

The Ethics of Migration Policy Dilemmas

Voluntariness, Mandatory Return and Democratic Legitimacy: A Response to Bauböck and Ruhs (2022)

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Bauböck and Ruhs (2022) tackle an important question that has been central to normative theorising about migration for some time, namely, the permissibility of temporary labour migration programmes (TLMPs). They propose an innovative theoretical framework of democratic legitimacy to address the issues that such programmes raise and conclude that appropriately designed and governed TLMPs are permissible from the perspective of justice.

We see Bauböck and Ruhs's analysis as an important step forward in the debate on TLMPs, especially because of their focus on democratic legitimacy as a crucial variable to include in the normative assessment of such programmes. However, in response to their thought-provoking proposal, we would like to raise a few critical points, especially concerning the conditions necessary for migration to be considered voluntary. We argue that, in the absence of exit options for migrants to leave their condition of temporary residence in the host country, fair representation is not sufficient to guarantee the voluntary nature of migration. We believe that exit options must include not just the possibility of return to the migrant's country of origin but also the possibility to stay in the host country. Thus, a TLMP that denies migrant workers the possibility to access permanent residence could not be considered voluntary even if it was negotiated under the conditions specified by Bauböck and Ruhs.

In their article, Bauböck and Ruhs define TLMPs as policies that grant migrant workers temporary residence and the possibility to access employment but, importantly, without guaranteeing them access to permanent residence. Such programmes usually offer temporary migrants a more restricted set of rights compared to permanent workers. This includes, for example, constraining migrants' right to free choice of employment, access

to the welfare state and opportunities for family reunification, all features that have been considered problematic by theorists and lead many to conclude that TLMPs are, contrary to Bauböck and Ruhs's contention, incompatible with the requirements of justice (see for example [Castles 2006](#); [Lenard and Straehle 2012](#); [Lenard 2012](#); [Boese and Macdonald 2017](#)).

Bauböck and Ruhs frame TLMPs as involving a fundamental dilemma between global and domestic justice, but they reject the view held by many that domestic justice requires abolishing TLMPs and that global justice requires open borders. To reconcile the dilemma, Bauböck and Ruhs propose a new normative framework. In their view, the normative acceptability of TLMPs is not just a matter of social justice but also of democratic legitimacy. On the side of justice, two essential preconditions hold: migrants' basic human rights must be protected and the inclusion in TLMPs must be voluntary. On the democratic legitimacy side, Bauböck and Ruhs stipulate a series of conditions requiring adequate venues for contestation, the protection of political rights in the countries of origin, and fair representation of all affected parties in the design of TLMPs.

We would like to raise here a few critical points concerning the conditions necessary for migration to be considered voluntary. In our previous work on migration and voluntariness, we set out a number of conditions for determining when migration can be considered voluntary ([Ottonelli and Torresi 2013](#)). Amongst other conditions, such as non-coerciveness and appropriate information, we suggested what we call a "sufficiency condition" for voluntariness: that is a migration project is undertaken voluntarily only if the available alternatives at home are good enough for the migrant. However, we claim there that the availability of exit options is also an important requirement in defining when migration is voluntary. This is because, we argue, what makes a condition voluntary is not just the structure of the available options at the moment in which the choice to enter that condition is made, i.e. for migrants the structure of available opportunities in the country of origin when they decide to migrate, but also the permanence of viable alternatives to remaining in that condition, that is, in the case of migrants, the availability of exit options.

Moreover, we believe, an exit option is not guaranteed for migrants by the simple possibility to return to one's country of origin. This is because the economic, social, and personal circumstances that were good enough for fulfilling the sufficiency condition at home may deteriorate over periods of time of residence abroad, such that returning becomes too costly for migrants. This may happen, for example, when migrants become uprooted from their culture, lose connection with the sending society and their personal networks there, such as friends and family, or lose the capacity to procure for themselves the means for a decent life once back home. Other examples include cases where the overall conditions in the country of origin become inhospitable for migrants, due to economic downturns, or social and political transformations. This shows how, in the case of migration, the existence of an 'exit option' must be understood not just as the possibility to exit the host country, for even when this option is actually available it may imply unbearable costs for the migrant. Of course, making a choice and committing to a life plan often imposes costs when one changes one's mind; we recognise that point in general, but we argue that we are coerced into sticking to a plan or choice if the cost of the exit option is unbearable, as it may become the case for temporary migrants over time. An exit option, in these cases, must also include

the substantive option to remain in the host country, and without such option migration fails to count as voluntary despite the negotiated conditions under which the TLMP was defined and decided.

