Travel bans and COVID-19

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Introduction

In Justice for People on the Move, Gillian Brock helpfully proposes a number of internal and contribution requirements, central to human rights practice, that must constrain states’ exclusion of non-citizens. On her account, failing to meet these requirements would undermine states’ claim to legitimacy. In particular, Brock persuasively shows that the USA’ travel ban on non-citizens from Muslim-majority countries violates the legitimacy constraint. Building on Brock’s framework, I analyse two other types of travel bans. In response to the ongoing coronavirus pandemic, the US first imposed travel bans on travellers from China and Europe to prevent further transmission of the virus. More recently, the US has issued a proclamation that suspends the entry of any immigrants who purportedly risk harming the US labour market in the wake of the COVID-19 outbreak. Would both these travel bans meet Brock’s internal and contribution requirements for state legitimacy?1

I discuss these questions in my response to Brock’s book, which proceeds in this order. I begin in Section 2 by recapping the legitimacy constraints that Brock places on states’ right to exclude non-citizens: specifically, what she calls the ‘internal’ and ‘contribution’ requirements, which focus on states’ role in upholding a robust regime of human rights protections (2020: 34). I then explain Brock’s criticism of the USA’s infamous ‘Muslim ban’, which she performs through the lens of these legitimacy constraints. Next, in Section 3, I expand on two different travel bans that have been imposed in the name of the COVID-19 pandemic and their implications for global migration: bans on travellers from certain geographic regions (which now includes US citizens themselves), and bans on migration on the basis that it will pose a threat to local workers in the period of economic recovery. In Section 4, using Brock’s framework, I evaluate their ethical permissibility. There, I argue that regional travel bans are not only justifiable, but necessary from the perspective of legitimacy, with certain caveats. On the other hand, while travel bans on the basis of ‘economic threat’ might be permissible in theory, the US’s application has been deeply unjust in practice. I conclude in Section 5.

1 I would like to thank Gillian Brock and two anonymous reviewers for their helpful comments and suggestions.

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Brock’s legitimacy constraints on immigration

Legitimacy constraints

Most philosophers have assumed that states have a pro tanto right to exclude non-citizens. The right to exclude is typically justified with reference to the idea of self-determination: a state’s right to decide on its own plans and policies. Equally, however, it is assumed that there must be some limitation on the scope of the state’s right to exclude. For example, even staunch defenders of the right to exclude have acknowledged that states have a (limited) duty to admit refugees, and that they must not engage in immigrant selection on the basis of gender or race.\(^2\) In this vein, Brock notes that in order to have a ‘robust justification’ for the ‘assumed position that states have rights to self-determination, which include reasonably strong rights to control borders’ (2020: 33), states must take steps to actively uphold the legitimacy of the state system that they are part of. In short, a state’s exclusion of non-citizens can only be justified if the state in question succeeds in meeting the requirements for legitimacy.

What conditions, then, must states meet in order to legitimately exercise their right to self-determination? While I cannot do justice to the full complexity of Brock’s framework, I will recap two of her key claims. First of all, states must respect the human rights of their own citizens; Brock terms this the ‘internal requirement’ for legitimacy (2020: 38). For example, a state that enslaves its citizens, deprives them of their right to freedom of expression, or prevents them from engaging in peaceful assembly will lack legitimacy. By extension, it will also lack the legitimate right to control its borders.

At the same time, states are also beholden to a ‘contribution requirement’ (Brock 2020, 38), which makes them responsible for actively contributing towards a state system where nobody’s interests and human rights are neglected. According to the contribution requirement, states must demonstrate their commitment to numerous goals that relate directly to human rights practice. Examples might include the commitment to maintaining an ethos that encourages respect for human rights practice, the commitment to practices of accountability that require states to demonstrate their compliance with human rights to the rest of the international community, a general commitment to refrain from promoting arrangements where respect and protection for human rights are substantially worsened, and finally, a commitment to demonstrating appropriate international concern and undertaking action in response to human rights violations when states have sufficient reason to do so (Brock 2020, 58).

