SYMPOSIUM

MIGRATION AND JUSTICE FOR PEOPLE ON THE MOVE

AN INADEQUATE HUMAN RIGHTS REGIME: ON GILLIAN BROCK'S UNJUSTIFIED OPTIMISM

BY

CHRISTOPHER BERTRAM

© 2021 – *Philosophy and Public Issues (New Series)*, Vol. 11, No. 1 (2021): 11-27
Luiss University Press
E-ISSN 2240-7987 | P-ISSN 1591-0660

[THIS PAGE INTENTIONALLY LEFT BLANK]

An Inadequate Human Rights Regime: On Gillian Brock's Unjustified Optimism

Christopher Bertram

There is much to admire, and, indeed, to endorse in Gillian Brock's *Justice for People on the Move*. In particular, her argument that the legitimacy of individual states and their authority to regulate human mobility and settlement across borders is interdependent with the legitimacy of the global order and that both depend on securing and protecting human rights, is one that I think of as broadly correct, at least provisionally. But although the form of Brock's view seems right, I have quite extensive reservations about the content. I find that Brock's view is too statist in its ideal picture of global governance: it presupposes the division of the world into discrete national states and provides no vantage point from which to question this, so that migrant interests must find a place in the normative space that remains. Brock's use of our human rights practice as a criterion of legitimacy contains a fatal ambivalence. Brock's realist impulse to rely on actual human rights practice rather than on some philosopher's ideal of justice or human rights gives her venture an admirable concreteness and practicality, but I

 Philosophy and Public Issues (New Series), Vol. 11, No. 1 (2021): 11-27
Luiss University Press
E-ISSN 2240-7987 | P-ISSN 1591-0660

shall argue that this human rights practice fails to provide migrants with the protections to their basic interests that Brock hopes for and reflects in its very construction the voice of states and their sedentary populations at the expense of migrants' own views.

In what follows, I try to place Brock on the realist-utopian spectrum, situating her close to the realist end. I then outline her conception of international legitimacy and make some remarks about the difficulties it faces. I then focus my attention on Brock's framework of human-rights based governance for migration, including on the recent Global Compact and suggest that Brock is far too sanguine about the prospects for justice for migrants based on such a regime. I shall inevitably neglect much of the interesting detail that Brock provides on discrete topics within the political philosophy of migration, such as on refugees or temporary labour migrants, and I apologise for not being able to give these the consideration they warrant.

I

Brock's is a "realist" view

There has been much work in political philosophy in recent years on the supposed distinction between ideal and non-ideal theory and on related contrasts, such as that between allegedly moralistic (perhaps utopian) and realistic approaches. Many of these disagreements seem to hang on different judgements about what we should take as given when we write about how the world should be. At the most "realistic" end, we may be quite close to the perspective of the politician, who has little choice but to take widespread public beliefs and values or considerations of who actually controls the media or other resources as quite hard constraints on what ought to be done; at the most utopian end, perhaps only the laws of physics stand in the way of possible social

arrangements. There is a lot of space in between these extremes and it is open to the political philosopher or theorist to entertain different scenarios within their writing, as when John Rawls distinguishes between what ought to be done on the assumption that everyone is motivated by and disposed to comply with principles of justice (his conception of ideal theory) and what we should do when some are not (non-ideal theory).[1] Here, I do not use these terms with precision, but simply to indicate a spectrum of approaches.

In my own book on the political philosophy of migration (Bertram 2018), I adopt an approach somewhat similar to Rawls's twin-track one. On the one hand I ask what kind of global migration regime might be justifiable to everyone it is to apply to, on the other I ask what states might be justly permitted to do in the absence of such a global system. In the first case, I proceed mainly negatively, showing that many people would have reason to reject the existing system because of the threat it poses to their most vital interests. I argue that it is not possible to sketch the detail of a just global migration regime in advance of hearing the actual voices of stakeholders including those migrants who lack an effective voice under the current order. I nevertheless speculate about what might emerge from such a conversation and the kinds of reasons that might be in play. I then ask what states might be permitted to do here and now in the absence of such a regime. I argue that if they are to acquire even a provisional right to regulate migration, states have duties to work with others to bring about a just global mobility system, duties to anticipate in their domestic immigration systems some features of a future global system, and duties not to undermine the paltry bits of global migration governance that we have now, such as the 1951 Refugee

[1] See, for example, Rawls 1999, 4-5.

Convention. States that fail to do these things lack the right to regulate and people have rights to resist their unjust policies.

