The Ethical Significance of Migrating Health Professionals' Legitimate Expectations: Canadian and Australian Pathways to Nowhere?

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Introduction

The migration of professionals to fill service gaps in developed countries is a well-established phenomenon. Destination countries typically offer migrants a more minimal ensemble of rights than normal citizens, raising well-known ethical concerns. However, another important ethical dimension is concerned less with the substance of the rights on offer, and more on the *stability* of migrants' employment and accreditation systems – their pathways to professional practice. When a country encourages health professional migration through promising pathways, and then shatters migrants' expectations by subsequently removing or radically changing employment and accreditation systems, they create 'pathways to nowhere'. We investigate this concern as it emerges in the Canadian and Australian recruitment of migrant health professionals. Drawing on the rule of law literature demonstrating the ethical importance of states' establishing and fulfilling legitimate expectations, we argue that states

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aiming to attract migrant health professionals need to create, clarify, and then vindicate, migrant professionals' legitimate expectations.

We begin in Section 1 with a description of the current situation, including the WHO Global Code of Practice (1.1), the institutions of the global migrant health professional (MHP) recruitment system (1.2), and the ways that recent changes in Australian and Canadian systems have given rise to 'pathways to nowhere' (1.3). Section 2 unpacks the resulting concerns by exploring the ethical literature on legitimate expectations and considering the ways this applies to state's duties to MHPs. Section 3 considers two potential objections.

1. The Path to Nowhere in Canada and Australia

1.1 WHO Global Code of Practice on the International Recruitment of Health Personnel

The current era of professional globalisation has produced a global surge in the international mobility of health professionals, and the predominant flow of MHPs has been from developing countries to, between, and within countries in the developed world. Rising concern about the ethical status and sustainability of uncoordinated, large-scale *ad hoc* developed world recruitment practices, and especially their effect on developing world health systems, led to the development of international codes of practice for overseas health professional recruitment in recent decades (OECD, 2010; WHO, 2006; Willets & Martineau, 2004). A shared desire to unify these various international codes culminated in the adoption by World Health Organization (WHO) Member States at the 63rd World Health Assembly in May 2010 of the *WHO Global Code of Practice on the International Recruitment of Health Personnel* ('the Code'). Australia, the United States, the United Kingdom and Canada – the four dominant developed world recruiters – have adopted the Code, which, *inter alia*, requests that signatories designate a responsible national authority which reports at regular

intervals on progress with respect to the implementation of the Code's principles (WHO, 2010, pp. 9-12).

The Code was drafted in response to emerging and continuing global shortages of health professionals in both developed and developing world health systems, and to the threat this shortage poses for both the provision of health services in general and the ability of developing countries to meet health-related targets of multilateral development agreements. As such, the Code is intended 'to establish and promote voluntary principles and practices for the ethical international recruitment of health personnel, taking into account the rights, obligations and expectations of source countries, destination countries and migrant health personnel' (WHO, 2010, pp. 2-3).

The Code's guiding principles are stated in article 3.5, which establishes transparency, fairness and sustainability as the defining ethical ideals for international health personnel recruitment (WHO, 2010, p. 5). Adopted at national government level by member states, the Code is global in scope; yet responsibility for planning, implementation, execution, and day-to-day administration and oversight of international health professional recruitment regimes in the developed world is subnational, falling on institutions such as state, provincial and local health agencies, regulators, professional organisations and health sector employers. It is notable that ethical guidelines such as those represented in the Code have in the past been seen by critical reviewers to be abstract, rigid, and ineffective, and to lack grounding and support within a sustainable governance regime (Buchan, 2010; Buchan & McPake, 2007; Willets & Martineau, 2004). Research studies conducted since the Code's implementation tend to bear out these concerns (Bourgeault, Labonte, Packer, Runnels, & Murphy, 2016; Brugha & Crowe, 2015; Edge & Hoffman, 2013; Tam, Edge, & Hoffman, 2016).

1.2 The global MHP recruitment system from an institutional perspective

The global MHP recruitment system is complex, dynamic, and multi-layered. Overarching international-scale elements, including ethical codes, multilateral and bilateral legal instruments and transnational institutional settings, are determined at an international political level, but these global ‘top-down’ elements are ultimately aimed at influencing a great number of individual subnational and local ethical decisions across a vast and complex global-scale multi-institutional landscape, much of which occurs at and between stakeholders from the ‘bottom-up’ both inside and between countries (Ransome & Sampford, 2012). Yet governments, their agencies, and other institutional stakeholders represent a broad range of different interests, and operate in the light of their own mandates, norms, legal rules and institutional settings. Top-down prescriptions derived from global principles meet a complex array of bottom-up functions, responsibilities, interests, priorities, limitations and loyalties operating across global, regional, multilateral, bilateral, national, subnational and individual levels (Ransome & Sampford, 2012, pp. 47-48). At a direct individual level, MHPs themselves represent a unique and central group: their personal circumstances and prospects, interests and expectations stand to be directly and profoundly affected by the decisions and actions of those within the system who influence and control their pathways to employment (Connell & Walton-Roberts, 2016; Kingma, 2008, 2018; Xu & Zhang, 2005).

At subnational institutional levels in both source and destination countries there are many interests represented, both directly and indirectly, in recruitment regimes, and a distinct lack of awareness of the Code has been noted at this level (Edge & Hoffman, 2013; Tam et al., 2016). Health agencies and facilities in destination countries are directly responsible for the planning and execution of international health personnel recruitment practices in an institutional environment in which many different, competing, and often conflicting official and unofficial, formal and informal obligations, commitments and loyalties operate within

and between institutions (Ransome & Sampford, 2012, pp. 49-50). These agencies and facilities operate under legislative and professional regulatory rules and procedures set by national and provincial governments and regulatory bodies, and within established public and private sector managerial and operational cultures, where health personnel interests are collectively represented by professional associations and workers' unions at local health facility, agency, state and national levels (Ransome & Sampford, 2012). To the extent that agencies at the subnational level are concerned about health and other human rights, they are focussed on the health of their citizens, constituents, clients, customers and patients.