Legitimacy constraints and the ‘Muslim ban’

I now turn to how the above constraints can be used to evaluate the legitimacy of present-day immigration policies. One of the case studies Brock focuses on is the USA’s ongoing ‘Muslim ban’, which was officially implemented in January 2017. The Executive Order ‘banned foreign nationals from seven predominantly Muslim countries from visiting the country for 90 days, suspended entry to the country of all Syrian

\(^2\)See, for example, David Miller’s position on these issues in ‘Immigration: The Case for Limits’. Contemporary Debates in Applied Ethics. Eds. A. I. Cohen and C. H. Wellman. Oxford: Blackwell Publishing Ltd, 2013.
refugees indefinitely, and prohibited any other refugees from coming into the country for 120 days’ (ACLU Washington). Despite a series of legal obstructions and challenges, a new version of the ‘Muslim ban’ was unveiled in September 2017, this time blocking travel from six Muslim-majority countries, but also including North Koreans and certain government officials from Venezuela, and upheld by the Supreme Court in 2018 (ibid).

To see how they function in practice, I outline what Brock’s legitimacy constraints have to say about the ‘Muslim ban’. It is quite clear, on her account, that the ‘Muslim ban’ would fall short of both the internal and contribution requirements. As a starting point, it can be said to disrespect the human rights of American citizens in several ways. By outright discriminating against persons on the basis of their religion, it violates clauses in all major human rights treaties that ban religious discrimination and demand the elimination of religious hatred and intolerance (Brock 2020, 77–78). Furthermore, through its expression of contemptuous attitudes towards Muslims, the ‘Muslim ban’ is likely to validate existing hostile attitudes towards American Muslims and harm their right to pursue their freedom of religion without fear of violent attacks and harassment (Brock 2020, 81).

Similarly, as far as contribution requirements go, the ‘Muslim ban’ violates the ethos of human rights documents, which seek to ‘treat each human being as an individual who has dignity and whose interests deserve consideration’ (Brock 2020, 83). It also speaks against a commitment to accountability practices that demonstrate compliance with human rights to the rest of the international community, as it is essentially a form of unjustifiable discrimination against nations with large Muslim populations (Brock 2020, 84). Finally, the ‘Muslim ban’ threatens to worsen the condition of human rights outside of the US more broadly; not only by emboldening direct bigotry against Muslims, but also providing the type of ammunition that Islamist extremists seek to promote violence against Christians, Americans, and ‘Westerners’ (Brock 2020, 86). In sum, Brock’s legitimacy constraints provide us with a persuasive explanation for the injustice of the ‘Muslim ban’.

**COVID-19 and travel bans**

I now want to apply these legitimacy constraints to other cases. While travel bans are usually associated with wrongful discrimination, following the COVID-19 outbreak in 2020, travel bans have become a widely-accepted and enthusiastically-defended part of the immigration landscape. For example, due to the relatively uncontrolled spread of the coronavirus in the US, US passport holders have been banned from entering at least 33 other countries. Before I proceed to my normative analysis of COVID 19-related travel bans, it is important that we first understand what they look like. I elaborate on two types of travel bans below.

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3Aside from the ‘Muslim ban’, think of the Chinese Exclusion Act of 1882, which prohibited the immigration of all Chinese labourers.
Regional travel bans

In the absence of a vaccine, or any other viable solution to the pandemic, regional travel bans are now a mainstream practice that have been widely embraced around the world. According to the website for the Centers for Disease Control and Prevention (2020), foreign nationals who have been in certain countries for the past 14 days ‘may not enter the USA’. The list is extensive, ranging from China, Iran and Brazil to the entire European Schengen area. Exceptions apply to US citizens and lawful permanent residents, as well as ‘certain family members and other individuals who meet specified exceptions’, but they must enter the US through one of 15 specified airports (ibid). In another example, as of September 5 2020, New Zealand has closed its borders to almost all travellers to ‘help stop the spread of COVID-19’, apart from New Zealand citizens and ‘people with a critical purpose to travel’ (New Zealand Immigration). The list of ‘critical purpose reasons to travel’ might apply to family members of New Zealand citizens or residents who do not hold relationship-based visas, the partners and dependent children of New Zealand work or student visa holders, or critical health workers (e.g. internationally qualified nurses or paramedics and ambulance workers). So far, New Zealand’s seemingly harsh policy has proven to be extremely effective in bringing it close to eliminating the virus from the country.

