

Rights with Capabilities: A New Paradigm for Social Justice in Migrant Activism

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ABSTRACT The paradigm of rights, established throughout the academic, policy and migrant activism arenas, governs the protection of vulnerable migrant workers against abuse. To what extent this approach has achieved social justice for the migrant worker in the current global political economy climate is, however, uncertain. In analyzing the use of rights in migrant activism in Hong Kong, this paper shows the limitation of rights in the migrant experience at the same time as it shows how a new paradigm based on the Capabilities Approach could provide a more appropriate framework from which to achieve social justice for the migrant worker.

Introduction

In the last few decades, the human rights agenda has been instrumental in providing the platform for establishing migrant activism. It has also served as the guiding paradigm for advocacy and policy actions on the empowerment of vulnerable migrant workers. For particular migrant groups such as overseas domestic workers, however, the rights agenda is delivering more on the political and less on the distributive requirements of migrant empowerment. Thus, while there has been growing recognition of their plight, less attention has been given to securing their livelihood (Briones, 2009a). This is particularly worrisome given that along with the flourishing of a rights agenda, has been the rapid ascendancy of neoliberal policies that exacerbate global economic inequality, particularly in the area of unskilled labour (Molyneux & Razavi, 2002). This paper argues for an alignment of livelihood security with the rights agenda as a means to achieve not only political but, more fully, social justice for the migrant domestic worker. It draws on the activism of Filipina domestic workers in Hong Kong to demonstrate the livelihood-centred context from which to understand the limitations of a rights approach but also how it can be fortified. The Capabilities Approach, as developed by Martha Nussbaum, is then used to theorize a rights-livelihood alignment. In particular, the paper will show how a paradigm based on capabilities, along with rights, can allow for the balance required to more fundamentally and explicitly incorporate distributive needs into migrant worker protection and empowerment. It is hoped that this new paradigm

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could guide current approaches to recognize the equal importance of *empowerment for what* with *empowerment for whom*. In this way, migrant activism could be more fully supported in achieving outcomes that not only facilitate social justice for, but also serve the more immediate and material needs of, the migrant worker.

I start by contextualizing the role of rights in migrant activism within the challenges posed by state controls, namely in migration and development policies. I do so to show the magnitude of constraints to migrant mobility and livelihood options as well as to livelihood security. I then use migrant activism in Hong Kong to illustrate how these constraints impact on the usefulness of rights in migrants' fight for social justice. The final section provides an outline of a "Capabilities Paradigm," and how in particular it works with rights to provide a framework for social justice in migrant activism.

Migrant Activism, Rights and Development

Over two decades of feminist scholarship on domestic work and the global political economy have shown the structural and systemic conditions that create, facilitate and exacerbate the vulnerable situation of women overseas domestic workers.¹ With very limited livelihood options in their home countries, overseas domestic work is chosen often at the expense of their human rights. As migrants, they are outsiders whose rights are superseded by the rights of the sovereign, receiving-state while unenforceable by the sending state (see e.g. Stasiulis & Bakan, 1997). Consequently, transnational activist organizations have emerged as a counterweight to state power and to fill the gap in protection for migrant workers (see e.g. Yamanaka and Piper 2003). Mostly run by migrant domestic workers themselves, these non-governmental organisations have been able to raise public awareness and influence state policies on immigration and labour rules by promoting human rights, sometimes expressed as migrant worker's rights or women's rights (Anderson, 2001; Law, 2002; Pratt G. and The Philippine Women Centre, 1999).² Piper and Uhlin (2004, pp. 13-14) draw a correlation between (trans)national activism and democracy, noting that democracy is an issue of not only citizenship but also human rights. Human rights is an area which democratic states, like Hong Kong,³ find problematic to control; they are more difficult than citizenship to legitimate as a concern of state sovereignty. Human rights, therefore, is one area in which migrants can counter state strategies (see especially here, Massey, 1999, pp. 313-314) and thus transcend state, regional and international controls (e.g. Anderson, 2001; Ball & Piper, 2002; Phizacklea, 1998; Stasiulis & Bakan, 1997).⁴

As I have argued elsewhere, however, there are many limitations to the use of rights for migrant worker empowerment.⁵ In particular, I have pointed to the problem in articulating what rights actually constitute in the case of migrant domestic workers as well as to the challenges in their practice in the midst of constraints posed by underdevelopment (see especially, Briones, 2009b). At the conceptual level, an over-focus across feminist works and NGO programs on a politics of recognition for migrant domestic workers as "victims" and as "women with agency" has meant a conflation of their agency with rights and power. Consequently, migrant rights struggles have remained confined to host country settings, thereby neglecting the

importance of the development dimension of the worker's emigration from a setting of underdevelopment (Briones, 2009b). Thus despite gaining some recognition as victims and women workers with agency, many migrant workers continue to struggle in precarious employment conditions for fear of losing their livelihood in overseas domestic work.

