMPLOYER by the WORKER either through weekly deduction or from the WORKER's final pay cheque if they elect to do so. Where a government agency reimburses an EMPLOYER, the latter shall not make any deductions from wages or other payment due to the WORKER.

For British Columbia only

7. The EMPLOYER is responsible for the cost of two-way airfare for the WORKER, regardless of any early termination of the contract, whether by EMPLOYER or WORKER, and for any reason except for as required under Section XI - EARLY CESSATION OF EMPLOYMENT. Notwithstanding the foregoing, where the WORKER becomes a transfer WORKER, the transfer EMPLOYER is responsible for the return airfare of the WORKER.

IX Obligations of the employer

The EMPLOYER acknowledges and agrees:

1. That the WORKER shall not be moved to another area or place of employment or transferred or assigned to another EMPLOYER without the consent of the WORKER and the prior approval in writing of ESDC/SERVICE CANADA and the GOVERNMENT AGENT.
2. That the WORKERS approved under the Seasonal Agricultural Worker Program are authorized by their work permit only to perform agricultural labour for the EMPLOYER to whom they are assigned.
3. That any person who knowingly induces or aids a foreign WORKER, without the authorization of ESDC/SERVICE CANADA, to perform work for another person or to perform non-agricultural work outside the scope of the Labour Market Impact Assessment (LMIA), is liable on conviction to a penalty up to $50,000 or two years imprisonment or both under the Immigration and Refugee Protection Act S. 124(1) and 125.
4. That if it is determined by the GOVERNMENT AGENT, after consultation with ESDC/SERVICE CANADA, that the EMPLOYER has not satisfied their obligations under this contract, and where required by law, the contract will be rescinded by the GOVERNMENT AGENT on behalf of the WORKER, and if alternative agricultural employment cannot be arranged through ESDC/SERVICE CANADA for the WORKER in that area of Canada, the EMPLOYER shall be responsible for the full costs of the WORKER'S return home as between Kingston, Jamaica and Canada; and if the term of employment as specified in Section I, clause 1, is not completed and employment is terminated under Section IX, clause 4, the WORKER shall receive from the EMPLOYER a payment to ensure that the total wages paid to the WORKER is not less than that which the WORKER would have received if the minimum period of employment had been completed.
5. That WORKERS handling chemicals and/or pesticides are to be provided with personal protective equipment at no cost to the WORKER, and receive appropriate formal and informal training and supervision where required by law. The EMPLOYER will ensure re-entry intervals are adhered to by the WORKER, as prescribed by the label of the pesticide and in accordance with provincial/ territorial legislation and the pesticide control act
6. To provide the WORKER with a uniform for work, when required by the EMPLOYER, and, where permitted by provincial/territorial labour standards, at least 50% of the cost will be borne by the EMPLOYER.
7. To be responsible for transportation to and from a hospital or clinic whenever the worker needs medical attention. The Government Agent will work in partnership with

the employer to ensure proper medical attention is provided to the WORKER in a timely fashion.

X Obligations of the Government Agent

The GOVERNMENT AGENT acknowledges and agrees:

1. That where there is reason to suspect abuse or mistreatment in the workplace, the Government Agent will report any allegations to Employment and Social Development Canada, including Service Canada, and will provide all information that may assist in an integrity inspection, should one be initiated.
2. That if the WORKER must be removed from a situation of exploitation and/or abuse and a transfer to another employer is being arranged, the GOVERNMENT AGENT will coordinate as appropriate to facilitate such a transfer.
3. To ensure that the future SAWP participation of any WORKER who reports abuse or mistreatment in the workplace is not negatively affected as a result of those allegations, unless ESDC determines that the allegation was unfounded or misleading.

XI Obligations of the worker

The WORKER agrees:

1. To proceed to the place of employment as aforesaid in Canada when and how the GOVERNMENT AGENT shall approve.
2. To work and reside at the place of employment or at such other place as the EMPLOYER, with the approval of the GOVERNMENT AGENT, may require.
3. To work at all times during the term of employment under the supervision and direction of the EMPLOYER and to perform the duties of the job requested of them efficiently.
4. To obey and comply with all rules set down by the EMPLOYER and approved by the GOVERNMENT AGENT relating to the safety, discipline, and the care and maintenance of property.
5. That he shall not work for any other person without the approval of ESDC/SERVICE CANADA, the GOVERNMENT AGENT and the EMPLOYER.
6. To return promptly to the place of recruitment upon completion of the authorized work period.

XII Early cessation of employment

The PARTIES agree:

1. That following completion of the trial period of employment by the WORKER, the EMPLOYER, after consultation with the GOVERNMENT AGENT, shall be entitled for non-compliance, refusal to work, or any other sufficient reason, to prematurely cease the WORKER'S employment, and must notify the worker a minimum of seven (7) days prior to dismissal except when dismissal is for cause requiring immediate removal and done in consultation with the Government Agent. Failing any attempts to transfer the WORKER, and at the WORKER`S request to return home, the cost of the WORKER`S return trip to Kingston, Jamaica shall be paid as follows:
    a. if the WORKER was requested by name by the EMPLOYER, the full cost of return shall be paid by the EMPLOYER;
    b. if the WORKER was selected by the GOVERNMENT and 50% or more of the term of the contract has been completed, the WORKER shall be responsible for the full cost of their return;

c. if the WORKER was selected by the GOVERNMENT and less than 50% of the term of the contract has been completed, the WORKER shall be responsible for the full cost of their return home and shall also reimburse the EMPLOYER for the monetary difference between the actual cost of transportation of the WORKER to Canada and the amount collected by the EMPLOYER under Section VIII, clause 5, actual cost being the net amount paid to the Carrier plus the Travel Agent's Commission at the International Air Transportation Association Approved Rate.