Recruiters, migration agents, educational institutions in destination and source countries, source country health systems, and other government agencies and NGOs also represent various differently-motivated interests affected by recruitment regimes at the subnational institutional level, and bring their influence to bear on recruitment policy formulation and practice through negotiation and lobbying efforts (Ransome & Sampford, 2012). National governments, on the other hand, may generally be expected to act in their own national interest, whereas global institutions such as the UN, WHO and OECD operate with a broader set of global ethical and other relevant principles, yet with limited power and resources to directly represent their interests within member countries (Buchan, 2010; Ransome & Sampford, 2012).

1.3 Emerging 'pathways to nowhere' for MHPs in Australia and Canada

In major destination countries such as Canada and Australia, overseas health professional recruitment takes place within a complex and dynamic national institutional landscape – ethical, social, political, legal, economic and historical – that is in each case uniquely arranged and (at least in recent years) in considerable flux (L.-A. Hawthorne, 2014; L. Hawthorne, 2008; Owusu & Sweetman, 2014; Stilwell, Diallo, Zurn, Vujicic, Adams, & Dal Poz, 2004). Major source countries, too, are differentiated by widely varying domestic

conditions, and can be divided broadly into three categories of official response to the emigration of domestically-trained health professionals: those who are very concerned about effects on domestic health system sustainability, such as Ireland, Singapore and many countries in the global ‘South’; those governments who are more sanguine, such as China and India (Bourgeault et al., 2016, p. 122); and those who intentionally pursue the export of health professionals, such as the Philippines (L.-A. Hawthorne, 2014, p. 128).

Variable prospects

In Australia, there is significant variability in employment prospects for MHPs post-arrival. For example, Australian Medical Council (AMC) examination outcomes for doctors are highly differentiated by country of origin: results are especially poor for candidates from non-English speaking backgrounds, and numbers of employer sponsored immigrant doctors from English speaking backgrounds have recently grown strongly whilst those from South Asia, have dropped (L.-A. Hawthorne, 2014). No doubt, there are genuine patient safety issues with respect to language and cultural competency at work here (see below, and Sect.3.2), but the final result sees an observable triple effect in play: developed world source countries with genuine concerns for their health systems, such as Ireland, are losing their health professionals to Australia, while qualified health professionals from the developing world are both lost to their (in many cases desperately struggling) domestic health systems, and are now failing to find accreditation for equivalent employment in Australia (L.-A. Hawthorne, 2014).

The historically fluid pattern of health professional migration into Australia has now developed into six well-defined pathways for MHPs: temporary sponsored migration, which numerically dominates; permanent skilled migration; the study-migration pathway; trans-Tasman migration from New Zealand; spouse and family migration; and humanitarian migration – with members of the latter two categories being ‘unscreened in advance for human capital attributes,’ and at disproportionate risk of occupational displacement and skills

loss (L.-A. Hawthorne, 2014, p. 115).¹ The Australian system of pathways for MHPs, dominated as it is by temporary visa positions, is characterised by strict professional registration and competency requirements, including English language testing, designed to protect patient safety and ensure effective integration into a well-functioning healthcare system (Elkin, 2015; B. McGrath, 2004; P. McGrath, Henderson, & Holewa, 2013; P. McGrath, Henderson, Tamargo, & Holewa, 2012), and restrictive conditions attached to work rights – for example, the ability to tie visa entry conditions and pathways to permanent residency to specific locations and areas of need within the Australian health system (L.-A. Hawthorne, 2014, pp. 113, 120-121). In addition, the privatised nature of Australian MHP pathways is notable, with temporary employer-sponsored migrants having priority over State-sponsored and traditional independent points-based visa applicants (L.-A. Hawthorne, 2014, p. 120). Within this context, there has been significant innovation in pathways to registration and practice for MHPs, including the ‘Competent Authority’ and ‘Workplace-Based Assessment’ pathway for doctors, and the development of nurse bridging programs. There has also been a boom in the study-migration pathway, with dramatically better employment outcomes when compared with overseas-trained MHPs (L.-A. Hawthorne, 2014, pp. 124-125). Evidence points to starkly varying employment outcomes for different MHP pathways, where, for example, in 2011 the study-migration pathway resulted in 99% of medical graduates gaining employment within four months, compared with just 57% of all MHPs with medical qualifications – and 66% of nurses, 40% of dentists, and 32% of pharmacists – gaining employment in their field within five years (Hawthorne, 2014, pp.116, 125).

The combination of these shifting and usually opaque standards and pathways, is that Australia-bound MHPs would frequently have expectations of passing the requirements but often ultimately prove incapable of doing so. The concern here is not that Australia *itself* risks becoming a pathway to nowhere, as shown by the reliability of the study-migration path, but

rather than specific pathways for certain cohorts lead nowhere. In this case, there are sizable proportions of MHPs with existing qualifications failing to find professional employment even after a considerable period in Australia. While some of these MHPs may have migrated without researching or serious planning about their future professional employment, it is plausible that many of this group undertook this pathway with expectations of future employment.