That rights stop short of addressing the root cause of migrants' needs for sustainable livelihoods is particularly evident in their feasibility in the political arena. Because the focus on rights is concerned with the domestic labour laws and related immigration rules within the borders of the receiving states, those who undertake circular migration, or who are yet to enter receiving countries' borders, or to return to their country of origin, are neglected. As Cox (1997) and Sim (2002) have identified, the vulnerability of migrant workers extends beyond the workplace destination, and occurs as a process that begins from preparation and recruitment for going abroad, to working abroad, but also to returning home. Furthermore, because the focus on rights is based on the demand for overseas domestic work, the supply side, bound in underdevelopment and lack of livelihood access in countries of origin, receives insufficient attention. This leads to a failure in incorporating the role of broader structural contexts that push and facilitate the movements of migrant workers through multiple borders, and in the case of circular migration, multiple times.

The applicability of rights in host settings, as well as in the international political arena, also presents some problems. In host settings, the issue of rights is in itself precarious and is received differently. For example, while overseas domestic workers' (ODWs') rights in western European receiving countries are attached to the right to citizenship, ODWs' rights in receiving countries in Asia are limited to short-term contracts (Battistella, 2002; Bell & Piper, 2005). Internationally, the fight for rights seems futile in the face of a lack of political will, by both sending and receiving states. The 1990 United Nations Convention on the Rights of All Migrants and their Families (ICMR) remains unratified by receiving countries. Where it has been ratified by the sending country, limited financial and technical capacity to enforce the rules of the Convention, has resulted in a rights-based approach that has met with great difficulty at implementation (Pécoud & de Guchteneire, 2004, pp. 12-17).

Cross-cutting these limitations of rights are the failure to consider the impact of increased rights on the sustainability of livelihoods, even within borders. More rights could lead to demands for better wages and working conditions, and probably citizenship. In turn, this could lead to receiving states closing off the migrant domestic labour market since pressure on state resources would make it preferable to encourage citizens to undertake the work instead. After all, the reason workers are "imported" (and tolerated, if illegal) is because they are cheap, flexible and expendable. Conversely, increased rights can speed up the process of saturation of the overseas domestic work labour market, as supply from the poor and populous countries rapidly expands. In both cases, the issue of livelihood security for migrant workers could become even more precarious as employment opportunities contract.

Given these formidable limitations of rights, it is little wonder that migrant activism has been found to be too weak to challenge the power of states and capital interests (Piper, 2004; Uhlin, 2001, 2002, 2003). But given also the importance of migrant activism amidst state indifference and in the case of some sending states like

the Philippines, incapacity, it remains a crucial task to ensure that migrant activist efforts be made more effective. As I discuss later in the paper, it is in this regard that the concept of Capability may be useful. First, however, it is instructive to analyse the contradictory positions of Filipino rights-based migrant organizations in Hong Kong in their fight for rights, on the one hand, and for safe-guarding their livelihoods in overseas domestic work, on the other.

Migrant Worker Activism in Hong Kong

Despite its favourable working conditions in comparison to other labour-importing countries in the Asian region, the Hong Kong Administration's migrant domestic worker employment policy has nevertheless come under attack, mainly from migrant worker-based organisations and other associations which have burgeoned out of the activism of Filipino-based organizations in Hong Kong.⁶ In 2000, the Asian Migrant Centre (AMC)⁷ found that the lack of a government mechanism for monitoring contracts resulted in 15 per cent of workers being underpaid, over 50 per cent of workers being deprived of their mandated one rest day per week or statutory holidays, and around 9000 subjected to sexual abuse, including rape (AMC & CMW, 2001). In addition, the AMC (2001, p. 3) identified administration policies that promote racial, gender, and class discrimination against migrant workers. Alarming, over a decade later, little improvement of conditions has occurred while at the same time the number of even more vulnerable domestic workers has increased from sending countries such as Indonesia and Nepal.⁸ It is, however, the administration's imposition of the New Conditions of Stay (NCS), which the AMC identifies as the major cause of problems for migrant domestic workers in Hong Kong. The AMC (2001) asserts that this immigration rule "generally favours the interests of employers...as employers can dismiss migrants without justification while [migrant workers] need to provide the proof of unfair treatment if they desire to win their case" (p. 2). This stance is supported by the umbrella organization of the United Filipinos in Hong Kong (UNIFIL), which is composed of around twenty five non-governmental organizations (NGOs) mainly run by migrant domestic workers (Law, 2002). In 1996, UNIFIL's campaign was joined by groups of domestic workers from other nationalities, forming the Asia Migrant Coordinating Body (AMCB).⁹ This body became particularly vocal on the financial aspect of the abuse, underlining that a migrant domestic worker

is forced to contend with abusive employers for fear of greater loss to their livelihood...While the employers can look anytime for a replacement, [migrant domestic workers] have to undergo...a[n] expensive process just to be able to remain in Hong Kong if a labour or criminal case is pending. [Migrant domestic workers] with labour cases are not allowed to work and are forced to borrow money...to pay for visa extension fees and other necessary expenses to survive. (Asia Pacific Mission for Migrants [APMM], 2003b, p. 29)

