Compulsory Public Service and the Right of Territorial Exit

Let us begin by simply noting what seems prima facie to be a puzzle: the title of Gillian Brock and Michael Blake’s dialogue is ‘Debating Brain Drain’ but its focus, as the subtitle reveals, is whether state’s may restrict emigration by their citizens. A normative focus on the ethics of brain drain would typically encompass issues of international and transnational justice concerning the responsibilities of justice that state and non-state actors have with respect to the recruitment, admission, employment and civic statuses of highly skilled non-citizens – and the forms of international cooperation and/or global governance regimes that would support the exercise of these responsibilities. In Rawlsian terms, this can be expressed as the recognition of the need for a basic structure regulating international and transnational interactions in order to secure the relevant conditions of global justice such as, for example, states with the disposition and capacity to be effective human rights protectors. Why, then, focus solely on the question of whether sending states may restrict the emigration of their highly skilled citizens?

The explanation is that Brock and Blake both see the governance of highly skilled labour migration (HSLM) as a regime predominantly structured by unilateralism. By this I mean a regime in which receiving states have no compelling incentives to bind their actions through multilateral agreements and institutions given the prevalence of asymmetrical interdependence in which the costs and benefits of HSLM are unevenly distributed between sending states (most of the costs) and receiving states (most of the benefits). Put less formally, Brock and Blake’s dialogue assumes a background in which the wealthy states of the global North do not discharge their responsibilities of justice towards the poorer states of the global South and hence the dialogue focuses on one important part of the question of what these poor states may legitimately do in such non-ideal circumstances.

Although there are some empirical indications that this situation could change in that recent years have seen notable developments of bilateral agreements between states, sometimes facilitated through existing multilateral institutions, primarily the World Trade Organization and the Global Forum on Migration and Development (Betts and Cerna, 2011: 64-68), the assumption that structures Brock and Blake’s discussion remains largely valid. This matters because the question of what poor states may legitimately do is, at least in part, relative to whether other states are fulfilling their responsibilities of justice. The restrictions that a poor state can place on its citizens may vary according to the degree to which receiving states that fail to comply with principles of justice and adopt or allow predatory practices of recruiting HSL non-citizens from poor states. This is the context in which it is appropriate to consider the normative debate between Brock and Blake on emigration and its restriction to which I now turn.

In taking up this debate, I will argue *contra* Blake that the right to territorial exit can be conditioned or delayed and *contra* Brock that highly skilled citizens ought not be singled out for compulsory public service. From a broadly republican standpoint, I will defend the legitimacy of compulsory public service programmes when these are appropriately generalized across the citizenry as a whole and are non-directive in character, and argue that such programmes are preferable to the kind of private contractual agreements that Brock and Blake both admit as permissible practices.

*Legitimate States and Restrictions on Emigration*

For Michael Blake, the freedom to exit one’s state is a fundamental liberal freedom, a core human right, which, like freedom of association or the right to a fair trial, places fundamental constraints on what states can do:

“Managed migration,” therefore, is as unavailable to liberal societies as “managed apostasy” might be; even if it were useful for us to prevent individuals from abandoning their religious affiliations, we would have no right to coercively seek to limit such abandonment. The rights of persons prevent societies from interfering with the freedom to leave, whether what is left is a religious group or the state’s territorial jurisdiction. Neither can liberal states condition the right to exit or impose delays upon those who want to use that right; even a day’s delay is an injustice, just as a day’s imprisonment is unjustified if used in the absence of a legitimate trial. (p.112)

I agree with Blake that the right to leave the territorial jurisdiction of the state is a fundamental right but I do not see that the analogy with religious association helps in quite the way that he appears to suppose or that there cannot be legitimate reasons to condition the right to exit or impose delays on the exercise of that right. I begin with the analogy to religious association, before turning to the issue of conditioning the right to exit.

