



IMMIGRATION AND DEMOCRATIC  
STATES' BORDERS

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## Abstract

When it comes to the issue of transnational migration and its normative demands on states' borders, some theorists uphold a world of open borders, while others support the full sovereignty of states in matters of migration. While each position offers important insights to the debate, my interest starts with acknowledging that a plausible justification for the right of states to exclude, as well as a more nuanced reflection on how morality imposes limits on this right are still needed. The project seeks to address the question whether and to which extent border policy can be unilaterally set by states and on what normative grounds (compatible with liberal and democratic theories) migrants can be denied entry to countries and have their rights restricted in today's world. Answering my research question means, on the one hand addressing one of the most pressing topic in political theory and international relations, and on the other hand, provide paramount normative grounds for the implementation of desirable migration arrangements at the global level. Furthermore, seeking to shed light on the issue of migration and states' borders in the light of democratic theory implications means departing from current studies of closed and open borders, currently focusing, among other arguments, on states right on territories, rights of freedom to association, distributive justice, libertarianism. The novel approach of porous borders theory I aim to enhance, if plausibly justified, seems able to meet both moral concerns, closure of borders and inclusion of *others*, laying thus the terrain for a fertile terrain of investigation that is worth exploring in my project.

## I. Introduction

My research project concerns transnational migration<sup>1</sup>, specifically the rights of would-be migrants and the rights of states to unilaterally set their border policy. According to United Nations estimates, there are 214 million international migrants worldwide, 44 million forcibly displaced people, and another 50 million people are living and working abroad with irregular status. The proliferation of terms to describe the varieties of migrancy-- permanent resident, guest worker, illegal alien, refugee, displaced person, asylum seeker-- is itself indicative of the scale of the phenomenon. Each term denotes a different type of experience, and a different relationship to the new society and inevitable implications for democratic politics and for the meaning of citizenship

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<sup>1</sup> By transnational migration I assume the definition given in (Benhabib 2004,10). "Transnational migrations, pertain to the rights of individuals, not insofar as they are considered members of concrete bounded community but insofar as they are human beings *simpliciter*, when they come into contact with, seek entry into, or want to become members of territorial bounded communities". Leaving out tourists, I usually refer to economic migrants. Nevertheless, a broader definition might include low-skilled labour migration, high-skill labour migration, irregular migration, human trafficking and smuggling, asylum and refugee protection and diaspora. In short, I call them would-be migrants. I refer to "international migration" instead mostly to indicate how binding guidelines created by international human rights regime constrain sovereign nation-states' will, in dealing with migrants and would-be migrants.

(Bellamy 2008,597-611). Put crudely, the global migration phenomenon seems to “challenge” states’ borders as we understand them today and states try unsuccessfully to “resist” this expanding phenomenon, by erecting new fences and walls, and posting guards at their borders.

Some theorists advocate a world of open borders, while others uphold the full sovereignty of states in matters of migration. Is there any way to reconcile these two clashing philosophical positions? While each offers important insight, my interest starts with acknowledging that a plausible justification for the right to exclude is still needed, as well as a more nuanced understanding of how morality imposes limits on this right. The project seeks to address the question: *whether and to what extent border policy can (still) be unilaterally set by states and on what normative grounds (compatible with liberal and democratic theories) migrants can be denied entry to countries and have their rights restricted in today’s world.* Answering this research question means, on one hand addressing one of the most pressing topics in political theory and international relations, and on the other, providing normative grounds crucial for the implementation of desirable migration arrangements at the global level.

Migration, as an obvious contemporary manifestation of globalization, is by definition a trans-boundary phenomenon that no state can address individually. Despite this, it has remained largely the domain of sovereign states.<sup>2</sup> I undertake a philosophical analysis of the “tools” which liberalism and democratic theory work with, tools that were initially developed to suit the context of the nation-state, and extend them to understand how liberal theorists evaluate immigration policies currently governing movements across borders. Specifically, I aim to “integrate” claims of migrants on the one hand and states on the other, while scrutinizing competing theories establishing the principles at the basis of the current thinking about transnational migration.

The literature presents us with three main positions, two of which are more “extreme”, envisaging “open” or “closed” borders, and the third, more moderate, “porous” borders, which I ultimately aim to enhance in my thesis. I am indebted to Benhabib’s porous borders theory for emphasizing that migration policies regulating the terms of *membership* ought not to be viewed as unilateral acts of self-determination *simpliciter*, but rather negotiations in line with “democratic iterations” which tend to eliminate the privilege guaranteed by traditional membership. I will develop her theory focusing primarily on migrants’ *right to membership*, extending her argument to migrants’ *right to first entrance*, the main concern of my thesis. When it comes to border policies<sup>3</sup> both citizens and

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<sup>2</sup> Alexander Betts (2012,1-29) argues that states developed international cooperation and institutionalized global level of governance, with regard to many trans-boundary issues (in the sense that, like migration, they are phenomena that go beyond the capacity of a nation-state) such as climate change, international trade, finance, etc., primarily through United Nations agencies (e.g. WTO, IMF). Despite its inherently trans-boundary nature, international migration doesn’t benefit from the existence of a unitary coherent institutional framework, regulating states responses to international migration. Because of this, sovereign states retain a significant degree of autonomy in determining their migration policies and interact only sporadically with a number of regional or global non-institutionalized actors. I shall consider what are the moral and political implications of both the lack of an international legal framework and the desirability of such increased international cooperation, put in few words, the prospect of global governance.