The availability of the option to stay is not only an essential condition of voluntariness, but also a crucial element of the democratic credentials of TLMPs. In their discussion of the 'all affected interests' principle in relation to the conditions for the democratic legitimacy of TLMPs, Bauböck and Ruhs argue that it is not enough that migrants agree to the terms of TLMPs, which, even if not strictly coercive, can be shaped unilaterally by receiving states in virtue of their overwhelming power. Instead, it must be ensured that the interests of destination states, sending states and migrants themselves are "fairly represented" (Bauböck and Ruhs 2022, 20), where the "results of bargaining must not be shaped by the power asymmetries between the three categories of actors" (ibid, 21). Power imbalances rightly worry Bauböck and Ruhs as disruptive of the preconditions of democratic legitimacy; later on in their article, they discuss some possible solutions, such as the involvement of the ILO or the IOM as guarantors of the fair negotiation processes through which the terms of TLMPs are established (ibid, 24). However, if the bargaining positions of the relevant parties in the negotiations are a crucial democratic worry, two questions naturally arise. The first is why the option for temporary migrants to remain after the expiration of their temporary residence and work permits should be taken off the table from the start, rather than being included among the issues that should be discussed in the course of fair negotiations.

The second and even more important question concerns the effects of making that option unavailable on the power balance between the parties affected. Indeed, it can be argued that entering negotiations from that constrained baseline deeply affects migrants' standing and bargaining power, in two main respects. First, from that position they have far fewer means of political leverage than if they could count on the option to stay. Even on the assumption that many of those migrants who enrol in TLMPs will eventually choose to return to their home country, the mere option for them to become permanent residents or even citizens of the host country makes a difference in their position vis-a-vis its political representatives and its public. If they have that option, migrants are potential voters and members of the polity, with the social and political power that comes with it. This is true especially if we compare this arrangement with the condition of temporary migrants when the only alternative to return, at the expiration of their temporary residence and work permits, consists in overstaying as unauthorised residents, with very few rights and little social power. Secondly, if denied the option to stay, temporary migrants enter negotiations not only with fewer means for political leverage but also with a diminished status, that is, the status of workers who are liable to be denied membership even after having become fully cooperating residents of the receiving country. Indeed, we cannot overlook the fact that access to permanent residence and citizenship, especially in the case of foreign workers employed in low-skill jobs, carries—along with important benefits in terms of rights and protections—a strong symbolic meaning, recognising them as worthy of becoming full members of the receiving society. Conversely, their a priori exclusion from the right to access citizenship carries with it a powerful stigma and diminished status. This is especially damaging, since it can be argued that even more than equality of power, equality of status among deliberating parties is one of the most fundamental preconditions of democratic legitimacy.

Bauböck and Ruhs argue that guaranteeing temporary migrants the legal option to stay after the expiration of their visa is self-defeating, because it amounts to including them in permanent immigration programmes; this would be against the interest of receiving states, which would not be motivated to provide opportunities for temporary labour migration ([ibid.](#), 15). However, their argument seems to assume that mandatory return is the only difference between temporary and permanent migration programmes. This is not necessarily the case. The programmes and policies that are addressed to permanent immigrants should aim at building a quick and smooth pathway to permanent membership within the receiving society. TLMPs, on the other hand, should include arrangements and special rights that are conceived for those immigrants who aim at return, such as portability regimes for pensions and social benefits ([Sabates-Wheeler, Koettl and Avato 2018](#); [Holzmann 2018](#); [Holzmann and Wels 2020](#)), financial arrangements and programmes facilitating reintegration and investments back in the home country ([Battistella 2018](#); [Wickramasekara 2019](#)), bi-curricular school programmes for migrants' children ([Espindola & Jacobo-Suárez 2018](#); [Kleyn and Porter 2021](#)), and the like. Leaving temporary migrants the option to stay does not imply putting them on the path of full citizenship from the start, but instead means providing them with a way to transition to permanent immigration even after initially opting for the regime of rights and policies that are meant to facilitate return.

Still, it may be asked why any migrants should choose a temporary migration regime over a permanent one, if the latter were available. The answer is that, contrary to what seems to be a widespread assumption in the mainstream normative debate on the topic, many migrants do aim at return and do not see spending their whole life in a foreign country as their preferred option. Indeed, there is ample sociological evidence that when return is not enforced and a liberal migration regime is in place, migrants tend to eventually return to their country of origin in much higher percentages than when a border regime is in place that constrains them to fixed and predetermined temporary stays ([Newland, Rannveig Mendoza and Terrazas 2008](#); [Constant and Zimmermann 2011](#); [Sinatti 2015](#); [Dustmann and Görlach 2016](#)). At the expiration of their visas, if the time is unsuitable for return, temporary migrants have a strong incentive to remain as unauthorised residents, which tends to forever cage them in the host state and makes their choice more final than if they had the option to leave at a more suitable time and with the perspective of being able to be readmitted in the future ([Cassarino 2014](#); [Massey, Pren and Durand 2016](#); [Roberts, Menjivar and Rodríguez 2017](#)). In other words, as the experiences of guestworker programmes in liberal-democratic countries have taught us in the past ([Castles 1986](#), [Lenard 2012](#)), the enforcement of return at a fixed and predetermined time does not guarantee that temporary migrants will leave, and it can actually make it more likely that they will remain as unauthorised residents. On the other hand, the best way to ensure high rates of returns consists in putting in place adequate measures and benefits that meet the common aspiration of many migrants to eventually return to their home country. This means that leaving temporary migrants the option to stay is not only implied by the requirement that TLMPs be voluntarily chosen, and by the democratic credentials of the processes through which their terms are negotiated, but might also be in the best interest of receiving countries.

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About the “Dilemmas” project

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