Although the response from the Hong Kong administration remains clear in the form of an unamended Rule, a sustained campaign for changing the NCS continues,

involving the Hong Kong Committee on the Elimination of Racial Discrimination and the United Nations Commission on Human Rights (APWLD, 2002). Moreover, the Administration's unamended rule did not deter the NGOs to curb the Administration's effort to cut migrant domestic workers' minimum wage in 1999. The AMCB (1999), this time joined by the Hong Kong Council of Trade Unions, organized massive campaigns and mobilizations, asserting that migrant domestic workers were already burdened with

the lowest [salary] for foreign workers in Hong Kong...Even with the minimum wage for [migrant domestic workers], a large number of Indonesians...and other nationalities are...receiving wages below the minimum wage...The decision to lower the minimum wage will further reduce the actual wage of many [migrant domestic workers]. (pp. 14-18)

Although they were not able to prevent a wage cut, the group forced the Hong Kong Government to reduce the wage cut from the proposed 20 to 25 per cent down to 5 per cent, thus claiming a victory of sorts (AMCB, 1999, p. 15).

As with other major activist groups such as RESPECT in Europe and the Philippine Women's Centre in Canada,¹⁰ the issue of rights has been a central policy consideration for migrant NGOs in Hong Kong. They conceptually draw from, as well as actively contribute to the development of international human rights-based instruments such as the ICMR (for the AMC's adoption of this, see AMC, 1995b). In 2001, a study of 20 major NGOs in Hong Kong found that almost half of them conducted seminars and training on rights education (AMC, ASPBAE, & MFA, 2001, p. 177). The AMC, along with the Indonesian Migrant Workers Union in Hong Kong, later worked with the United Nation's Working Group on Contemporary Forms of Slavery to submit the case of "Forced labour and Exploitation of Indonesian Migrant Workers" to the United Nations Commission on Human Rights (Antislavery International, 2003).¹¹

Alongside their rights advocacy, however, has been the careful protection of their employment, which seems to provide a more appropriate understanding of rights as they matter to the migrant workers. NGOs consistently protect their employment in Hong Kong through strong campaigns on the one hand, and strategic silence, on the other. In a comparative study on the AMC and the Mission for Migrant Workers (MFMW), a member of UNIFIL, Weekley (2003) found that neither of their contrasting policies—the former based on a rather functionalist view of the "migrant entrepreneur" and the latter on the victimized migrant—were effective in promoting the rights of workers. Perhaps, however, the AMC and the MFMW have a different understanding from Weekley on how to promote rights for migrant domestic workers. Indeed those issues on which they have been particularly militant and strategically silent, but which do not seem to have a logical connection with their fight for human rights, gain sense when understood in the context of their interests in sustaining employment in Hong Kong. The more vocal issues include the campaign against the 1982 Philippine government Executive Order 857, the protest against the Aquino Government in 1988, and the more recent massive wage-cut campaign led by the AMCB. The less vocal issues involve inaction on those that directly affect employment prospects, as well as on reintegration programs that underscore the

primary importance of employment for Filipina domestic workers in Hong Kong. I expand on these in the following section.

Political versus Livelihood Security in Hong Kong

In 1982, the Marcos government's Executive Order 857 required 50 to 70 per cent of Filipino domestic workers' monthly earnings to be compulsorily channelled through Philippine banks (MFMW, 2000a, p. 4). The Order, deemed to "rob" the workers, became the reason for the formation of the UNIFIL alliance, then called United Filipinos Against Forced Remittances (Law, 2002, p. 212). Although UNIFIL did not succeed in abolishing the Order, it succeeded in removing the penalty clause, which meant in effect, that the workers could choose not to follow the Order without any penalties (MFMW, 2000b, p. 3). In 1986, UNIFIL joined other groups to protest against the Philippine government's proposal to ban the entry of Filipina domestic workers to Hong Kong. Then President Aquino imposed this ban as a means to curtail the increased cases of abuse among domestic workers in Hong Kong. Despite this noble intention, Filipina domestic workers in Hong Kong were not willing to let the gates shut on their employment opportunities. Campaign approaches thus turned from the right to fair working conditions to the more immediate concern of the right and freedom to have work at all (Constable, 1997, p. 207). In 1997, the AMCB's fight against the wage cut proposed by the Hong Kong administration again underscored the centrality of gainful employment for the migrant worker. As Law (2002b) observed of the campaign:

[T]hat [the coalition among different nationalities of migrant domestic workers in Hong Kong, along with the HKCTU)] came into being [due to the wage cut imposition,] reflects the important perspective in Hong Kong of domestic workers as "workers," and attempts to build solidarity on this basis. It also reflects the financial imperatives of domestic workers themselves, who migrate to Hong Kong primarily for economic reasons. (p. 216)

Indeed, Law (2002b, p. 219) also found that some migrant domestic workers are now wary of the success of NGOs and their loud and visible activities "since they are seen to be jeopardising their future employment."

