



THE POINTS-BASED IMMIGRATION SYSTEM FROM A HUMAN RIGHTS PERSPECTIVE:
A CASE STUDY OF CANADA AND AUSTRALIA

MASTER THESIS

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INTRODUCTION

The following is a case study of points-based immigration systems (PBSs) and whether they violate *qua system* human rights norms, both customary and treaty-based. The paper analyzes the Canadian Federal Skilled Workers Visa program and the Australian General Skilled Migration Visa subclasses 189, 190 and 489. These two case studies have been chosen based on various factors, in order to elucidate features of the PBS, constituting prototypes upon which other frameworks of the same nature have been created. The analysis is therefore two-pronged. Firstly, these systems are analyzed in regard to the three main factors on which prospective migrants are tested for admission into the country, namely language, education and employment. Secondly, they are analyzed as a whole in regard to their stated purpose: the ability of migrants to integrate into the local economy and to contribute to economic growth by favoring high-skilled workers at the expense of low-skilled ones. This two-pronged approach stems from the two possible legal grounds on which the system might be in violation of Human Rights Law: points-based migration might violate HRL because of the combination of the selection factors (skills) it imposes or because its scope and design is itself in violation. The first part of the analysis also offers observations and concepts that are helpful for the second. Although the paper aims primarily at theorizing the violation of PBS under HRL *qua system*, it has the potential to provide a practical contribution in light of recent reports of interest in the system by law-makers in other Western nations and its possible expansion worldwide.

The paper is structured as follows. Chapter I explains what points-based immigration is, its origins and purposes, the choice of case study methodology and provides an overview of the Canadian and Australian systems. Chapter II describes how the single selection criteria might be found to be in violation of HRL norms. Chapter III identifies the constant tweaking of the points-based test

threshold and of the points assigned to each criteria, the goal of maintaining national identity as fundamental features of the system and analyzes them under Human Rights theory. Finally, Conclusions are drawn.

CHAPTER I: OVERVIEW OF THE POINTS-BASED SYSTEM

Sub-chapter 1: What is a Points-based Immigration System?

In order to conduct a proper analysis, the first step is to distinguish a PBS from other immigration systems that differ from it. Only once the field of inquiry has been identified, can an analysis *qua system* be carried out. For this purpose, one has to compare and contrast different national systems and outline the fundamental and constituent aspects of the PBS that make it unique. This process of analytical generalization may be divided into multiple stages. At a first stage, one may rely on primary factors such as the name under which it came to be known; the definitions given historically by scholars to identify it; or stated declarations by law-makers at the time of its introduction. At later stages of the analysis, however, the task becomes more demanding, as a judgment of violation *qua system* requires a deeper level of understanding of the legal elements present in PBSs that are conversely absent in other systems that fall outside the phenomenon at issue. These elements range from studying the intent of law-makers when adopting or changing certain provisions within PBSs to appreciating the design of certain provisions and their impact on potential migrants. The study of these elements is crucial in order to discern between aspects that are unique because of the inherent design of the PBS and those that may be common among PBSs today but that are in no way necessary for an immigration system to be deemed points-based. Only

in the former case, can the findings be relevant for a *qua system* evaluation.

Points-based Test

Firstly, the points-based immigration system, as the name suggests, can be identified in an immigration system under which eligibility to migrate for a foreign national to a certain country is based on the non-citizen's ability to reach a predetermined number of points (threshold) awarded based on various factors (generally called selection criteria¹). Each of these factors is given a maximum amount of points and there is a fixed amount of total points. The scoring system is otherwise known as the points-based test. The kinds of factors vary across the nations that have so far implemented this system, although they generally but not exclusively include: education levels, language fluency, wealth and previous job offers received by the individual. Whether designed to be a comprehensive system, under which every claim by foreign nationals should be processed, countries that have adopted it allow for exceptions to the test for some claims, usually instances of family reunification and for humanitarian reasons (refugees)². Additionally, national security requirements and the absence of a criminal record are in most cases criteria to be met *a priori* that fall outside the scoring system³.

From a legal standpoint and based on this essential definition only, several aspects stand out. Firstly, the aspect that qualifies this system is certainly the fact that prospective migrants (potential right-holders) are graded under a predetermined scale of so-called skills. The right to migrate to the country is therefore dependent on the ability by the prospective migrant to reach a quantified level of skillfulness that is deemed satisfactory by the state. This threshold is set by the state and has been changed during the years in both Canada and Australia, the two cases proposed. The level of importance of each skill that a prospective migrant has to fulfill is also determined by the state and

1 Points-based Immigration Systems, The Law Library of Congress, Global Legal Research Center, <http://www.loc.gov/law> (March 2013)

2 Convention Relating to the Status of Refugees (1951)

3 Health Requirement, Skilled Independent Visa (subclass 189) (Points-tested) stream, <https://www.homeaffairs.gov.au/Trav/Visa-1/189->; see also Immigration, Refugees and Citizenship Canada, Biometrics

has been adjusted over time. How fulfillment of each skill is evaluated is a task that is sometimes assigned to the state itself or is delegated to independent organizations whose authority may still be classified as state power (i.e. panels that evaluate certified professions or education levels⁴) or in some cases to non-state actors (i.e. private entities that evaluate language proficiency⁵).

Absence of Human Component for the Final Outcome

Perhaps the most relevant aspect in the presence of a test is the fact that it renders the procedure less dependent on human component than other immigration systems. The lack or minimal presence of the so-called human component has been cited as an essential element of the PBS by both supporters and critics alike. To those who endorse the PBS, the reduction in the presence of human judgment to pass the test provides transparency to the procedure, on the grounds that decisions can be more easily challenged if they do not follow precisely the test and, on the other hand, more easily upheld if they do⁶. Critics of the PBS, however, contend that precisely the absence of the human component in the final outcome is detrimental to the system as a whole, as the circumstances of each case are too much varied and complex for a 'box ticking system to work.'⁷ Perhaps interestingly, this last stance has been espoused by groups that advocate for lower immigration levels, such as Migration Watch UK, which finds the lack of the human component one of the problems that has led to 'chaos'⁸ in the enactment of the PBS by the Labour Government in the UK when adopted in 2008⁹. This signals a split among anti-immigration activists as other groups or parties in the same country have praised the PBS¹⁰. Either way, as previously hinted at, the lack of a human component regards exclusively the final outcome of the test, as the assignment of points for

4 Points for Arranged Employment—Skilled Workers and Professionals, IRCC

5 Determine Your Eligibility—Skilled Workers and Professionals, IRCC, <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/eligibility/federal-skilled-workers/six-selection-factors-federal-skilled-workers.html>. (last modified 29th March 2018)

6 CIC, Evaluation of the Federal Skilled Worker Program: Executive Summary, <http://www.cic.gc.ca/english/resources/evaluation/fswp/section1.asp> (August 2010)

7 Migration Watch UK, Assessment 2014

8 *Id.*

9 Points-based Immigration Systems, The Law Library of Congress, Global Legal Research Center, the United Kingdom <http://www.loc.gov/law> (March 2013)

10 UKIP General Election Manifesto, 2015

each selection criterion is highly influenced by some sort of human judgment, whether a governmental entity or non-state actor. It is the supposedly empirical combination of independently assessed criteria that renders the final outcome apparently void of the human component.

Furthermore, the fact that the final decision on a prospective migrant's acceptance is based on passing a threshold does not mean that the human component does not greatly contribute to the establishment of the threshold in the first place. Selection criteria are weighted against each other after thoughtful human consideration by lawmakers. What appears to be unique for the PBS is that the system is designed as to lead to possible final outcomes, all deemed pre-determinedly desirable or at least acceptable by lawmakers. To simplify, under Canada's Federal Skilled Workers Visa Program and Australia's Visa subclasses one prospective migrant may apply for a visa if she holds a PhD, is younger than 30 years old but has no previous work experience and has a low level of English. At the same time, in the Canadian system a 40 year old with a high level of English and French and 10 years of work experience, but with a high school diploma may also apply (maybe helped by a spouse that does hold a tertiary education degree). Both instances are considered acceptable by the way in which the system is designed.

Looking closer at the issue, one can start to see how the system is also designed to fulfill principles common to Western state administrative law frameworks such as the principle of legality and of executive discretion. This has translated into the ability of prospective right-holders to challenge administrative decisions within the internal legal system as well as the application of well-established legal standards of scrutiny for these decisions (i.e. the tendency by internal courts to allow for ample margins of discretion by administration officials within the bounds of what instruments of primary or secondary legislation make possible and therefore a subsequent narrow interpretation of possible judicial review¹¹).

Based on this first essential definition, only four national jurisdictions may today be described as

11 *Alakkad v. Canada (Minister of Citizenship & Immigration)*, 1996 CarswellNat 1926, 121 F.T.R. 34, 35 Imm. L.R. (2d) 95, 67 A.C.W.S. (3d) 139

presenting within their immigration frameworks a points-based system: Canada¹², Australia¹³, the United Kingdom¹⁴ and New Zealand¹⁵.

Annex: The Points-based Tests in the Canadian Federal Skilled Workers Visa program and the Australian General Skilled Migration Visa sub-classes 189, 190 and 489 compared

SELECTION CRITERIA	CANADA	AUSTRALIA
TOTAL SCORE	100	100
MINIMUM THRESHOLD TO LODGE APPLICATION	67	65
LANGUAGE	Maximum: 28	Maximum: 20
	FIRST OFFICIAL LANGUAGE (Maximum 24): CLB level 9 or higher: 6 for each ability CLB level 8: 5 for each ability CLB level 7: 4 for each ability Below CLB level 7: not eligible to apply SECOND OFFICIAL LANGUAGE (Maximum 4): At least CLB 5 in all of the 4 abilities: 4 points CLB 4 or less in any of the 4 abilities: 0	Superior English (IELTS 8 or higher): 20 points Proficient English (IELTS 7): 10 points Competent English (IELTS 6): 0 points
EDUCATION	Maximum: 25	Maximum: 20
		-Doctorate: 20 points -Bachelor Degree: 15 points -Diploma or Trade Qualification completed in Australia: 10 points -Award or qualification recognized by Assessing Authority for Nominated Skilled Occupation: 10 points -Australian Study Requirement: 5 points -Masters Degree by research or Doctorate from Australian institution with at least two academic years in

12 Points-based Immigration Systems, Library of Congress, Canada

13 Points-based Immigration Systems, Library of Congress, Australia

14 Points-based Immigration Systems, Library of Congress, United Kingdom

15 Apply for a Visa, New Zealand immigration.govt.nz

		relevant field: 5 points
PREVIOUS EMPLOYMENT	Maximum: 15	Maximum: 20
	1 year: 9 points 2-3 years: 11 points 4-5 years: 13 points 6 or more years: 15 points	OUTSIDE AUSTRALIA: -less than 3 year: 0 points -3-4 years: 5 points -5-7 years: 10 points -8-10 years: 15 points INSIDE AUSTRALIA: -less than 1 year: 0 points -1-2 years: 5 points -3-4 years: 10 points -5-7 years: 15 points -8-10 years: 20 points
AGE	Maximum: 12	Maximum: 30
	Under 18: 0 18-35: 12 36: 11 37: 10 points 38: 9 points 39: 8 points 40: 7 points 41: 6 points 42: 5 points 43: 4 points 44: 3 points 45: 2 points 46: 1 point 47 and older: 0 points	18-24: 25 points 25-32: 30 points 33-39: 25 points 40-44: 15 points
MISCELLANEOUS	Maximum: 10+10	Maximum: 10
	Arranged Employment in Canada (valid job offer): 10 points Adaptability: maximum 10 points, of which -spouse or partner's language level: 5 points -past studies in Canada: 10 points -spouse or partner's past studies in Canada: 5 points -past work in Canada: 10 points -spouse or partner's past work in Canada: 5 points -arranged Employment in Canada: 5 points -relatives in Canada: 5 points	-accredited in a community language: 5 points -study in regional Australia or a low population growth metropolitan area that meets Australian study requirement: 50 points -partner skill qualifications: 5 points -professional year in Australia: 5 points

Sub-chapter 2: What are the Origins and Purpose of Points-based Immigration Systems?