Emerging 'pathways to nowhere'

The policy landscape for immigrant health professional recruitment in Australia and Canada has transformed in recent years from perceived undersupply to potential oversupply (Birrell, 2018, p. 6). In both countries – but via different instruments in distinctively different circumstances – pathways to professional practice have become more difficult for immigrant health professionals from traditional source countries (L.-A. Hawthorne, 2014; Owusu & Sweetman, 2014). For immigrant doctors in Canada, restrictive access to medical places in combination with minimal private sector medicine; minimal and reducing access to resident medical places reserved for immigrant doctors (with a majority going now to returning Canadians trained overseas (Owusu & Sweetman, 2014, pp. 146, 149-152)); and new barriers such as the reduction of conditional licensure options between successful Medical Council of Canada (MCC) certification and employment access, have resulted in pathways to nowhere for immigrant health professionals seeking to follow historical routes to professional practice (Owusu & Sweetman, 2014; Sinclair, 2017).

Canada's health professional recruitment system, and therefore the trajectory of MHPs into the country, differs in important respects from the open, partially privatised, and demand-driven Australian MHP recruitment market. In Canada, an uncoordinated 'single-payer' provincial government-run public health system operates for medically necessary services, muting labour market dynamics in favour of centralized provincial control (Owusu &

Sweetman, 2014, p. 136). Under this system, for example, provinces determine medical school and immigrant doctor residency numbers, and ration medical school (for the former) and postgraduate training (for the latter) places, resulting in lower-than-OECD-average per capita physician numbers, and unaddressed problems with geographic maldistribution (Owusu & Sweetman, 2014, pp. 136-137). Moreover, since a 2002 federal legislative change which eliminated an occupations-in-demand points test in favour of a more generalised education, language and age-based points system, immigration of overseas health professionals into Canada increased, although maldistribution problems have remained, and MHPs face ‘expensive and time-consuming’ mandatory education, accreditation, and registration processes, through which they are significantly less likely to pass than domestic graduates (L. Hawthorne, 2008; Owusu & Sweetman, 2014, pp. 138-148, 150-154). In addition, due to the fact that many health professions in Canada are regulated via independent professional colleges subject to provincial legislation, pathways to licensure and practice for MHPs – despite sporadic and usually uncoordinated efforts across various provincial and federal bureaucracies to redress problems of inequitable access – remain ‘both opaque and difficult’ (Owusu & Sweetman, 2014, p. 149). Thus, MHPs in Canada can enter the country, and select a (geographical, employment, education) pathway, with an expectation of progressing through the process to eventual accreditation and practice. However, the opacity of the inter-tangled governance systems, the shifting policies and priorities of the various agencies, and the challenging standard of shifting educational requirements (especially for those from non-English-speaking backgrounds) combine to shatter those expectations.

The results can be vividly seen in Sinclair’s (2017) recent exploration of the personal experiences of fifteen immigrant doctors from Africa, the Middle East, South America, Asia, Eastern Europe and the West Indies, denied the opportunity to practise medicine but qualified for medical recertification in Canada. Arriving highly motivated, anticipating the opportunity

to build a new life and contribute as new citizens to Canada, and seeking ‘coveted positions earmarked for immigrant doctors’, these MHPs were instead faced with ‘costs, frustration, humiliation, embarrassment and low-income levels’ (Sinclair, 2017, pp. 137-138, 166). As might be expected, the fear, frustration and helplessness were greatest for those MHPs who had been in the situation for longer (Sinclair, 2017, pp. 168-169). Perhaps most telling, in terms of shattered expectations, was that most participants felt they had been ‘tricked into believing that there are jobs in Canada for foreign doctors; that, if they pass the Canadian exams, they will be eligible for a license to practise’ (Sinclair, 2017, p. 170).

Similarly, in Australia, recent legislative changes have had the effect of making it more difficult for health professionals from traditional source countries to gain a foothold, and have made that foothold, when gained, less secure (Dutton, 2017; L. Hawthorne, Harrap, & Diocera, 2018). In 2017, Australia’s existing 457 temporary visa system – under which MHPs were traditionally hired – was abolished, effective March 2018, and a new system of temporary visas with more restrictive conditions was introduced. Importantly, the strategic use of transitional arrangements and grandfathering provisions served to mitigate important aspects of the disruption to existing practitioners’ pathways and expectations. More generally, however, there has been significant growth in the number of domestic medical graduates under the aegis of a national ‘self-sustainability’ policy. These domestic graduates compete with immigrant doctors and displace them from clinical training places and desirable placements – making the pathways that include such waystations more difficult to complete (Buchan, Naccarella, & Brooks, 2011; Mason, 2013). Finally, overseas-trained doctors holding temporary work rights are recruited in significant numbers by rural and regional health districts suffering workforce shortages that domestically-trained doctors are unwilling to fill (L.-A. Hawthorne, 2014; Mason, 2013). This change in the distribution of available work can cause unforeseen problems for some MHPs – such as those whose partners rely on

the employment opportunities of big cities, or who require access to international airports for family reasons.

A concrete example of these frustrated pathways occurred with respect to the initial tolerance given to MHPs to practice in designated rural areas without sitting local professional exams (Grindlay, 2018). Recently, the perceived need became less urgent, and MHPs were required to sit the exam. A grace period of several years was allowed – a noteworthy mechanism which is often an effective protector of legitimate expectations insofar as it gives stakeholders time to plan around new regulatory requirements. However, in cases where a new hurdle is introduced, if that hurdle turns out to be far more difficult than would have been ordinarily anticipated, and ultimately presents what for some foreign doctors (often from non-English-speaking backgrounds) turns out to be an almost insurmountable obstacle, then there remains a threat to legitimate expectations. In the event, the finishing of the grace period has seen award-winning doctors serving in rural areas forced to give up practice (Grindlay, 2018). Increasingly, therefore, Australia risks offering ‘pathways to nowhere’ for MHPs (Health and Ageing Standing Committee, 2012).