Consider first the analogy with leaving a religious group. Leaving a religious group *is* ceasing to be a member of the religious community, whereas leaving the territory of a state and ceasing to be a member of a state are distinct. This is why in the case of citizens, as Blake rightly notes, there are two rights: the right to leave the territory of the state and the right to change one’s nationality. The mere fact of leaving the territorial jurisdiction of the state does not entail that the citizen ceases to be a member of the political community or to have binding duties to the state. The analogy is thus better viewed in terms of the ‘right to leave’ as the conjunction of territorial exit and associative exit. In other words, no one should be denied the right to ‘change their nationality’ (this rules out, for example, the use of the doctrine of perpetual allegiance by states in binding persons to them irrespective of their choices) and, with the possible exception of dual nationals, this standardly entails the right to exit from the territorial jurisdiction of the state in order to acquire a new nationality. This is not to say that the right to exit the territory of a state is only grounded on the right to change one’s nationality, it is simply to say that this is as much as we get from the religious analogy.

Notice two further and related differences between the two cases that are significant. First, in the religious case, the fact I may choose to leave the community at will is conjoined to the fact that I can also be expelled from the community if I breach the duties of membership. Second, this ease of disassociation is facilitated by the fact there is no obligation on me to join another religious community nor does my choice affect my access to human and civic rights, I may simply choose to be without any religious membership without incurring significant costs in terms of my access to such rights. By contrast, in the case of state membership, I cannot choose to be stateless nor (except perhaps under very special and limited conditions?) can my state of nationality legitimately strip me of nationality for breaching the fundamental duties of citizenship if that would leave me stateless. This is because being stateless is a condition of a radical insecurity. The burdens and disadvantages that it imposes on individuals in terms of secure access to rights are sufficiently excessive and disproportionate that liberal states are obliged to avoid allowing their citizens to choose this condition or placing them in it. This point cuts two ways.

On the one hand, the fact that, in contrast to the religious case, ‘exit’ from a civil association is conditional on the choice of another such association to admit, makes ‘voice’ much more important in the context of states than religious associations to securing the autonomy of persons. If individuals do not have a right to surrender their nationality except in the form of ‘changing’ their nationality, then the governance of the civic association must allow more opportunities for the expression of, and be more responsive to, the interests of its citizens than would be required for a religious community. This is one reason why freedom of expression, assembly and protest are much more vital to the legitimacy of a state than that of a religious community. Precisely because the state is not a voluntary association in the relevant sense, the fact of membership cannot be taken – even *prima facie* – to denote consent to the norms of the association; rather for the rules of the association to be legitimate, they must be subject to the control of the citizens of the state.

On the other hand, the fact that states, in contrast to religious associations, cannot legitimately use expulsion as religious associations in order to generate compliance with, or punish breaches of, the norms of the association entails that states can legitimately use coercion to enforce compliance with these norms to the extent to which, subject to a variety of procedural constraints, they are authorized to do so by the members who will be subject to these norms. In other words, it can deploy coercion to limit the freedom of its citizens in order to secure access to human and civic rights for its citizens as long as citizens can reasonably agree to the restriction in question on the basis of general and reciprocal reasons.

If the preceding argument is cogent, the fact that there cannot be managed apostasy does not have any significant implications for the question of whether there can be managed migration. Let us now turn then to the question of the conditioning of the right to exit and the imposition of delays on the exercise of this right. This is central to the dispute between Brock and Blake. Brock proposes that a state can legitimately delay the right to exit of highly skilled migrants while they undertake a year of compulsory service in the state. This service is, directly, to help secure the basic human rights of their fellow citizens, that is, to enhance the rights-protecting capacity of the state and, indirectly, to support the building of institutions of good governance in the state. The justification for this delay is twofold. First, that highly skilled citizens have benefitted from the state’s investment of scarce resources in their tertiary education as well as enjoying more general benefits of citizenship and that the state is entitled to a return on its investment. Second, that uncompensated departures amount to both free-riding on the remainder of the civic community and a form of harm towards them by creating disadvantages in terms of access to human rights protection and institutions of good governance. There are two key issues at stake in Brock’s proposal: that of delay to exit and of temporary compulsory service. However, before we address these issues, we need to clarify the scope of the proposal, that is, the range of states that may, on Brock’s view, legitimately exercise their power in this way.