Notably, as an alternative to heavily restricted borders, a number of countries have proposed ‘travel bubbles’ where citizens of two or more countries may enjoy freedom of movement within the ‘bubble’. This idea was first implemented by Estonia, Latvia, and Lithuania, allowing citizens of the Baltic states to move freely between the three countries without having to quarantine for 14 days (unlike other EU nations) and remains under consideration by Australia and New Zealand. It is difficult to foresee, however, how widely-implemented travel bubbles will eventually be.

Travel bans for the purpose of economic recovery

Quite apart from travel bans to limit the spread of the coronavirus, the US has implemented further restrictions on immigration. On 22 April 2020, the Trump administration issued a ‘Proclamation Suspending Entry of Immigrants Who Present Risk to the U.S. Labor Market During the Economic Recovery Following the COVID-19 Outbreak’ (Whitehouse.gov 2020). The proclamation has effectively suspended the entry of any individuals seeking to migrate to the US who were located outside the US on the effective date of the proclamation, did not have a valid immigrant visa on the effective date, and did not also have a valid official travel document (e.g. an advance parole document) that permitted travel to the US (ibid). Under this proclamation, the issuing of work visas and green cards was also temporarily suspended.

In an update issued on 22 June 2020, the Trump administration announced that the suspension on immigrant visas would remain effective till 31 December 2020, and ‘may be continued as necessary’ (Whitehouse.gov 2020). It reiterated the logic behind the original proclamation in no uncertain terms, stating that ‘without intervention, the USA faces a potentially protracted economic recovery with persistently high unemployment

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See, for example: https://www.bbc.com/news/world-europe-52673373#:~:text=The%20Baltic%20countries%20of%20Estonia,self%2DIsolate%20for%2014%20days.
if labor supply outpaces labor demand’ (ibid). Apart from banning the entry of ‘lawful permanent residents, once admitted pursuant to immigrant visas’, the administration explained that it also had reviewed non-immigrant visa categories, finding that ‘the present admission of workers within several nonimmigrant visa categories also poses a risk of displacing and disadvantaging USA workers during the current recovery’, to the degree that the admission of temporary workers might pose an ‘unusual threat to the employment of American workers’ (ibid) As a result, the US has extended the suspension on the issuing of employment-based permanent immigrant visas (e.g. the EB-1 and EB-2 visas), alongside employment-based temporary nonimmigrant visas (e.g. the H1-B, H2-B, L, and certain J visas). Given the country’s global influence, the US’s proclamation may set a precedent for similar adjustments to the future immigration policies of other countries.

**Are COVID-19 travel bans legitimate?**

In this section, I turn to the question of whether the COVID-19 travel bans can be normatively justified, or if they should be viewed similarly to the ‘Muslim ban’. Specifically, I analyse them through the lens of Brock’s legitimacy requirements. I argue that region-based travel restrictions, for the purposes of limiting the spread of COVID-19, are generally legitimate in theory and practice. However, I also show that such travel bans are not as straightforwardly justifiable as they might initially appear. Travel bans for the purpose of economic recovery, on the other hand, may be justifiable in theory, but we ought to be suspicious of them in practice.