<sup>3</sup> Border controls are regimes of coercion, which ought to be subject to discourses of justification. Benhabib (2004) and Abizadeh (2008) take this perspective.

foreigners have a say and their interest is negotiated,<sup>4</sup> rather than the latter being subject to the former's will. Democratic iterations, which are formal (e.g. laws) and informal (e.g. social activism) both shape the demos and includes *others'* say. I analyse whether we can formally establish the desirable extent of such say of *others* and on which grounds, whether moral, ethical, legal and political.<sup>5</sup>

My contribution to the current porous border theory is three fold:

- 1) I attempt to defend porous borders theory against criticism of closed borders theory; the extensive work of David Miller and other closed borders theorists;
- 2) I clarify existing ambiguity in the porous borders theory for subscribing to a 'bounded' *demos* and the need of a porous boundary that admit an (unspecified) degree of *others'* interest (non-members of the demos), but without justifying sufficiently Benhabib's strategy.
- 3) I address the *rights to membership* approach and the strident omission of the *right to first entry*.

In section II, I present my assumptions and the "theoretical puzzle", and in section III, the main theoretical positions in the literature trying to explain the puzzle.

## II. Assumptions

Echoing Benhabib, I view migration as a matter for non-ideal theory, thus considerations of historical contingencies and actual injustices are taken into account. Contrary to the Rawlsian ideal utopia in *The Law of Peoples*, according to which democratic society, like any political society is a "complete and closed social system", I assume that democratic societies are "interactive, overlapping, and fluid entities, whose boundaries are permeable or porous, whose moral visions travel across borders, are assimilated into other contexts, are then re-exported back into the home country, and so on." (Benhabib 2004:87) In the Rawlsian ideal, according to which we enter a society by birth and exit it by death, no concern about migration arises. Our intuitions strongly

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<sup>4</sup> The concept of such "negotiation" is very well expressed in Michael Blake's response to Christopher Heath Wellman (Blake 2012,748-762). on the latter's account about the freedom of association. The main idea of Wellman is that citizens of a state have the right to deny entry to foreigners, full stop with no justification. Michael Blake argues instead that citizens might have to deem reconsidering their reasons and might decide that although they cherish more their own national interests, granting entry to foreigners, on the assumption that not doing so will produce an enormous consequent loss of rights by the side of the needy foreigners. Consider the example of the St. Louis boat having aboard German Jewish refugees, which was denied to entry the Cuban and the US borders in 1939, and resulted in the death of many passengers on the boat.

<sup>5</sup> Benhabib (2011,145): "if we do not differentiate between morality and legality, we cannot criticize the legally enacted norms of democratic majorities even when they refuse to admit refugees to their midst, turn away asylum seekers at the door, and shut off their borders to immigrants. If we do not differentiate morality and functionality, we cannot challenge practices of immigration, naturalization, and border control for violating our cherished moral, constitutional, and even ethical beliefs".

conflict with the Rawlsian view of such static world of “self-satisfied people, who are indifferent not only to each other’s plight but to each other’s charms as well” (92). Rather, supporting the idea that peoples’ interactions are “continuous and not episodic; their lives and livelihoods are radically, and not only intermittently, interdependent” (97) Therefore, conditions of entry and exit into liberal-democratic societies and ways in which we think about border policies, unlike the Rawlsian view *are* problematized *qua*.

The next non-ideal assumptions I take, following Beitz (1979), (Young, 2003) and Pogge (2002, 1992), is that of a world with great economic disparities between “peoples” has an impact on migratory movements, causing a “pull” of poorer in the world to higher standards of living. With regard with the central debate on the question to what extent affluent societies and persons have obligations to help *others* worse off, among other reasons, I assume that -- because the institutional order which involves a complex pattern of interaction and international interdependence that contributes to maintaining the *status quo* or even exacerbates the situation of the poorer -- there is a moral obligation on the better off towards the worse off. However, I will not discuss extensively the scope and the content of principles of distributive justice, as it is not my focus. Thus I will make assumptions about *what* we owe to others, focusing on *how*<sup>6</sup> we should meet such obligations, particularly when it comes to would-be migrants at the border.

I will undertake two levels of analysis, whereby the second precedes and constrains the first:

- 1) Institutional: “Where it can be argued that a group shares responsibility for structural processes that produce injustice, but institutions for regulating those processes don’t exist, we ought to try to create new institutions.” (Young, 2003) This explains what kind of regulatory institution is desirable to deal with transnational migration, other than states actors alone.
- 2) Justificatory (normative): what rights migrants have in the democratic negotiation and conversely to what extent the sovereign acts unilaterally in its own interest. My research question addresses mainly this normative point.

