

# Self-Determination, Human Rights, and Migration

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**ABSTRACT:** Gillian Brock's compelling and richly textured new book aims to set out a human-rights-based framework for thinking about justice in migration. There is much to celebrate in these chapters, not least Brock's masterful effort at weaving together her basic justificatory framework with real-world political concerns. In this article, I query the focus she places on self-determination in setting out the basic normative argument elaborated in Chapters 2, 3, and 9. In particular, I will wonder whether she gives the collective self-determination of a people anything more than instrumental value, and so whether she is able to distance herself from so-called proponents of "open borders."

**KEYWORDS:** Human rights; cosmopolitanism; ethics of immigration.

Gillian Brock's compelling and richly textured new book aims to set out a human-rights-based framework for thinking about justice in migration. The book spans widely: there are chapters applying the main thread of argument to refugees, the US Muslim ban, undocumented migrants, and temporary workers. There is much to celebrate in these chapters, not least Brock's masterful effort at weaving together her basic justificatory framework with real-world political concerns. In this article, I will query the focus she places on self-determination in setting out the basic normative argument elaborated in Chapters 2, 3, and 9. In particular, I will wonder whether she gives the collective self-determination of a people anything more than instrumental value, and so whether she is able to distance herself from so-called proponents of "open borders."

Brock writes: "My position might be characterized as a human rights oriented middle ground between the positions of those who advocate for open borders and their critics."<sup>1</sup> The account is "human rights oriented" because the justification of the state system requires respect and promotion of human rights; the account is a "middle ground" because Brock argues that, as long as states meet their human rights obligations, they can be self-determining, which includes rights to control their borders. In summary, Brock writes, "states . . . have a defensible right to self-determination [as long as they make] relevant progress with regard to the human rights of their citizens and mak[e] sufficient contributions to the maintenance of

a legitimate state system that can secure human rights for all.”<sup>2</sup> But why does meeting human rights standards give states the right to be self-determining? Put another way, what is the argument for self-determination *in the first place*?

Note that it would beg the question to argue that self-determination simply follows from satisfying human rights standards, since human rights standards themselves include such a right (see, e.g., Article 1 of both major international covenants). If the argument had that form, then we could respond: Yes, but why ought human rights standards include state rights to collective self-determination in the first place?

To her credit, Brock does not rely on this strategy. Instead, her argument is straightforwardly functionalist. This is how I interpret it:<sup>3</sup>

1. Groupings of human beings require, as Brock puts it, administrative structures to meet basic human needs.
2. To function well (i.e., to meet basic human needs and standards of justice), such administrative structures must have some control over their borders (i.e., be self-determining with respect to admission).<sup>4</sup>
3. In our world, states function as the relevant administrative structure.
4. Therefore, states have rights to control their borders (i.e., states have rights to self-determination).
5. However, these self-determination rights are not unconditional or unlimited. States must respect human rights in their exercise of rights to self-determination (e.g., vis-à-vis refugees); furthermore, to retain rights to self-determination, the exercise of state power must be justifiable to both insiders and outsiders.
6. States are only justifiable to insiders if they satisfy human rights standards with respect to them. States are only justifiable to outsiders if they contribute meaningfully, at the international level, to maintaining the state system’s legitimacy (by, for example, contributing to human rights protection abroad through development schemes, refraining from the promotion of human rights abuse, and securing an ethos of respect for the practice of human rights).

For our purposes, the key, to my mind, is 2. How extensive is the right to control borders, and hence to exclude would-be immigrants? Note that no appeal is made by Brock to the significance of what we might call collective autonomy. No importance is given to the idea that groups of people may want to protect a collective way of life or the particular historical character of their institutions. The argument does not rest on typical commonplaces about the importance of such ways of life in the literature on “peoplehood,” civic nationalism or constitutional patriotism.<sup>5</sup> Similarly, no normative significance is given to the idea that collectives, under certain circumstances, have rights to freedom of association—rights, that is, to decide with whom to associate and under what conditions.<sup>6</sup> On Brock’s

view, states have rights to self-determination only *because* and *insofar as* (rather than merely *only if*) such rights, when exercised, promote justice and human rights.