**Public health and travel bans**

Assuming that they are significantly helpful and effective for containing the disease, regional travel bans seem to pass both the internal and contribution requirements for legitimacy. To the extent that at least some travel bans might be required to control the spread of COVID-19, we may go further than that and say that they might be necessary to uphold legitimacy conditions. To start with, in terms of internal legitimacy, failing to control the outbreak of COVID-19 would show disregard for the human rights of citizens. After all, it has proven to be a potentially fatal disease with long-term health implications that we are only just beginning to understand. Although there is no official ‘human right to health’, among other things, Article 25 of the Universal Declaration of Human Rights states that ‘[e]veryone has the right to a standard of living adequate for the health and well-being of himself and his family including food, clothing, housing and medical care and necessary social services’ (Universal Declaration of Human Rights). A situation where the virus is permitted to spread freely amongst the population – many of whom might be at risk of death or permanent damage to their health without any preventative measures – would certainly not amount to providing citizens with a standard of living adequate for their health.

Furthermore, there is a serious worry that, with a high infection rate, medical facilities may be overwhelmed to the degree that doctors are forced to triage patients rather than giving them equal amounts of medical attention and resources. In addition, if medical facilities are preoccupied with treating COVID-19 patients, persons with
health conditions unrelated to COVID-19 may be unable to seek adequate medical care. So, the failure to contain the disease may constitute two violations of the right to an adequate standard of living for health and well-being – firstly, by forcing persons to live in an environment where a potentially deadly virus is circulating, and secondly, by severely worsening the overall standard of medical care for unwell persons. We ought, also, to bear in mind that minority-race citizens are disparately affected by outbreaks of COVID-19 due to their working in ‘essential jobs’ that cannot be performed from the safety of one’s own home, as well as unequal access to healthcare. The disparate impact of COVID-19 on persons of colour may constitute a separate worry about discrimination, which Brock clearly identifies as a violation of a human right (2020: 77–8).

In addition, there is a clear connection between the internal and contribution requirements. The goal of the travel bans – to limit the spread of the outbreak across the globe – can only be achieved through some degree of international cooperation. While the widespread travel bans on, say, travellers originating from the US may be inconveniencing to many, the travel bans effectively serve to protect citizens of the country that has implemented the ban and the populations of other countries that their citizens may come into contact with. Presumably, given the disease’s highly contagious nature, it is sensible for neighbouring countries to contain COVID-19 transmission together by collectively implementing bans on travellers from high-risk regions. For this reason, travel bans may be appropriately regarded as a state’s external contribution to upholding the human right elucidated in Article 25, insofar as every travel ban makes it less likely that the virus will be imported to the region in question.

We must consider another angle, however. There is a real worry that regional travel bans may reinforce stigmatizing attitudes towards persons from particular regions. The virus, which is widely accepted to have originated in Wuhan, China, led to a wave of racism directed at Chinese persons, as well as people of Asian descent who are socially coded as ‘Chinese’ due to the failure of many non-Asians to properly distinguish between different Asian ethnicities – itself a product of racism. For example, a South China Morning Post article notes that ‘[p]eople of Asian descent [based in the US] have reported being shunned, verbally abused, name-called, coughed and spat on, even physically assaulted as the coronavirus pandemic continues to upend American life’ (2020). Relatedly, the hashtag #JeNeSuisPasUnVirus was created in light of French-Asian citizens experiencing a new wave of anti-Asian sentiment. At the outset of the pandemic, despite its practical value, calls to ban Chinese travellers in various countries were steeped in racism and accompanied by negative stereotypic views about Chinese persons being naturally unhygienic or riddled with illness and disease. The racially stigmatizing impact of COVID-19 has, of course, not been helped by President Trump’s readiness to label it the ‘Chinese virus’.

This issue, I think, can be resolved. We need to make a more careful differentiation between travellers from certain regions, and nationals of certain countries. A travel ban on all travellers arriving from China is not the same thing as a travel ban on all Chinese nationals, as it may include citizens from other countries who are attempting to fly in from China. The focus, in the former case, is on geographic location and not national identity. The ‘Muslim ban’, on the other hand, targets persons on the basis of their nationality, which in turn serves as a proxy for racial or ethnoreligious identity. Nor is it clear why a ban on nationals of particular countries would be necessary, or even
sensible. An American passport-holder might be travelling from a country where the
virus has been virtually eliminated, and they would not pose any higher risk to public
health than a national of that country.