Puzzle:

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<sup>6</sup> Nancy Fraser (Fraser 2009) addresses the issues of *what* and *how* of justice in drawing a connection between justice and democracy. Benhabib draws upon Nancy Fraser in concluding that politics need be framed in such a manner that there are insiders and outsiders with respect to a given bounded polity. However, like Fraser, she refuses the line of reasoning proposed by closed border theories, which, by taking as a given “fixed” democratic polity, prematurely forecloses the search for other frames, which might be more just and inclusive of others, yet still generate new exclusions. Envisioning an ongoing process of critique, reframing, critique that democratically addresses claims for further reframing inevitably demands transnational regulatory institutions to support the process of framing. These are needed because although the closed polity remains the main decision-maker on transnational migration policy, it results inadequate in dealing with transnational issues on its own.

Imagine three idealized solutions to the “global poor problem”-- namely different countries, which citizens of some countries are far poorer than others of some other countries -- each assuming a liberal egalitarian approach.

1. Closed border theories (e.g. Rawls or David Miller, Michael Walzer) generally claim that massive redistribution from wealthy to poor countries is desirable to equalize such economic and social disparity. Immigration is conditional on serving the national interest; therefore immigration is a solution if it happens to serve some wealthy countries’ interest (e.g. California’s flourishing economy thanks to Mexicans’ skills in agriculture and low salaries). National self-determination prevails in setting its interest.

2) Open border theory (e.g. Joseph Carens) claims that freedom of movement across borders will enable the less fortunate to pursue their goals, and more broadly, better lives. Equality is achieved by means of free mobility. This scenario is implausible in line with the empirical claim that the poor are far more numerous than the ability of wealthy states to receive them; mass migration of individuals from all corners of the world to small wealthy countries, is of no good for anybody. We therefore discard this proposal.

3) A porous border theory (e.g. Seyla Behanbib) claims that re-distribution and “regulated” migration (in the sense that does not entail ‘completely’ open borders and complete freedom of circulation of individuals) are not mutually exclusive strategies to address the problem; the claim is that the application of both, re-distribution and regulated migration ‘better’ pursue the ideal of equality.

Notice that the intuition put forward by porous borders theory is that equality (broadly understood) is not the only desirable goal, but there is “more” to it. In case 1) we have equality of all members of all countries after the distribution. In case 3) we also have perfect equality. Yet, we seem to prefer solution 3) to 1). Although we share the idea that a world in which resources are distributed in such a manner, including a systematic transfers from others to us, for us not to desire to move elsewhere, we still have the intuition that something is missing. We share the intuition (compatible with 3) that a well-ordered world both guarantees enough wellbeing for us not to need nor desire to move elsewhere, yet guarantees the choice for any of us to move (and be granted access) elsewhere, if we want to, for any sort of (decent and non-malicious) reasons of our own in the pursuit of our goal. This raises the question what kind of migrants’ reasons count on, faced with a national border and can question the legitimacy of the latter to turning her down with no justification. Should her interests be weighed against the reasons of the host country, rather than the legitimate national

interests of the latter prevail *only*? More specifically, what is the desirable moral balancing between concerns towards *everyone's* interests and the legitimate interests of states?

If the guiding intuition can be supported by good reasons in my dissertation, the porous border theory is desirable over the other sets of theories, if, and only if, it specifies a clear account of what should such a porous border world entail when it comes to explaining the negotiation between the interests of migrants and states as regards porous border.

### III. An Outline of the Main Theories

#### i. Open Borders Theories

A fundamental assumption of democratic thought, which stands at the basis of citizenship in Western liberal democracies, is the principle of national sovereignty (Pevnick 2009). When it comes to contemporary transnational migration (usually, from the Third World to wealthy, Western democracies), the power to admit or exclude aliens is inherent in national sovereignty and considered by most theorists to be essential for any political community. Every state has the legal and moral right to exercise that power in defence of its own national interest<sup>7</sup>, even if that means denying entry to peaceful, needy foreigners. States may choose to be generous in admitting immigrants, but they are under no obligation to do so<sup>8</sup>. I call this view “closed border theory”<sup>9</sup> as it provides arguments in support of closed borders and border policies that are unilaterally set by states in line with their national interest.

In his book *The Case for Open Borders*, Joseph Carens directly challenges the conventional, “liberal-statist” view on migration that upholds the legitimacy of closed national borders. According to Carens, borders should generally be open and people should normally be free to leave their country of origin and settle in another country, and then have the same rights and obligations as the citizens of the state to which they have moved. While Carens’ argument in favour of open borders has been extensively criticized for being unrealistic and utopian, and for undermining the

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<sup>7</sup> Consider the example provided by David Miller in “Border Regime and Human Rights”, p.8: “Your human right to food could at most impose on me an obligation to provide adequate food in the form that is most convenient to me (costs me the least labor to produce, for example), not an obligation to provide food in the form that you happen to prefer”.

<sup>8</sup> Carens, 1987, Carens’ view of closed borders is rather strong. Other philosophers, e.g. Walzer (1984, 41) accepts that state have a moral obligations to admit family members of current citizens, refugees and displaced ethnic nationals.