I have permitted myself the indulgence of self-summary in order to situate Brock's view against my own. She eschews utopian theorizing and rather collapses the more ideal and more realistic perspectives together rather than keeping them separate. According to Brock, we actually already have the basics of a just global mobility regime at hand and it is to be located in international human rights practice. Specifically, it is to be located in the documents that comprise the International Human Rights Bill, together with other treaties, conventions and projects such as the Refugee Convention and, more recently, the Global Compact on Migration. There is no need to speculate about what all parties would ideally agree to as a system of international governance because the system already exists as a matter of practice, and the problem we face is to make it effective for the benefit of "people on the move" by reforming it in various ways, such as to allow migrants access to fair adjudicative processes.

Two initial observations are worth making. The first is that the ideal envisaged by Brock would be a considerable improvement on what we have now. Under the regime she favours, many people would be treated more fairly than they currently are: the world would be a better place. The second is that Brock's vision is nevertheless extremely conservative: it takes the state system and, indeed, state sovereignty, as a given and screens from our consideration more radically cosmopolitan views about how the world ought to be. Worlds of open borders or no borders, where governing authorities manage their local territories without exclusion in the manner that, say, city authorities do within states at present, are not on the table. Brock's project, then, is about an improvement to the current system that does not challenge the legitimacy of the sovereign state in principle, but conditions that

legitimacy on compliance with some already existent international legal standards. Indeed, Brock's view not only retains the basic status of states within the global order but actually requires cleaned-up versions of such states as its constitutive components.

II

Legitimacy

At the centre of Gillian Brock's view of a just migration regime is an account of state legitimacy (chapter 3), which is a necessary condition for a right to self-determination that includes a right to regulate. As she presents it, the full legitimacy of any individual state depends on its membership in a state system the legitimacy of which depends, in turn, on the legitimacy of its component states. At the core of this view is a conception of human rights. This conception, derived from Charles Beitz, sees human rights not as timeless or natural rights applying to humans in all times and places, but as a practice embedded in specific documents and institutions with the aim of making it possible for all human beings now to participate in the goods and practices of modern life (46). The most important components of this human rights practice are the documents comprising the International Human Rights Bill, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. To these we can add other documents such as the Refugee Convention and the Global Compact for Safe, Orderly and Regular Migration as well as regional institutions like the European Convention on Human Rights.

It is possible to distinguish between the formal and the substantive content of this picture. So, for example, we might accept the structure of Brock's account of legitimacy, with its relationship between individual state legitimacy and the legitimacy of the state system, while disagreeing with her account of what it is, substantively, that makes states legitimate, or, perhaps, agreeing in general terms with the idea that legitimacy depends on respecting and upholding human rights, while disagreeing with her view of what human rights are or with her elaboration of the content of her preferred human rights regime.

Brock sets out three conditions: an Internal Requirement (LC1), a System Requirement (LC2) and a Contribution Requirement (LC3). The Internal Requirement is the requirement that states respect the human rights of their own citizens (38); the System Requirement is the requirement that states are a part of a legitimate state system; and the Contribution Requirement is a requirement that states meet various positive obligations to ensure that the legitimate state system continues to function. Brock often expresses her view as being that these three conditions are individually necessary (and jointly sufficient?) for state legitimacy. If this were right it would follow that the failure of any one of these three conditions would undermine the right of states to self-determination and, hence, would rob them of the authority to regulate immigration onto their territories. But this would be a very implausible conclusion. To cite one example of why this is so, it would seem to be the case that the failure of any state, anywhere, participating in the international system to meet the Internal Requirement (perhaps there are human rights abuses in Kazakhstan) would undermine the legitimate authority of states everywhere because their legitimacy depends on the legitimacy of a state system that would disappear as soon as one of its component parts failed to be legitimate.

Wisely, then, Brock introduces a backup or failsafe condition that can insulate, somewhat, the legitimacy of individual states from failures elsewhere. She does this by introducing legitimacy correction mechanisms to the state system as a whole. Such legitimacy correction mechanisms include provision for refugees and other forcibly displaced persons and, perhaps, provision for external intervention to restore the internal legitimacy of states that are oppressing their citizens. These correction mechanisms are, in turn, generators of positive duties on the parts on states that form part of the Contribution Requirement, that is to say, states have duties not only to comply with these corrective mechanisms but also provide material support to ensure their adequate functioning.