For provinces and territories except British Columbia

2. That if, in the opinion of the GOVERNMENT AGENT, in consultation with the EMPLOYER, personal domestic circumstances exist in the island of recruitment which make return home of the WORKER desirable or necessary prior to the expected date of termination of the contract, the GOVERNMENT AGENT shall assist the WORKER'S return home, and where,
    a. the WORKER was requested by name by the EMPLOYER, the full cost of return to Kingston, Jamaica, shall be paid by the EMPLOYER;
    b. the WORKER was selected by the GOVERNMENT and 50% or more of the term of the contract has been completed, the EMPLOYER shall pay 25% of the cost of reasonable transportation and subsistence expenses of the WORKER in respect of their return to Kingston, Jamaica;
    c. the WORKER was selected by the GOVERNMENT and less than 50% of the term of the contract has been completed, the WORKER shall be responsible for the full cost of their return home.
3. Where the WORKER has to return home due to medical reasons which are verified by a Canadian doctor, the EMPLOYER shall pay the cost of reasonable transportation and subsistence expenses except in instances where return home is necessary due to a physical or medical condition which was present prior to the WORKER'S departure in which case the WORKER will pay the full cost of their return home.

For British Columbia only

The PARTIES agree

4. That if it is determined by the GOVERNMENT AGENT, after consultation with ESDC/SERVICE CANADA, that the EMPLOYER has not satisfied their obligations under this contract, the contract will be rescinded by the GOVERNMENT AGENT on behalf of the WORKER, and if alternative agricultural employment cannot be arranged through ESDC/SERVICE CANADA for the WORKER in that area of Canada, the EMPLOYER shall be responsible for the full costs of the WORKER'S return to Kingston, Jamaica; and if the term of employment as specified in Section I, clause 1, is not completed and employment is terminated under Section XII, clause 4, the WORKER shall receive from the EMPLOYER a payment to ensure that the total wages paid to the WORKER is not less than that which the WORKER would have received if the minimum period of employment had been completed.
5. Where the WORKER has to return home due to medical reasons which are verified by a Canadian doctor, the EMPLOYER shall pay the cost of reasonable transportation and subsistence expenses except in instances where return home is necessary due to a physical or medical condition which was present prior to the WORKER'S departure, in

which case the Government of the WORKER'S source country will pay the full cost of their return home.

6. That if a transferred WORKER is not suitable to perform the duties assigned by the receiving EMPLOYER within the seven (7) days trial period, the EMPLOYER shall return the WORKER to the previous EMPLOYER and that EMPLOYER will be responsible for the cost of the WORKER'S return home.

XIII Financial undertakings

The PARTIES further agree:

1. That any bona fide debt to the EMPLOYER voluntarily incurred by the WORKER in respect of any matter incidental or relating to the WORKER's employment hereunder shall be repaid by the WORKER to the EMPLOYER.
2. That any expenditure incurred by the GOVERNMENT AGENT in repatriating the WORKER by reason of their employment being terminated under this contract shall be repaid by the WORKER to the GOVERNMENT.

XIV Governing laws

1. All provisions of this contract affecting the obligations created:
    a. between the WORKER, the EMPLOYER and ESDC/SERVICE CANADA or the GOVERNMENT AGENT, the EMPLOYER and ESDC/SERVICE CANADA shall be governed by the laws of Canada, and of the province/territory in which the WORKER is employed; and
    b. between the WORKER and the GOVERNMENT, shall be governed by the laws of the sending country;
2. The French and English versions of this contract have equal force.

XV Transfer of workers

In the case of Transferred WORKERS, the TRANSFERRING EMPLOYER and the RECEIVING EMPLOYER agree that:

1. The term of employment shall consist of a cumulative term of not less than 240 hours.
2. For a WORKER transfer to take place:
    a. The WORKER does not need to seek a new work permit, provided the WORKER has a valid work permit and has not completed eight (8) months of employment.
    b. The RECEIVING EMPLOYER must be a SAWP EMPLOYER with a positive LMIA received in writing from ESDC/SERVICE CANADA prior to the transfer of the WORKER.
    c. All parties, including the WORKER, TRANSFERRING EMPLOYER, RECEIVING EMPLOYER and GOVERNMENT AGENT in Canada must agree to the transfer.
3. At the time of transfer, the TRANSFERRING EMPLOYER will provide the RECEIVING EMPLOYER with an accurate record of earnings and deductions up to the date of transfer, and clearly state which deductions, if any, may still be recovered from the WORKER. The RECEIVING EMPLOYER may continue to deduct expenses associated with the program, starting from the aggregate amount deducted by the first EMPLOYER, without exceeding the amounts indicated in Section VIII, Clause 5.
4. The RECEIVING EMPLOYER shall give the WORKER a trial period of seven (7) actual working days from the date of his arrival at the place of employment. Effective the eighth working day, such a WORKER shall be deemed to be a named WORKER.

Further, following completion of the trial period, the RECEIVING EMPLOYER agrees to pay the travel agent in advance the cost of one-way air transportation of the WORKER's return trip as between Kingston, Jamaica and Canada.