The problem with the argument is that it leaves Brock particularly open to the charge that our best understanding of human rights or justice in fact requires open borders. Views that emphasize the significance of collective autonomy do not face such challenges in the same way. They have resources to argue that, for example, demanding obligations of distributive justice only extend among those who share the relevant institutions and/or way of life, or that the right to freedom of movement is justified only for citizens and residents of states given the importance of such movement for maintaining the way of life and/or institutions.<sup>7</sup> Absent such an independent appeal to the importance of collective autonomy, the argument must demonstrate either that justice and human rights do not require open borders (but without appealing to the significance of collective autonomy), or that, even if they do, border control is nonetheless justified by the need to maintain a minimum degree of social control and public goods provision. I will discuss each possibility in turn.

Arguing that justice and human rights do *not* require open borders is made more difficult by the fact that Brock claims that

we should not start from the assumption that states are justified natural units. Rather, the prior question is: How can we justify a world carved up into states (the state system)? The rights states have need justification and cannot just be assumed. And the justification needs to be made in terms that everyone, including and especially those excluded from the state can appreciate as compelling. . . . What kinds of norms governing the relations among persons—among those both inside and outside of particular communities—can be justified from a common standpoint, from a standpoint that both insiders and outsiders can find compelling? . . . One accessible way to get at the relevant perspective is to ask: If people did not know whether they would be insiders or outsiders of particular communities, what kind of justification for the state system might they find compelling?<sup>8</sup>

Following a similar logic, we can ask: If people did not know whether they would be insiders or outsiders of particular communities, would they opt for a right to freedom of movement that is restricted to freedom of movement *within a state* (whatever state one happens to be member) or to *international* freedom of movement? To be sure, current human rights practice only supports the former. But why shouldn't it support the latter instead?

One important argument for why they would support the latter is the following. According to Joseph Carens,

Every reason why one might want to move within a state may also be a reason for moving between states. One might want a job; one might fall in love with someone from another country; one might belong to a religion that has few adherents in one's native state and many in another; one might wish to pursue cultural opportunities that are only available in another land.<sup>9</sup>

Kieran Oberman agrees: "If human rights are to fully protect our freedom to access the full range of life options then we must have a human right to immigrate to other states."<sup>10</sup> If human rights are grounded in *universal* interests in a full

range of life options then don't all states have duties to respect, protect, and fulfill them?<sup>11</sup> And, if they do, then how can they justifiably prevent a French man, for example, from moving to the US to fall in love (i.e., associate) with an American woman, or to practice his religion in an American mosque? It is not clear to me what resources Brock can marshal to resist this line of argument.

Brock sometimes seems to argue that we should not support a human right to international freedom of movement because doing so would undermine the ability of states to protect human rights and provide essential public goods. Brock writes:

A large influx of migrants, without adequate advance warning and time to complete necessary planning, might significantly undermine delivery of essential goods and services, such as capacity to offer adequate education, health care, and law enforcement, all of which are necessary to secure fundamental human rights. Citizens might rightly feel aggrieved if such service delivery falls below what is needed to sustain their basic human rights.<sup>12</sup>

The argument, as stated, is somewhat equivocal. What does it mean to *significantly undermine* the delivery of essential goods? If, as seems to be implied by the passage, to significantly undermine the capacity to deliver goods and services just means to cause a state to become *incapable of protecting human rights to the minimal degree required for legitimacy*, then this sets a very high bar for any exclusion to meet. If, on the other hand, to significantly undermine simply means to *significantly reduce* the capacity of the state to deliver on its human rights promises, then the bar looks much lower. The trouble with the latter reading is that it looks unmotivated: why would such a mere *reduction* (assuming the state was still capable of protecting human rights to a minimal degree) constitute grounds for exclusion? What right do current citizens and residents have to maintain their high degree of human rights provision in the face of would-be immigrants wanting to move?