Notwithstanding these fears from individual migrant domestic workers, NGOs have nevertheless kept silent on issues that could threaten employment. These issues include those of rights such as citizenship, unspecified working hours, and gross structural inequalities in their employment sector.¹² The issue of citizenship for migrant domestic workers in Hong Kong is particularly restrictive. As Bell and Piper (2005) have observed, while "documented" in western liberal democracies includes access to citizenship, in East Asian societies, the status remains one of a strictly temporary contract. Even if contracts are indefinitely renewable, as in the case of Hong Kong, the option for permanent residence remains closed. The Immigration Ordinance¹³ excludes migrant domestic workers from qualifying for permanent residence. While this does not mean that the Ordinance has gone unchallenged, such as in the case of a Filipina domestic worker who took her case for citizenship to the

High Court (The Sun, 2003, p. 3), winning the case would certainly be the exception and not the rule.

For the NGOs, the key issue seems to be controlling the employment gates to Hong Kong, which could narrow if issues of citizenship were to be considered seriously by the Hong Kong government. As Bell and Piper (2005) put it:

For [migrant domestic workers], the fact that the door is closed to [citizenship] does have one practical benefit—it means that there are more doors open to temporary contract workers. The only reason that so many [migrant domestic workers] are allowed to work in Hong Kong...is that all sides assume they will eventually return home. In Canada, by way of comparison, [migrant domestic workers] can become permanent residents after two years, but the government can afford to be relatively “generous” because it only lets in a few thousand such workers every year. (p. 209)

Similarly, NGO silence on long work hours, despite its obvious centrality as a source of abuse, points to an acknowledgment of market demand for 24 hours on-call service. With the advent of en masse and “cheaper” Indonesian labour, it becomes understandable why migrant domestic worker NGOs would avoid the issue (Bell & Piper, 2005, p. 220). Arguably the strongest evidence of the central importance given to employment opportunities in Hong Kong, however, is the disjunction between the major NGOs’ fight against structural oppression and its silence on challenging the inherent structural oppression in “domestic work” itself. As Constable has observed, “as long as domestic work is viewed as degrading...foreign workers will face little competition from local workers” (Constable, 1997, p. 208). Indeed, this silence becomes all the more crucial in light of Hong Kong’s integration with Mainland China, which increases the possibility of increased competition from numerous Chinese workers.

Further evidence to the importance of employment are major home-country reintegration projects, such as the Migrant Worker Re-entry Program (Migrant Savings for Alternative Investments), that depend on migrants’ savings. The Re-entry Program is a long-term project of the AMC. The program encourages migrants to save and invest their earnings in the Philippines, in order to ensure a financially sustainable future upon their return. The AMC points out that one in five Filipinos in the Philippines depend on the income earned by Filipinos working overseas for their own livelihoods (AMC, 1995c). The Filipino Migrant Workers Union (FMWU), the largest trade union of Filipino domestic workers in Hong Kong, notes how such programs provide “the most empowering experiences as they...enable migrants to return and remain in their home country” (cited in AMC et al., 2001, p. 198).

What these vocal campaigns, strategic silence, public indifference, and also more long-term focused projects point to, is that employment, and in particular, sufficient income from that employment, is the immediate matter for the migrant domestic worker. Concerns of abuse in the workplace, and more generally, the lack of respect for migrant rights in the form of racist and discriminatory policies and practices in Hong Kong take secondary importance. In other words, employment security for Filipina domestic worker in Hong Kong puts into context the political fight against discriminatory Hong Kong administration policies as second only to seeing Hong Kong as an economically desirable environment to earn a living, relative to that of the Philippines.

Providing support to this observation is a discourse pertaining to the “forced migration” in the Hong Kong NGO community. That is, the “forced migration” of Filipina overseas domestic workers by successive Philippine governments through their neoliberal development programs (see here also, Chang, 2004; Eviota, 1992, 2004; McCulloch & Stancich, 1998). In the early 1990s, the AMC (1995a, p. 52) had already begun to identify the connection between migrant domestic worker oppression and “forced migration”: “There is no subtle pressure to accept difficulties or even “slight” abuses on pain of repatriation... Their [workers] alternative is often less appealing—that of being sent home where there is no prospect for work.”