Merit

In the quest to better define what a PBS is, a mention of the initial intent desired by law-makers at the moment of the adoption as well as the ultimate outcome achieved by the system as a matter of public policy may be helpful. The essential element of the points-based test cannot be considered in a vacuum as, with any kind of test, the objectives that a test seeks to achieve have to be considered a fundamental feature as well. These two aspects are relevant, in this sense, only insofar as they are too either unique to PBSs or are uniquely or inextricably intertwined with the way the system is designed. If they are unique, they constitute another fundamental element that defines PBSs. If they are uniquely and inextricably intertwined, this means that an analysis *qua system* cannot do without a thorough dissection thereof, since the potential replication of the system in other jurisdictions, for instance, would inevitably result in their presence too.

When it comes to its origins, the adoption of points-based immigration can be traced to the lawmakers' desire to introduce what have been perceived to be more meritocratic criteria (other than country of origin and race) to decide who would enter the country. The first nation to adopt the system, Canada in 1967¹⁶, had up until that point received migrants mainly from European countries, in particular the United Kingdom. Starting from 1972, the Australian Government¹⁷ followed the Canadian example and gradually introduced a series of measures that radically changed the way in which migrants were allowed in the country. In doing so, Australia got rid of what came to be known as the “White Australia Policy”¹⁸, a series of measures that made it difficult for people of non-European descent to immigrate, a system decried by anti-discrimination

16 Migration Act, 1976, Parliament of Canada

17 Migration Act, 1958, (No. 62 of 1958) Parliament of Australia

18 Fact Sheet – Abolition of the “White Australia” Policy, Australian Immigration, Commonwealth of Australia, National Communications Branch, Department of Home Affairs

advocates. In this sense, points-based immigration has been credited by supporters with changing the demographics of both countries. The introduction in the 1970s of points-based immigration has also corresponded to both countries addressing and promoting multiculturalism by the Trudeau and Whitlam governments respectively, even going as far as considering it a value of constitutional rank¹⁹. In the United Kingdom, the introduction of a PBS in 2008 came as both the then Labour government²⁰ and the Tory opposition²¹ praised the Australian points-based system as a model, supposedly not only in design but in intended outcome too. The emphasis put on meritocratic criteria is evident in the tiers the system is made of: Entrepreneur and Graduate Entrepreneur (High Value Migrants); Exceptional Talent; the now-abolished Post-Study Work tier aimed at “graduates who have been identified by Higher Education Institutions as having developed world class innovative ideas or entrepreneurial skills to extend their stay in the UK after graduation to establish one or more businesses in the UK.”²². The initial intent of favoring perceived merit instead of country of origin may be apparently considered as a constituting feature of the system. The concept of merit is undoubtedly object to subjective assessment, but the point may be made that each jurisdiction that has so far introduced the PBS has done so based on lawmakers' assessment of what constitutes merit. It is interesting to note how this assessment can lead to different results in different jurisdictions and to some selection criteria be prioritized at the expense of others. It is no surprise then that the PBS is sometimes referred to as Merit-based system²³. Although it appears inextricably linked to PBSs and therefore represents one of its constitutive aspect, the intent to promote merit is not unique to them²⁴, as many jurisdictions around the world issue visas to particular groups of prospective migrants for specific achievements deemed worthy of recognition

19 Section 27 of the Canadian Charter of Rights and Freedoms, see also Canadian Multiculturalism Act (1988); Stephen Tierney, *Multiculturalism and the Canadian Constitution*, (2007) UBC Press

20 What's the point? The countries that have invented points-based immigration have concluded that they do not work, *The Economist*, July 2017

21 Conservative Manifesto, 2005 United Kingdom General Elections

22 Points-based Immigration Systems, The Law Library of Congress, Global Legal Research Center <http://www.loc.gov/law> (March 2013) at 35

23 Merit-based Immigration Systems, Federation for American Immigration Reform

24 German Business Visa

and support by the state²⁵.

The next step is to understand in what specific terms the origin and purpose of merit is conjugated.

The next two paragraphs help elucidate this aspect.

Economic Contribution

Another constitutive aspect of the PBS appears to be the goal of economic contribution of the prospective migrant. This purpose is clearly stated for Canada's Federal Skilled Workers Visa program²⁶ or has been made clear by the constant tweaking of the threshold level or of the maximum amount of points awarded for each skill²⁷. Changes in these areas have been explicitly justified on economic grounds, citing research proving how the different selection factors for migrants impact economic activity²⁸. Just as for the concept of merit, the goal of economic contribution is not unique to the PBS²⁹ but it appears to be inextricably linked to it: the selection criteria are none other than evaluations on the skills the state deems necessary to succeed in the national economy. There is an argument to be made that, regardless of whether it is the intent of the state, any migrant ends up contributing in some form to the economy, though such contribution may not be in a form desired or promoted by the state. What is perhaps more interesting is that the design of the PBS appears to attempt to maximize this objective as intended by lawmakers and government officials.

Integration

Another relevant aspect enshrined in how the system has been designed is the correlation made

25 Artist Visa, USA; Highly Skilled Visa, Netherlands

26 CIC, Evaluation of the Federal Skilled Worker Program: Executive Summary, <http://www.cic.gc.ca/english/resources/evaluation/fswp/section1.asp> (August 2010)

27 Press Release, Chris Bowen MP, Migration Program Gives Priority to Those with Skills Most Needed (Dec. 17, 2008), <http://www.minister.immi.gov.au/media/media-releases/2008/ce08123.htm>.

28 DIAC, TRENDS IN MIGRATION: AUSTRALIA 2010-2011 (Annual submission to the OECD's Continuous Reporting System on Migration (SOPEMI)) 22, <http://www.immi.gov.au/media/publications/statistics/trends-inmigration/trends-in-migration-2010-11.pdf>

29 Business Visas, Investor Visas

between integration of migrant communities and their economic contribution. One may point to press releases by Immigration Ministers in both Canada and Australia³⁰, as well as extracts of instruments of primary legislation themselves³¹, that draw a direct link between the potential for economic contribution by migrants and their ability to integrate into society. If points-based immigration is designed to favor migrants with a certain set of skills because of their potential to contribute to the economy and economic contribution leads to integration, then the system itself may be characterized as favoring economic integration as the sole form of integration possible. This aspect is relevant from a human rights perspective on two grounds. On one side, several instruments of International Law impose positive obligations on states to favor integration of migrant communities: seeing economic integration as the only type of integration relevant may be in violation of these instruments. On the other hand, even if one assumes that integration is only of an economic nature, the fact that a certain set of skills deemed conducive of integration needs to be fulfilled prior to migration into the country may negate the positive role that HRL requires of states³² in this area, which may be then seen as an abdication of responsibility and an illegal one at that.

Interaction between Constituting Elements

So far the paper has identified five constituting aspects of the points-based system: the presence of a test; the absence of a human component for the final outcome regarding a prospective migrant's right to enter the country; the stress on merit; the goal of economic contribution of the migrant; the goal of integration of the migrant. Whether visas issued based on a points system are temporary or permanent does not appear to be a defining feature, as under the British attempt at points-based

30 News Release, CIC, Minister Kenney Proposes to Assess Foreign Education Credentials Before Skilled Workers Arrive <http://www.cic.gc.ca/English/department/media/releases/2012/2012-03-28.asp> (March. 28, 2012); Press Release, Chris Bowen MP, New Migration Points Test to Better Address Australia's Skills Needs (Nov. 11, 2010), <http://www.minister.immi.gov.au/media/media-releases/2010/cb10078.htm>

31 Migration Act 1958 - Subsections 96(1) and 96(2), Commonwealth of Australia;

32 Obligation to Fulfill, See CESCR, General Comment, No. 16, paras 17–18; CESCR, General Comment No. 20, para. 8(b);

immigration some visas have been issued for a determined period of time, whereas under the Canadian³³, Australian³⁴ and New Zealand systems, all points-based granted visas are permanent. Another element that does not apparently define the PBS is whether visas issued under these systems require an employer sponsorship. Canada's Federal Skilled Workers program does not, nor does the Australian General Skilled Migration program or New Zealand's PBS. Both Canada and Australia expressly differentiate between points-based and employer-sponsored immigration, though they do in some cases award higher points based on a sponsorship offer. Under the United Kingdom system, however, employer sponsorship is needed at least for Tier 2³⁵ for instance, while other tiers are aimed at investors rather than prospective employees³⁶. Regardless of whether the British system is an outlier because of particular circumstances that make it different from the other three (further touched upon later), the absence of employer sponsorship does not appear to constitute a fundamental aspect of the system.

On the so far identified five constituting elements, it is essential to understand how they interact between each other. As previously mentioned, for instance, the goal of integration appears to be tied to economic contribution. The two elements seem to be in a relation of dependence one to the other, with integration being linked to the prospective economic contribution of the migrant. The element of merit, moreover, appears to be a vehicle-element, in the sense that the concept of merit, being highly subjective, needs to be conjugated in some form to be relevant, at least legally. In this sense, the elements of economic contribution and integration seem to be declensions of the element of merit: the state finds a prospective migrant meritorious of entry into the country because there is an assessment that she may contribute positively in the eyes of the state to the economy and because she may integrate more easily into society. The test element and the human component element

33 Selection Factors – Skilled Workers and Professionals, IRCC, <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/eligibility/federal-skilled-workers/six-selection-factors-federal-skilled-workers.html>

34 The Points Table, DHA <https://www.homeaffairs.gov.au/visas/supporting/Pages/skilled/the-points-table.aspx>

35 Tier 2, United Kingdom Immigration

36 Guidance for Application for UK Visa as Tier 1, United Kingdom Government, Visa Applications <https://www.gov.uk/government/publications/guidance-on-application-for-uk-visa-as-tier-1-entrepreneur>

instead appear to be structural rather than substantial. A distinction between substantial (merit conjugated as contribution to the economy and integration into society) and structural (test and lack of human component for final outcome) elements is legally relevant because it leads to different kinds of analysis: violations under HRL may be found because the system is structurally designed in a way that runs contrary to human rights or because it presents substantial elements that may be considered in violation of HRL norms.

Sub-chapter 3: Why is an Analysis of Points-based Immigration under HRL Relevant?

Judgment on the Points-based System

Firstly, if points-based immigration is found to be *qua system* in violation of human rights norms, then the main consequence would be that the states that currently adopt it would be breaching HRL. The relevance would be more pronounced if current jurisdictions that operate a PBS decided to expand it at the expense of other programs, for instance family reunification programs or employer-sponsored visas.