<sup>9</sup> I distinguish between two closed borders theories, (1) strong- Westphalian, and (2) moderate- liberal understanding of sovereignty; and take the (2) as valid. Reading (1) regards cross-border issue as a “private matter”, whilst (2) views states to be increasingly interdependent as they observe common principles, such as international human rights regimes; moreover, view (2) postulates that sovereignty is no longer the ultimate and arbitrary authority, rather the respect to self-determination is fulfilled when domestic principles are anchored in institutions shared with other states. Reading (2) is plausible and incorporated in both moderate closed and porous borders theories, as both theories support the idea that the right to admit migrants within a polity is the prerogative of the republican sovereign in the described sense by (2). Disputes between the two sets of theories regard the rights that would-be migrants ought to have to condition the terms and conditions of sovereign’s decision.

fundamental principles of the Western democratic political tradition, especially that of state sovereignty and democratic self-determination, there are merits to his argument.

Firstly, Carens should be credited for drawing theoretical attention to the previously taken-for-granted issue of national borders. He challenges our tendency to assume the legitimacy of denying entry to foreigners and forces us to engage normatively with the rights of migrants, the lack of which would constitute an isolation of the theoretical concerns from the empirical world<sup>10</sup> that draws our attention to the fact that migration is an increasing phenomenon as are the human rights concerns on the side of those who migrate.

Second, Carens' argument illuminates the deeply-rooted conflict between the demands of universalism<sup>11</sup> and particularism through the lens of the ethics of migration. His argument for open borders is grounded in the same political tradition that promotes this conventional argument for restricting immigration. Drawing particularly upon Kantian cosmopolitanism and Rawlsian liberalism, Carens' uses core democratic assumptions which shape contemporary political theory on the state and democracy, yet challenges the conventional view about migration that is based on these assumptions.

In criticizing the conventional view that justifies the restriction of immigration, Carens considers Western democracies to be the modern equivalent of feudal privilege—an inherited status that greatly enhances one's life chances. Like feudal birthright privileges, those born in a particular state or to parents who are citizens of a given state are more entitled to the benefits of citizenship than those born elsewhere or born of alien parents. Thus, birthplace and parentage are natural contingencies that are arbitrary and irrelevant from a moral point of view. Carens extends therefore a basic right to freedom of movement from one city to another within the same country or from one social class to another, to one country to another. Being born in an African country in today's society and being impeded by migration regulations to join a wealthier country is the equivalent of being destined, using Carens, by guns pointed at migrants at the border, to remain in the same social class. In condemning the closed borders thesis of Michael Walzer, his main communitarian interlocutor, which assumes the political space is the same as the ethical and cultural space, Carens takes a cosmopolitan position, based upon Kantian universalism. Morally, the cosmopolitan tradition is committed to viewing each individual as an equal unit of moral respect and concern, and legally, cosmopolitanism views each individual as a legal person and grants protection of their

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<sup>10</sup> It is estimated that, whereas in 1910 roughly 33 million individuals undertook crossborder movements to settle in countries other than that of their own, by the year 2000 that number had reached 175 million. During the same period (1910-2000), the population of the world is estimated to have grown from 1.6 to 5.3 billion, that is three fold. Migrations, by contrast, increased almost six fold over the course of the same 90 years. United Nations, the Department of Economics and Social Affairs, 2002, report it. (Benhabib 2004, 5)

<sup>11</sup> Basic rights and human rights are conditions that enable the exercise of personal autonomy; as a moral being you have a fundamental rights to justification (Forst 1999). Your freedom can be restricted only through reciprocally and generally justifiable norms, which equally apply to all. (Benhabib, 2004,133) In the sphere of morality, generality means universality. Particularity instead refers to those rights of individuals by virtue of their membership to a community. (Benhabib 2004)

human rights by virtue of their moral personality, not based on national membership or any other status.

Open border is based on three distinct arguments: necessary to maximize overall utility (utilitarianism, not detailed here), the requirement of distributive justice (liberal egalitarianism) and the requirement to ensure individuals' right to free movement (libertarianism). Carens emphasizes the Rawlsian "original position" to justify his argument in favour of freedom of international movement as a basic liberty, even though Rawls explicitly assumes a closed political system in which questions about immigration could not arise. Echoing Rawls, Carens argues people in the original position would choose two principles: the first principle would guarantee equal liberty to all, and the second—the "difference principle"—would permit social and economic inequalities as long as they were to the advantage of the least well off and attached to positions open to all under fair conditions of equal opportunity. According to Carens, these principles are satisfied when individuals are free to pursue the best opportunities wherever they are in the world, regardless of their place of birth. In this respect, Carens' argument is supported by Robert Nozick's libertarian theory in which the state of nature justifies the creation of a minimal state whose sole task is to protect people within a given territory against violations of their natural rights, including rights to property and to enter in voluntary exchanges. According to this view, the individual might not be impeded in pursuing their life goals and therefore a significant amount of freedom, including freedom to migrate to the land in which life plans are fulfilled, is desirable.