Overall, regional travel bans (as they are currently practiced) are generally consistent
with Brock’s internal and contribution requirements. However, there may be conditions
under which travel bans may fall into the trap of illegitimacy. First of all, it is possible
that there could be other ways to curb and contain the virus; if these alternative
measures are comparably effective to travel bans while imposing fewer social costs,
they ought to be adopted in place of travel bans. I have also noted in the previous
section that regional travel bans generally allow for some exceptions, e.g. citizens and
permanent residents arriving from those regions, or other persons with strong reasons
to travel. It runs contrary to internal requirements for states to shut out their own
citizens or permanent residents, which could keep such persons locked in precarious
and dangerous situations in other countries. Relatedly, there is a worry about travel
bans on persons who are neither citizens nor permanent residents, such as international
students or work visa holders, who nonetheless have a strong interest in being able to
return to and reside in the state.

At the same time, it strikes me as cruel to apply travel bans without recognizing
exceptional cases where the traveller’s interest in visiting is strong enough that it can
outweigh public health considerations at the epidemiological level. I have in mind their
ability to be present for one-time life events, concerning matters of great personal
significance, that simply cannot be rescheduled. A quintessential example would be the
impending death of a close relative, or the birth of one’s child. (Events like weddings
and job interviews, which can be shifted to a later date, would not fall into this
category.) Alternatively, we might think of cases where travel is necessary for an
individual’s caregiving needs to be met – that is, situations where care cannot be
delivered remotely. For example, one might need to travel to care for an elderly relative
whose health has taken a turn for the worse, or be in need of such care themselves. In
order for regional travel bans to remain justifiable to the international community,
states must issue clear guidelines about which individuals would be eligible for the
travel ban and establish fair procedures and opportunities for persons to apply for
exemptions. It is also important for states to make transparent and accountable
decisions about which travellers are judged, by the state, to meet the criteria. Lastly,
in place of outright bans on travel, states could consider alternatives whenever possible,
such as the imposition of 2-week quarantines and/or mandatory testing as soon as the
travellers arrive on their soil.

Economic health and travel bans

In this section, I now turn to travel bans on the basis of preserving the state’s ‘economic
health’ in the wake of the outbreak. At first blush, this type of travel ban, which I will refer
to as an ‘economic travel ban’, seems to pass the requirements for internal legitimacy.
Much like the regional travel bans, it might even be necessary to uphold internal
legitimacy. Relevantly, Article 23 of the UDHR states that ‘[e]veryone has the right to
work, to free choice of employment, to just and favourable conditions of work and to
protection against unemployment’, as well as that ‘[e]veryone who works has the right to
just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. COVID-19 has indeed had severe effects on domestic unemployment rates, which could justify a range of exceptional measures to protect citizens’ right to protection against being unemployed, or carving out a minimally decent living, as Article 23 describes. For example, it doesn’t seem unjust for states to require employers to prioritize the employment of local workers over non-citizens who are still located outside of the US, assuming that citizens have the relevant training, or can be trained to perform those jobs. Arguably, it would be illegitimate for states to leave a large segment of their local population unemployed or in conditions of financial precarity whilst allowing firms to continue importing cheaper foreign workers in order to cut costs. In this case, the state may be rightly perceived to be failing to uphold its citizens’ human rights.