The problem with the former reading—namely that exclusion is only justified when it would undermine the capacity of the state to protect human rights to some minimal degree—is that it is unclear why it would count as an argument *against* a human right to immigrate. Why not consider it instead as a *qualification* of such a right? There is nothing, after all, in the defense of a human right to immigrate (as defended by Carens or Oberman) that implies that *other* human rights should be sacrificed to give it priority. Indeed, Carens writes:

If a rich country like the United States were simply to open its doors, the number of people from poor countries seeking to immigrate might truly be overwhelming, even if their goals and beliefs posed no threat to national security, or liberal democratic values. Under these conditions, it seems likely that some restrictions on immigration would be justified under the public order principle. But it is important to recall all the qualifications that apply to this. In particular, the need not justify any level of restriction whatsoever or restrictions for other reasons, but only that level of restriction essential to maintain public order.<sup>13</sup>

Oberman, similarly, concedes that public order can be a factor that tilts in the direction of exclusion in an all-things-considered judgment, while reminding his readers that such a concession is really only a qualification. He goes on to say that, while exclusion may be temporarily justified, there are background duties

created by commitment to international free movement to alleviate the burdens associated with it, so as to pave the way for reopening borders as soon as possible.<sup>14</sup>

If the argument thus far is right, then Brock either needs to (a) accept a human right to immigrate along the lines suggested by Carens and Oberman, or (b) find independent grounds for arguing that there is no such right—grounds, that is, that are independent of claims about the value of collective autonomy. I will discuss the possibility of choosing (a) below. First, however, I will canvass the possibility of choosing (b), and ask whether Brock has resources within the account provided in *Justice for People on the Move* for resisting a human right to immigrate.

The most obvious place to look, I believe, is at her list of human needs in Chapter 2. (These needs present the basic bedrock for the human rights later affirmed in the rest of the book.) Among such needs is the need for

*Political self-determination.* Autonomy is a central driver of many further needs, including political self-determination. As the need for autonomy signals, we have central needs to be authors of our own lives, that is, to have some important sphere of control over key decisions about the shape of our lives. The need for some personal control blends into participation in processes that allow collective control over our common affairs as well. While we can derive the importance of the need for political self-determination from the need for autonomy, again this need connects importantly with others as well, notably, with several psychological ones, such as for recognition, connectedness, or esteem.<sup>15</sup>

Might this argument for the *individual* importance of self-determination be extended to the collective in such a way as to resist the pull of the human right to immigrate? I am not sure it can. The problem is that collective self-determination in this thin sense can be exercised to the same degree with more open borders (subject to the public order principle). Because no emphasis is put on the importance of either national belonging, or the particular historical character of shared political institutions, or institutions as the particular historical embodiment of collective authorship of a people over time, there is nothing in the idea of self-determination that cannot apply to any number of new immigrants when added to the general population (especially if such immigrants, as Brock recommends, eventually become full-blown members of the polity).

What difference would accepting (a)—accepting, that is, that there is human right to immigrate—make to the overall argument presented in the book? Many arguments could stay the same, for example, regarding refugees. I will focus on two main differences, the first regarding temporary migrant labor (Ch. 5), and the second regarding a just framework for regular migration (Ch. 9). First, with respect to temporary migrant labor, Brock puts the puzzle (as is common in the literature) as a tough choice between giving migrant laborers access to the domestic labor market but with more restricted access to various social, tax, and welfare benefits, or securing equal treatment for migrant laborers, but with fewer admitted.<sup>16</sup> But if there is a human right to immigrate, then the second choice is not really an option, and the only choice is between open borders and equal rights and open borders and lesser rights. If we also believe that migrants have a human right to equal treatment and non-discrimination, there will not be much room to allow