2. The ethical significance of legitimate expectations

2.1 The importance of creating and vindicating reasonable expectations

The rule of law carries many benefits for citizens, but one of the most significant sources of moral support for it – and one of the explicit reasons for it possessing its signature properties – is its capacity to establish and fulfil citizen’s legitimate expectations.² At the beginning of the nineteenth century, Jeremy Bentham (1778/1802) argued that establishing security of expectations – especially for property – was law’s pre-eminent function, given the profound benefits to individuals and societies this provided. More recently, Lon Fuller’s (1969, pp. 35-37) classic canons on law-making included constraints on making retrospective law (the principle of prospective-ness), and changing the law too quickly (the principle of stability).³ Both these conditions allow citizens

to comply with the law – but Fuller is clear that their significance extends to establishing and fulfilling citizens’ legitimate expectations about, and secure reliance upon, the law, and the important moral benefits this facilitates. He highlights in particular the importance of avoiding thwarting or adding unforeseen burdens to people’s actions, and of providing a stable framework for decision-making about, and the pursuit of, life goals (Fuller, 1969, pp. 60, 80, 205-219).

Legitimate expectations about governmental action, policy or rule X, include the following constitutive features:

- *Epistemic factor*: X is reasonably believed by subjects to be very likely or almost certain to occur – that is, X has rational reason to believe X;
- *Axiological (motivational/normative) factor*: The subject values the fact that X will occur, usually because X plays a role in a larger action or project undertaken by, and intrinsically or instrumentally valuable to, the subject;
- *Stability factor*: Subjects have held their belief in X long enough to begin planning and acting on its basis;⁴
- *Responsibility factor*: The entity that can perform or dictate the performance of X is itself the one responsible for creating the subject’s expectation that X will be performed (Brown, 2017). This factor ties in with the epistemic condition: the genuine reasons the subject has for the expectation must be grounded in the performance and communications of the authority.

The first two factors are central to expectations as understood in the psychological literature. Miceli and Castelfranchi (2002, pp. 336-337) refer to such expectations as ‘hope-casts’, a combination of epistemic prediction (forecast) and the desire for that prediction to be accurate (hope). They posit that hope-casts, even those without legal or even cultural

imprimatur, are necessarily perceived as normative. Subjects feel that their hope-casts *ought to come true*.

These four factors are routinely present in most developed legal regimes (Sampford, 2006, pp. 98-99). In the standard case, the government through its legislature is responsible for passing the law, and its adherence to rule of law values (including clarity and publicity) establishes the expectation. Once laid down in law, subjects plan their affairs in reliance on that law, and desire its continuance so that their plans are not derailed. As such, citizens hold reasonable and long-standing beliefs about the law's existing and future state (epistemic and stability condition), they value the vindication of those beliefs through the law's stability (axiological condition), and the government created those beliefs (responsibility condition).

Of course, while there are good reasons for respecting citizen's expectations, these reasons are not always decisive. States can deliberately highlight areas of law (such as tax law) where expectations should be mitigated, and stakeholders will expect increased flexibility and dynamism in those areas (Sampford, 2006).⁵

But these areas of flexibility and dynamism tend to lie at the margins of citizens' legal entitlements, allowing the system as a whole to establish and fulfil expectations about the legal superstructure governing each subject's life. The benefits of such a system can be seen if we consider the circumstances of people (on the one hand) who have expectations set down but not fulfilled by their state, and (on the other) who have no expectations to rely on at all (Raz, 2011, p. 222).

Consider first the harms to citizens who don't have their legitimate expectations fulfilled. The most visible harm suffered by these citizens is the sting of disappointment (Bentham, 1978/1802, p. 49; 2013/1795, p. 292). Once they begin to count on their expectations being filled, they will see the violation of those expectations as a loss, and they will feel it, and

respond to it, more urgently than they would a deprivation of a potential gain or acquisition. Psychologists phrase this by saying that goals based on expectations are *maintenance* goals rather than *acquisition* goals: the subject sees the vindication of her expectations as her due, something that simply maintains her current situation (Miceli & Castelfranchi, 2002, p. 346).

Lying beneath this powerful subjective experience is a material loss. Having relied on their expectations about the law, the citizens will have made decisions, undertaken actions, invested resources, shouldered hardships, expended labour and so on. The unexpected change in law can thwart these actions and the goals they aimed to pursue, potentially wasting the time, effort and resources invested (Fuller, 1969, pp. 60, 80). In undermining the results and costs of the subject's activities, such changes impact on her autonomy – that is, the extent to which her life is the product of her intentional decisions, life-plans and life-goals. The more the 'rules of the game' shift in unpredictable directions, the less her long-term plans can secure her life goals. This is reflected in the principle of equity in which it is unconscionable to refuse to act as you had promised if you knew that others had acted on the basis of your promise and would suffer loss if you did not act in line with your commitment.⁶

Even a 'one-off' violation of legitimate expectations – and even if it happens to another person – may make a citizen doubt the general accuracy of their similar expectations (Bentham, 1978/1802). This leads us into the second circumstance – one that can carry even more serious human costs.

An array of harms beset subjects living in a political milieu that provides them with only limited legitimate expectations. Such a situation facilitates a different sort of material loss. Without expectations about future entitlements, the incentives for prudence, productive labour, enterprise, investment and education are greatly curtailed (Bentham, 1978/1802, pp. 43, 50). Citizens are unlikely to devote precious energies to enterprises likely to be undone by

an abrupt change in the rules. Collectively and individually, they lose the prosperity that stable expectations can fuel.