The scope question concerns the fairness of the contractual conditions and, more specifically, the relationship of fair contractual conditions to the legitimacy of the state. Brock and Blake agree that a state that engages in, or fails to prevent, widespread human rights abuses is not legitimate and no social contract or private contract with the state can be binding. But this leaves us with the question of what adequacy threshold must be reached by a state for a social or private contract to be valid. Brock initially characterizes governments as exercising power legitimately in terms of making good faith efforts to protect human rights as well as provide public goods, administer justice impartially, etc. (p.102) but there is a distinction between a government exercising power legitimately and the legitimacy of a state in that the latter requires not only good faith efforts but also some degree of success. In a state where the government makes good faith but ineffectual efforts to protect human rights, a contract that prevents citizens from emigrating cannot be binding. Blake stresses this point (and Brock acknowledges its force) in arguing that such contract can only be binding if the state has met a basic threshold of adequacy with respect to human rights protection: Ghana, probably yes; Sudan, no (in Blake’s examples). Neither the fact that some ‘poor but responsible’ states may not meet this adequacy threshold nor the fact that minimal criteria of legitimacy must be met in order to validate social or private contracts aimed at generating resilient access of human rights and robust institutions of good governance negate the potential salience of Brock’s proposal however. There may be a level of state legitimacy where human rights protection and institutions of good governance are sufficiently entrenched that policies of this kind are no longer needed (for example, some EU states) and states are, arguably, obliged to aim at reaching this level, but this level is likely to be considerably beyond the minimal level of adequacy required for a state to engage in legitimately enforceable social and private contracts with its citizens.

Let us turn now to this substantive issues raised by Brock’s proposal. We can start by noting that there are a range of grounds on which the right to exit the territory of a state, like most human rights, can legitimately be conditioned or delayed. Grounds of conditioning include national security (e.g., the UK would be legitimately entitled to prevent the territorial exit of UK citizens that it had compelling reason to believe were travelling to join ISIS) and flight from justice (e.g., the USA would be legitimately entitled to prevent the exit of fraudsters fleeing arrest), while grounds of delay may include, for example, lack of a valid documentation, the urgent need of another person (where ‘urgent need’ denotes, for example, the need for urgent medical treatment) or safety concerns (for example, flying during an air traffic controllers strike). It is unlikely that Blake would deny these cases but they raise the question of how we can distinguish legitimate grounds of conditioning or delay from illegitimate grounds.

To approach this question let us consider whether we can conceive of circumstances in which a citizen in good standing who has valid documentation and is not otherwise obstructed by external events can be restricted in terms of the exercise of their right to exit. Reflect on the following examples: being under a duty to serve as a witness in a court case or being under a duty to serve on a jury. These are duties that serve the fundamental interest of the political community in ensuring that the human right to a fair legal process and, more specifically, a fair trial is protected. If I receive a job offer overseas while waiting for, or during, the trial in which I am due to serve, or am serving, as a witness or juror, I am not entitled to simply leave the country. I am not so entitled because I have a binding duty to my fellow citizens to serve. This is part of the social contract between us (and I cannot free myself from this obligation by surrendering my citizenship if doing so would render me stateless). There may be conditions under which I could reasonably ask to be excused from such service (for example, if my personal contribution is not vital and the burden of my service would be unreasonably high), but where these do not apply, the state can legitimately use coercion to prevent my leaving the state to avoid discharging this duty.

These examples move us nicely to the issue of compulsory service. Compulsory jury service illustrates two conditions under which such ‘forced labour’ may be reasonably held to be legitimate. First, it is general in the sense that the obligation to engage in jury service (and the possibility of being chosen for jury service) falls equally on all relevantly competent citizens. Second, it is a reasonable way of seeking to secure the interest of all citizens in the protection of a basic human right (in this case, the right to a fair trial). It is reasonable because the burdens that it places on citizens are limited (in terms of duration of service) and equitably distributed, and the right that it serves to protect is one that all citizens recognize as central to a legitimate state. (We may note further that, in contrast to legal systems that lack jury trials, it makes manifest the grounding of state authority in popular sovereignty.)

A similar case can be made if we turn to the widespread state practice of compulsory military service, where the duty to perform military service for periods up to two years also places constraints on the right to exit one’s state (most obviously during such service). A compelling normative justification for such compulsory service is that citizens have associative obligations to one another to protect the state from threats to its basic capacity for legitimate self-rule. In its traditional republican form, the argument is that the freedom of citizens hangs on sustaining a free state against external and internal threats to legitimate self-rule. Compulsory military service ensures that citizens both serve in the military for a period of time and that they have the training required should they need to be recalled to military service or to take up arms against illegitimate rule. Thus the sovereign people can defend itself against both external threats such as foreign invading armies and internal threats such as corrupt elites deploying voluntary professional armies or mercenaries for purposes of oppression. Assuming that such compulsory service makes reasonable allowance for those who have conscientious objections to military service by providing a ‘civilian’ service option, I see no reason to hold that it is a politically illegitimate practice since it serves the purpose of protecting the conditions necessary for the exercise of fundamental liberties.