The discourse of “forced migration” in Hong Kong became more clearly articulated when the MFMW released a set of magazine publications in 2000 and 2001, named *Migrant Focus*, for the readership of the migrant domestic worker community in Hong Kong. Its titles alone provide a clear and chronological insight into the precarious livelihood issues for migrant domestic workers. *When the Only Option is Migration* (2000b) highlighted the Philippine Government’s inadequate national development strategy as the cause of deepening poverty in the country, and consequently of the increasing number of “willing victims” to migrate for precarious employment. In this view, the Philippine government is seen as “an adversary rather than a protector of its citizens... peddl[ing] the notion that seeking overseas employment is a ‘choice’” (MFMW, 2001a, p. 5). Thus, the abuse and injustices experienced by workers are framed in the individual’s lack of luck rather than as a structural responsibility of the government. *The Lucrative Business that is Labor Export* (2000a) discusses the Philippine government’s elaborate set up of the state’s labour export industry. This industry consists of the DOLE, POEA, OWWA and Philippine embassies and consulates worldwide¹⁴ as well as private institutions, such as recruitment agencies. The MFMW argues that this labour-export system is geared to maintain the high numbers of overseas workers and thereby to secure the “remittance business” of the government, which it uses mainly to repay international debts and to continue funding the system. *There’s More to Migration than Money Problems* (MFMW, 2001b) takes up the social costs of this economic focus on the gains of migration. It highlights the social problems caused by labour migration such as broken marriages, motherless families and vulnerability to trafficking, especially of poor women and children. The MFMW contends that these social costs are beyond the “personal” and are directly connected to the economic and political structures of Philippine society as a whole.

Finally, *Breaking the Cycle of Forced Migration* (2001a) highlights the role of migrant-concerned NGOs in bringing about political change not just in Hong Kong but also in the Philippines. This change is anticipated to break the cycle of forced migration through the establishment of labour unions and reintegration programs that guard the rights of workers to financial security. The MFMW argues that economic security will see the end of the need to migrate.¹⁵ The APMM (2003a) later extended the concept of “forced migration” to apply to other migrant domestic workers and their respective countries of origin, and in the particular context of global development (see here also, Luan, 2005).¹⁶

Beyond Rights: Livelihood, Resources and Power

The above insights from migrant rights NGOs' political strategies to retain gainful employment in the host state at the cost of other human rights entitlements, such as that of citizenship, revealed a more appropriate understanding of rights as they matter to the migrant worker, both individually and collectively. For the migrant workers, rights seem to be more economic rather than politically oriented, ultimately defined in the context of a transnational livelihood strategy for the purposes of sustaining families and projects back in the Philippines. When considering the livelihood of migrant domestic workers, it is important to recognize that their earning power is not only tied to work in the wealthier countries, but also to sustaining life for families back home, including their own upon return. In other words, they make their living in the world within a context of unequal globalization; a practice that Olwig and Sørensen (2002) call "mobile livelihoods." In particular, this involves means and strategies for sustaining life transnationally. "Means" refers to assets and resources in cash and kind that people can access. "Strategies" are connected to social institutions, such as kin, family, village and other social networks facilitating and sustaining diversified livelihoods. Pursuing mobile livelihoods can thus be seen as "a poverty-reducing strategy involving refashioning resources dispersed in space into family livelihoods" (Sørensen, Van Hear, & Engberg-Pedersen, 2002, p. 53).

Mobile livelihoods is a useful concept that allows an appreciation of resources in the migrant domestic worker context as constituting both means and strategies used to access, as well as remain in, paid overseas domestic work. It further allows identification of the resources specific to a migrant domestic worker's basic needs; that is as cash in the form of wages from domestic work (means), and as networks in the form of social and political migrant groups (strategies). These resources are in turn used to reduce poverty, or the occurrence of poverty, by being refashioned in terms of savings, capital accumulation and investments and/or for daily livelihood expenditures such as food, shelter, medicine and education for themselves and their families.

Of central importance to issues of livelihoods and resources for the migrant domestic worker, is the recognition that they are pursued. This means that they simply do not exist for the taking. Rather, they exist in a highly political environment of restrictive immigration and host country labour controls that constrain the use of domestic work migration as a livelihood strategy, but also of oppressive development policies that obliterate livelihood access in countries of origin.

A focus on migrant worker livelihoods thus enables migrant activism to articulate what constitutes rights for the migrant worker, that is, the rights for livelihood access. That constraints to the migrant workers thus extend to the structural impasse of poverty and unemployment/underemployment in their home country while at the same time their agency (as apparent in their strategies for activism) is ultimately oriented to safeguard against such constraints, tells us that their agency do not readily translate into having rights or to having the power to overcome oppression. Evidently, migrant agency in Hong Kong underscores the efficacy of power as being based less on resistance against political repression and more on the *capability* to continue earning; to secure "mobile livelihoods." The NGOs show how the success of resistance has been largely ambivalent, and that the way they therefore empower their activism is not so much in their activities of resistance but more in their fight to

remain in employment in the host state.¹⁷ Indeed, the issues silenced by NGOs in Hong Kong contextualize the Filipina domestic worker's practice of "self-discipline" (Constable, 1997), hidden transcripts (Chin, 1998), and multiple subjectivities (Momsen et al. 1999; Parreñas, 2001) as a "trade-off" strategy to retaining livelihood capabilities.