5. Following completion of the trial period of employment by the WORKER, the EMPLOYER, after consultation with the GOVERNMENT AGENT, shall be entitled to prematurely cease the WORKER'S employment for reasons of non-compliance, refusal to work, or any other sufficient reason. Failing any attempts to transfer the WORKER to an alternative EMPLOYER and at the WORKER'S request to return home, the cost of the WORKER'S return trip between Kingston, Jamaica and Canada shall be paid by the RECEIVING EMPLOYER.
6. In the case of a double transfer, the ORIGINAL EMPLOYER will be responsible for paying the cost of the WORKER's return airfare from Canada to Kingston, Jamaica.
7. If a TRANSFERRED WORKER is not suitable to perform the duties assigned by the RECEIVING EMPLOYER within the seven (7) day trial period, the RECEIVING EMPLOYER shall return the WORKER to the TRANSFERRING EMPLOYER and the TRANSFERRING EMPLOYER will be responsible for the cost of the WORKER'S return trip as between Kingston, Jamaica and Canada.
8. Following completion of the seven (7) day trial period and no later than ten (10) days of employment, the RECEIVING EMPLOYER will provide the GOVERNMENT AGENT with written confirmation of the name(s), identity code(s), the actual date of transfer, and anticipated end date of employment of all TRANSFERRED WORKERS. EMPLOYERS in Ontario, Quebec, and Atlantic Canada will provide this information to their designated Third Party.
9. The GOVERNMENT AGENT is responsible for notifying the supplementary medical insuring company of the WORKER TRANSFER.

XVI Miscellaneous

1. The WORKER and the EMPLOYER agree that personal information held by the Federal Government of Canada and the Government of the Province/Territory, in which the work is performed, may be released to ESDC/SERVICE CANADA, to Immigration, Refugees and Citizenship Canada (IRCC), to the respective Caribbean GOVERNMENT AGENT, to the Foreign Agricultural Resource Management Service, (FARMS), to the Fondation des entreprises en recrutement de main-d'oeuvre agricole étrangère, (FERMES), to the Western Agriculture Labour Initiative (WALI) and to the Insurance Company designated by the GOVERNMENT AGENT. Information shared must be necessary to facilitate the operation of the Seasonal Agricultural Worker Program, and includes:
    a. information held under the Employment Insurance Act, (including the WORKER'S Social Insurance Number);
    b. any health insurance number, social service or accident compensation related information, including any unique alpha-numerical identifier used by any province/territory; and
    c. any other relevant information contained in the Labour Market Impact Assessment.
2. In the event of a fire, the EMPLOYER, the GOVERNMENT AGENT and the WORKER, will bear the replacement cost of the WORKER'S personal property up to a maximum of $650.00 each.

3. This contract may be executed in any number of counterparts, in the language of the signatory's choice, with the same effect as if all PARTIES signed the same document. All counterparts shall be construed together and shall constitute one and the same contract.
4. The EMPLOYER, the GOVERNMENT AGENT, and the WORKER agree that in the event that this contract is frustrated in its entirety through no fault of any party (for example, due to an act of nature), any party may terminate this contract.
5. The PARTIES agree that no term or condition of this contract shall be superseded, suspended, modified or otherwise amended, in any way, without the express written permission of the GOVERNMENT OF CANADA, the GOVERNMENT AGENT, the EMPLOYER and the WORKER.
6. The PARTIES agree that this contract is complete and absolute and that any purported addendums to this contract that do not adhere to Section XVI, Clause 5, may result in being found non-compliant with the Seasonal Agricultural Workers Program.

In witness whereof the PARTIES state they have either read or had explained to them and agreed with all the terms and conditions stipulated in the present contract.

Date:_____
Name of employer:_____
Address:_____
Corporate name:_____
Telephone:_____
Fax no:_____
Place of employment of worker
(If different from above):_____
Employer's signature:_____
Witness:_____
Name of worker:_____
Worker's identity card no.:_____
Worker's address in Canada:_____
Worker's signature:_____
Witness:_____
Government agent's signature:_____

Contract for the employment in Canada of seasonal agricultural workers from Mexico – 2018

(Source: ESDC, 2018)

WHEREAS the Government of Canada and the Government of the United Mexican States are desirous that employment of a seasonal nature be arranged for Mexican Agricultural Workers in Canada where Canada determines that such workers are needed to satisfy the requirements of the Canadian agricultural labour market; and,

WHEREAS the Government of Canada and the Government of the United Mexican States have signed a Memorandum of Understanding to give effect to this joint desire; and,

WHEREAS the Government of Canada and the Government of the United Mexican States agree that a Contract for the Employment in Canada of Seasonal Agricultural Workers from Mexico be signed by each participating employer and worker; and,

WHEREAS the Government of Canada and the Government of the United Mexican States agree that an agent for the Government of the United Mexican States known as the "GOVERNMENT AGENT" shall be stationed in Canada to assist in the administration of the program;

THEREFORE, the following Contract for the Employment in Canada of Seasonal Agricultural Workers from Mexico is made in duplicate this _____ day of _____ 2018.

I Scope and period of employment

The EMPLOYER agrees to:

1. Employ the WORKER(S) assigned to them by the Government of the United Mexican States under the Seasonal Agricultural Workers Program and to accept the terms and conditions hereunder as forming part of the employment contract between them and such referred WORKER(S). The number of WORKERS to be employed shall be as set out in the attached clearance order.
2. The PARTIES agree as follows:
    a. Subject to compliance with the terms and the conditions found in this Contract, the EMPLOYER agrees to hire the WORKER(S) as a _____ for a term of employment of not less than 240 hours in a term of six (6) weeks or less, nor longer than eight (8) months with the expected completion of the period of employment to be the _____day of _____, 2018.
    b. the EMPLOYER needs to respect the duration of the Employment Contract signed with the WORKER(S) and their return to the country of origin by no later than December 15th with the exception of extraordinary circumstances (for example, medical emergencies).
    c. In the event of an employment transfer, the total term of employment must not exceed a cumulative term of eight (8) months and the worker must return to the country of origin no later than December 15 with the exception of extraordinary circumstances (for example medical emergencies).
3. The standard working day is expected to be eight (8) hours, however, to accommodate the cyclical demands of the agricultural industry, the EMPLOYER may request of the

WORKER and the WORKER may agree to extend their hours when the situation requires it, and where the conditions of employment involve a unit of pay. EMPLOYEES must not be required to work excessive hours that would be detrimental to their health or safety. Requests for additional hours of work shall be in accordance with the customs of the district and the spirit of the program, giving the same rights to Mexican workers as given to Canadian workers. The urgent working day will be defined by the appropriate Provincial and Territorial labour legislation.