Equally, as the capacity to inform their decisions with reasonable expectations about costs, risks, outcomes and opportunities diminishes, so too does the subject's capacity for autonomously governing their life. In this case, the threat to autonomy is not of citizens developing life-plans that are laid to waste by rule-changes. Instead, the futility and impossibility of making such plans precludes their being made in the first place.

Subjectively, citizens without stable expectations for their future security are liable to be anxious and fearful, knowing that any projects they do pursue – and even the reliable provision of their most basic liberties and needs – may be thwarted (Bentham, 1978/1802, p. 54).

Finally, such an environment impacts upon the character of the citizenry itself. With no reasonable expectation of reward for problem-solving, hard work, planning and prudence, there is no consistent structure within which such valuable human capabilities may be rewarded, practised, honed and learned (Bentham, 1978/1802, pp. 54-56). In this respect, having expectations is critical to basic human intentionality. Without them, learned helplessness, fatalism and disengagement reign (Miceli & Castelfranchi, 2002, pp. 348, 355, 356).

Conversely, a state governed by the rule of law, that establishes expectations and fulfils them, avoids these harms to human wellbeing. More positively, it empowers autonomy. With established expectations about the law, citizens can make informed decisions about their career, education, goals, relationships and more. Of course, the law's stability does not guarantee success in any given endeavour. However, it creates a known superstructure within which risks and rewards may be approached with an informed eye, and within which a citizen

has considerable scope to govern their own lives in an integrated way, allowing their hopes to manifest as plans, actions and finally results (Bentham, 1978/1802, p. 54; Fuller, 1969, pp. 205, 209-210; Raz, 2011, pp. 215-221).

An additional benefit to stable expectations lies in the phenomenon of preference adaptation. As John Stuart Mill (1861/2001, p. 13) once observed, the very foundation of a life of happiness is ‘not to expect more from life than it is capable of bestowing’. One of the advantages of having a stable legal structure to one’s life is that it allows citizens to make rational judgments about their future prospects, and to adapt their preferences towards that reality. As the ancient Hellenistic philosophers – particularly the Epicureans and the Stoics – observed, adapting one’s desires towards what is in one’s control not only enhances one’s happiness, but also empowers one’s freedom, as it limits the capacity of others to dominate one’s life, through their possession of the objects of one’s desire (Breakey, 2010, p. 35). The harsh sting of disappointment noted earlier by Bentham occurs when one has sensibly adapted one’s preferences to one’s understanding of a situation – and then that understanding is violated (Breakey, 2010, pp. 37-38).

Summing up, the stability of law and its essential quality of establishing and respecting legitimate expectations provides considerable human goods – whether weighed on utilitarian (felt-happiness), deontological (autonomy) or virtue-based (human character and capabilities) bases.

Of course, the situation is not an all-or-nothing dichotomy. Almost all functioning systems of law create some expectations that allow for a degree of life-planning. (Though tyrannical regimes deliberately generate legal ambiguity in order to create terror in the repressed population (Murphy, 2005, pp. 252-253)). As well, every functioning system of law allows for changes in law – preventing the ossification, and ultimately the ineffectiveness, of the law

(Fuller, 1969, p. 60; Sampford, 2006).⁷ Furthermore, no legal system can ever deliver certainty, and it is unreasonable to expect it. Even if the same rules are applied to an individual that were discoverable when they first relied on them, the rules may have been subject to judicial interpretation or development, and they may have to be squared with other rules. Ultimately, the gains in happiness, autonomy and virtue derived from respect for legitimate expectations are significant, but they are not exhaustive or necessarily compelling in any given case. The gains provide reason for (a) slowness and incrementalism in changing laws (perhaps including grandfathering, grace periods, or transitional measures when swift change is necessary (Colla, 2017, p. 302)); (b) effective communication about likely future changes, or at least warnings that a certain area of law is in flux; (c) a stability to the core of fundamental entitlements (e.g., those that protect basic human rights), even if tinkering at the margins is allowed; and finally, (d) ensuring that discretionary authority (such as exercised by public servants) occurs predictably and on the basis of settled reasons, and within certain boundaries. As David Luban (2010, p. 35) puts it, “*either* the law must not change too rapidly (the procedural clause), *or* the changes must be minor and easily conformed to (the substantive clause).”

Summing up, if states exercise jurisdiction over a person, and they create an expectation – especially one that is central to a person’s life and planning – then they have a *prima facie* ethical obligation to fulfil that expectation.

2.2 Does this moral requirement apply to foreigners?

The above-noted benefits supply a strong moral case for states to commit to the rule of law protection of legitimate expectations, at least for their own subjects. But what of the subjects *of other countries*? What, in terms of legitimate expectations, does one country owe to others’ citizens?

Consider a case where a destination country refuses to establish *any* expectations for migrating health professionals from other countries. It may even be explicit in this refusal. The radical uncertainty created by this posture may prevent a foreign professional coming, even if this policy provides a legal opportunity for them to do so. This stymieing of their migration may be a loss for the professional in that there could have been valuable opportunities for work, and a loss for the destination country because its population could have used the health professional's expertise. If only it had created expectations, both losses could have been avoided.

However, the health professional does not suffer the sting of disappointment and loss, nor the enervation of living in a lawless society, because it is *their* government, rather than the potential destination government, that controls and vindicates (or not) their most important life expectations about, for example, personal liberties and freedoms, employment rights, welfare entitlements and property rights. The failure of a foreign government to give consistent policy may be a source of frustration, but as a general matter – provided the foreigner stays in their country and does not emigrate – it does not undermine their autonomy, character or subjective disappointment in any substantial manner. That said, in at least some modern societies, movement to other countries may stand as a reasonable expectation, for example insofar as it is a matter of treaty (e.g., the Refugee Convention or the EU treaties on the movement of people).⁸

2.3 This moral requirement *does* apply to migrants

Once a migrant professional makes the decision to emigrate, is granted a visa and enters the destination country, the moral situation changes dramatically. Now it is the destination country's willingness and capability to establish and respect legitimate expectations that has the most substantial effects on the subject's happiness and autonomy.