Secondly, this paper argues that the analysis may be also relevant in regard to other nations that are either contemplating or may in the future contemplate its adoption. There have already been proposals in other countries that go in this direction. In the United States, the US Administration has proposed the repeal of certain immigration measures, a repeal aimed primarily at curbing the entry into the country of low-skilled or unskilled migrants such as the Diversity Visa program³⁷, the so-called Green Card lottery that awards visas to migrants based on the country of origin regardless of skills set. The repeal of such a program has been the subject of negotiations between the Administration and the US Congress³⁸, but has found strong opposition from the Congressional Black Caucus³⁹ in particular, a group of African-American law-makers, because it would severely

37 Immigration Act of 1990 (Pub. L 101-649 104 Stat. 4978, enacted November 29, 1990)

38 Trump demands Congress terminate Diversity Immigration Lottery, CNN.com, November 1, 2017

39 Democratic Leaders face Internal Mutiny over Dreamers Deal, Politico, January 11, 2018

curtail migration from African countries. At the same time, US President Trump has decried the US Family Reunification program aimed at reuniting current US visa holders with members of their families, a policy derisively called by the head of state chain-migration⁴⁰. Moreover, during a press conference with then Australian Prime Minister Malcolm Turnbull, the President praised⁴¹ the Australian merit-based system, referring to it as a model to follow and, during its first presidential address to Congress, the American head of state has publicly advocated for a merit-based system⁴². On the other side of the Atlantic, in the United Kingdom, the Migration Advisory Committee (MAC), an independent body that advises the government on immigration policy, has recently published a report⁴³ urging post-Brexit Britain to curb low-skilled migration from the European Union. In advocating for a future global system of immigration, one that does not differentiate between EU and non-EU nationals, the Committee has explicitly praised the Canadian system as a “open, welcoming approach to migration” that does not have free movement agreements with other countries, a position championed by Prime Minister Theresa May and Home Secretary Sajid Javid⁴⁴. More importantly, the United Kingdom had already introduced a points-based system in 2008⁴⁵ for migrants from outside the European Union, which had so far had a relatively minor impact due to free movement within the EU and is not considered a fully points-based system because of special exemptions obtained by particular interest groups⁴⁶. With the country abandoning free movement within the EU and with an explicit nod to the Canadian model, the United Kingdom may soon see an expansion of points-based migration.

Apart from the explicit proposals, several factors, this paper argues, point in the direction of a possible adoption of points-based systems by other countries. As stated above, the purpose of

40 What “chain migration” really means – and why Donald Trump hates it so much, Vox.com, January 30, 2018

41 Trump, Turnbull Praise Each Other on Immigration and Taxes, NZ Herald, February 24, 2018

42 First Presidential Address to Congress, February 2017

43 Migration Advisory Committee (MAC) report: EEA migration, September 18, 2018, gov.uk
<https://www.gov.uk/government/publications/migration-advisory-committee-mac-report-eea-migration>

44 Theresa May to push through restrictive post-Brexit immigration plan, Financial Times, September 18, 2018

45 Points-based Immigration Systems, The Law Library of Congress, Global Legal Research Center, the United Kingdom <http://www.loc.gov/law> (March 2013); see also The Points-base System: How it works”, UK Border Agency, retrieved July 6, 2014

46 What's the point? The countries that have invented points-based immigration have concluded that they do not work, The Economist, July 2017

points-based immigration systems has been identified in the need to favor migration by skilled or highly-skilled workers at the expense of unskilled or low-skilled ones. This purpose is intrinsically contained in how these systems have been designed. The selection criteria are none other than skills that the state evaluates to allow entry into the country. Canada's program is expressly called Federal Skilled Workers Visa and the Australian visa sub-classes are those aimed at favoring “General Skilled Migration”. If current economic factors persist, states may look at the system designed to maximize skilled migration and minimize unskilled migrants as a model. Without venturing into economic or policy predictions, it may suffice to say that, were factors such as a highly-globalized economy, low wages for autochthonous low-skilled workers and competition from developing countries in the manufacturing sector to persist, it may be reasonable to assume that law-makers in Western states, pressured by the population at large and interest groups, would go in the direction of further curtailing the entry into the country of low-skilled or unskilled migrants, phenomenon that is linked to family reunification programs or, in the case of the European Union, the principle of free movement. The manufacturing sector may become what the agricultural sector is today with, instead of high subsidies, strong measures against competition from foreign unskilled workers. The analysis would be at this point relevant under a HRL perspective because finding points-based immigration in violation of human rights norms *qua system* would mean that those characteristics that run contrary to HRL would be replicated, were the system to be adopted elsewhere.

Judgment on Human Rights

Thirdly, an analysis of points-based immigration under HRL is relevant in order to give a judgment, however modest in breadth, about the role of HRL itself in enforcing and maintaining exclusion, despite the stated ideal of this legal area to be universalistic⁴⁷ although many scholars dispute that⁴⁸. The stated link between the economic contribution and migrants' prospective integration into

47 UDHR art 1, Freedom and Equality in dignity and rights

48 Andrew J. Nathan, *Universalism: A Particularistic Account*, in *Negotiating Culture and Human Rights* (Lynda S. Bell, Andrew J. Nathan & Iliana Peleg eds., 2001).

society of the points-based systems makes the definition of skilled migrant crucial. The elements of merit based of possible economic contribution and integration serve the purpose of defining who is skilled. As with any definition, the definition of skilled migrant is discriminatory in the literal sense of the term. It discriminates between those that fall inside or outside its scope. This creates an issue under a HRL perspective on two grounds. On the one hand, the relation between human rights and the economic dimension may be explored. If the definition of skillfulness is tailored around the potential of the migrant to contribute to the economy, then the fact that points-based migration is found or not to be in violation of HRL may give a hint about where human rights norms situate themselves with regard to economic considerations: to what extent HRL has a primacy over the economic dimension or in what measure the human rights discourse succumbs to considerations of an economic nature. On the other hand, the relation between human rights norms and cultural difference may also arise. A system designed to lead to acceptance of migrants based on these latter's skillfulness inevitably raises questions about who defines what the skills are and whether the definition of skilled migrant is ultimately culturally biased and denies cultural peculiarities: in other words, to what extent human rights norms protect against culturally-based assessments or help perpetuating culturally-hegemonic views on language, education, employment and the economy.

Finally, the analysis is relevant in regard to Human Rights Law when it comes to whom this area of law ultimately is able to address. For simplifying purposes only, this paper calls this issue the “in-betweeners paradox”. The adoption of points-based immigration as the cornerstone of a state's immigration system inevitably leads to those identified as skilled to be prioritized over those that are not. On the other end of the equation, treaty-based International Law strongly protects those deemed to be in dire need of refuge on humanitarian grounds⁴⁹ (asylum seekers, refugees), a duty of protection by which both Canada and Australia are bound. Points-based immigration, therefore, creates a category of people that are considered highly skilled or skilled enough to warrant acceptance into the community and, at the same time, operates under a system of international and

49 Convention Relating to the Status of Refugees (1951)

national assistance for those thought to need particular attention on humanitarian grounds. The system creates therefore a category of people that falls outside both camps on the two side of the spectrum, those in between that are not skilled or not skilled enough to be accepted under the system and that are not perceived to be in need of particular protection accorded under International Law. These “in-betweeners” are those negatively affected by points-based immigration if they wish to migrate to points-based immigration countries. The presence of this group does not in itself lead to any conclusion about the legality of points-based under HRL. Indeed, any system that sets fixed standards that differentiate people is inherently going to create these occurrences. The issue is particularly relevant when it comes to those prospective migrants who, for instance, fail to gain asylum under dubious circumstances or those prospective migrants that fail the points-based test because they miss the threshold for one or two points, hence the “paradox”. In order to make the issue clearer, two instances of national law of the same nature may be cited. Under the US healthcare system, for example, citizens and residents that fall under the federal poverty line or 133% the poverty line⁵⁰ (for those states that have decided to expand Medicaid following the 2010 Patient Protection and Affordable Care Act) are entitled to receive free medical care. Moreover, citizens and residents that turn 65 are too entitled to medical care with minor co-payments for single visits to the doctor or prescription drugs⁵¹. These rigorous thresholds lead to people who fall 1% above the federal poverty line or that are 64 years of age to having to pay considerable premiums with high deductibles, in spite of their personal situation being relatively comparable to those who enjoy free or cheap medical care. Another example that may be cited is that of several national employment laws that require a minimum amount of employees for an employer to be mandated to provide them with certain benefits or to be mandated to reinstate the employee in case of unfair dismissal, instead of simply paying damages⁵². This leads to employees in workplaces with one

50 Patient Protection and Affordable Care Act (2010) Pub. L. 111-148 124 Stat. 119, US Code

51 Medicare Modernization Act (2003) Pub. L. 108-173

52 Workers' Statute, Law No. 300 of May 20, 1970, Italian Republic; Workers' Statute, March 14, 1980; Kingdom of Spain; El Khomri Law, Law No. 1088, August 8, 2016; French Republic

employee below the threshold to not receive those benefits that a comparable employee in a similar workplace does. As stated above, the “in-betweeners paradox” is inherent in any system with strict thresholds to be met to be considered a right-holder. This issue, however, acquires particular significance with regards to human rights norms because of these latter's supposed universality. Even if a state is free to set strict standards, failure to address the in-betweeners by HRL may mean that human rights norms may be bent by the states at will, and would put in peril their professed universality.

Sub-chapter 4: Why the Case Study Methodology for the Analysis?

The methodology chosen to carry out the study has been identified as the case study approach. This decision is based on the elements that are generally viewed as being either unique to the case study approach or whose objectives are often regarded as being better served by the methodology⁵³. Firstly, the case study approach has been viewed as better serving the purpose of description of phenomena than non-case studies, which helps with the core purpose of this paper of seeking to describe in all its relevant components the PBS for the purpose of a *qua system* analysis. Furthermore, the case study approach has been found to be more potent when the purpose of the analysis is that of exploring a new theory (the PBS violates HRL) rather than confirming an already existing one. Moreover, this methodology has been described as better serving the goal of identifying the causal mechanisms that lead to the enactment of a certain system, as opposed to merely describing the cause-and-effect link between different elements within a system. This because the approach, by allowing an in-depth analysis based on quality rather than quantity, allows the researcher to focus on pattern-matching and process-tracing. The focus on two cases, in particular, permits the quest to find common patterns across the same system (abstracting) that can be matched across cases for the purpose of highlighting the constituting elements of a phenomenon

53 John Gerring, What Is a Case Study and What Is It Good for? *The American Political Science Review*, Vol. 98, No. 2 (May, 2004), pp. 341-354, American Political Science Association

(generalizing) in order to test a specific theory regarding the phenomenon (theorizing)⁵⁴. It also allows to focus on tracing the process that leads to certain decisions or, alternatively put, to study the motivations of the actors involved (for instance, the purpose of economic contribution and integration).

Rather than constituting a different kind of analysis, the case study approach distinguishes itself from other methodologies in the way it defines the cases. The Canadian Federal Skilled Workers Visa program and Australian visa sub-classes are here found to be representative of the points-based system as a whole. Firstly, both of these systems are the oldest among those described as points-based. This factor does not only allow for a deeper analysis of the motivations behind some of their features (the presence of many instruments of secondary legislation of administrative decisions on the matter), but it also highlights the fact that the two other systems described as points-based that fall outside the scope of this paper have been highly influenced by the Canadian and Australian examples. Both the New Zealand system and the British one have been characterized as being based on the Australian, for instance⁵⁵. In advocating for its implementation in other jurisdictions, supporters have spoken about a Canadian or Australian model. Some who have studied the system have gone insofar as to say that an immigration system can be deemed as being points-based only if judged comparable to these two⁵⁶. The British system, in particular, presents many elements that may render it an outlier that may negatively skew the analysis: the relatively minor impact because of the principle of free movement within the European Union; the fact that some parts of the initial legislative framework have never been enacted⁵⁷; the quick repeal of some other parts⁵⁸. No wonder then that PBS supporters keep advocating for a Canadian model, since the current system for them does not appear to reflect the original or what they see as what a points-based system should look

54 Christian Lund, *Of What is This a Case?: Analytical Movements in Qualitative Social Science Research*, Human Organization, Vol. 73, No. 3, 2014

55 Murray, Alasdair (January 1, 2011). "Britain's points based migration system" (PDF). Centre Forum. Retrieved November 24, 2017

56 *Id.*

57 Points-based Immigration Systems, The Law Library of Congress, Global Legal Research Center, the United Kingdom <http://www.loc.gov/law> (March 2013)

58 *Id.*

like.