## ii. Closed borders

Carens basic argument is correct in assuming that moral equality cannot stop at the border, however this does not account for why citizenship is arbitrary like ethnicity or race. Although citizenship arises in such a manner that individuals cannot be blamed or credited for it, thus appearing morally *arbitrary*, yet the border is not *irrelevant* insofar as it marks the morally relevant relationship between its citizens. Moral equality does not require political equality insofar as the state exercises power over those living *within* its borders, which it cannot do to others; the justifiability of states' institutions is due to those subject to its authority, thus, far from being morally irrelevant, citizens of a country are those who maintain its political and social institutions (subjects to and authors of them). Thus moral equality and more broadly liberal principles of justice are not inconsistent with immigration constraints of states. (Risse, 2005, 2006) Christopher H. Wellman's argument, one of the most articulated in favour of closed borders -- upholding that "legitimate states may choose not to associate with foreigners, including potential immigrants, as they see fit" (Wellman 2008:13) - rests on three main premises: (1) legitimate states have a right to

political self-determination, (2) freedom of association is an essential component of political self-determination, and (3) freedom of association allows one not to associate with others.

Premise (1) upholds that e.g. Sweden cannot punish Norwegian drivers who speed on Norwegian highway, because intruding in Norway's domestic affairs constitute a violation of the legitimacy of its state. The legitimacy argument holds against the USA if (hypothetically) it unilaterally decided to annex Canada, and American citizens supported this in a referendum. Legitimacy relies on the doctrine of popular sovereignty, according to which people have a right to rule themselves. Whilst we find the first illustration plausible, we also believe that such a premise is too demanding, e.g. we do not believe that Sweden's legitimacy to self-determination is undermined if constrained by EU laws in domestic affairs, e.g. labeling its import-export goods veraciously, or international human rights laws or other regional and international treaties. Most importantly, the annexation example is crucially different from immigration: immigration is an *individual* phenomenon that concerns individuals who take residence within a territory, whereas annexation means a state taking over another's territory, subjecting people and changing its jurisdiction. Annexation is a blatant breach of freedom of association as the annexed people are forcibly incorporated under a new authority, whereas immigration involves individual permission granted. (Laegard, 2013)

Premises (2) and (3) provide a more robust, yet limited argument for states having a right not to associate with prospective migrants. The freedom of association right is fundamental in liberal societies as enabling citizens' moral autonomy to collectively decide their own political future, thus their political autonomy.

Philip Cole --who challenges those defending the right to control membership by subscribing to liberal values -- attributes the freedom of association argument a limited role on the ground that states are not associations such as clubs or marriages. When exercising the right to leave a marriage or a club one does not need to enter a new one to leave the former; while leaving a state necessarily entails entering another. Thus states are "meta-associations" where autonomous individuals enter all other possible forms of association. Therefore, Wellman's argument for freedom of association seems too demanding, in that it unjustifiably defends the political self-rule against the background of perspective migrants' basic needs who flee persecution or severe human rights violation, and lacking minimally decent life (Laegard, 2013). Self-determination can be overridden in favor of granting asylum, as most theorists assume -- unlike Wellman -- that states have a moral and legal duty to admit refugees that doesn't undermine self-determination. Or so most of us believe (Blake, 2012).

Moreover, the associative view is defective in implying that the territorial right of states and the right to freedom of association regard the same entity. States, although they protect individual's rights do not enjoy the moral status of individuals. Thus the state does not enjoy the right to

exclude migrants from its territory by virtue of the right of freedom to association, (Laegaar, 2013). Therefore migrants' exclusion should be grounded in states' territorial rights, rather than freedom of association rights. However, those that take this direction face circularity insofar as even if states had such territorial rights, ultimately the people are in control of a state's action and the state represents people's interests. Thus the argument for states excluding immigrants does not follow from Wellman's associative account.

David Miller's thesis grounds the right to control immigration to the territory of the state in the contingent inference that the ability of the state to perform its functions, such as upholding law, protect human rights, presumes "absolute" control over a territorial jurisdiction, including control to exclude needy foreigners, (Miller 2007, 2000). This view is compatible with the assumption (1) that citizens have special duties towards their fellow citizens and therefore special entitlements to rights within a given territory, and that these same concerns are lesser towards foreigners; and (2) protecting migrants from violations of human rights when this occurs, but generally setting ones own borders and protecting primarily the national interests, may be considered unjust, but not right-violating.

But all other functions, that are powers of sovereignty, are generally compatible with not exercising control over immigration, resulting in being undermined only if massive immigration burdens the state. This is a contingent matter that cannot justify a general right to control immigration for cases where there is no prospect of such consequences as well (Fine 2010, 355), requiring therefore an additional argument that justifies the general right to control migration<sup>12</sup>.