Each of the three legitimacy conditions can be realised to a greater or lesser degree and combining three distinct conditions into an overall judgement can be tricky. Take the internal legitimacy condition as an example to illustrate this. We obviously don't want it to be the case that any violation of human rights on the territory of the state means that the condition is not satisfied because, in the real world, there will predictably be some lapses even by generally compliant states. Some of these lapses will be corrected or punished but, again predictably, some will not. This might lead us to adopt some kind of threshold view, such that we take the Internal Requirement to be satisfied once human rights standards have been met to some degree or, alternatively, a scalar view, such that a state is legitimate or has legitimate authority to the degree that it satisfies the Internal Requirement. On a scalar view, both Sweden and the United States might possess some legitimate authority, but Sweden would have more legitimate authority than the United States.

Neither the threshold not the scalar approach is without problems. If we adopt a threshold view in which meeting the threshold on each of the three legitimacy conditions is necessary,

then it is easy, for example, to imagine a state that easily meets the internal requirement and the system requirement but where citizens are so reluctant to fund overseas development aid that it fails, just, to meet the overall legitimacy threshold. If we adopt a scalar view then we may have problems, and, crucially citizens may have problems, in judging what the authority of a, say, 57 per cent legitimate state amounts to in a concrete situation where obedience to the law and independent moral judgement are in conflict. There may be further difficult questions to address about how far performance on one dimension of legitimacy can compensate for relatively poor performance on another, where, perhaps, a state with an admirable record in upholding international human rights norms adopts controversial restrictions on domestic freedoms in the face of a perceived terrorist threat.

The way in which Brock ties state legitimacy not just to conformity with human rights abstractly considered but to the particular documents that have been agreed as international conventions also leads to some problems with her approach. One reason is that there may be components of those very treaties and conventions that states and their citizens may find objectionable on something like human rights grounds. An obvious example of this arises around the question of free speech and hate speech. International conventions often modify an absolutist conception of free speech in order to specify that hate speech is not protected and, indeed, such documents may impose an obligation on states to outlaw hate speech. This requirement is a problem for a country like the United States with its First Amendment guarantee of free speech together with surrounding jurisprudence that makes impossible the kinds of prohibition on hate speech envisaged by these international instruments. Since the United States cannot, as a practical matter, conform to the requirements of international human rights law as Brock takes them to be, and probably would not do so even if it could, should we therefore accept the

judgement that, at least in this respect, the United States and any other state with a similar understanding of the right to free speech and expression, fails to be legitimate?

I think we ought to be reluctant to embrace such a conclusion. A first reason, which I only mention, is that there is an unclarity about what conformity with the human rights regime requires given that the treaties are voluntarily entered into and include the possibility of derogation from or non-ratification of specific component parts. So there is a real question about whether a state that chooses not to be bound by a specific requirement is therefore in violation. The general drift of Brock's writing suggests that they are, but her emphasis on voluntary agreement as one of the reasons for the legitimacy of the human rights order leaves open the possibility for doubt. The second reason is that Brock's insistence on the specifics of international human rights practice as a condition of legitimacy crowds out another possibility, namely that we ought to judge state legitimacy by an altogether vaguer standard. On such a view, for each of a basic set of human rights, we might accept quite a wide degree of variation in how they are interpreted by different political communities. We might say that any decent liberal society must protect something like the Rawlsian basic liberties, for example, but be willing to allow of particular states that their regimes, although quite different from one another in their particulars, meet that broad standard.

III

Human rights

Brock's principal criterion for state and system legitimacy, then, is conformity with human rights. As I have mentioned above, for Brock "human rights" here refers to a recent set of global practices associated with a number of treaties and conventions. One thing

that is worth drawing immediate attention to is that the global instruments that make up this regime are not the result of some cosmopolitan democratic process that gives voice to all those affected or finds some way of registering their interests, but are rather agreements among states, forged at particular historical moments, and reflecting the interests of powerful states and the balance among them. Parts of the human rights regime arose in the immediate aftermath of the Second World War and the Holocaust. Other elements were forged or developed against the background of Cold War ideological competition between West and East. Now it is true that these various treaties and conventions are the best we have actually got and to the degree that there is a consensus setting a standard that state actors must uphold, that is an advance on an alternative under which sovereign states are able to do what they like within their boundaries, where the principal international norms are merely of non-aggression and non-interference. So provisionally, tactically, there are good reasons, including reasons of justice to uphold this human rights framework, particularly against states seeking to water it down or other forces seeking to undermine it. But while being willing to resist state backsliding, we should resist the idea that this "human rights" framework is the basis for regulating mobility from an impartial perspective.