When it comes to the structure of the analysis, the two cases are first studied based on the three most relevant selection criteria or skills. This analysis does not lead in and of itself to any judgment about the overall compliance of the PBS to HRL, as taken individually they are not constituting elements of the system. They do, however, help in the second part of the analysis that follows because taken together they help establish what states define as meritorious or acceptable for the purposes of economic contribution and integration. For this reason, the selection criteria are analyzed under HRL only insofar as they contribute to the determination of who is meritorious under an economic contribution and an integration perspective. Then, in Chapter III the findings for each individual selection criterion are put together to try and understand why the system may be in violation of HRL from the overall perspective.

CHAPTER II: THE SELECTION CRITERIA

Sub-chapter 1: Language

In Canada's FSWP, applicants have to pass a minimum threshold of language ability in one or both of Canada's two official languages, English and French. In order to demonstrate their ability, applicants have to pass an approved language test. A minimum level of proficiency is needed for the first official language chosen by the applicant. A maximum of 24 points is awarded for the first official language. Points are then decided based on the test score from 4 to 6 for each language ability (speaking, listening, reading and writing). To be awarded points for the second official language, a minimum level is also required, although lower than the one for the chosen first official language. Contrary to what happens for the first official language, for the second 4 additional points are awarded if the minimum level of proficiency is reached in all four abilities. The total maximum level of points for language is therefore 28, the highest among the factors.

For Australia's General Skilled Migration visa sub-classes⁵⁹, a maximum of 20 points is awarded in case a candidate has obtained an International English Level Test score of 8 or higher (Superior English) in all four language abilities. 10 are assigned for a test score of 7 (Proficient English) while 0 for a score of 6 (Competent level). Foreigners are ineligible to qualify for these visa sub-classes if they have scored lower than 6. Contrary to Canada that has established a language assessment score of its own (one which translates scores from different tests into one), Australia relies on IELTS scores for establishing the points awarded⁶⁰ as well as other English languages tests, for each indicating the relative minimum score needed to get points. In addition, while in the Canadian FSWP points are awarded based on the overall results, in the Australian visa test additional points are apportioned only in case the applicant has achieved that score in all four language abilities⁶¹, meaning that the final score is not based on the overall average between the abilities but rather each single ability must satisfy the level required.

Both Canada and Australia, however, rely on private entities for conducting language proficiency tests rather than administering the test themselves. Citizens from the US, Canada, Ireland, New Zealand and the United Kingdom are exempted from taking the test. However, in this case, 0 points are awarded for the language factor, as these are presumed to have an IELTS score of 6 rather than 8 or more. When compared to the Canadian FSWP, the Australian Skilled stream visa sub-classes test award less points for the language factor (though the difference is relatively small; 28 vs. 20).

Analysis of Points-based Immigration under the Language Requirement

In order for the requirement to be in violation of HRL in its entirety, one would have to envision a human right to express oneself in the language of choice, regardless of whom one speaks to, a right that the State would then have to guarantee under the duty to protect⁶². Such right does not exist. To

59 English - The Points Table, DHA <https://www.homeaffairs.gov.au/visas/supporting/Pages/skilled/the-points-table.aspx>

60 How Can I Prove I Have Proficient English? DHA <https://www.homeaffairs.gov.au/lega/lega/form/immi-faqs/how-can-i-prove-i-have-proficient-english>

61 *Id.*

62 Duty to Protect, the Three Obligations theory, Overview and Characteristics at 63

the contrary, the jurisprudence of the European Court of Human Rights, for instance, has explicitly stated that, under Article 10 of the European Convention of Human Rights (freedom of expression), there can be no expectation of a right to express oneself in one's mother-tongue in any given context⁶³. This interpretation of freedom of expression, a right contained in other general instruments of HRL such as Article 19 of the United Nations Declaration of Human Rights, although given by a Regional Court, may be extended to other jurisdictions. This wide interpretation of freedom of expression would certainly have repercussions for the enjoyment of other human rights. Both Canadian and Australian governments place importance of the need for a competent level of English because research shows that that is the main factor that allows migrants to find a job in their countries. From a Human Rights perspective, the point can be undoubtedly made that understanding the language spoken by the local populace is an essential factor in being able to benefit from a wide range of other rights. The UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Family, the supervisory body of the International Convention on the Rights of Migrant Workers (ICRMW)⁶⁴, an instrument admittedly ratified by few migrant-receiving nations, has stressed the detrimental effect of language barriers for the effective enjoyment of rights by migrants in its General Comment No. 1 on Migrant Domestic Workers. A few exceptions when HRL norms explicitly spell out a duty of the State to provide for information in the stated language of choice of a person exist, especially in sensible areas of criminal law and health. In regards to the former, Article 3 of the International Covenant on Civil and Political Rights (ratified by both Canada and Australia) recognizes the right to be informed about the nature, the cause and charges brought against a person in a language that he or she can understand in case of criminal proceedings. In the health domain, the Report to the UN General Assembly by the UN Special Rapporteur on the Human Rights of Migrants highlights the importance of a state's health policy to be sensitive to both culture and gender, as well as conducive to reducing linguistic,

63 Clerfayt, Legros et al. v. Belgium, ECHR (1985) Appl. No. 10650/83, decision of 17 May 1985. AND ECmHR, A Group of Inhabitants of Sint-Pieters-Leeuw v. Belgium (1968) Appl. No. 2333/64, Recueil 28, 1, 16 December 1968

64 International Convention on the Rights of Migrant Workers (ICRMW)

communication, and cultural barriers.⁶⁵ Outside these instances, Human Rights norms are generally more focused on ensuring migrants can retain their language as a marker of their cultural identity. Article 27 of the ICCPR has been interpreted as requiring the adoption of positive measures by the states to guarantee the enjoyment of one's mother-tongue as a sign of maintaining one's cultural identity by the UN Human Rights Committee (HRC) in its General Comment No. 23 on the rights of minorities⁶⁶. Along the same line, some have sought to advocate for a broad interpretation of the UN Declaration on Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities⁶⁷, adopted in 1992, as to comprise not only so-called “old minorities” (indigenous groups) but also recent migrants. The extensive interpretation would make Article 4 of the declaration (‘to take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue’) applicable to migrants as well. The interpretation has been endorsed by the UN Working Group on Migration but the Declaration itself is not binding⁶⁸. In this area, monitoring bodies, advocacy organizations, and—for the most part—scholars, have almost consistently pushed for an expansive interpretation of the concept of national minorities that would encompass migrants whereas states have been unwilling to give up their margin of discretion.⁶⁹

When it comes to what is considered to be the official language of the country one migrates to, learning of that language can be therefore expected. After all, national citizens too, when subject to mandatory schooling, are expected to learn skills which will ensure their self-sufficiency⁷⁰. Article 14 of the European Framework Convention on National Minorities, for instance, makes it clear that

65 (1989) Series A, No. 168). 73 UN Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, Enjoyment of the rights to health and adequate housing by migrants, Annual Report to the Human Rights Council, UN Doc A/HRC/14/30, 16 April 2010, para. 78.

66 HRCtee, General Comment No. 23, The rights of minorities (Art. 27), CCPR/C/21/rev.1/Add.5 (1994), paras 5.1–5.2

67 UN Doc A/RES/47/135 (1992)

68 Commission on Human Rights, Sub-Commission on Promotion and Protection of Human Rights, Working Group on Minorities, Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Working paper submitted by Asbjørn Eide Sixth session, 22–26 May 2000, UN Doc E/CN.4/Sub.2/AC.5/2000/WP.1 (2000).

69 Medda-Windischer (n 14) at 42; see also Ruth Rubio-Marin, Human Rights and Immigration, Oxford Scholarship Online (2014) at 86

70 *Id.*

there is nothing *a priori* problematic about expecting migrants to learn the basics of the official language of the host country. The arguments generally cited in favor of the position may be distinguished along two lines: the “self-interest” argument and the “mandatory schooling” argument. According to the former, it is in the self-interest of the migrant to learn the official language for employment opportunities and the full enjoyment of other rights and benefits. Additionally, this argument tends to have as corollary an alignment of interests of both the migrant and the state. Since both Canada and Australia identify the need for a migrant workforce that can speak the language as beneficial to their economies (and studies conducted tend to show this), the argument combines the interests of the two. On the other hand, the latter seeks to demonstrate that the migrant should reach a level of language proficiency at least comparable to that achieved by the local population through mandatory schooling for reasons of, if none others, equality in treatment. Both arguments open themselves up to criticism and, in particular, may lead to counter-arguments when it comes to their feasibility under HRL.

Self-interest argument

In the case of the “self-interest” argument, then it should be necessary for the language criterion to reflect the effective ability of the migrant to communicate through that language. This begs the question of whether there is a hidden reason as to why the requirement is established, other than economic contribution and integration.

The stated rationale behind the introduction of language requirements in both the Canadian and Australian model is the belief that higher language proficiency leads to higher employment for migrants⁷¹. By statistical evidence, there is certainly reason to agree with this statement. However, a few signs may point to additional reasons as to why the language requirement is imposed for

71 CIC, Evaluation of the Federal Skilled Worker Program: Executive Summary, <http://www.cic.gc.ca/english/resources/evaluation/fswp/section1.asp> (August 2010); DIAC, TRENDS IN MIGRATION: AUSTRALIA 2010-2011 (Annual submission to the OECD’s Continuous Reporting System on Migration (SOPEMI)) 22, <http://www.immi.gov.au/media/publications/statistics/trends-inmigration/trends-in-migration-2010-11.pdf>

migration. Apart from the fact that they are tests on British English and American English that determine migration to Canada and Australia, one may cite another aspect that puts in doubt the fact that integration into the economy and society is the state's primary concern when establishing the requirement. Canada's FSWP, for instance, attributes a total of 28 points for language as a selection factor. Tellingly, however, it establishes a maximum of 24 points for the chosen first language and 4 additional points for the chosen second language. In Canada both English and French are considered official languages. Bilingualism has been adopted since the Trudeau Senior years in the 70s. The issue is a somewhat thorny one for the nation. Tied to the question of Quebec autonomy and independence, the Constitution now requires that all federal official communications shall be issued in both official languages and Canadians must learn the other official language in school regardless of the province they live in. When it comes to the lived experience of Canadians in everyday life, however, one might argue that in many instances, the knowledge of both languages is far from being essential. Someone working in the energy sector in the province of Alberta may have at best a tangential connection to the French language, as someone that lives and works in rural Quebec does not need English for his or her daily life. Even at the highest levels of power, knowledge of both languages is not a requirement. It is not strange to hear about prime ministerial candidates from anglophone Canada having to “bone up”⁷² on French, but there is no official document requiring the head of government to be able to speak both. Even more strangely, the only bilingual Canadian province of New Brunswick does not require knowledge of both languages by high ranking officials: recently, much has been made about the fact that the new provincial Premier does not speak French⁷³. The question does thus become why prospective migrants are evaluated on both to determine whether they are allowed to migrate to the country. If integration into the economy is not the sole reason, additional considerations must come into play. Another intent, different from the stated one of economic integration, does not constitute, of course, in and of itself

72 COMMENTARY: Jagmeet Singh Should Learn from O'Leary's mistakes in Quebec, May 4, 2017, Global News

73 Can Province's New PC Leader Bring Party Together to Win next Election?, October 24, 2016, cbc.ca

a violation of HRL. It depends on the hidden intent. In order to find one which other intent is sought by imposing the language requirement, one has to venture into the field of national identity. According to Rubio-Marin, by imposing tests on migrants, states “may be selectively and unilaterally demanding and testing that non citizens exhibit the civic virtues that the system would arguably require from all its residents for its overall long-term sustainability.” This issue obviously needs a thorough analysis and cannot easily find solution in a paragraph since it would need a thesis of its own. Suffice to say, however, that question is one of compatibility of general instruments of HRL that prescribe the need for cultural accommodation and the possible limits of state sovereignty with regard to what constitutes national identity. Firstly, there is the issue of whether instruments of HRL that deal with minorities extend to migrant communities. In this area, instruments have remained declaratory at the international level allowing interpretive discretion for member states with modest effect on imposing positive obligations on the part of states⁷⁴. On the other hand, migrant-focused human rights instruments have not been numerous or particularly successful in achieving wide ratification, but they express a clear principle: the need to respect migrants’ cultural identity. However, they remain almost silent on concrete state obligations regarding cultural accommodations due to migrants.⁷⁵ In this regulatory landscape, one may argue that the adoption of these instruments to cover migrant communities not only is essential to impose positive obligations on states to accommodate migrants’ cultural diversity. They may also be relevant in a negative way, to curb the imposition of “national identity”-driven policies.