### iii. Porous Borders Theory

In terms of democratic theory the major problem with Carens' argument for open borders identified by Benhabib is that democracies must be accountable to a specific people, hence a democracy actually requires some kind of political closure. (Benhabib 2004, 219) She attempts to reconcile the rights of migrants conflicting with the need for democratic sovereignty, and more broadly to reconcile the demands of universalism and particularism. While accepting that the issue of democratic sovereignty has become a contentious theoretical and political issue, Benhabib challenges the view that there is a conflict between democratic sovereignty and international legal norms regarding human rights. She claims that such a view misunderstands not only what sovereignty is, but also how international and transnational norms function in democracies. Such norms, she claims, enhance rather than undermine democratic sovereignty. While accepting that states do have the right to limit who enters their borders, Benhabib argues that these borders should not be open, or closed but "porous". This is a much more moderate position than that put

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<sup>12</sup> Fine's argument, found in Laegard 2013.

forward by Carens. Benhabib acknowledges that the migration phenomena has become part of the demos, the decision making, without borders being open. By “porous borders” Benhabib means that the principles and practices of a community incorporate aliens, refugees and asylum seekers, newcomers and immigrants into existing polities.

If we accept that democracy needs borders, and that these are not unilaterally set by a “fixed” group of individuals who constitute a polity, it remains a question how borders should be set in order to also accommodate migrants’ say. How do borders *fluidly* “change” and maintain, at the same time, a stable polity? Can we even address the *right to membership* without first addressing the *right to first entrance*?

This view -- although it accommodates in principle both main concerns, on one hand that democracies need some sort of closure and that migration requires accommodation within the demos -- is inconclusive in clarifying the right of the contemporary would-be migrant in contrast with the right of the state to unilaterally set its policies, which by default restrict the rights of the would-be migrant. Benhabib’s conclusion is problematic for realizing on the one hand that borders are *de facto* porous<sup>13</sup>, but when it comes to explaining normatively the theory of porous borders on the other hand, it collapses into closed borders theory, in line with which states unilaterally set up border policies, looking uniquely at their national interest in setting up migration policies, and migrants have no say.

However, porous borders’ theory grants a fundamental human right, in line with the Kantian hospitality principle, to sojourn in other territories, not only temporarily, as Kant foresees, but more permanently, including a lifetime. This is because residing for a long time in one place should trigger a right to full membership, unlike the Kantian principle of hospitality that grants a cosmopolitan right<sup>14</sup> to migrants to sojourn in other territories, rather than be a permanent visitor. The republican sovereign may refuse the migrant only if this can be done without leading to her destruction<sup>15</sup>. Thus, asylum seekers and refugees’ claim to admission to a new territory is grounded in the right to hospitality, and anchored in the republican cosmopolitan order. Moreover, it is legally incorporated in the international human rights regime<sup>16</sup>, and subsequently accepted by

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<sup>13</sup> In chapter four and five (Benhabib 2004) empirical examples are explained, e.g. extensive discussion on EU borders.

<sup>14</sup> The Kantian temporary sojourn right stands on two premises: the capacity of all human beings to associate and the common possession of the surface of the world.

<sup>15</sup> The Kantian concept of temporary sojourn is incorporated in Geneva Convention on the Status of Refugees as the principle of “non-refoulement” (United Nations, 1951), obliging signatory states not to forcibly return refugees and asylum seekers to their countries of origin, if doing so would endanger their life and freedom. (Benhabib 2004,35)

<sup>16</sup> By international human rights regime, Benhabib refers to a set of interrelated and overlapping global and regional regimes that encompass human rights treaties as well as customary international law or international “soft law” (namely, international agreements which are not treaties and are not covered by the Vienna Convention on the Law of Treaties). Examples would include UN treaties bodies under the International Covenant on Economic, Social and Cultural Rights, The Convention of all Forms of Racial Discrimination, The Convention Against Torture and Other Cruel, Unhuman and Degrading Treatment or Punishment, and the Convention on the Right of the Child (Newman, 2003). Other international such structures are the establishment of the European Court of Justice, The European Conventions of Human Rights and Fundamental Freedoms, The European Court of Human Rights and others. These international norms constrain national sovereignty in a number of ways, for example, state sovereignty is subject to international norms which prohibits

republican states. Benhabib's fundamental human right regards the admission of the asylee and refugee and says little about immigrants whose admission remains "a privilege", in the sense that it is up to the sovereign to grant such "contract of beneficence"<sup>17</sup>. Benhabib's theory focusing on the right to membership of *all* strangers (refugees and immigrants) is inconsistent insofar as she does not explain immigrants' first entrance as she does with the category of refugees. I cannot speak of the rules that apply to me as a PhD student in a given university if I do not first clarify how I got *into* the PhD program of that given university, for rules of the program, such as a leave of absence, or stipend, etc. apply to me.

The Kantian right of hospitality adopted in the porous border theory, however, broadly suggests that denying foreigners the claim to enjoy the land and its resources, when this does not endanger the life and welfare of original inhabitants, would be unjust. Unless we do not take Miller's position (2002) we have no grounds to believe that immigration by definition endangers the style of life and cultural values considered essential for decision-making values<sup>18</sup>. Benhabib eschews this view by contrasting the "demos" to the "ethnos". The right of hospitality is situated at the boundaries of the polity, grounding a human right to hospitality, rather than constituting either a virtue of sociability, or a kind of kindness and generosity on the side of states. This suggests hospitality to refugees and immigrants as well, but Benhabib is not clear on this point. The principle of hospitality is legally unambiguous as it distinguishes between refugees to whom admission is granted and immigrants, whose admission instead is conditional on democratic decision-making. Morally, the hospitality principle is ambiguous for distinguishing between migrants and refugees, whereas the latter *deserve* hospitality for escaping war and persecution, the former do not for *simply* escaping poverty. Morally, these categories overlap and the hospitality principle does not account for the distinction it takes: Why does it apply if your life is threatened, but when your overall life is endangered by poverty (which can deny many liberties)? The human right to life is not distinguished clear-cut from other basic human rights to subsistence, such as capacity to live a decent life, have adequate wellbeing for oneself and her family, including clothing, housing, medical assistance, etc. I argue that the Kantian hospitality principle is too restrictive, namely it entails that "immigrants entry be denied based on not leading to her destruction" ought not to entail her life or bodily injured protection, but take into account other human rights that are grounded in the interest of human beings.