While Brock holds up our shared human rights practice as her standard for legitimacy, she also has a rather simplistic method of judging what that human rights practice actually is and is excessively sanguine about the prospect of that practice bringing real changes for migrants. Her account of human rights practice mainly takes the form of looking at the key international human rights documents and judging on the basis of the apparent meaning of the texts whether this or that policy is a violation.[2] This is a

[2] One example, on p. 209 is her assertion that existing treaties already require family reunification and admission of asylum claimants.

tempting thing to do, and activists, journalists and academics often make claims that this or that state policy or practice is a violation of human rights on such a basis. The difficulty this has, though, is that human rights practice is not simply a matter of what the texts appear to say but also about the interpretation of those norms and their relative importance by institutions. A good example here is family life. Human rights treaties and conventions have much to say about the importance and sanctity of family life, the vital interests of children and so forth. At the same time, immigration law often has terrible implications for families and children, for example by separating children from their parents. Accordingly, one might think that immigration laws that have such effects are plainly in violation of what is required by international human rights norms and that states that continue to conduct themselves in such a manner fail a basic test of legitimacy.

But such a judgement would be premature. Courts such as the European Court of Human Rights and the UK Supreme Court (bound by the Human Rights Act that incorporates the European Convention directly into UK law) have had to address matters such as whether the deportation of foreign criminals may be blocked by considerations of family life and whether the UK's minimum income requirement to sponsor family members for UK residence is unlawful, given its predictable and known effects in splitting up families. Although courts have sometimes disagreed with governments on getting the right balance between, say, the interests of children on the one hand and state interests in law enforcement or tax and welfare policy on the other, they have generally judged that there are legitimate state interests against which these prima facie human rights claims must be balanced and in the light of which they must be interpreted. And this has led courts, independent tribunals charged with giving people due process and enforcing their human rights, to make judgements that endorse as permissible state policies that the ordinary person in the

street might judge to violate things like a right to family life. So one objection to Brock's human rights based framework is that it will often not deliver the negative judgements on state legitimacy that she is hoping for, even when migrants have access to the legal processes that the advocates extending.

Another worry concerns the effectiveness of this human rights framework in affording protection for the actual human rights of those at the sharp end of state practice. While it is disappointing if courts judge an appalling state practice to be human rights compliant, many of the worst abuses don't even see their day in court because they are too hard for victims to make use of. In chapter 5 of the book, "Irregular Migration", Brock discusses the UK's Windrush scandal. This concerns long-term lawful UK residents who became victims of the UK's "hostile environment" policy. The policy has as its central goal to make life so unpleasant for irregular migrants that they self-deport and to conscript civil society, including firms, landlords, hospitals and universities into the business of immigration control. People who cannot prove their right to reside in the UK have been denied access to a range of public services as well as to the housing rental market and the labour market. As a result many people who were not "irregular migrants" at all, but long-term lawful residents who lack the documentary support the policy called for, have been refused health care, made homeless, or lost their jobs. Others, having come to the attention of the authorities, have been detained, some have been deported, and others having left the country on holiday have been denied readmission. The Windrush scandal is a series of massive human rights violations taking place in a country that has incorporated the European Convention on Human Rights in domestic law and on the basis of legislation that ministers have certified as human rights compliant. When it came to detecting, exposing and correcting these human rights violations the legal human rights mechanisms were entirely ineffective and played no

role: campaigners and journalists who exposed the truth and embarrassed the UK government politically were the leading force in partially correcting the injustice. The hostile environment legislation that was the proximate cause of the scandal remains in force to this day.[3]

The reality of human rights practice presents a dilemma to an approach such as Brock's. She wants to use this practice as a standard to constrain state unilateralism in migration matters, but, as we have seen, the practice as currently institutionalized and the principles as interpreted by those institutions actually fails constrain states effectively. It looks like she faces a choice between, on the one hand, accepting that something looking very like the status quo -- perhaps stripped of the most flagrant abuses -- meets the test of justice and, on the other, giving up on the reality of human rights practice and being willing to judge state actions directly on the basis of whether they match with more free floating principles (some of which are paid lip service to in the documents she references).