In this case, the two worrisome problem areas noted above arise; namely, cases where the state avoids creating legitimate expectations for migrant professionals, and cases where it does create, or allow the creation of, legitimate expectations, but does not subsequently fulfil them.

In the first case, the state refuses to create expectations, but nevertheless attracts, and allows entry to, migrant health professionals (who are presumably desperate or ill-informed, if they take this risk). The likely outcomes here are of those above-noted harms to those with no established expectations. The state accepts the MHPs into its jurisdiction, but then fails to treat them in a way that is vital to their subjective wellbeing and autonomy. True, the migrants might otherwise, and in other areas, enjoy reliance on the law (such as with respect to their free speech or property rights). But they do not enjoy legitimate expectations on a central part of their lives – namely, their capacity for profitable employment in a profession in which they have developed (and often spent considerable resources developing) expertise. Professions also attract a sense of pride and identity (Iseda, 2008). Denial of accreditation and work in their profession can therefore also undermine the MHPs' sense of significance and social importance. In this case, it morally behoves the state to establish expectations, so that these people under its jurisdiction and subject to its law can plan their lives appropriately.

In the second case, the state creates expectations (deliberately or accidentally), which migrant professionals act on. However, the state then fails to fulfil those expectations. This is the fault in the 'path to nowhere'. Migrants make plans on an expectation about the system, take large-scale and life-changing actions (migrating to a new country or province, pursuing education, etc.) and begin down pathways that they expect to lead to accreditation and employment. However, these paths ultimately have no destination – leading to subjective disappointment, wasted investments, missed opportunities elsewhere and a lack of personal control over a crucial area of their life. This is a violation of the obligation defended above, that if states

exercise jurisdiction over a person, and they create an expectation – especially one that is central to a person’s life and planning – then they have a prima facie obligation to fulfil it.

These concerns remain separate from the question of whether the state provides the migrant with specific rights and entitlements (Ruhs, 2013). The subject who has only limited rights to employment (such as if their migrant status was tied to a single employer) may be vulnerable, and have their prospects straitened. These present distinct and important areas of concern.

But so long as such conditions were settled and known at the beginning of the process, and not changed in any substantive way, then there is at least something that can be said for them: the migrant could make an informed choice whether to accept the condition, safe in the knowledge that he or she can rely upon this entitlement not subsequently being changed to his or her disadvantage. Because this concern with legitimate expectations is distinct from the content of the law – a procedural issue of legal change rather than a substantive issue of law’s content⁹ – migrant professionals need to be protected not only in terms of the actual legal rights they are offered, but also in terms of the protection of their legitimate expectations.

Institutional realization

Rule of law benefits are paradigmatically secured through use of legislation (though also through relatively stable bodies of judge-made law, state policies or bureaucratic practices and ethical constraints on discretion). When legitimate expectations are secured through bureaucratic activities or regulatory bodies, these are required and empowered to act on the bases, for the purposes, and within the restraints laid down by their implementing legislation. But in the case of these paths to nowhere, we have major life events being dictated by decentralized decision-makers fulfilling their own institutional priorities. As we saw in Section 1, these decisions may be made by institutional office-holders a vast distance from legislative chambers, including at the hospital, professional body, or education administrative level. In this case, the *types* of expectations normally secured by legislation, or at least by

state bureaucracies who are bound by statutory law to view the affected citizens as major stakeholders, are now hostage to agents with little to no mandate to these fulfil expectations – and, indeed, who may not even be cognizant of those expectations. For this reason, national governments need to work hard to live up to these moral obligations, curating the overall system to make sure the MHP’s legitimate expectations are fulfilled.

Even if fulfilling these expectations is not feasible, there are other ways forward. One response that mitigates some of the problems of frustrated expectations would be to ensure, so far as possible, that all official recognitions, achievements and qualifications regarding professional education, experience and accreditation are valid for as many regions (and even countries) as possible. Doing so means that if the government needs to make changes to its MHP regime, these alterations may have comparatively less impact, because the MHP’s progress through the various pathways previously on offer will be recognized in other jurisdictions. Still, the capacity to realise this response must not be overplayed, especially beyond national borders. The variability and complexity of different health systems, and education systems, limit how far standardization can be effectively pursued.

Perhaps a more promising response would be for national governments to expand their existing investments in the types of support and training (including in language and cultural competencies) that would empower MHPs to shift from one pathway to another, or to successfully pass new competency or capability hurdles placed on an existing pathway. (To be fair, both countries have a history of comparatively substantial investments in language and employment settlement services (L. Hawthorne, 2008).) Expanding and targeting this support could mitigate the life costs to MHPs of the impositions of demanding new standards by providing resources to tackle them. At the same time, it would allow governments to respond to changes in the health system and the ongoing need to deliver quality, safe services.

3. Potential objections

3.1 The need for flexibility

Consider the following objection to national governments establishing and respecting legitimate expectations for migrant professionals. States are entitled to retain flexibility in this space. Fuller (1969, pp. 212-213) explicitly observes how the use of a law-based system (as distinct from one of managerial edict) carries costs for the authority. Through the use of law, the authorities bind themselves and limit their future options and flexibility, even as they bind the citizenry. Indeed, the use of MHPs often occurs precisely to respond to a perceived shortfall in the relevant expert professionals (perhaps in a specific geographical area). This shortfall might be only temporary, or it may not be known by the authority how long it will last. As such, migrant professional work is one area where policy flexibility is especially desirable from the government standpoint – ‘desirable’ in the sense that it will allow the authority to more effectively, quickly and efficiently deliver services to citizens in need.