Mandatory Schooling Argument

In the case of “mandatory schooling”, an issue of potential discrimination arises in case of excessive burden of the migrant in comparison to the native. Some may argue, in fact, that it is perfectly reasonable to expect migrants to acquire a level of language proficiency comparable to that

⁷⁴ *Id.* at 77

⁷⁵ *Id.*

provided by mandatory schooling for citizens and residents of the country during the first period of their lives. It may be counter-intuitive to think that migrants may be put in a different position than those who have attended compulsory education in the host country. The argument is relevant for the purpose of this paper because of the causal conclusion that may be inferred from such premise. If migrants are to be put in the same position of natives and residents when it comes to minimum level of English based on equality grounds, then what happens in case the burden put on migrants is higher than what constitutes mandatory schooling-level of language proficiency? If we start from an equality argument, then whatever exceeds that level may be considered unequal treatment and therefore discriminatory. Such conclusion, if adopted, is not in itself sufficient to lead to a judgment of incompatibility of the language requirement with Human Rights norms from a discrimination perspective. Firstly, the crucial point of whether the international prohibition of discrimination supersedes fundamental principles of state sovereignty in determining who enters its territory must be tackled. The right to equality and non-discrimination is contained in numerous general instruments of International Law. Article 1, 2(1) and 7 of the UN Declaration of Human Rights, Article 2, 3 and 26 of the ICCPR and Articles 2(2) and 3 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), more poignantly, all recognize a right to equality and non-discrimination. In addition, for instance, specific instruments also cite the principle. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), in particular, is relevant to the discussion due to a General Recommendation (No. 30) issued by its supervisory Committee in 2004. Paragraphs 3 and 4 of that recommendation, specifically, reads “that, although some rights—such as the right to participate in elections, to vote, and to stand for election—may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. In other words, equality is the norm, and differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not

proportional to the achievement of this aim. The paragraphs are illustrative of the breadth in scope as well as the limits of the right to non-discrimination. On one hand, the passage highlights the issue of distinction between citizen and non-citizen in the enjoyment of such right. On the other, the justification grounds typically connected to this right are mentioned. The distinction between citizen and non-citizen is therefore recognized, but unequal treatment still needs to pass a legitimate aim and proportionality test. This is because human rights still enjoy lexical priority over state sovereignty even in the realm of immigration law, since the General Recommendation appears to suggest that immigration status cannot be taken as self-evident justification. Such lexical priority, therefore, means that the equal treatment between citizens and non-citizens by the state through its policies and actions must be presumed, certainly if both the citizen and the non-citizen are within the national territory. The issue is trickier, when it comes to the application to the Canadian FSWP and the Australian General Skilled Migration visas, because one may apply from outside Canada and Australia. There may be, therefore, a question of territorial jurisdiction for those applicants who do not reside within the national borders. The issue is based on whether a state may be censured for human rights violations committed for its actions, or if its policies must also be taken into account. If I am a foreign citizen living in that foreign country, I may have standing in national court for a decision and an action taken by and in that country. Regardless, however, under Human Rights Law, it might appear that in case of unequal treatment, even in the area of language standards, if the adverse treatment is proven by the plaintiff, then it would be up to the state to justify such discrepancy. For this, it is essential to recall that human rights law typically does not only oblige the state to protect rights, but also to ensure them (see Article 2(1) ICCPR), something which has been read as imposing positive action obligations on the state. In other words, the notion of substantive equality, or equality of opportunities, has increasingly gained force.⁷⁶

76 CESCR, General Comment, No. 16, paras 17–18; CESCR, General Comment No. 20, para. 8(b); CEDAW, General Recommendation No. 25, paras 4, 7–8; CERD, General Comment No. 32. They have affirmed that a state must ensure both *de facto* and *de jure* equality (CESCR, General Comment No. 16, para. 7; CEDAW, General Recommendation No. 25; para. 4; CERD, General Comment, No. 32, para. 6; CESCR, General Comment No. 20, para. 8.) and eliminate both direct and indirect discrimination, ensuring that seemingly neutral measures do not have a discriminatory effect in real terms (see CEDAW, General Recommendation No. 25, para. 7; CESCR, General

For both Canada's and Australia's points-based visas, a minimum level of 6 on the IELTS test is necessary to apply. Points are given only if an individual exceeds the pass mark for the language test. Tellingly, the Australian system allows applicants from countries in which English is the official or the unofficial language to forward their request even in the absence of a test. In this case, the Australian system presumes a score of 6 on the IELTS test and not 8, for example, which would give right to the maximum of 20 points awarded for the language category. Such presumption may signal that the state assumes that English mother-tongues, unless proven otherwise, might have an English level of 6.

Possibility of States Found Derelict in Duty to Integrate Migrants

However, if we accept the premise that a migrant should be expected to learn the local language, one might perhaps ask if the difference in the phases of migration are relevant to determine if there is a violation under HRL. In simpler terms, one might wonder whether it makes a difference to require language proficiency to acquire permanent residency or to acquire citizenship. There is currently a trend to expand testing of migrants from naturalization procedures to permanent resident.⁷⁷ There is a risk that the language requirement becomes less a tool to enjoy rights by the migrant (and potential citizen), such as an instrument to engage in the political discourse and therefore exercise civil and political rights, and more a fetish that defines national identity. However, if we accept the premise that the right of equality and the one to not be discriminated against extend to migrants, then one has to concede that, in accordance to the jurisprudence of several international institutions⁷⁸ when asked to pronounce about these rights, the state has at least some degree of positive obligation to eliminate barriers that impede the enjoyment by migrants of equality of opportunities. In the area of language, that means that it may be incumbent upon the

Comment No. 16, paras 5, 12–13; CESCR, General Comment No. 20, para. 10; General Comment No. 14; CERD, General Comment No. 32, para. 7).

⁷⁷ Ruth Rubio-Marin, *Human Rights and Immigration*, Oxford Scholarship Online (2014). at 74

⁷⁸ Obligation to Fulfill, See CESCR, General Comment, No. 16, paras 17–18; CESCR, General Comment No. 20, para. 8(b);

state to provide the tools necessary for migrants to acquire language proficiency. This may take the form of, for instance, language courses for migrants to learn the language spoken by the majority of the population. This aspect is paramount when it comes to analyzing the temporal shift of the language requirement from citizenship to permanent residency. Whereas acquiring citizenship usually (but not always) follows a minimum of years of residency in a particular country, no minimum period of time of legal residency in the country is required to obtain permanent status, at least that is the case with Canada's FSWP and Australia's General Skilled Migration visas. The temporal shift is therefore accompanied by a shift in the place where people may apply for status (almost always in that particular country for citizenship, probably in a foreign country for permanent residency). This spatial shift is then crucial for the role of the state. By moving the language requirement from citizenship to permanent residency, the state creates the conditions for the impossibility for positive obligations to be fulfilled. In other words, the state cannot be asked to organize language classes for migrants if those migrants are not in the country, and certainly cannot be asked to organize language classes for potential migrants who have not even set foot in its territory, because, in that case, there would be no need for integration. To borrow a legal concept common to several national jurisdictions, the state fraudulently abdicates one of its obligations, by making it impossible for instances in which it may have positive obligations to occur in the first place. It nullifies the potential for positive obligations to be fulfilled by denying instances in which these obligations may be necessary. Even if one concedes that some candidates may apply for permanent residency from within the country and may therefore attend potential language courses organized by the state, this occurrence may become irrelevant if even temporary visas, the ones that may be an initial venue to then seek permanent residency status, require language proficiency, as some Australian temporary visas do.

Testing as Evidence of Language Proficiency

When it comes to establishing whether there may be a violation on the grounds of particular features of a test, the issue can be tackled from the perspective of the different standard dialects of one language. In particular, when it comes the case studies of Canada and Australia, both of them rely on tests carried out by private actors and, in particular, by foreign institutions. The IELTS test is operated by the British Council, a British institution, while the TOEFL test is administered by the Education Testing Service, an American institution. Perhaps, the point could be made that these tests evaluate participants based of particular standard dialects of English that somewhat differ from the Canadian and Australian one.

In addition, the argument could be made that testing, in particular, has a discriminatory outcome for persons with not only intellectual or mental disabilities, but learning disabilities such as dyslexia. Article 2 of the Convention on the Rights of Persons with Disabilities (CRPD) includes intellectual and mental disabilities. More recently, there has been a push to include learning disabilities among the kinds of disabilities covered by national legislation on the matter in numerous states. An extensive interpretation of Article 2 of the treaty, signed and ratified by both Canada and Australia, might include learning disabilities because of their effect on creating “impairments and attitudinal and environmental barriers that hinders [...] [the] full and effective participation [of those who have them] in society on an equal basis with others”. The Convention seeks the adoption of “reasonable accommodation”, defined as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden,” to ensure “the enjoyment and exercise on an equal basis with others.” To escape a judgment of discrimination based on disability status, Australia and Canada might have to provide alternative methods to evaluate a disabled person's language ability. In this regard, it is relevant to report that Canada's FSWP previously allowed language proficiency to be determined by other methods other than official testing such as written documents and an assessment of language proficiency made by the visa officer at Canadian consulates around the world. This latter occurrence had led, during the years and prior to its repeal⁷⁹, to several judicial

79 CIC, Evaluation of the Federal Skilled Worker Program: Executive Summary,

cases being brought by failed applicants to Canadian courts precisely based claims of unfair assessment by the officer of the plaintiff's language level. Although the courts had tended to give visa officers ample discretion in evaluating applicants and to reject such claims, nonetheless the government got away with alternative methods of language testing in an effort to simplify.