The insights from migrant activism in Hong Kong then, guards against a conflation of agency with rights and correspondingly, activism with power. As I have argued elsewhere (Briones, 2009a), these are confluences of which we must be wary if we are to avoid short-changing analyses on not only the challenges faced by ODWs but also on how capable they are of responding to them. It is thus in this way, that the insights provide both a theoretical and practical premise from which to appreciate the central role that capability must play in correcting the conflation of agency with rights and power. Theoretically, it enables current analyses to more accurately define power in the context of capability rather than resistance; what the migrant domestic worker can actually do and be to overcome oppression, and not merely her reaction against oppression. Practically, it provides current policy approaches with the tangible basis of livelihood security from which to acknowledge that effective protection cannot be based on rights advocacy alone but must also be based on measures of material means/resources that enable migrant domestic workers to act, resist, negotiate, and achieve. To employ this framework is to inform a paradigm that ensures support for migrant activism that will necessarily involve an identification of migrant workers' capability to overcome structural constraints, and the associated issues of livelihood resources and security. How rights, in essence, can be aligned with the livelihood framework is the task of the Capabilities Approach, discussed in the following section.

A Capabilities Paradigm¹⁸

Martha Nussbaum's Capabilities Approach (CsA) provides a theoretical framework within which to directly link issues of human rights with migrant domestic worker agency, and how in turn, they link with mobile livelihoods. Originally theorized by Amartya Sen, the Capability Approach is a broad and multi-dimensional framework for evaluating individual well-being and the intrinsic experience of development and justice this entails. The Approach argues for a concept of human development to challenge the economic growth-centred orthodox model of measuring development within a country, and thus articulates resources qualitatively rather than quantitatively. Development is seen in "human" terms; in terms of a quality of life and what people are able to do and be, rather than as a measure of how many resources people have or are given by the state. This departure from treating people as factors of production to seeing them instead as agents of production, foregrounds the immediacy of capability over functionality. As Nussbaum (2002) puts it: "...about a variety of functionings...of central importance to a human life, we ask, is the person capable of this or not?" (p. 127). Since, in this way, capability is seen as a pre-requisite to what a person can actually do and be, the CsA finds both theoretical and practical resonance with human rights.

Nussbaum (see especially, 2002; 2005) explains the relationship of capability with human rights through what she terms the “basic,” the “internal” and the “combined” aspects of capabilities. Basic capabilities refer to capabilities that are innate to the human condition such as that of practical reason and imagination. Internal capabilities refer to “states of the person herself that are, so far as the person herself is concerned, sufficient conditions for the exercise of the requisite functions.” Combined capabilities are “internal capabilities combined with suitable external conditions for the exercise of the function” (2002, p. 132). Through these dimensions of capability, Nussbaum shows how human rights can be understood in two distinct yet integral ways. First, rights can be understood in terms of basic capabilities as “prior to and a ground for the securing of a capability” (p. 136). Thus to take, for example, a migrant domestic worker’s call for a right to a livelihood even when her circumstances obviously do not secure such a right to her, Nussbaum (p. 135) here would argue that, “just in virtue of being human, a [migrant domestic worker] has a justified claim to have the capability secured to her.” Second, rights can be understood as equivalent to combined capabilities. In this regard, “to secure a right to a [person] is to put them in a position of capability to go ahead with choosing that function if they should so desire” (p. 134). Because people cannot function without basic capabilities, and cannot function freely as they see fit for their own circumstances without combined capabilities, Nussbaum (p. 131) argues that “capability, not functioning, is the political goal.” In this way, capabilities can be seen to provide an informational base that allows tangible and achievable outcomes for the highly abstract and highly contentious notion of human rights. Not only does a CsA define what it means to secure a person’s rights, it also ensures the explicit inclusion of the larger structural context involved in securing a person’s rights or “combined capabilities.” As Nussbaum asserts, the CsA “makes it clear that securing a right to someone requires making the person really capable of choosing that function...[and also] makes it clear that all human rights have an economic and material aspect” (2005, p. 175).

In practical terms, Nussbaum has created a working list of capabilities to ensure that certain capabilities essential to a quality of life are constitutionally secured to the individual. Nussbaum argues for a Capabilities Constitution because the rights approach has proven futile both in theoretical, epistemological, and practical/enforceable terms with particular regard to individuals in the developing world vulnerable to unemployment, hunger, and other resource-challenged situations. The existing provisions for livelihood, development, economic and social security in various international human rights declarations and conventions are exclusively state-oriented. The very methodology of setting up such conventions is also state-dependent. In contrast, understanding rights as a person’s capability transcends the traditional distinction between the private realm of the family and the public sphere within human rights approaches. It also transcends the traditional distinction between state action and state inaction in implementing rights since securing capability in a person will necessarily require state action to provide the economic and material resources necessary to secure that capability (*ibid.*).