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genocide, ethnocide, mass expulsion, enslavement, rape and forced labor. Concretely in the domain of transnational migration, the International Declaration of Human Rights (UN, 1948) recognizes the right of movement across boundaries: a right to emigrate-to leave a country, but not to enter a country. (Benhabib 2004, 7-11)

<sup>17</sup> (Benhabib 2004, 38)

<sup>18</sup> Other empirical considerations strictly related to the impact of immigration on national welfare systems are in favor and against immigration (e.g. Carens, against Miller claims that immigration augments the overall utility and individual utility of migrants). I consider this discussion to go under the "utilitarian" umbrella that I will not address, as stated in section III, i.

Assuming Benhabib is right in asserting that the tension between universalism and particularism<sup>19</sup> is overcome by renegotiation,<sup>20</sup> I attempt to shed light on what claims immigrants have new territories in such renegotiation. Can democratic iterations support the project of establishing would-be migrants' admission to new countries in their negotiation with sovereign states? Benhabib accepts that sovereignty is a relational concept, rather than a self-referential one. "While the paradox that those who are not members of the *demos* will remain affected by its decisions of inclusion and exclusion can never be completely eliminated, its effects can be mitigated through reflexive acts of democratic iteration by the people, who critically examine and alter its own practices of exclusion. We can render the distinction between "citizens" and "aliens", "us" and "them", fluid and negotiable through democratic iterations. Only then do we move toward a postmetaphysical and post national conception of cosmopolitan sovereignty, which increasingly brings all human beings, by virtue of their humanity alone, under the net of universal rights, while chipping away at the exclusionary privileges of membership" (Benhabib 2004, 21). As a result of this, policies regarding access to citizenship ought not to be viewed as unilateral acts of self-determination, rather as decisions with multilateral consequences that influence other entities in the world community.

The act of renegotiation between the two dimensions, universalism and particularism, occurs by democratic iterations, concept that shows how commitments to context-transcending constitutional and international norms can be mediated with the will of democratic majorities. In Benhabib's words, democratic iterations are complex processes of public argument, deliberations, and learning through which universalist rights claims are contested and contextualized throughout legal and political institutions as well as in public sphere of liberal democracies. Democratic iterations are jurisgenerative as it changes established understanding in a polity and establishes precedents. Policies regarding access to citizenship ought not to be viewed as unilateral acts of self-determination, but rather must be seen as decisions with multilateral consequences that influence other entities in a world community. But what are the implications for migrants' degree of say in the decision-making of border policies, which lay the grounds for their access to a new territory and the terms of it? I will interrogate and clarify ways in which implications of concepts such as "democratic iterations" and "negotiation" answers my research question.

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<sup>19</sup> Universal human rights have a context-transcending appeal, whereas popular and democratic sovereignty must constitute a circumscribed *demos*, which acts to govern itself. Self-governance implies self-constitution. There is thus an irresolvable contradiction between the expansive and inclusionary principles of moral and political universalism, as anchored in universal human rights, and the particularistic and exclusionary conceptions of democratic closure. (Benhabib 2004)

<sup>20</sup> Examples of such democratic iterations are provided in chapter five, as forms of interpretation of the local, the regional, the global, and the national, including "the scarf affair" in France, the case of a German-Afgani school teacher who was denied to teach with her head covered and the German Constitutional Court that denied the right to vote in local elections to long-term foreign residents in the city of Hamburg. This decision was superseded in 1993 by the Treaty of Maastricht; a democratic iteration that resulted in abolishing of German restrictive citizenship laws. (Benhabib 2004, 21-23)

Furthermore, against Rawls ideal world of “closed and complete societies”, Benhabib argues that it would be grossly inadequate to consider the “fortune of the liberal people” in the West without considering the “interdependence of capitalism and imperialism”. What does taking into account world-historical processes (Benhabib 2004, 100) entail with regard to migrants’ first entrance? This presupposes a principle of historical interactivity of peoples, which Benhabib does not address explicitly and my intuition is that it is worth exploring. Migrants might have a say on borders policies based on historical interactivity, special relations (e.g. ex-colonizer, ex-colonized), and broadly historical reasons. This line of argument implies that only countries that have not colonized have the right to exclude immigrants and that countries that colonized have a weaker claim to self-determination in the area of immigration. This argument cannot provide normative guidance speaking of the right of the states to constrain immigration as I inquire whether there is a general argument that applies at all times. However, in line with Benhabib, I endorse that historical circumstances cannot be left aside in the analysis. Clarifying these insufficiently unexplored areas in the porous borders theory both responds to my research question and enhances the theory against closed borders theory.