The Link between Language, National Origins and Race

Today, no immigration system overtly discriminates migrants on the grounds of religion, race and national origin. Even in instances in which a state denies entry to citizens of particular nations, the rationale for such moves has been found on other grounds such as national security. The issue has recently come up to the attention of the international community due to the US Administration's decision⁸⁰ to deny entry to citizens of six countries. Although all countries cited in the order have a population whose majority practices Islam, the Administration has defended what has journalistically come to be known as Travel Ban based on the discretion that the US President has in determining how can migrate to the US on national security grounds, a defense that has been endorsed by the internal courts⁸¹. The case is illustrative of the potential for decisions based on national origins ground to hide additional discerning factors (the religion factor in this particular case). In particular, for instance, the HRC's Sub-Commission on the Promotion and Protection of Human Rights, in its "The rights of non-citizens: Progress report of the Special Rapporteur, Mr David Weissbrodt"⁸², has highlighted the need for states to avoid different standards of treatment with regard to citizens and non-citizens, which might lead to "racial segregation and the unequal enjoyment of economic, social, and cultural rights." In other words, learning English may be easier for speakers of Germanic languages, for instance, as French may be easier for romance language speakers, especially if there has not been the chance to interact with English or French speakers

<http://www.cic.gc.ca/english/resources/evaluation/fswp/section1.asp> (August 2010)

80 Presidential Proclamation 9645, *see also* Executive Order 13780

81 Trump's Travel Ban is Upheld by Supreme Court, The New York Times, June 26 2018

82 UN Doc E/CN.4/Sub.2/2003/23 (2003)

(because one is not yet a resident of that country). Then the issue becomes to what degree can language be linked to national origin. If language is found to have a link to national origins, which in turn may lead to some form of indirect discrimination based on race, then such requirement may be in violation of HRL, in particular the International Convention of the Elimination of All Forms of Racial Discrimination, an instrument that has been found to have an impact as discrimination based on race is rightly considered a particularly heinous form of discrimination that warrants a higher standard of judicial scrutiny. If the weakness of the language-nation origins-race link is overcome, then the strength of the legal instrument may have an impact in classifying the language requirement as in violation of HRL. Worth mentioning, in this regard, is the broad definition of racial discrimination under the Convention. Indeed, Art. 1 reads that the term “racial discrimination” shall mean “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.” Racial discrimination does therefore already contain a reference to national origins.

Sub-chapter 2: Education

In Canada's Federal Skilled Workers Visa program, applicants are awarded a maximum of 25 points based on the level of education they achieved, from secondary school to doctoral level. Proof of education level may be provided by an official certificate from a Canadian educational institution of secondary or post-secondary level or from a foreign educational institution but, in this latter case, an “Educational Credential Assessment report” from an approved agency is needed, in order to determine that the education level is the same of the Canadian equivalent⁸³. The lowest number of

83 Selection Factors – Skilled Workers and Professionals, IRCC, <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/eligibility/federal-skilled-workers/six-selection-factors-federal-skilled-workers.html>

points available is five for completion of high school⁸⁴. A Master's Degree gives its holder the right to 23 points.

For Australia's General Skilled Migration sub-classes⁸⁵, a maximum of 20 points are awarded for those applicants who hold a Doctorate degree, 15 for a Bachelor's degree, and 10 for an Australian diploma or Trade qualification. The Assessing Authority evaluates whether titles from foreign education institutions are equivalent to an Australian qualification and to what level they correspond. Five additional points may be awarded in case of Australian diploma, Bachelor's degree or trade qualification obtained in the country under a Student Visa, provided it be in the same field as the “nominated occupation” declared in the application and it lasted at least 2 years. The test seems to favor those who already hold a temporary visa to a higher degree than the Canadian FSWP.

Analysis of Points-based Immigration under the Education Requirement

Both Canada's FSWP and Australia's GSMP have education as a selection factor, a maximum of 25 and 20 points respectively. When it comes to determining the potential violation of HRL, two different questions may be posed: if the requirement in itself violates HRL; if the judgment by the assessing authorities may be in violation of HRL.

With regard to the first question, considerations have to be based on the right to education. Such right is contained in Article 26 of the Universal Declaration of Human Rights and Articles 13 and 14 of the ICESCR. Both instruments have been signed and ratified by virtually every country in the world (the former has been argued by scholars to be binding under customary international law; the latter has 169 signatory parties), Canada and Australia among them. Not only does the UN Declaration prescribe the need to ensure access to education for a state's population, but it also

84 Points for Education—Skilled Workers and Professionals, IRCC, <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/documents/education-assessed/read-report.html>

85 Qualifications / Australian Study Requirement / Specialist Education Qualification – The Points Table, DHA <https://www.homeaffairs.gov.au/visas/supporting/Pages/skilled/the-points-table.aspx>

specifies the role and inspiring goal of education as “directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms.” Education, under the UDHR, is not only a tool to higher societal integration, but also an instrument useful to the full enjoyment of other human rights. Both Canada and Australia's rationale for the inclusion of the education factor in their visa programs is, however, found in statistical data that show that higher educational attainment leads to higher employment rates and salaries and therefore to economic participation and growth (again, the perceived self-interest/state's interest alignment argument). Certainly, the systems give different points based on education level, from secondary school to doctorate. A minimum amount of points is awarded (5 and 10 respectively); the difference between the points awarded for high school and those for doctorate are a ratio of 1:5 and 1:2.5 respectively, and therefore vary. Canada seems to put more value on a higher education level. There may be a correlation between this factor and the fact that Canada is currently first in the world tied with Russia for highest rate of tertiary education holders⁸⁶. Regardless of the difference in value, arguments on HRL violations may be found on grounds similar to those for the language requirement.

Some may argue that people who come from countries where mandatory schooling is not enforced are being discriminated against: currently 70 million children across the world are estimated to be prevented from going to school each day⁸⁷. States may not only require that prospective migrants obtain at least a secondary degree, they may also, in this way, prevent these children to come to the country to acquire there their compulsory education level diploma (students visas are issued primarily for tertiary education⁸⁸ or only specific years of secondary education). This aspect may be particularly relevant when it comes to potential discrimination based on gender. The Convention on the Elimination of All Forms of Discrimination Against Women dictates in its Article 10 the

86 Education, OECD data

87 Human Rights-based Approach to Programming, UNICEF

https://www.unicef.org/policyanalysis/rights/index_62012.html (last modified January 23rd 2016)

88 Student Visa, DHA, Australia <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/student-500>

prohibition to treat boys and girls differently in the field of education. However, there are currently many countries in the world where education is denied to women and girls. By requirement an education factor for deciding eligibility to come to their countries, they may be discriminated twice, for their lack of access to education and for the adverse consequences caused by such lack of access. Similar arguments may be advanced for racial discrimination based on the provisions contained in the UNESCO Convention against Discrimination in Education.

Moreover, this critical aspects may be further exacerbated by the fact that, among the miscellaneous factors criterion present in both the Canadian and the Australia systems, educational qualifications of the spouse are may lead to more points being awarded.

Additionally, issues of a more practical nature may arise. The so-called Assessment Authorities in Australia and Approved Agencies in Canada may require the show of documents that for some prospective migrants in some countries may be difficult to obtain because of procedural and administrative hurdles. Finally, the judgment of these agencies and authorities may be based on considerations with a particular cultural connotation, an issue further addressed in the following sub-chapter on previous employment experience.

Sub-chapter 3: Employment

Under Canada's FSWP, applicants must also have at least one year of continuous full-time or equivalent paid work experience in the past 10 years in a skilled occupation classified as skill level 0 (managerial occupations) or skill level A (professional occupations) or B (technical occupations and skilled trades) under the NOC, the Canadian National Occupational Classification⁸⁹ (at the directive of the Minister for Immigration, the list of qualifying skilled occupations has been narrowed down to twenty-nine specific, high-demand occupations in 2012). The maximum of points awarded for the employment factor is 15 for 6 or more years; a minimum of 9 points are

⁸⁹ Points for Work Experience—Skilled Workers and Professionals, CIC

awarded for 1 year of experience⁹⁰. Furthermore, an applicant is given a maximum of 10 points if he or she qualifies for Arranged Employment In Canada with a Labor Market Impact Assessment and a full-time, permanent job offer from a Canadian employer that has been confirmed by Human Resources and Skills Development Canada. The IRCC website states that the officer managing the visa request has to be convinced that the applicant be able to become licensed or certified in Canada if the occupation for which he or she received a job offer is regulated⁹¹.

In Australia, the previous work experience selection criterion distinguishes between employment in Australia or abroad⁹², which would signal that, in the Australian case, these visa sub-classes for permanent residency favor more than the Canadian FSWP those candidates that have previously come to the country on a temporary visa and are now seeking to stay indefinitely. In case of previous work experience in Australia, a maximum of 20 points is assigned for a minimum of 8 years in the Australian job market, whereas a maximum of 15 points is awarded for 8 years of job experience outside the country. At least 1 year of work experience in Australia and three years abroad are needed to be given the minimum amount of 5 points for this category. However, job experiences in Australia and abroad may be summed together but no more than 20 points are to be awarded overall. In the Australian case, previous work experience seems to be valued slightly more than in the Canadian FSWP (16 points maximum). In order to be counted for the purpose of gaining points on the test, only jobs with a work week of at least 30 hours and employment 10 years prior to the application may be cited. Finally, the work experience must be the same or similar to the “nominated occupation” indicated in the request.

Analysis of Points-based Immigration under the Employment Requirement

The question about potential violation under HRL of this requirement may hinge upon issues of a

⁹⁰ *Id.*

⁹¹ Points for Arranged Employment—Skilled Workers and Professionals, IRCC

⁹² Skilled Employment in the last 10 Years – Points outside Australia / Points in Australia – The Points Table, DHA
<https://www.homeaffairs.gov.au/visas/supporting/Pages/skilled/the-points-table.aspx>

cultural dimension. As with the language requirement, the cultural dimension of the concept of work may come into play. Although international HRL provisions recognize a right to work in Article 23 of the UDHR as well as in Part III Article 6 of the ICESCR, it is difficult to see how these provisions may impede by themselves states from requiring previous employment as a selection factor. Rather, the potential for different cultural traditions of work may constitute a relevant aspect. In HRL, as already mentioned, the importance of “cultural facilitation” has been stressed. In particular, the UN Committee on Economic, Social and Cultural Rights has developed the concept of cultural adequacy, which refers to the idea that every human right (for example, the right to work) has a cultural component that public policies should respect⁹³. In addition, Human Rights treaties have invariably articulated their rights as universally applicable, citizenship being, in principle, irrelevant regarding their enjoyment or protection. They therefore all lend themselves to collective and culturally relevant forms of exercise. Moreover, Article 27 of the ICCPR recognizes non-discrimination and noninterference with regard to members of ethnic, religious, or linguistic minorities in the enjoyment their own culture. In the domain of work, few would argue that employment can never assume a specific cultural connotation. Roma communities, for instance, have a different work societal structure as it relates to work; domestic work may be valued differently in some communities or countries than in others. If we accept the premise that work can have a different cultural declination, then we may conclude that the employment requirement may risk infringing on those cultural differences because of the denial of recognition. The issue becomes more relevant if we think about the assessment process that both Canada and Australia's potential migrants commit to when it comes to professional licenses. These need to be assessed positively by the competent authorities under both the FSWP and the GSMP. For instance, a Chinese doctor might see her professional credentials rejected because the courses she followed in China did not adhere to the Canadian equivalent. Cases of rejection on these grounds are not rare⁹⁴. The question

93 CMW, General Comment No. 1 on Migrant Domestic Workers, CMW/C/GC/1, 23 February 2011, paras 27(b), 29, and 30(a); see also paras 7, 11, and 40

94 *Alakkad v. Canada (Minister of Citizenship & Immigration)*, 1996 Carswell Nat 1926, 121 F.T.R. 34, 35 Imm. L.R.

then becomes the degree to which these international instruments apply to migrants.

Finally, the employment requirement may lead to particularly paradoxical outcomes such as the fact that child labor, considered illegal under international law⁹⁵ but nonetheless present worldwide, may not be taken into account for awarding points even though it occurred.