4. To give the WORKER a trial period of fourteen (14) actual working days from the date of their arrival at the place of employment. The EMPLOYER shall not discharge the WORKER except for sufficient cause or refusal to work during that trial period.
5. The EMPLOYER shall provide the WORKER and the GOVERNMENT AGENT with a copy of rules of conduct, safety discipline and care and maintenance of property so that the WORKER may be aware of and observe such rules.
6. On arrival at the place of employment, the WORKER agrees to provide to the EMPLOYER a copy of the Contract for the employment in Canada of Seasonal Agricultural Workers from Mexico signed by the WORKER and the GOVERNMENT AGENT. The EMPLOYER agrees to sign the Contract and return it to the WORKER. The WORKER further agrees that the EMPLOYER may make and keep copies of the signed Contract.

II Lodging, meals and rest periods

Part A: Lodging

The EMPLOYER agrees to:

1. Provide clean, adequate living accommodations to the WORKER at no cost to the WORKER (except in British Columbia where employers can deduct for accommodations). These accommodations must be equipped with laundry facilities including an adequate number of washing machines and, where possible, dryers. Such living accommodations must meet with the annual approval of the appropriate GOVERNMENT authority or other accredited bodies responsible for health and living conditions in the province/territory where the WORKER is employed, and the GOVERNMENT AGENT. Where accommodations are not equipped with laundry facilities, the EMPLOYER must provide weekly transportation to a laundromat at no cost to the WORKER, and will provide the WORKER with $5 per week towards laundry costs.

The WORKER agrees:

2. That they:
    a. shall maintain living quarters furnished to them by the EMPLOYER or their agent in the same safe, hygienic and functional state in which the WORKER received them; and
    b. realize that the EMPLOYER may, with the approval in writing of the GOVERNMENT AGENT, recover from their wages the cost to the EMPLOYER to maintain the quarters in a safe, hygienic and functional state.

For provinces and territories EXCEPT British Columbia

The EMPLOYER agrees:

3. To provide suitable accommodation to the WORKER, without cost. Such accommodation must meet with the annual approval of the appropriate government authority responsible for health and living conditions in the province/territory where

the WORKER is employed. In the absence of such authority, accommodation must meet with the approval of the GOVERNMENT AGENT.

The WORKER agrees

4. That the EMPLOYER may deduct from the WORKER'S wages an amount to reflect utility costs in relation to the employment of the WORKER in the provinces of Alberta, Saskatchewan*, Manitoba, Ontario, New Brunswick, Nova Scotia and Prince Edward Island only. The amount of the deduction is to be $2.26 Canadian dollars per working day. This amount is adjusted annually beginning January 1, by the consumer price index increase for the months of January to June from 2016 to 2017 in the provinces allowing the deductions. A working day for the purpose of this deduction is to be such that a WORKER completes a minimum of four (4) hours of work in a given day. Said costs deduction withheld under this provision are to be made for the current pay period only.

***** In Saskatchewan, WORKERS employed by greenhouses and nurseries are exempted from this deduction.

For British Columbia ONLY

The EMPLOYER agrees:

5. To provide suitable accommodation to the WORKER. Such accommodation must meet the annual approval of the appropriate government authority responsible for health and living conditions in British Columbia or with the approval of a private housing inspector licensed by the province of British Columbia. In the absence of such authority, accommodation must meet with the approval of the GOVERNMENT AGENT.
6. To ensure that reasonable and suitable accommodation is affordably available for the WORKER in the community. If the WORKERS's accommodation is not on the farm, the EMPLOYER will pay any costs for transporting the WORKER to the worksite.
7. That costs related to accommodation will be paid by the WORKER at a rate of 5.36 per working day* of the WORKER'S pay from the first day of full employment. The amount paid for accommodation during the WORKER'S stay in Canada is not to exceed $826.00.

***** A working day for the purpose of this deduction is to be such that a WORKER completes a minimum of four (4) hours of work in a given day.

Part B: Meals

For provinces and territories EXCEPT British Columbia

8. Where the WORKER and the EMPLOYER agree that the latter provides meals to the WORKER:

The EMPLOYER agrees:

a. to provide reasonable and proper meals for the WORKER

The WORKER agrees:

b. that the EMPLOYER may deduct from the WORKER'S wages a sum not to exceed $6.50 per day for the cost of meals provided to the WORKER, provided the WORKER agrees to receive this service from the EMPLOYER, to which end the WORKER must state in writing their agreement, prior to making the first deduction.

9. Where the WORKER prepares their own meals, the EMPLOYER agrees to furnish cooking utensils, fuel, and facilities without cost to the WORKER, and to provide a minimum of thirty (30) minutes for meal breaks.

For British Columbia ONLY

10. Where the WORKER and the EMPLOYER agree that the latter provides meals to the WORKER:

The EMPLOYER agrees:

a. to provide reasonable and proper meals for the WORKER.