If this flexibility is denied the government, then it will incur greater costs from the migration policy, and therefore be less likely to pursue it at all. Yet (this counter-argument may continue), even an ultra-flexible policy in the destination country may be better for *all concerned*. Better for the country, insofar as it attains the necessary expert service-providers when and where it needs them. And better – at least potentially – for the migrant professional herself, as compared with her continued existence and practice in the source country. As such – the conclusion may be asserted – states are morally entitled to retain their flexibility in this space.

We offer three counter-arguments to this objection.

First, a key part of the justification for such flexibility is that the migrant can make an informed choice that their prospects in the destination country are better than the source

country. Obviously, for some level of flexibility this judgment can be made. Equally obviously, there comes a point where flexibility makes genuinely informed decision-making impossible, and the migrant is effectively plunging into the unknown. In this respect, a straitening of certain rights – so long as it is clearly communicated, stable and respected – may be less of an infraction on human autonomy than a more generous but shifting policy. Informed consent to the former, but not the latter, is possible for the prospective MHP.

Second, there is a level of basic respect owed to all humans, or at least owed to all those over whom the state exercises jurisdiction (especially when it is responsible for exercising jurisdiction, by deliberately enticing and allowing them into the country). Just as we would not accept some infractions on migrant's basic human rights (such as their freedom of religion), so too egregious violations of their legitimate expectations, or forcing them to live without such expectations over a central part of their lives and identities, should not be countenanced. This concern may also be given a comparative inflection; that is, there are serious ethical and justice implications in the creation of a two-tier society, where the differences in basic respect under the law differ profoundly for citizens versus migrants. Just societies have reasons to avoid, or at least mitigate, such an outcome.

Finally, as well as having an interest in flexibility, the destination country may have a strong interest in stability. This will attract future professionals who will come to learn and work in the country. Given that the better professionals are likely to have choices as to where they go, they are more likely to go to places where they can be reasonably confident they can develop their careers. This is related to the long-standing point about the rule of law being in the interests of the rulers. If the rules are clear in advance, then this affects the behaviour of the ruled. If nobody knows what the ruler will do, then it is impossible for subjects to mould their behaviour to fit in with the ruler's plans by taking advantage of the rules and avoiding behaviour that makes them fall foul of those rules.

3.2 ‘Self-made pathways’

A second objection observes that not all the expectations about pathways held by migrant professionals are intentionally created by the destination government. To the contrary, at least some pathways (possibly including some ‘pathways to nowhere’) may be *self-made*. This objection rightly draws attention to the fact that there is a continuum of responsibility for the development of expectations. Some expectations may be deliberately created, others negligently or recklessly created. In general, the less the government in question is the agent eliciting the expectations, the lower the moral responsibility of the government to vindicate those expectations (Sampford, 2006, p. 251). At the lowest point on the continuum are ‘self-made’ pathways. In such cases, a particular pathway, and the expectation of its prospects, may ‘make sense’ to the subject, but is more the product of their wishful thinking, or entrepreneurial inventiveness, rather than an explicit process developed and declared by the government. We saw above in the Australian context that MHPs often expect to be able to navigate the pathways to professional accreditation and employment, but ultimately can fail to do so. Yet it may reasonably be asked whether these expectations were established by the Australian government, or whether they are more self-made. Patient safety and cultural-language competence bears notice here. Governments and professional organizations may alter MHP pathways on the basis of legitimate concerns about public protection (Elkin, 2015; P. McGrath, Henderson, & Holewa, 2013). But at least some pathways may have been self-created in the sense of MHPs overestimating their own linguistic and cultural competencies. Well-known psychological mechanisms like self-enhancement bias tend to make people prone to misperceiving their own levels of competence and safety (Svenson, 1981), meaning at least some MHPs might form mistaken expectations about how substantial the legitimate hurdles to practice will be on a given pathway. While such self-made pathways may be extremely valuable to those that are progressing upon them, they are less reasonable as

rational beliefs and they are less attributable to the state. Hence, both the epistemic and responsibility conditions (from Section 2.1) are weaker in this case.

That much admitted, states can still be responsible for ‘allowing’ the formation of expectations that they are able to explicitly disavow. Legal subjects tend to develop expectations about issues important to them. The development of such expectations is a normal part of being a psychologically well-balanced, intentional human being (Miceli & Castelfranchi, 2002). Fuller (1969) notes the tendency even of subjects in an explicitly managerial (not rule-based) environment to interpret managerial directives as if they were stable rules. As Tummolini et al (2013, p. 593) argue, “*allowing* a belief or an action is *to have the power to disconfirm another’s belief* (which is a reason to believe something else or to act in some way) *and forbearing to disconfirm it*.”¹⁰ Having failed to disconfirm the belief, in the knowledge that others are relying upon it, an agent incurs a prima facie obligation to act in accordance with that belief (Tummolini et al., 2013, p. 594). This parallels the operation of equity, where the key issue is whether the person whose conduct has led to the expectation is aware that others are relying on it. Brown (2017, p. 456) applies a similar idea to states’ responsibility for legitimate expectations:

Ordinarily we cannot hold individual citizens, businesses, or non-governmental organisations responsible for causing expectations by omission. ... But administrative agencies of government are not the same in that regard: they do have a duty of concern not to let us form expectations of future courses of action without taking reasonable steps to prevent us from forming what they know to be unreliable expectations.

In the case of MHPs, there are two additional reasons to think that governments, if they want to absolve themselves of responsibility for living up to migrant's expectations, need to clearly and explicitly repudiate those expectations at the earliest possible moment.