CHAPTER III: THE POINTS-BASED SYSTEM AS A WHOLE

The study of the single selection criteria, as previously stated, does not provide in and of itself an evaluation of the PBS from a Human Rights perspective. However, the findings may be helpful in establishing a first account of where the critical aspects of the system are if the PBS is to be evaluated under HRL. The following chapter analyzes the system as a whole. In order to try and find violations *qua system*, the fundamental and constituting elements of the system are divided into structural and substantive elements. Under structural elements, the analysis focuses on the system's unique design (points-based test, lack of human component). For the substantive part, the analysis is centered on the element of national identity.

Sub-Chapter 1: Structural Elements

The Constant 'Tweaking' of Thresholds and Points

Scholars interested in the system have pointed out that the PBS requires constant tweaking. By tweaking, these researchers mean that the system is in constant need of revision when it comes to establishing the maximum amount of points awarded for each criterion, how to assign the points

(2d) 95, 67 A.C.W.S. (3d) 139

⁹⁵ ILO Convention No. 182 on the Worst Forms of Child Labour, 1999; ILO Convention No. 138 on the Minimum Age for Admission to Employment and Work

within a skill and the threshold ultimately needed for an application to be lodged. The Australian and Canadian PBSs are constantly studied and reports⁹⁶ are issued by national agencies to provide estimates over its impact and its ability to reach its stated goals. These periodical assessments have often led to changes in the overall configuration of the points-based test. Apart from changes based on carefully reached assessments, changes are often also made based simply on labor market demands, for instance by lowering the threshold in periods of labor demand or increasing it in periods when there is low or no demand for foreign workers. Furthermore, some changes, it may be argued, have been made based merely on changes in policy or political win by the government of the day, perhaps based on public sentiment.

These changes have occurred not by modification of the instruments of primary legislation that established the PBS, but rather by secondary legislation issued by the ministerial department in charge of immigration. In the Australian system, for instance, it is widely understood that the Minister for Home Affairs may exercise a fair amount of discretion in dealing with the issuance of visas⁹⁷ and with the tweaking of points and threshold of the points-based test. In Canada, Ministerial Instructions (MI) are the primary instruments through which changes to the points-based test are made. Although executive discretion in the realm of immigration law is nothing new, it is peculiar of the PBS that the grounds on which immigration to the country is allowed shifts so constantly and at the discretion of the Minister in charge.

Some have concluded that this constant tweaking on the points-based test is a pathological aspect of the system, meaning that it is a sign of the points-based system malfunctioning and being unable to achieve the purpose sought by lawmakers. Critics have cited this constant need to tweak the test as a symptom that PBSs do not work, as they do not fulfill their stated purpose⁹⁸. The need to tweak is

96 CIC, Evaluation of the Federal Skilled Worker Program: Executive Summary <http://www.cic.gc.ca/english/resources/evaluation/fswp/section1.asp> (August 2010); DIAC, TRENDS IN MIGRATION: AUSTRALIA 2010-2011 (Annual submission to the OECD's Continuous Reporting System on Migration (SOPEMI)) 22, <http://www.immi.gov.au/media/publications/statistics/trends-immigration/trends-in-migration-2010-11.pdf> DIAC, ANNUAL REPORT 2011-12 at 111, <http://www.immi.gov.au/about/reports/annual/2011-12/pdf/report-onperformance.pdf>

97 Peter Dutton under Pressure Eligibility and Au Pair Visa Intervention, August 29 2018, SBS News

98 What's the point? The countries that have invented points-based immigration have concluded that they do not work,

seen as a sign that there is no static 'magic formula' to achieve complete economic contribution of the migrant and therefore integration.

It appears, however, that rather than being a pathology of the system, the constant tweaking is on the contrary another fundamental element of PBS. The fact that the threshold is changed between 60, 63, 65 and 67 for instance is a physiological aspect of points-based immigration. From the Canadian and Australian system, we may gather that the constant tweaking is both intrinsically linked to the points-based test and unique among immigration systems.

This aspect, from a human rights perspective, means that the bar of compatibility between the PBS and HRL risks being subject to constant revision as well or, better put, needs to be constantly reassessed.

Creating the Perfect Migrant

The fundamental element of constant tweaking makes the system the perfect tool to design the category of desirable migrant by the state. Not only are the points assigned to each selection criterion carefully considered, but they may also be tweaked at the discretion of lawmakers and the executive. In this sense, no other immigration system appears to come close to this powerful potential more than the PBS. Although it is true that both the Canadian FSWP and the Australian visa sub-classes allow the applicant to bring dependents with her to the country, in both instances under the miscellaneous selection factor spouses who have also taken and passed the language test or hold an educational degree are awarded additional points, thus favoring higher-educated families overall. As stated in the previous chapter, all selection criteria to some extent contribute to either a shift in the integration effort by the migrant from the moment of naturalization to that of acquisition of permanent residency (as it is the case with language for instance) or the imposition of higher standards of skillfulness than the general populace (education requirement) or the imposition of standards that may run contrary to culturally distinctive practices (as for employment for example).

The Economist, July 2017

The points-based test and its flexible nature that allows the constant tweaking helps to enhance the chance by states to escape a consistent judgment on whether they comply with HRL.

A Race to the Top/Bottom?

The points-based test and its flexible nature may encourage other states to adopt it. As reported in Chapter I, other states besides the ones that are the object of this paper have expressed interest in adopting the PBS. If one starts from the assumption that the PBS provides the perfect tool to create the most desirable migrant, then it is not difficult to see why other states may go in this direction. While it is difficult to predict future developments in this field, if there were a more widespread adoption of the PBS in other jurisdiction, this might create a subsequent race not only to construct each country's PBS in light of that country's needs, but also states might use the features of the system to search for the best migrant. This would in turn lead to states pitting migrants against each other, creating a worldwide competition. Although admittedly hypothetical, this phenomenon might be already observed to a much smaller scale today. Both Australia and Canada pride themselves in the results that their system achieves. When observations and critiques are made internally in the country with regard to the PBS, those seem to go primarily in the direction of pushing towards tweaks in the system that may better achieve the goals of economic contribution and integration, thus striving to get what are perceived internally to be the best migrants to come to the country.

Structural Elements under Human Rights

Under its structural elements, violations of Human Rights norms are not easy to detect. The opinion that the PBS provides the best design through which to achieve the goal of getting the most desirable migrants is not *per se* a violation of HRL, as states are almost universally recognized wide leeway when it comes to deciding who might enter the country and, as corollary, might very much establish policies aimed at maximizing the entrance into the country of whom they perceive to be

the most desirable migrants. Where violations of the PBS under HRL might be envisioned is when the aim to attract the most desirable migrants clashes with Human Rights Law when it comes the human component. In this case, the lack of the human component in the final assessment about a prospective migrant's right to lodge an application and subsequently be accepted into the country might be in violation of Human Rights norms on discrimination grounds. In particular, it might be discriminatory to treat differently situations that are relatively similar if not equal. If an applicant is denied the possibility to lodge an application because she has missed the threshold by one points, on human rights grounds it might be difficult to justify how she is precluded from having the chance to lodge the application while someone else who reaches the aforementioned threshold by one point is not. In this case, the fact that the selection criteria taken individually may be violating some aspects of HRL only enforces the discriminatory dimension of the PBS. The potential for discrimination in its design in conjunction with the possible violations under the individual selection criteria appears to be the strongest argument at this point to deem the PBS in violation of HRL. It might also be the only avenue to solve the 'inbetweeners' paradox as laid out in Chapter I.

Sub-chapter 2: Substantial Elements

National Identity

The substantive elements of PBS have been identified in the purpose of rewarding merit conjugated in the goal of economic contribution and subsequent integration.

Through the analysis of the individual selection criteria, traces of a different goal may be found. When it comes to the language requirement, for instance, the fact that the second official language of Canada is awarded points regardless of where the prospective migrant is expected to live signals that the goal of integration is not solely intended in its economic dimension. By requiring knowledge of a particular language, as well as by favoring educational achievements and prior work

experience in the country (as the Australian system does), it appears that a different purpose may be envisioned by the state. There seems to be a hidden intent to favor migrants who better adhere to a certain idea of what it means to be part of the country at large. In this sense, the goal of integration might be intended not only as economic but also cultural assimilation. This version of integration may be also been in the imposition of what appear to be culturally hegemonic views of what constitutes education and employment. If there is a goal to shape and enforce a national identity through immigration at the time of application for permanent residency, there is an argument to be made that the PBS offers, in this instance as well, the ideal tool through which to achieve it.

Under a Human Rights perspective, this issue may only be explored through an account of the different HRL philosophies that one may espouse. In particular, different judgment on the PBS may be levied based on the different approaches that have been taken in the field of Human Rights when it comes to the universality or relativity of such rights.

The universality of Human Rights have been professed since their first arrival in the legal world, when HRL concurred with Natural Law. Today, while absolute universality is proclaimed by few, there are those that still interpret Human Rights provisions as universal in scope and application. In the face of accusations of 'cultural imperialism' and Western ethnocentrism, many point to the 1993 Vienna Declaration and Programme of Action which clarified that, despite the cultural peculiarities of local or traditional groups, states are required to respect the universality of human rights. The Declaration states that “[w]hile the significance of national and regional peculiarities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms. Others contend that the aim of universal Human Rights is to transcend cultural differences that might jeopardize the minimum standard set by HRL norms⁹⁹. Michael Ignatieff is perhaps the starkest critic of the relativism of Human Rights, regarding it as the

99 Michael Freeman, *Human Rights: An Interdisciplinary Approach* (Cambridge: Polity Press, 2002), at 118

invariable ally of tyranny¹⁰⁰.

Jack Donnelly postulates the relative universality of Human Rights when he argues that these are universal, functionally and in its international legality and overlapping consensus¹⁰¹, while not ontologically nor anthropologically. To their conceptual universality, Donnelly believes, correspond multiple different conceptions through which the concept may be positivized, which discourage global homogenization or the sacrifice of valued local practices¹⁰². In this sense, they not only do not justify cultural imperialism but rather protect people from imposed conceptions of the 'good life', whether those visions are imposed by local or foreign actors. Other authors that try to combine universalism and relativism in the realm of Human Rights are Nathan¹⁰³ (tempered universality) and Wilson¹⁰⁴.

At the other end of the spectrum, there are those who view Human Rights as absolute relativist terms¹⁰⁵, based on cultural relativism. For these authors, the norms of the Universal Declaration are presented as having no normative force in the face of divergent cultural traditions. Practice is to be evaluated instead by the standards of the culture in question¹⁰⁶. Some anthropologists criticize HRL as ethnocentrically Western, although many admit that many socio-cultural groups have concept analogous to Human Rights. On this basis, some advocate pluralist approaches to HRL¹⁰⁷.

For those who view Human Rights as conceptually universal with minimum to non-existent possibility of culturally diverse conceptions, arguments about HRL violations on the grounds of the need to respect cultural identity may appear misplaced. They may in this way play in the hands of states that impose cultural hegemonic views. For others who accept the need to consider culturally

100 Michael Ignatieff, "Human Rights as Politics and Idolatry," in *Human Rights as Politics and Idolatry*, ed. Amy Gutmann (Princeton: Princeton University Press, 2001) at 74

101 Jack Donnelly, *The Relative Universality of Human Rights*, *Human Rights Quarterly*, Vol. 29, No. 2 (May, 2007), pp. 281-306

102 *Id.* At 304

103 Andrew J. Nathan, *Universalism: A Particularistic Account*, in *Negotiating Culture and Human Rights* (Lynda S. Bell, Andrew J. Nathan & Iliana Peleg eds., 2001)

104 *Human Rights, Culture & Context: Anthropological Perspectives* 23 (Richard Wilson ed., 1997)

105 Rhoda E. Howard, *Cultural Absolutism and the Nostalgia for Community*, 15 *Hum. Rts. Q.* 315 (1993)

106 Alison Dundes Renteln, *Relativism and the Search for Human Rights*, 90 *Am. Anthropologist* 56 (1988)

107 Ellen Messer, *Pluralist Approaches to Human Rights*, *Journal of Anthropological Research*, Vol. 53, No. 3, *Universal Human Rights versus Cultural Relativity* (Autumn, 1997), pp. 293-317, The University of Chicago Press

different conceptions on language, education or work, then violations on HRL grounds of the PBS may be envisioned. The next step is to consider that cultural relativity when it comes to Human Rights does not only mean that states have to respect other states in the way in which they interpret Human Rights provisions, but also that they may have to re-calibrate their provisions in respect to their populace who may hold a different idea of what constitutes Human Rights.