The WORKER agrees:

b. the EMPLOYER will charge the WORKER the sum of $6.00 per day for one meal, $9.00 per day for two meals and $12.00 per day for the cost of three meals provided to the WORKER as long as the meals are prepared by an unrelated third party catering company and the meal plan is reviewed and approved by a qualified nutritionist. The WORKER will have the right, prior or during their employment, to accept or refuse the payroll deduction for this service.

11. Where the WORKER prepares their own meals, the EMPLOYER will furnish cooking utensils, fuel, and facilities, without cost to the WORKER, and to provide a minimum of thirty (30) minutes for meal breaks.

Part C: Rest periods

The EMPLOYER agrees to:

12. Provide the WORKER with at least two (2) rest periods of ten (10) minutes duration, one such period to be held midmorning and the other midafternoon, paid or not paid, in accordance with provincial/territorial labour legislation.
13. For each six (6) consecutive days of work, the WORKER will be entitled to one (1) day of rest, but where the urgency to finish farm work cannot be delayed the EMPLOYER may request the WORKER'S consent to postpone that day until a mutually agreeable date.

III Payment of wages

The GOVERNMENT AGENT and both PARTIES agree:

1. That in the event the EMPLOYER is unable to locate the WORKER because of the absence or death of the WORKER, the EMPLOYER shall pay any monies owing to the WORKER to the GOVERNMENT AGENT. This money shall be held in trust by the GOVERNMENT AGENT for the benefit of the WORKER. The GOVERNMENT AGENT shall take any or all steps necessary to locate and pay the money to the WORKER or, in the case of death of the WORKER, the WORKER'S lawful heirs.

The EMPLOYER agrees:

2. To allow EMPLOYMENT AND SOCIAL DEVELOPMENT CANADA (ESDC)/SERVICE CANADA or its designate access to all information and records necessary to ensure contract compliance.
3. That the average minimum work week shall be forty (40) hours; and
    a. that, if circumstances prevent fulfilment of Section III, clause 3, the average weekly income paid to the WORKER over the period of employment is as set out in Section III, clause 3 at the hourly minimum rate; and
    b. that where, for any reason whatsoever, no actual work is possible, the WORKER, shall receive an advance with a receipt signed by the WORKER to

cover personal expenses, the EMPLOYER shall be entitled to deduct said advance from the WORKER'S pay prior to the departure of the WORKER.

For provinces and territories EXCEPT British Columbia

The EMPLOYER agrees:

4. That a recognition payment of $4.00 per week to a maximum of $128.00 will be paid to WORKERS with five (5) or more consecutive years of employment with the same EMPLOYER, and ONLY where no provincial/territorial vacation pay is applicable. Said recognition payment is payable to eligible WORKERS at the completion of the contract.
5. To pay the WORKER at their place of employment weekly wages in lawful money of Canada at a rate at least equal to the following, whichever is the greatest:
    a. the minimum wage for WORKERS provided by law in the province in which the WORKER is employed;
    b. the rate determined annually by ESDC to be the prevailing wage rate for the type of agricultural work being carried out by the WORKER in the province in which the work will be done; or
    c. the rate being paid by the EMPLOYER to the Canadian workers performing the same type of agricultural work.
6. In the case of piecework, the WORKERS shall be paid wages at least equivalent to one hour of employment for every hour worked on the harvest.

For British Columbia ONLY

The EMPLOYER agrees:

7. In the case of piecework, the WORKER shall be paid wages at least equivalent to one hour of employment for every hour worked on the harvest.
    a. The EMPLOYER shall pay the WORKER the approved piece work rate as set out in the "Minimum Piece Rates - Hand harvested crops" published by the B.C. Ministry of Jobs, Tourism and Skills Training for harvesting.
    b. The EMPLOYER shall pay the WORKER _____ per hour for any period spent performing duties other than harvesting. (This hourly rate shall be no less than the most current minimum wage).

IV Deductions of wages

The WORKER agrees that the EMPLOYER:

1. Will make deductions from the wages payable to the WORKER only for the following:
    a. those employer deductions required to be made under law;
    b. all other deductions as required pursuant to this contract.

V Health and safety of workers

The EMPLOYER agrees to:

1. Comply with all laws, regulations and by-laws respecting conditions set by competent authority and, in addition, in the absence of any laws providing for payment of compensation to WORKERS for personal injuries received or disease contracted as a result of the employment, shall obtain insurance acceptable to the GOVERNMENT AGENT providing such compensation to the WORKER.
2. Report to the GOVERNMENT AGENT within forty-eight (48) hours all injuries sustained by the WORKER which require medical attention.

The WORKER agrees that:

3. The EMPLOYER can deduct the cost of non-occupational medical coverage by way of regular payroll deduction at a premium rate of $0.90 per day per WORKER.
4. The EMPLOYER shall remit on a monthly basis directly to the insurance company engaged by the Government of Mexico the total amount of insurance premium as invoiced by the insuring company. Such amount will be recovered by the EMPLOYER with the deduction made to the WORKER'S wages according to Section V, clause 1. In the case where the WORKER leaves Canada before the employment contract has expired, the EMPLOYER will be entitled to recover any unused portion of the insurance premium from the insurance company.
5. The WORKER will report to the EMPLOYER and the GOVERNMENT AGENT, within forty-eight (48) hours, all injuries sustained which require medical attention.
6. The coverage for insurance shall include:
    a. the expenses for non-occupational medical insurance which include accident, sickness, hospitalization and death benefits;
    b. any other expenses that might be looked upon under the contract between the Government of Mexico and the insurance company to be of benefit to the WORKER.
7. If the WORKER dies during the period of employment, the EMPLOYER shall notify the GOVERNMENT AGENT and, if the WORKER's life insurance policy does not cover burial and/or repatriation of the body, upon receipt of instructions from the GOVERNMENT AGENT, either:
    a. provide suitable burial; or
    b. remit to the GOVERNMENT AGENT a sum of money which shall represent the costs that the EMPLOYER would have incurred under Section V, clause 7a, in order that such monies be applied towards the costs undertaken by the Government of Mexico in having the WORKER returned to their relatives in Mexico.