It might be objected that compulsory military service is not (or no longer) needed, at least in the democratic states of the global North, because there is little risk of the external or internal threats against which it is designed to protect and in such contexts it is unreasonably burdensome to require that citizens give up, say, two years of their time to a practice that lacks its original justification. Suppose that this is the case and that the legitimacy of compulsory military service is related to the extent to which the state is vulnerable to external and internal threats. It follows that what a state can legitimately ask of its citizens in terms of compulsory service is conditional on whether other states discharge their duties of justice towards this state. If they do not, and hence there is risk of exposure to significant external threat, then compulsory military service is legitimate. This is not to say that there are not risks attached to compulsory military service and that safeguards are not needed if people are not, for example, to be forced to participate in unjust wars. Rather it is simply to say that there is nothing intrinsically wrong with compulsory military service as an institution for protecting the human rights of citizens from external or internal threats where there are good reasons to suppose such threats to be real.

The preceding considerations suggest *contra* Blake that there are grounds on which it is legitimate to condition the right of exit and offer some specification of the kinds of constraints that apply to the justified use of compulsory civic service. We can thus turn to us address Brock’s substantive proposals.

*Compulsory Public Service for Human Rights*

If compulsory jury service is a morally permissible practice and compulsory military service is morally permissible practices in contexts in which other states cannot be counted on to act justly to a given state, and that these practices can place legitimate restrictions on the right to exit the territory of the state, what of Brock’s proposal? This proposal may take two distinct forms – as a public proposal that is part of the social contract between citizens and as a private proposal involving contractual agreements between the state and each individual who takes up state funding for tertiary education. I’ll address these in turn.

The problem that I have with Brock’s proposal as a public proposal is not that it involves compulsory service nor that it delays the exercise of the right to exit, but rather that it lacks civic generality and option choice. First, it applies only to a limited section of the population, those who are highly skilled. Second, it is very directive with respect to how those compelled must serve.

Consider first that although highly skilled citizens may be more instrumentally valuable than other citizens in increasing the ability of the state to offer its citizens secure access to human rights, this does not imply that only highly skilled citizens should be obligated to engage in compulsory service. It do not do so anymore than the fact that wealthy citizens are more instrumentally valuable from the standpoint of raising tax revenue implies that only citizens who benefitted from the state’s arrangements in using their abilities to become wealthy should be liable for taxation. In both cases, the obligation to support the development of the state as able to provide resilient rights protection and robust institutions of good governance falls on all citizens equally as an associative obligation. Scarce resources have also been invested in primary and secondary education as well as, for example, apprenticeships, job creation and training schemes, knowledge transfer, etc., and citizens who do not go on to university have often also benefitted in a variety of important ways from their residence in the state.

What is objectionable in Brock’s proposal is that its argument focuses on the instrumental value of the highly skilled rather than on the general and reciprocal obligations of citizens to secure each other’s access to human and civic rights. The fact that the emigration of highly skilled citizens is a threat to the enjoyment of secure access to human and civic rights on the part of the resident citizenry does not entail that only this social group owe the relevant duty of public service to their fellow citizens anymore than the fact that the loss of tax revenue from the wealthy is such a threat entails that only they should be targeted by anti-evasion measures.

Does the analogy with tax also imply that either that the obligation to engage in compulsory public service is conditional on state investment in the development of the skills that a person has acquired or that the duration of compulsory service might reasonably vary according to the degree of investment in the development of their skills that citizens have received? Suppose that an individual was educated and trained as a doctor in another state with no support from the home state to which she now returns, should this exempt her from compulsory public service (or secure her the minimum period of service if differentiation were made on the basis of degree of investment)? If we take ‘fair return on investment’ as the relevant ground, it seems an exemption (or minimum period of service) should be granted. If, however, as I suggest, we view such service as part and parcel of the general and reciprocal associative obligations of citizens, then no such exemption (or minimal period of service) would be justified.