CONCLUSION

The fundamental elements of the points-based system have been found to be: the points-based test, the lack of the human component at the time of the final decision, the purpose of establish the merit of the prospective migrant, conjugated in the sense of ability to contribute economically and therefore to integrate into the economy and society. These elements have all to be taken into account for an evaluation *qua system*.

The selection criteria taken individually do not by themselves provide an overall judgment on HRL violations, but they do contribute to identify the areas of Human Rights Law that may be at risk of being violated: discrimination against minorities and unequal treatment; risks of imposing culturally hegemonic views; the shift of integration efforts from naturalization to the moment of application to permanent residency. The structural elements of the points-based test and, in particular, the constant tweaking as a permanent design feature provide the perfect tool for states to attempt at creating the most desirable migrant. These factors may favor in the long run a race among states to secure what they perceive to be the best migrants, and the flexible design may be easily used to constantly updating this assessment. If read in conjunction with the possible critical areas in HRL found when analyzing the individual selection criteria, then a judgment of the PBS under HRL may be based on

possible unequal treatment of relatively similar if not equal situations of those who find themselves falling below the threshold or reaching above it.

The points-based system also offers an ideal tool through which to attempt to favor those migrants who may be more willing or able to recognize a certain idea of national identity. Although neither in the Canadian nor the Australia system there is 'values' selection criterion, there may be traces of attempts by states to seek to favor those migrants who adhere more strongly to certain values of the state (i.e. bilingualism in Canada, the educational system in Australia).

Under an attempt to insert national identity into the points-based test, violations may be envisioned by those who admit that, although universal in their application, Human Rights norms are subject to culturally different conceptions that have to take into account culturally-based assessments. In this area, Human Rights advocates for migrants have to tread carefully. The scholarly opinion of relative universality appears to be the best suited to challenge the PBS from a Human Rights perspective. If from one side the conceptual and functional universality of Human Rights helps in challenging the PBS in the first place, only a culturally-relativist conception of HRL allows the system to be further challenged on less shakier grounds.

Finally, the issue of justiciability must be cited. Only the violation of justiciable rights may prove to be a challenge to the points-based system. In this case, the implementation of so-called second generation or socio-economic and cultural rights and their justiciability are paramount for the protection against discrimination and of cultural diversity in the points-based system through the enforcement of positive obligations by the state to respect, protect and fulfill.

BIBLIOGRAPHY

In order of first appearance

Points-based Immigration Systems, The Law Library of Congress, Global Legal Research Center, <http://www.loc.gov/law> (March 2013)

Convention Relating to the Status of Refugees (1951)

Skilled Independent Visa (subclass 189) (Points-tested) stream, <https://www.homeaffairs.gov.au/Trav/Visa-1/189->

Skilled Workers and Professionals, IRCC <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/eligibility/federal-skilled-workers/six-selection-factors-federal-skilled-workers.html>. (last modified 29th March 2018)

CIC, Evaluation of the Federal Skilled Worker Program: Executive Summary, <http://www.cic.gc.ca/english/resources/evaluation/fswp/section1.asp> (August 2010)

Migration Watch UK, Assessment 2014

UKIP General Election Manifesto, 2015

Alakkad v. Canada (Minister of Citizenship & Immigration), 1996 CarswellNat 1926, 121 F.T.R. 34, 35 Imm. L.R. (2d) 95, 67 A.C.W.S. (3d) 139

Apply for a Visa, New Zealand immigration.govt.nz

Migration Act, 1976, Parliament of Canada

Migration Act, 1958, (No. 62 of 1958) Parliament of Australia

Fact Sheet – Abolition of the “White Australia” Policy, Australian Immigration, Commonwealth of Australia, National Communications Branch, Department of Home Affairs

Canadian Charter of Rights and Freedoms

Canadian Multiculturalism Act (1988), Parliament of Canada

Stephen Tierney, Multiculturalism and the Canadian Constitution, (2007) UBC Press

What's the point? The countries that have invented points-based immigration have concluded that they do not work, The Economist, July 2017

Conservative Manifesto, 2005 United Kingdom General Elections

Merit-based Immigration Systems, Federation for American Immigration Reform

Press Release, Chris Bowen MP, Migration Program Gives Priority to Those with Skills Most Needed (Dec. 17, 2008),

<http://www.minister.immi.gov.au/media/media-releases/2008/ce08123.htm>.

Press Release, Chris Bowen MP, New Migration Points Test to Better Address Australia's Skills Needs (Nov. 11, 2010), <http://www.minister.immi.gov.au/media/media-releases/2010/cb10078.htm>

DIAC, TRENDS IN MIGRATION: AUSTRALIA 2010-2011 (Annual submission to the OECD's Continuous Reporting System on Migration (SOPEMI)) 22,
<http://www.immi.gov.au/media/publications/statistics/trends-inmigration/trends-in-migration-2010-11.pdf>

News Release, CIC, Minister Kenney Proposes to Assess Foreign Education Credentials Before Skilled Workers Arrive <http://www.cic.gc.ca/English/department/media/releases/2012/2012-03-28.asp> (March. 28, 2012);

CESCR, General Comment, No. 16

CESCR, General Comment No. 20

Guidance for Application for UK Visa as Tier 1, United Kingdom Government, Visa Applications

<https://www.gov.uk/government/publications/guidance-on-application-for-uk-visa-as-tier-1-entrepreneur>

Immigration Act of 1990 (Pub. L 101-649 104 Stat. 4978, enacted November 29, 1990), United States Congress

Migration Advisory Committee (MAC) report: EEA migration, September 18, 2018, gov.uk <https://www.gov.uk/government/publications/migration-advisory-committee-mac-report-eea-migration>

The Points-base System: How it works”, UK Border Agency, retrieved July 6, 2014

Universal Declaration of Human Rights

John Gerring, What Is a Case Study and What Is It Good for? The American Political Science Review, Vol. 98, No. 2 (May, 2004), pp. 341-354, American Political Science Association

Christian Lund, Of What is This a Case?: Analytical Movements in Qualitative Social Science Research, Human Organization, Vol. 73, No. 3, 2014

Andrew J. Nathan, “Universalism: A Particularistic Account, in Negotiating Culture and Human Rights” (Lynda S. Bell, Andrew J. Nathan & Iliana Peleg eds., 2001).

Alasdair Murray, "Britain's points based migration system". Centre Forum. (January 1, 2011). Retrieved November 24, 2017

Linda Hajjar Leib, “An Overview of The Characteristics and Controversies of Human Rights, Human Rights and the Environment Book, Philosophical, Theoretical and Legal Perspectives, Brill. (2011)

Legros et al. v. Belgium, ECHR (1985) Appl. No. 10650/83, decision of 17 May 1985. AND *ECmHR, A Group of Inhabitants of Sint-Pieters-Leeuw v. Belgium* (1968) Appl. No. 2333/64, Recueil 28, 1, 16 December 1968

International Convention on the Rights of Migrant Workers (ICRMW)

Series A, No. 168). 73 UN Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, Enjoyment of the rights to health and adequate housing by migrants, Annual Report to the Human

Rights Council, UN (1989)

Human Rights Committee, General Comment No. 23, The rights of minorities (Art. 27), CCPR/C/21/rev.1/Add.5 (1994)

UN Doc A/RES/47/135 (1992)

Commission on Human Rights, Sub-Commission on Promotion and Protection of Human Rights, Working Group on Minorities, Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Working paper submitted by Asbjørn Eide Sixth session, 22–26 May 2000, UN Doc E/CN.4/Sub.2/AC.5/2000/WP.1 (2000).

Ruth Rubio-Marin, Human Rights and Immigration, Oxford Scholarship Online (2014)

International Covenant on Economic, Social and Cultural Rights (ICESCR)

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

ICERD General Recommendation (No. 30)

Convention on the Rights of Persons with Disabilities (CRPD)

Convention on the Elimination of All Forms of Discrimination Against Women

UNESCO Convention against Discrimination in Education

CESCR, General Comment, No. 16

CESCR, General Comment No. 20

CEDAW, General Recommendation No. 25

CERD, General Comment No. 32

UN Doc E/CN.4/Sub.2/2003/23 (2003)

Human Rights-based Approach to Programming, UNICEF

https://www.unicef.org/policyanalysis/rights/index_62012.html (last modified January 23rd 2016)

CMW, General Comment No. 1 on Migrant Domestic Workers, CMW/C/GC/1, 23 February 2011

ILO Convention No. 182 on the Worst Forms of Child Labour, (1999)

ILO Convention No. 138 on the Minimum Age for Admission to Employment and Work

Michael Freeman, Human Rights: An Interdisciplinary Approach (Cambridge: Polity Press, 2002)

Michael Ignatieff, "Human Rights as Politics and Idolatry," in Human Rights as Politics and Idolatry, ed. Amy Gutmann (Princeton: Princeton University Press, 2001)

Jack Donnelly, The Relative Universality of Human Rights, Human Rights Quarterly, Vol. 29, No. 2 (May, 2007), pp. 281-306

Human Rights, Culture & Context: Anthropological Perspectives 23 (Richard Wilson ed., 1997)

Rhoda E. Howard, Cultural Absolutism and the Nostalgia for Community, 15 Hum. Rts. Q. 315 (1993)

Alison Dundes Renteln, Relativism and the Search for Human Rights, 90 Am. Anthropologist 56 (1988)

Ellen Messer, Pluralist Approaches to Human Rights, Journal of Anthropological Research, Vol. 53, No. 3, Universal Human Rights versus Cultural Relativity (Autumn, 1997), pp. 293-317, The University of Chicago Press

Amitai Etzioni, The Normativity of Human Rights Is Self-Evident, Human Rights Quarterly, Vol. 32, No. 1 (Feb., 2010), pp. 187-197, The Johns Hopkins University Press

Corinne Kumar-D'Souza, The Political Economy of Human Rights, International Review of Education / Internationale Zeitschrift für Erziehungswissenschaft / Revue Internationale de l'Education, Vol. 29, No. 3, The Debate on Education for Peace (1983), pp. 413-422, Springer

Chomsky, Noam & Herman, Edward S: The Political Economy of Human Rights, Vol II: after the cataclysm: post-war Indochina and the reconstruction of imperial ideology

Pritam Singh, *Economy, Culture And Human Rights: Turbulence in Punjab, India and Beyond*,
Review by: Ashutosh Kumar, *Pacific Affairs*, Vol. 86, No. 2, Special Issue: GLOBAL
PERSPECTIVES ON CHINESE INVESTMENT (JUNE 2013), pp. 424-426, *Pacific Affairs*,
University of British Columbia

Axel Dreher, Martin Gassebner and Lars-H. R. Siemers, *Globalization, Economic Freedom, and
Human Rights*, *The Journal of Conflict Resolution*, Vol. 56, No. 3 (June 2012), pp. 516-546, Sage
Publications, Inc