VI Maintenance of work records and statement of earnings

The EMPLOYER agrees to:

1. Maintain and forward to the GOVERNMENT AGENT proper and accurate records of hours worked and wages paid and submit those records to the GOVERNMENT AGENT upon request within seven (7) days.
2. Provide to the WORKER a clear statement of earnings and deductions with each pay.

The WORKER agrees that:

3. The EMPLOYER may pay the WORKER in advance so the WORKER can purchase food and/or personal items. The EMPLOYER and WORKER must agree to this pay advance in writing, and the EMPLOYER must make payroll deductions according to federal and provincial legislation. The EMPLOYER can recover the net pay advanced during the first six (6) weeks of employment. In the event the WORKER leaves the place of employment prior to completing six (6) weeks of work, the EMPLOYER shall deduct the full remaining balance from the WORKER'S final pay. These deductions will be reflected on the WORKER'S pay stub.

VII Travel and reception arrangements

The EMPLOYER agrees to:

1. Pay to the travel agent the cost of two-way air transportation of the WORKER for travel from Mexico City to Canada by the most economical means.

2. Make arrangements:
    a. to meet or have the worker's agent meet and transport the WORKER from the point of arrival in Canada to the place of employment and, upon termination of their employment to transport the WORKER to the starting point of their air travel to depart Canada; and
    b. to inform and obtain the consent of the GOVERNMENT AGENT to the transportation arrangements required in Section VII, clause 2a.

The contracting PARTIES agree:

3. In the event that at the time of departure a named worker is unavailable to travel the EMPLOYER agrees, unless otherwise stipulated in writing on the request form, to accept a substitute WORKER.
4. That the WORKER will pay the cost of the work permit processing fee directly to Immigration, Refugees and Citizenship Canada. The EMPLOYER may not recover any costs related to the work permit fee.

For provinces and territories EXCEPT British Columbia

The WORKER agrees to:

5. Pay to the EMPLOYER costs related to air travel as follows:
    a. The EMPLOYER may deduct up to 50% of the actual cost of air travel (i.e. from Mexico City to Canada and back) over the period of employment only and is not to exceed the maximum amounts set out in the chart below:

Airport / City / Province	**Maximum amount that can be deducted**
Charlottetown, PEI	$ 617.00
Halifax, NS	$ 617.00
Fredericton, Moncton or St-John, NB	$ 617.00
St. John's, NL	$ 617.00
Montreal, QC	$ 646.00
Ottawa, ON	$ 548.00
Toronto, ON	$ 543.00
Winnipeg, MB	$ 602.52
Calgary, AB	$ 631.24
Regina / Saskatoon, SK	$ 651.24

6.

a. Costs related to air travel will be recovered by way of regular payroll deductions at a rate of ten (10) percent of the WORKER'S gross pay from the first day of full employment.
b. The employer will provide the worker with a receipt for the cost of travel, and will reimburse the worker if the worker has paid in excess of 50% of the airfare.

7. Where a federal/provincial/territorial agreement on the selection of foreign workers exists with associated cost recovery fees, the cost of such provincial/territorial fees will be reimbursed to the EMPLOYER from the WORKER'S final vacation pay cheque.

For British Columbia ONLY

The EMPLOYER agrees:

7. To pay to the travel agent the cost of two-way air transportation of the WORKER for travel from Mexico City to Canada by the most economical means.

VIII Obligations of the employer

The EMPLOYER acknowledges and agrees:

1. That the WORKER shall not be moved to another area of employment or transferred or assigned to another EMPLOYER without the consent of the WORKER and the prior approval in writing of ESDC/SERVICE CANADA and the GOVERNMENT AGENT.
2. That the WORKERS approved under the Seasonal Agricultural Workers Program are authorized by their work permit only to perform agricultural labour for the EMPLOYER to whom they are assigned. Any person who knowingly induces or aids a foreign worker, without the authorization of ESDC/SERVICE CANADA, to perform work for another person or to perform non-agricultural work outside the scope of the Labour Market Impact Assessment (LMIA), is liable on conviction to a penalty up to $50,000 or two (2) years imprisonment or both under the Immigration and Refugee Protection Act S 124(1)(C) and 125.
3. To provide:
    a. WORKER with a uniform for work, when required by the EMPLOYER, and, where permitted by provincial/territorial Labour Standards, the cost will be shared at 50% between the EMPLOYER and the WORKER.
    b. WORKERS handling chemicals and/or pesticides with personal protective equipment at no cost to the WORKER; and where required by law, will receive appropriate formal or informal training and supervision, at no cost to the WORKER. The EMPLOYER will ensure Re-Entry Intervals are adhered to by the WORKER, as prescribed by the label of the pesticide, and in accordance with provincial/territorial legislation and the pesticide control act.
4. The EMPLOYER shall take the WORKER to obtain health coverage according to approved provincial/territorial regulations.
5. The EMPLOYER agrees to provide existing housing at no cost to the WORKER during the time in which the WORKER must wait in Canada between the end of the WORKER's employment contract and the day of the WORKER's return flight to Mexico.
6. To be responsible for transportation to and from a hospital or clinic whenever the WORKER needs medical attention. The Consulate will work in partnership with the employer to ensure proper medical attention is provided to the WORKER in a timely fashion. With respect to work-related injuries, the EMPLOYER shall take the

WORKER (if required) to the closest hospital or clinic, or the EMPLOYER shall pay for such transportation if he is unable to take the worker to receive medical attention.