First, the government is not a disinterested party when it comes to the raising of expectations.¹¹ To the contrary, from a self-interested point of view the government gains when expectations are raised sufficiently to entice migrant professionals to migrate to the country. Provided they have some employment (and therefore are not a welfare cost to the public purse), this cohort represent a valuable and flexible resource to switch on or off, through activation or removal of pathways, education and accreditation, to deal with service shortfalls as they arise. For this reason, state agents and organs may be tempted to implicitly raise expectations, in order to encourage valuable migration activities. (States often behave as largely self-interested entities in such matters (Ruhs, 2013).) Placing a strong onus on the government to be clear and explicit about pathways prevents it profiting (perhaps negligently, if not intentionally) off expectations it allows to arise.

Second, as we saw in Section 1, many destination countries, including Australia and Canada, are signatories of the WHO Code and its three guiding principles of transparency, fairness, and sustainability. The Code matters in two ways to our discussion here. As a first matter, its principles supply an independent moral reason (on the basis of commitment and integrity) for establishing and vindicating MHP expectations – living up to your publicly stated values is a hallmark of personal and institutional integrity (Breakey, Cadman, & Sampford, 2015). Ever-changing conditions placed on migrant's accreditation and employment opportunities – resulting in greater precariousness and vulnerability – mean that immigrant health professionals in both countries may be treated unfairly compared with their incumbent Australian and Canadian colleagues. In this way, the Code's fairness principle implicates not only the MHPs' substantive entitlements, but also their capacity to autonomously govern and

manage their lives through a stable legal superstructure. So too, the transparency principle requires that migrants have access to clear knowledge about their conditions and prospects of employment in the destination country.

But (and this is the second matter) as well as creating an independent reason to treat migrants fairly and transparently, the Code *is itself a source of expectation*. In making these declarations, states encourage the belief that migrants can rely on fair and transparent treatment if they make the commitment to migrate. This belief, based on state's messaging through the Code, is epistemically reasonable, highly valued, and stems from the explicit declarations of the state responsible for vindicating that belief: it is thus a legitimate expectation.

In summation, it is true that some MHP pathways may be substantially self-created. If these pathways work by exploiting loopholes in the law, or acting directly against legislative intention, then the beliefs about the stability and continuance of these pathways will not count as 'legitimate expectations'. However, outside these narrow cases, governments have a wide responsibility to take care both with expectations they establish, and expectations they allow to arise.

Conclusion

Attention on the ethical vulnerability of MHPs typically focuses on the substantive entitlements held – or not held – by MHPs. This is a natural and important source of concern. However, we have argued it is not exhaustive of the ethical issues in play. MHPs, on the basis of utility- and autonomy-based ethical principles, deserve to enjoy the 'rule of law' benefits of having their legitimate expectations vindicated. Federal and state actors at all levels should ensure that MHPs are not being encouraged – or even 'tricked' – into making life-shaping decisions on the basis of misleading and deceptive information and declarations. Having

enticed MHPs to immigrate, government agencies need to guard against, and mitigate so far as possible (including through transitional arrangements like grandfathering provisions), the human costs of pathways to nowhere.

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Endnotes

¹ Strictly speaking, child migrants to Australia that subsequently attain domestic qualifications employ a final (seventh) pathway.

² The rule of law possesses other benefits too. But even the quality of ensuring the possibility of compliance (a key concern of theorists like Fuller and Raz) includes some goods that come from the creation and fulfilment of legitimate expectations. The fact that it is possible for citizens to comply with the law (and therefore not be punished) allows those citizens to rely on their capacity to avoid punishment – and to know that others are likely to behave similarly, allowing citizens to rely on others' law-abidingness.

³ Because Fuller's first condition is that rules must be general – including that they extend forward through time – this condition also implicates the significance of expectations.

⁴ 'Stability' invokes the notion that warning about expectations being frustrated is only fully acceptable when it happens before any party has "taken any action or passed up any valuable

opportunity” (Scanlon, 1990, p. 206). The notion of stability requires that enough time has passed for actions and decision-making to occur.

⁵ As well as the need for flexibility even in the face of legitimate expectations, Sampford (2006) points out that in some cases the expectation that one will be treated according to rules reasonably discoverable at the time of the conduct is not legitimate. For example, a criminal who relies on the rule of unanimous verdicts (and has a method for ably exploiting this rule to ensure he is erroneously acquitted) has no legitimate expectation that is worthy of respect.

⁶ (Sampford, 2006, pp. 98-101). While the extension of private law to public law is a matter for caution, both these areas of law reflect the importance of legitimate expectations and reliance on them. See (Sampford, 2012).

⁷ That said, Bentham’s (1788/1802) overriding commitment to the security of expectations led him to resist changes to property regimes even when the existing regimes were manifestly suboptimal from Bentham’s utilitarian point of view.

⁸ A strong cosmopolitan might go further, holding that states do have a duty to establish consistent expectations even when these are directed to those in other countries. But even here, the duty cannot be as morally substantial as the one owed by the source-country government, for this latter controls its citizens’ most fundamental liberties and expectations.

⁹ Fuller’s principles are often phrased as ‘procedural’. While there is debate over whether this is an apt term for all his principles, it is clearly appropriate in terms of stability (Luban, 2010, p. 35).

¹⁰ Scanlon (1990, p. 204) invoked a similar principle, allowing that if one intentionally *or negligently* led someone to expect one would X, that one thereby derives obligations pertaining to X.

¹¹ It bears notice that professional organizations, like medical colleges, that provide accreditation to MHPs also possess a worrying conflict of interest, as their members benefit

from the increased demand for their services when restrictions for MHPs are tightened and service supply is thereby constrained.

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