The most contentious issue is whether there is a human right to hospitality that applies not only to refugees and asylum seekers, but immigrants as well, on the ground that the categories overlap. Porous borders have the burden of proof of whether there is a right to migrate and would this right what ensure in terms of making others’ voice heard in a *demos*. David Miller, the main closed border theory interlocutor finds unproblematic that a country acts in its own national interest (Miller 2007, Chapter 7; 2012, 407-27) when setting border policies that enhance particularistic rights of state’s citizens even though they harm or do not offer equal regard and protection to migrants rights. In this sense, border policies cannot be considered a violation of a universal human right, precisely because human rights alone do not encompass under their umbrella a set of more *substantive* rights<sup>21</sup>. The idea is that not *everything* citizens enjoy as a right of citizenship by virtue of their status will translate into a human right. Miller correctly points out that not even a fully philosophically grounded human right<sup>22</sup> can ensure a migrant a say with regard to his admission in a new territory. However, I will adopt two strategies in order to address the limitation of human rights:

- 1) A thicker one: by developing an account of justice<sup>23</sup> concerned primarily with the rights of migrants. This is because justice has a broader domain of application than a

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<sup>21</sup> Miller David. *Borders Regimes and Human Rights*, *Journal of Law and Ethics of Human Rights* (forthcoming). David Miller’s conclusion is that such policies might be unjust, but not necessarily right-violating.

<sup>22</sup> Note 20.

<sup>23</sup> I will elaborate on Nancy Fraser’s account, addressing the capacity of public sphere and democracy in times in which publics no longer coincides with territorial citizenries, economies are no longer national and states no longer possess the capacity to solve many problems, transnational by nature. She calls it the “misframing” issue, specifically this one of democratic frame-setting, demanding that subject of justice be balanced: “who”, “how”, “what” counts as a matter of justice be balanced in virtue of reflections on the scales of justice. Fraser’s goal is to provide a theory that encompasses and “valorizes expanded contestation of previously overlooked harms, such as non-distributive inequities and transborder

simple human right<sup>24</sup> that would be combined with human rights, which by their very nature are universally binding and applicable to the relationship between states and immigrants as well as to other relationships. To accommodate migrants' rights, democracy goes hand in hand with justice.

2) A thinner one: by developing an account against Miller's idea upholding that, because there is no such human right to migrate, a given state is only constrained to have a more just migration policy. I doubt that this line of argument can be understood so straightforwardly. In line with Michael Blake's argument (Blake 2012:748-762) and in line with an account of justice concerned with the rights of migration that I will develop, I shall argue that the rights of migrants to enter ought to be a matter of "negotiation" the freedom of association right is to be regarded in the context of the direct impact that it has with the antidiscrimination right. In other words it is plausible not to want to associate with x, so for instance to exclude x from your members, but there are instances when x can be a women or homosexual and they may feel discriminated against, for example, on the grounds of her "womanhood". This means therefore that the first freedom is subordinated to the second because the right to freely associate cannot produce discrimination, and therefore, it is a morally prohibited strategy. I will proceed in line with this argument in weighing different claims and trying to evaluate to what extent migrants have a say on border policies and to what extent borders can be unilaterally set, rather than assuming, like Miller, that would-be migrants have none full stop.

At this stage my project lacks normative clarity with regard to concepts of "democratic iterations" and "negotiation" that could obfuscate the idea, yet at its inception, of a fruitful conceptual relationship between democracy and the account of justice, defining what should be negotiated based on the nature of justification we owe to one another. I prioritize research in this domain, e.g. Rainer Forst's *The right of Justification: Elements of a Constructivist Theory* of Justice and Nancy Fraser's *Scale of Justice*. These readings, which inspired Benhabib herself, should help conceptualize the principle of interactivity, left under-theorized in her work, potentially proposing new lenses to look at the relationship between territorial rights of states, democratic sovereignty and immigrants' rights.

This essay drastically oversimplifies the theories of open, closed and porous borders. I plan on reading the extensive work of David Miller, Michael Blake, Mathias Risse, Christopher Wellman and other central arguments advocating closed borders. David Miller invited me to Oxford University for one exchange semester, giving me a great opportunity to elaborate on this part of the literature.

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injustices, while also tracking reduced capacities for overcoming injustice, absent a stable framework in which claims can be equitably vetted and absent legitimate agencies by which they can be efficaciously addressed" (Fraser 2009, 8).

<sup>24</sup> See Griffin 2008.

This essay also lacks a more nuanced reading of Seyla Benhabib extended work. To this regard, Seyla Benhabib, with whom I discussed my research project recently, invited me to visit Yale University for the spring semester, 2014.

Both visiting opportunities are part of my planning for the second and third years as both David Miller and Seyla Benhabib's theories are central to my project; nonetheless it would be a privilege to work with theorists whose contributions are amongst the most preeminent to the contemporary debate on global migration.

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