7. In the absence of compensation for lack of work at the end of the contract and in order to avoid days of labour unproductivity of workers prior to their return to Mexico, the maximum waiting period should not be greater than 96 hours.

For British Columbia ONLY

8. To provide the WORKER with a uniform for work, when required by the EMPLOYER, at no cost to the WORKER.

IX Obligations of the worker

The WORKER agrees:

1. To work at all times during the term of employment under the supervision and direction of the EMPLOYER and to perform the duties of the agricultural work requested in an efficient manner.
2. To obey and comply with all rules set down by the EMPLOYER relating to the safety, discipline, care and maintenance of property.
3. To not work for any other person without the approval of ESDC/SERVICE CANADA, the GOVERNMENT AGENT and the EMPLOYER, except in situations arising by reason of the EMPLOYER'S breach of this contract and where alternative arrangements for employment are made under Section X, clause 6.
4. To return promptly to Mexico upon completion of the authorized work period.
5. To submit/file their tax return. For that purpose, the GOVERNMENT AGENT shall provide information on the adequate options to meet this obligation.

For provinces and territories EXCEPT British Columbia

The WORKER agrees:

6. To work and reside at the place of employment or at such other place as the EMPLOYER, with the approval of the GOVERNMENT AGENT, may require.

For British Columbia ONLY

The WORKER agrees:

7. To work at the place of employment.

X Early cessation of employment

1. If the WORKER has to return to Mexico due to medical reasons, which are verified by a Canadian doctor, the EMPLOYER shall pay reasonable transportation and subsistence expenses. Where the WORKER`s return home is necessary due to a physical or medical condition which was present prior to the WORKER’S arrival in Canada, the Government of Mexico will pay the full cost of the WORKER`S return.
2. Following completion of the trial period of employment by the WORKER, the EMPLOYER, after consultation with the GOVERNMENT AGENT, shall be entitled for non-compliance, refusal to work, or any other sufficient reason stated in this contract, to prematurely cease the WORKER’S employment and must notify the worker a minimum of seven (7) days prior to dismissal except when the dismissal is for cause requiring immediate removal and done in consultation with the Government Agent.

For provinces and territories EXCEPT British Columbia

3. Failing any attempts to transfer the WORKER as per section XI, and at the WORKER`s request to return home, the cost of the WORKER`s return trip to Mexico shall be paid as follows:

a. if the WORKER was requested by name by the EMPLOYER, the full cost of return shall be paid by the EMPLOYER;
b. if the WORKER was selected by the Government of Mexico and 50% or more of the term of the contract has been completed, the full cost of returning the WORKER will be the responsibility of the WORKER;
c. if the WORKER was selected by the Government of Mexico and less than 50% of the term of the contract has been completed, the full cost of the returning flight will be the responsibility of the WORKER. In the event of insolvency of the WORKER, the Government of Mexico, through the GOVERNMENT AGENT will reimburse the EMPLOYER for the unpaid amount of the return flight.

4. The parties agree that:
    a. If the WORKER returns to Mexico due to personal and/or domestic circumstances, the WORKER shall be responsible for the full cost of their return to Mexico.
    b. If the WORKER wants to return to Canada to finish their contract after attending the personal circumstances in Mexico, with previous authorization from the EMPLOYER and the GOVERNMENT AGENT, it is considered a DOUBLE ARRIVAL and the WORKER is responsible for the full cost of his return to Canada.
    c. If the EMPLOYER, in agreement with the WORKER and the GOVERNMENT AGENT arrange a DOUBLE ARRIVAL for operational needs of the farm, the EMPLOYER is responsible for the full cost of the return ticket Canada-Mexico-Canada for the WORKER.
5. The EMPLOYER cannot continue recovering the costs incurred through the cheques issued to the WORKERS by the insurance companies.
6. That if it is determined by the GOVERNMENT AGENT, after consultation with ESDC/SERVICE CANADA that the EMPLOYER has not satisfied their obligations under this contract, the contract will be rescinded by the GOVERNMENT AGENT on behalf of the WORKER, and if alternative agricultural employment cannot be arranged through ESDC/SERVICE CANADA for the WORKER in that area of Canada, the EMPLOYER shall be responsible for the full costs of returning the WORKER to Mexico City, Mexico; and if the term of employment as specified in Section I, clause 2, is not completed and employment is terminated under Section X, clause 6, the WORKER shall receive from the EMPLOYER a payment to ensure that the total wages paid to the WORKER is not less than that which the WORKER would have received if the minimum period of employment had been completed.

For British Columbia Only

7. The EMPLOYER is responsible for the cost of two-way airfare for the WORKER, regardless of any early termination of the contract, whether by EMPLOYER or WORKER, and for any reason.

XI Transfer of workers

In the case of transferred workers, the TRANSFERRING EMPLOYER and RECEIVING EMPLOYER agree that:

1. For a WORKER transfer to take place:

a. The WORKER does not need to seek a new work permit, provided the WORKER has a valid work permit and has not completed eight (8) months of employment.
b. The RECEIVING EMPLOYER must be a SAWP EMPLOYER with a positive LMIA received in writing from ESDC/SERVICE CANADA prior to the transfer of the WORKER.
c. All parties, including the WORKER, TRANSFERRING EMPLOYER, RECEIVING EMPLOYER and GOVERNMENT AGENT in Canada must agree to the transfer.