Theoretically speaking, then, there is a case for economic travel bans. Yet we need to pay attention to the intent behind the travel ban. Might the language of prioritizing and promoting the interests of citizens conceal a more sinister agenda of scapegoating and stigmatizing immigrants? In order to answer this question, we need to examine the social context more closely. At least in the case of the US, there seems to be insufficient rationale or evidence provided for the claim that immigrants will pose a threat to economic recovery. What needs to be shown, in order to justify the ban, is that the would-be immigrants excluded under the work visa suspension are indeed vying for jobs with local workers (as opposed to persons who will perform essential labour for the state and have the potential to create new jobs for US workers). In the absence of empirical evidence for its premises or the willingness to refer to such evidence, the economic travel ban seems to be a thinly-masked attempt to restrict immigration – one of the Trump administration’s long-term professed goals. Put differently, the weak justification for the proclamation seems to be an attempted spin on the oft-repeated talking point that immigrants ‘steal’ local workers’ jobs, particularly with the scare-mongering language of ‘threat’. The lack of justification is especially apparent vis-à-vis the US’s approach to green card applicants. In the words of the Trump administration, ‘lawful permanent residents, once admitted pursuant to immigrant visas, are granted “open-market” employment authorization documents, allowing them immediate eligibility to compete for almost any job, in any sector of the economy’. However, this reasoning seems weak. As recent evidence suggests, industry supersectors suffering from the most significant job losses during the ongoing recession do not align with those that have made the most green card applications (Ramón 2020).

Quite apart from whether the economic travel ban can be justified as an effective means of achieving economic recovery for citizens, states have to meet contribution requirements by justifying the travel ban to non-citizens who face exclusion as a result. In order to meet the contribution requirement, it is insufficient for states to show that economic travel bans will be good for their economies. The fact is that economic travel bans can seriously set back migrants’ basic interests. For example, migrants may have to leave their current jobs because their work visas cannot be renewed, or be trapped in difficult scenarios where their temporary visas are about to expire, but they are unable to move forward with their application for permanent residency. In both scenarios, migrants might have to endure separation from their family members – a clear violation of Article 16. Furthermore, an economic migrant whose immigration status has lapsed may become vulnerable to arrest,
detention, and deportation by immigration enforcement agents. This scenario, which would violate the Universal Declaration’s provision against ‘arbitrary arrest, detention or exile’ in Article 9, is not an unrealistic one. It is worth recalling the Trump administration’s recent attempt to revoke visas from international students who were enrolled in online-only courses during the pandemic, which was accompanied by the stern warning that students enrolled in such programmes ‘must depart the country or take other measures, such as transferring to a school with in-person instruction’, lest they face immigration consequences ‘including, but not limited to, the initiation of removal proceedings’ (U.S. Immigration and Customs Enforcement 2020). Given the impact of economic travel bans, it seems that they could only be justified as a last-resort move in the absence of any alternative measures that would help to protect local workers from unemployment or substantially lowered rates of remuneration. Again, without the willingness to consider alternatives, the suspension seems more like a cheap political move, aimed at stoking nationalist sentiment in support of a government that has responded poorly to the pandemic, rather than a sincere attempt to improve the lot of US workers.

To conclude, as matters stand, the US’s economic travel ban may actively uphold and promote the state’s internal legitimacy in theory. Yet, in the real world, it is not obvious that the policy would be effective in achieving its stated aims, nor that it is truly intended to help citizens who continue to suffer the dire consequences of the pandemic (rather than an excuse to exclude non-citizens). Consequently, in combination with its serious impact on non-citizens, the economic travel ban may fail to meet the contribution requirement, which requires states to adequately justify their decisions to the international community.

Conclusion

In my contribution to the symposium, I have focused on an unprecedented side-effect of the coronavirus pandemic: the advent of travel bans across the globe and their growing normalization. Chiefly, while regional travel bans are generally consistent with internal and contribution requirements, economic travel bans are far more questionable. While the US has provided insufficient rationale for us to be convinced that economic travel bans are needed to uphold the state’s internal human rights requirement, economic travel bans may fail the contribution requirement precisely because they are not adequately justified to the international community. All in all, I have tried to show how Brock’s human rights contribution requirements, as articulated in Justice for People on the Move, provide us with a principled basis through which we can understand complex immigration-related issues. This, I think, is exactly the aim of her book.

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