The articulation of rights in terms of capability importantly allows us to conceptualize the transnational contexts of the pursuit of overseas domestic work livelihood. In incorporating the structural and materialist constraints to rights, a capability perspective enables a richer appreciation of rights and capabilities as

issues of human development and security rather than human agency or human rights i.e. “making the person really capable of choosing that function.” We can begin to see beyond “the victim” and “the agent” as a problem not of structural oppression in migration nor agentic liberation through migration. Instead, we can foreground the capability needs and entitlements of the migrant worker beyond her migration to that of her development and socio-economic security. Concern for capability transcends, at the same time as it draws together, physical borders such as sovereign states’ borders but also conceptual borders between issues of recognition and distributive justice.¹⁹ As the livelihood strategies of migrant activism in Hong Kong show, the concern for capability itself is a product of the problems of unequal human development as migrants experience and respond to it; as a problem rooted, but also structured transnationally, by their lives in the host country as well as back in their homeland. Having capability is therefore criteria for human development, and as such, can enable us to evaluate how well the migrant worker is doing. If a Capability Approach, in Nussbaum’s words (2002, p. 122) “allows comparisons between individuals and across nations as to how well they are doing,” then it becomes clear that as economically disadvantaged individuals from an economically disadvantaged nation, migrant workers are not doing so well. They remain deprived of distributive justice; of commodities, incomes and other resources, but more specifically of “combined capabilities.” “Educated” Filipino migrants, for example, share much in common with many educated women in Kerala who cannot find jobs other than sex work in Delhi (2005, p. 180).

Given that on the one hand, the CsA occupies a position of some significance in the current international development policy agenda, and on the other, the issue of migration is likely to remain at the top of the political agenda of governments, it will be both practically and politically strategic to highlight the intrinsic relationship between migration for domestic work and (under)development. This could have the effect of simultaneously securing and making more pronounced the issue of migrant worker vulnerability as not only an issue of political recognition but also as an issue of redistribution in social justice agendas. In this way, analysis can move the issue of livelihoods and other important developmental needs along with calls for migrant political rights. As well, a CsA to migrant activism can override state-centric interests (such as remittance revenue for sending states and border security for receiving states) by campaigning for state responsibility as providers of capabilities-based resources and as facilitators of capability. An immediate change in this area is particularly crucial—as NGO activism in Hong Kong shows, the lack of livelihoods access in the country of origin has been a major cause of both risks and endurance of abuse and enslavement in host locales.

Conclusion

Learning from migrant domestic worker activist groups in Hong Kong, this paper revealed that while campaigns were based on calls for rights to recognize their personhood and status as bona fide workers, the actual basis for activism rested on the priority of retaining employment in overseas domestic work. As the ultimate constraint of underdevelopment in the Philippines force them to migrate and to

endure hostile immigration policies along with employer and recruiter abuse, their very activism must therefore be oriented to maximizing and retaining opportunities of gainful livelihood in the host locale. In this way, the paper provides a challenge to the paradigm of Rights, employed by much of current academic and policy approaches to support the political struggle of migrant activism while sidelining the more immediate, materialist concerns of migrant workers.

The paper discussed the value of the CsA as the theoretical voice of migrants' struggle for capabilities in securing their livelihood in overseas domestic work. Premised on the holistic concept of "human development," the notion of capability fluidly fuses physical (i.e. state borders) and conceptual (i.e. recognition and redistribution) borders within the experience of the individual migrant worker. Through such a fluid framework, it becomes possible to piece together issues of migrant's rights but also vulnerability as part and parcel of their transnational experiences across the political and economic spectrum. I argued, therefore, that migrant activism can be more appropriately and fully served by a Capabilities paradigm. This is not to say that the fight for rights should be abandoned. Only that it is important to consider the fight be defined in terms of capability. Fighting for capabilities instead of rights can avoid the inherent difficulties in the lack of political will by some states to implement, let alone consider, migrant workers' rights. Moreover, framing rights in the context of capability can allow the "victims" themselves to reclaim their rights for their own intended and valued quality of life. So far, it is mostly the "Rescue Industry" (Agustín, 2006) that has dominated both the discourse and actions on the reclaiming of these rights, and only then, as mainly an issue of political recognition. Indeed, if we are to learn from migrant activism as demonstrated by campaigns in Hong Kong, then we must align policies based on political recognition with migrants' fight for a politics of redistribution. The grave abuses which continue after decades of "industry" efforts, and which alarmingly are now widespread across other domestic worker groups in Hong Kong such as those from Indonesia and Nepal, is perhaps the most telling sign that "rights" is simply not enough. The practical feasibility of the CsA will require exploration.²⁰ In this way, the paper provides a challenge to the paradigm of Rights that is employed by much of current academic and policy approaches to support the political struggle of migrant activism and that sidelines the more immediate, materialist concerns of migrant workers.