2. In the case of a TRANSFERRED WORKER, the term of employment shall consist of a cumulative term of not less than 240 hours.
3. The RECEIVING EMPLOYER shall be provided by the SENDING EMPLOYER at the time of transfer an accurate record of earnings and deductions to the date of transfer, noting that the record needs to clearly state what, if any, deductions can still be recovered from the WORKER.
4. Following completion of the seven (7) day trial period and no later than ten (10) days of employment, the RECEIVING EMPLOYER will provide the GOVERNMENT AGENT with written confirmation of the name(s), identity code(s), actual date of transfer and anticipated end date of employment for all TRANSFERRED WORKERS. EMPLOYERS in Ontario, Quebec, and Atlantic Canada will provide this information to their designated Third Party.
5. The GOVERNMENT AGENT is responsible for notifying the supplementary medical insurance company of the worker transfer.

For provinces and territories EXCEPT British Columbia

6. The airfare and visa costs may be deducted from the WORKER one time only. The transfer of a WORKER does not give rise to a double deduction for these items.
7. An EMPLOYER shall, upon requesting the transfer of a WORKER, give a trial period of seven (7) actual working days from the date of the WORKER's arrival at the place of employment. Effective the eight (8th) working day, such a WORKER shall be deemed to be a "NAMED WORKER" and Section X, clause 3 will apply.
8. If a TRANSFERRED WORKER is not suitable to perform the duties assigned by the RECEIVING EMPLOYER within the seven (7) days trial period, the EMPLOYER shall return the WORKER to the previous EMPLOYER and that EMPLOYER will be responsible for the repatriation cost of the WORKER.
9. In the case of a TRANSFERRED WORKER, the RECEIVING EMPLOYER agrees to pay the travel agent in advance the cost of one-way air transportation of the WORKER between Canada and Mexico by the most economical means as expressed in the Memorandum of Understanding.
10. In the case of a TRANSFERRED WORKER, the second EMPLOYER may continue to make deductions in expenses associated with the program, starting from the aggregate amount deducted by the first EMPLOYER, without exceeding the amounts indicated in Section VII, clause 5.

For British Columbia ONLY

11. An EMPLOYER shall, upon requesting the transfer of a WORKER, give a trial period of seven (7) actual working days from the date of the WORKER's arrival at the place

of employment. Effective the eight (8th) working day, such a WORKER shall be deemed to be an employee of that EMPLOYER.

12. Where the WORKER becomes a TRANSFER WORKER, within the meaning of Section XI, clause 2, the second EMPLOYER is responsible for the return airfare of the WORKER.
13. In the case of a TRANSFERRED WORKER, the second EMPLOYER may continue to make deductions in expenses associated with the program, starting from the aggregate amount deducted by the first EMPLOYER, without exceeding the amounts indicated in Section II.

XII Miscellaneous

1. In the event of fire, the EMPLOYER will bear 1/3 of the replacement cost of the WORKER'S personal property, up to a maximum of $650.00. The Government of Mexico shall assist the worker for the remaining cost, up to 1/3 of the replacement of the WORKER'S property, in accordance with Mexican legislation.
2. The WORKER and the EMPLOYER agree that any personal information held by the Federal Government of Canada and the Government of the Province/Territory in which the work is performed may be released to ESDC/SERVICE CANADA, to Immigration, Refugees and Citizenship Canada, to the GOVERNMENT AGENT of Secreteria del Trabajo y Prevision Social and Secretaria de Relaciones Exteriores, to the Foreign Agricultural Resource Management Service (FARMS), to the Fondation des entreprises en recrutement de main-d'oeuvre agricole étrangère (FERME), to the Western Agriculture Labour Initiative (WALI) and to the Insurance Company designated by the GOVERNMENT AGENT. Information shared must be necessary to facilitate the operation of the Seasonal Agricultural Workers Program.

The consent of the WORKER to the release of information includes, but is not restricted to:

   a. information held under the Employment Insurance Act, (including the WORKER'S Social Insurance Number);
   b. any health, social service or accident compensation related information held by the government of the province/territory in which the work is performed, including any unique alpha-numerical identifier used by any province/territory;
   c. Medical and health information and records which may be released to Immigration, Refugees and Citizenship Canada as well as the Insurance Company designated by the GOVERNMENT AGENT.

3. That the contract shall be governed by the laws of Canada and of the province/territory in which the WORKER is employed. French, English and Spanish versions of this contract have equal force.
4. This contract may be executed in any number of counterparts, in the language of the signatory's choice, with the same effect as if all the PARTIES signed the same document. All counterparts shall be construed together, and shall constitute one and the same contract.
5. The PARTIES agree that no term or condition of this contract shall be superseded, suspended, modified or otherwise amended, in any way, without the express written permission of the competent Canadian and Mexican authorities, as well as the EMPLOYER and the WORKER.
6. The PARTIES agree that this contract is complete and absolute and that any purported addendums to this contract must adhere to Section XII, Clause 5.

For provinces and territories EXCEPT British Columbia

7. Upon request of the WORKER, the GOVERNMENT AGENT agrees to assist the WORKER and the EMPLOYER with the completion of the necessary parental benefit forms.

Date:_____
Employee's signature:_____
Name of employee:_____
Employer's signature:_____
Witness:_____
Name of employer:_____
Address:_____
Corporate name:_____
Telephone:_____
Fax:_____
Place of employment of worker
(If different from above):_____
Government agent's signature:_____
Witness:_____