IV

The Global Compact as an example of the limits of human rights practice

Although Brock believes that it does not go far enough in some respects, Brock puts the Global Compact for Safe, Orderly and Regular Migration at the centre of her vision for a just migration system. She notes that all 193 members of the United Nations agreed to the Compact in July 2018 but notes that "In a subsequent vote at the UN General Assembly five countries voted against the

[3] For an account from one of the journalists who helped bring the scandal to public attention, see Gentleman 2019.

compact (USA, Israel, Hungary, Czech Republic, and Poland)" (196 fn 5), with others abstaining. In fact, there is significant opposition to the Compact from the populist right internationally. While Brock hails the Compact as a significant step towards fairer migration, it is worth noting that many of the co-operative framework provisions that she lists are actually about giving states greater control over migrants and strengthening their abilities to enforce immigration controls. For example, objective 9 is about strengthening the international response to the smuggling of migrants, objective 10 is an anti-trafficking clause, objective 11 concerns inter-state co-ordination to manage borders, objective 12 sets standards for screening, assessment and referral and objective 21 is about facilitating return and readmission. While some of these articles have the appearance of humanitarian concern – after all, people smuggling and human trafficking sound and, and often are, bad – migration scholars are aware that these are often pretexts for strengthened control measures that states use to exclude forced migrants from their territories and that inter-state co-operation and return and readmission are often screens used by wealthier states to co-opt poorer ones into their externalized border enforcement practices. Moreover, far from being a neutral framework that seeks to manage the normal human practices of mobility and migration in a way that is fair to all concerned, the Compact normalizes the idea that humans are sedentary creatures who should get on with their lives within the boundaries of their home state and frames migration as exceptional and aberrant rather than as choice that people might reasonably and rationally make for themselves.

Brock holds up the Compact as an example of what is possible in this area, writing "The fact that 85 per cent of states have adopted it is at least one kind of rather compelling answer to the worry that states will not be inclined to bring into being the kind of institutional architecture required for a legitimate state system." (224 but nearly identical words are used on 201). Brock asserts, on

the basis of this that, "We have huge support from the world's peoples to make progress in the direction of migration justice" (224). But the problems with these statements are manifest. First, we cannot necessarily infer support from the world's peoples from such an agreement since it is an interstate pact the content of which nearly all states' citizens are totally unaware of (and in the case where they are aware it is probably because they have been whipped up into opposition by right-wing populists). Second, and more significantly, we cannot infer from states agreeing to a non-enforceable measure containing symbolic commitments to all kinds of good humanitarian things that there is widespread support from those same states to a just global regime with teeth. It is easy and cheap to put your hand up in favour of something that sound generally good if you know that there is little realistic prospect that you will be required to actually do something, so, foreseeably, here and elsewhere, lots of people and states are willing to do exactly this.

A third point is worth mentioning, at the risk of repetition. Insofar as the Global Compact is the object of agreement among "peoples" or the states that purport to represent them, it fails to be based on the input or consent of migrants themselves. People who are living in a country other than that of their nationality, be that from choice, family reasons, economic necessity, forcible displacement or for any other reason, will not have had a voice in the formulation of the compact. Governments may claim to have their interests at heart but their voice will nearly always be drowned out by that of sedentary majorities on the territory of states. If we think that the regime governing global mobility and migration should be one that is justifiable to all whom it subjects then this is a sketch for a regime that doesn't even pass the really attenuated tests of justification that we inevitably have to make do with. But while leaving migrants voiceless and foregrounding states as the makers of international human rights law, the Global Compact

presupposes the existing state system of division into sovereign polities so that this can't be questioned and reflects state interests in the management of populations at the expense of migrant interests.

Conclusion

Gillian Brock has written a fine book that will inform debates among political philosophers for years to come. The framework she adopts is, at least as a realistic objective for a world of states, a good one in making the legitimacy of individual states interdependent with the legitimacy of the state system as a whole and making the legitimacy of state rights to regulate migration conditional on its conformity to a human rights-guided regime of global migration governance. But Brock's reading of what our current human rights practice is, how close it is to an acceptable ideal, is far too sanguine. The content of that human rights regime does not have the interests of migrants at its heart but rather is the product of inter-state jostling and the reality is that states can too easily conform with the demands that human rights practice makes upon them. For most migrants, the human rights regime is practically inaccessible and, even when they have access to independent and impartial tribunals, often fails to deliver judgements that reliably secure their rights.

University of Bristol

References

Bertram, Christopher. 2018. *Do States Have the Right to Exclude Immigrants?*. Cambridge: Polity Press.

Brock, Gillian. 2020. *Justice for People on the Move: Migration in Challenging Times*. New York, N.Y: Cambridge University Press

Gentleman, Amelia. 2019. *The Windrush Betrayal*. London: Faber.

Rawls, John. 1999. *The Law of Peoples*, Cambridge Mass.: Harvard University Press, 1999.