Notes

¹ For review of these works, see Briones, L. (2009a). *Empowering Migrant Women: Why Agency and Rights are not Enough*. Surrey and Burlington: Ashgate Press, 51-70.

² While human rights refer to claims that transcend the state, rights more generally are often claimed within the context of a legal system in a nation-state. I use the two terms interchangeably; given the transnational context of migrant domestic work, human rights and legal rights make

them inextricably linked. For example, a migrant domestic worker's right to work refers to a claim both within and across states.

- ³ Hong Kong, albeit under the administration of a non-democratic Chinese government since 1997, continues to operate under a nation-state and has maintained its liberal administrative systems as inherited from the British colonial administration. It is on this basis, that I classify it as democratic.
- ⁴ While there is a significant number of migrant domestic workers in non-democratic states such as those in the Middle East, this paper focuses on the experience of migrants and migrant activism in democratic settings.
- ⁵ See here also Leonore Lyons (2006) on the limitations of rights in alliances within transnational activist groups.
- ⁶ For a review of these NGOs see Sim (2002) and Swider (2006).
- ⁷ An NGO in Hong Kong that acts as the hub for research on migrant workers in Hong Kong as well as in the greater Asia Pacific region. It advocates for rights as well as provides educational activities and support programs for the migrant workers. See <http://www.asian-migrants.org>, accessed at 29 March 2011.
- ⁸ Refer *ibid.* Note also that the main concerns outlined in this paper remains very much at the forefront of issues as set out in the website content, even after over a decade of campaigns.
- ⁹ Namely the Association of Indonesian Migrant Workers in Hong Kong, the Friends of Thai group, the Far East Overseas Nepalese Association, and the Association of Sri Lankans.
- ¹⁰ See my discussions of these migrant groups in Briones, 2009a.
- ¹¹ For the latest coalition and rights-based activities of the AMC, see <http://www.asianmigrants.org>.
- ¹² Although the 1990s campaigns on maternity benefits for migrant domestic workers in Hong Kong were organized around equality of gender rights, it is important to note that the campaign was a response to changes made in the existing legal provisions for paid maternity leave for migrant women workers that would give employers the right to terminate contracts, paying off only a few month's salary (for details see Swider 2006, 125-7).
- ¹³ Section 2(4)(a)(vi).
- ¹⁴ The Department of Labor and Employment (DOLE) has jurisdiction over issue pertaining to overseas contract workers. Within the Department are the Philippine Overseas Administration (POEA) and the Overseas Workers Welfare Administration (OWWA). The POEA oversees all issues pertaining to the deployment of workers while OWWA works closely with Philippine consulates and embassies to administer in-country services for Filipino migrant workers. These services include repatriation assistance, legal and counselling assistance, insurance coverage, and loan programs for housing, micro business enterprises, and education.
- ¹⁵ This correlates with my finding on migrant domestic workers across Hong Kong and Paris (Briones, 2009a), who said that had they received sufficient wages back in the Philippines, also doing domestic work, they would have not resorted to domestic work overseas.
- ¹⁶ Indeed, the PWC, which has no official connection with these Hong Kong based NGOs, also ascribe the root cause of Filipina domestic workers' presence in Canada to the political and economic crisis of their country of origin (see Pratt, G. and The Philippine Women Centre, 1999, pp. 39-40). Arguably also, an inverse approach to this concept of 'forced migration' is the RESPECT network's fight for citizenship rights, which point to the importance of remaining in Europe for the purposes of retaining their livelihood.
- ¹⁷ Supporting this is Lan's (2006) comprehensive study of Filipina and Indonesian migrant domestic workers in Taiwan, and in which she observed that 'most migrant domestic workers exercise overt resistance only when a contract's termination is inevitable' (2006, p. 55).
- ¹⁸ I refer to a capabilities paradigm in the sense used by Robeyns (2003). As Robeyns (2003, p. 20) observes of the Capability Approach, 'while it can be read as a theory of social or distributive justice, it is in fact much broader, and has overtime developed in a sort of paradigm to think about normative issues.' However, slightly different to Robeyns, I particularly consider Martha Nussbaum's explicit and tangible adaptation of the Capability Approach which also deals more directly with issues of human rights and gender justice (see here also Briones 2009a, p. 112).
- ¹⁹ For a full theorization of this paradigm through a 'capable agency' approach, see Briones 2009a, especially pages 165-177.
- ²⁰ A Capabilities paradigm will raise a new set of challenges, one of which will be its plausibility within democratic settings only. At least, however, it takes us on an analytical path that actually addresses livelihoods, security and sustainability for the migrant worker. As this paper has

attempted to show, it is a path also that leads to a social justice framework to support their activism.

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