This does not entail that there are no possible grounds for exemption. Thus, for example, where the emigration of particular groups is beneficial to the state in respect of human rights and good governance, it may be reasonable to grant an exemption on the grounds that this benefits all.

It is notable that Brock’s other proposal, that of taxation on all citizens regardless of residence-status is much more appropriate in this respect because it acknowledges that the obligation to pay some form of tax applies equally to all members of the civic community. It is true that emigrants would cease to liable for this taxation if they change their nationality, but that is itself simply an acknowledgment of the fact that some forms of taxation can legitimately construed as a civic obligation rather than simply a residential obligation.

The second problem with Brock’s compulsory service proposal is that it is highly directive. A citizen who has trained as a doctor is required to serve as a doctor even if their university training has instilled in them a deep hatred to medicine. However, if it is the case, as she plausibly argues, that most people with professional qualifications would choose to work in these professions given the option to do so, there is no compelling reason to be so directive. Rather citizens engaging in their compulsory service could be provided with an adequate range of options from which to choose and incentives could be provided for taking up roles of particular importance for which they have the requisite qualifications.

With these two adjustments – civic generality and non-directedness – I see no compelling objection to the public version of Brock’s compulsory service proposal. If compulsory jury service and/or compulsory military service are morally permissible ways of securing certain conditions of a legitimate rights-protecting state, then I submit that the same is true of compulsory civic service of this kind where other states are not acting justly and there are good reasons to hold that it is needed to secure resilient access to human rights and good governance.

In a world in which individuals could reasonably choose to be stateless or could acquire another nationality at will and in which state could strip individuals of their citizenship for breaches of basic civic norms, then I would accept that individuals could legitimately avoid compulsory service by surrendering their citizenship in that same way that members of a religious group can avoid compulsory religious duties by disavowing their membership. But this is neither the world that we inhabit nor, I think, is it a desirable world. In this world, states can reasonably demand of their citizens that they have a shared duty to act to secure one another’s access to human and civic rights and, under conditions of international injustice of the kind that Blake and Brock assume, this duty can encompass requiring they make sacrifices in terms of, for example, postponing their emigration from the state or delaying the pursuit of their careers.

The second way that Brock proposes that compulsory service for the highly skilled might be implemented is through government loans for tertiary education being conditional of civic service following graduation. Brock argues that the same condition that make it legitimate in the USA or UK for students to be granted loans on condition of repayment after graduation, also make it legitimate for a ‘poor but responsible state’ that satisfies the minimal rights-protecting threshold to grant loans on condition of compulsory service. Blake agrees, offering a qualified Yes to the legitimacy of such private contracts (that is, assuming not only a certain level of state legitimacy but also competence on the part of the individual, voluntary agreement, etc.). However, we might reasonably worry that this private contractual proposal is less desirable than a generally applicable compulsory public service requirement on citizens.

We can put the point as a dilemma. If taking out state loans is a necessary condition of admission to university by relevantly qualified persons, then it appears that those seeking to become doctors, lawyers, etc. have no choice but to accept the contract on offer – in which case the fairness of the contract can be reasonably disputed. If taking out state loans is not a necessary condition of admission to university, then it is the case that the burden of compulsory service is liable to fall on the intelligent poor rather than the educated rich – in which case the fairness of access to educational opportunity can be reasonably questioned. By contrast, a presumptive compulsory public service requirement on all citizens at whatever point they complete their educational career enacts the principle of civic equality.

**Conclusion**

I have argued *contra* Blake that the right to territorial exit can be conditioned or delayed and *contra* Brock that highly skilled citizens ought not be singled out for compulsory public service. Instead I have offered a defense of the legitimacy of compulsory public service programmes when these are appropriately generalized across the citizenry as a whole and are non-directive in character, and I have further argued that such programmes are generally preferable to the kind of private contractual agreements that Brock and Blake both admit as permissible practices. This, no doubt, reflects the difference between republican and liberal approaches to this issue but it also indicates that such programmes are continuous with other legitimate state practices of compulsory service that have been, and in many cases are, integral to building or sustaining the capacity and disposition of the state to secure the human rights of its citizens.

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