for more restricted rights (as Brock wants to argue). There is only room for such more restricted rights if we assume that states have some legitimate control over their borders, including, therefore, decisions on what kinds of conditions might be appended to work visas. (Note that, in response, it would seem odd to say that application of a human right to immigrate in cases like these could be *suspended* given our real-world, non-ideal conditions [which include the unwillingness of publics to extend equal treatment]; Brock is rightly adamant that human rights can only be suspended in extreme cases). If Brock endorses open borders, she should argue that anything short of open borders plus equal treatment would constitute a straightforward violation of human rights, and hence open the state up to foreign interference.

Second, Brock could no longer justify even the limited degree of control she defends in her proposed framework for just regular migration (Ch. 9). According to Brock, the following would count as a legitimate response to would-be immigrants excluded from entering:

In any given year the number of applicants that we admit from these first three categories [asylum seekers, resettled refugees, and family reunification] totals about 200,000 people. By our calculation, given our commitments to a range of other important international initiatives and treaties, we can admit a further 200,000 people. These further international commitments include the contributions we must make to various sustainable development initiatives (such as those articulated in the Sustainable Development Goals) and to address climate change by committing to projects that would reduce emissions (as specified in our commitments under the Paris Climate Accord). Relevant to the last issue in particular is our current infrastructural capacity, concerning transportation, energy production, and distribution networks, availability of housing, places in schools, hospitals, and demands on other public facilities and services that we need to make available to ensure residents' human rights are met (while meeting our sustainable development and emissions targets and the like), which is why we can admit only a further 200,000 people per year. Here is the way we have ranked other applications on our point system. Applicants are awarded points for various categories . . .<sup>17</sup>

This kind of response only makes sense if states exercise legitimate control over their borders (in all but bases of extreme necessity *qua* public disorder). If there were a human right to immigrate, then a state's obligations to respect various international agreements, or general concerns with public service provision (short of breakdown), could not be used as grounds for exclusion. And, of course, a points system would also be incompatible for similar reasons.

I have argued that, given her premises, Brock should accept standard arguments for a human right to immigrate (or provide independent reasons to reject them). Her functionalist argument for self-determination, that is, is not enough to rebut standard open borders arguments. I have also suggested some places where this would occasion revisions. I have, however, only touched the very surface of Brock's admirable book in this article; there is much more there that would repay closer attention.

## ENDNOTES

1. Brock 2020, *Justice for People on the Move*, 226.
2. *Ibid.*, 62.
3. Cf. Brock 2020, 25–29, 38–39.
4. See, in particular, 29: “Whether or not we had states, it would be useful to have administrative units, so we might well have good reason to put some in place. And the borders of those units would be somewhat controlled, as they have been throughout history, though perhaps for more benign reasons; namely, to facilitate good planning in bringing about justice in particular communities.”
5. See, e.g., Miller 2016; Song 2018. See also Miller 1995; Smith 2003; Tamir 1995; Habermas 2001; Ingram 1996; Laborde 2002.
6. Cf. Wellman 2008.
7. See, e.g., Miller 1995; Hosein 2013.
8. Brock 2020, 36.
9. Carens 2013, 239.
10. Oberman 2016, 36.
11. Oberman 2016 also provides a convincing response to the idea that, at best, a right to freedom of movement should protect an *adequate* range of life options, which can be fully provided for within any state (for this claim, see Miller 2013). He shows, convincingly I believe, that, if the right to freedom of movement only needs to serve our interest in an adequate range of options, then there would be no objection to restricting internal freedom of movement between the *Länder* of Germany, since each region provides an adequate range of options (as adequate as any state of a similar size).
12. {brock@210}.
13. Carens 1995, 260.
14. Oberman 2016, 51.
15. Brock 2020, 24.
16. Brock 2020, 148ff.
17. Brock 2020, 213–14.

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