

**The Post, the Trans, and the Cosmo of Citizenship
A Critical Study on Seyla Benhabib**

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I. Introduction

This paper is concerned with recent theoretical developments that seek to address state citizenship in the context of migration. The scholarly preoccupation is twofold: on one hand, there is a sociological interest in tackling with actual changes of state practices in terms of citizenship and immigration laws; on the other hand, new conceptualizations regard the analytical level and are directed towards questioning conceptual categories we rely on when we reflect upon reality.

Contemporary migration appears as a challenge to the nation-state. Migrants are supposed to disturb the assumption on which the nation-state functions: the coincidence between people, territory and political authority. If we take for example the case of Gellner, one of the most influential theoreticians on nation state, nationalism is a political principle that assumes the political unit, i.e. state, to be coterminous with the cultural unit – nation. This becomes especially relevant when one considers the aspect of citizenship.

If we take it, for example, as a legal concept, citizenship informs on who are the members of the state, and by extension it renders intelligible at international level the distribution of such membership among states, as political units. Additionally, the status of citizenship concerns internal aspects of the state: on equal terms, all citizens are subject to the laws of a delimited bounded political authority, all enjoy the same rights and obligations, and can legitimately hold accountable the government for its policies through democratic deliberation.

Migrants, as legal residents in receiving countries have progressively come to benefit from extended civil, social and economic rights as well as political rights, although in a limited sense. These substantial transformations seem to blur the line between citizens and residents to the point of make it indistinguishable. Even without naturalization, migrants in virtue of their legal residence-ship, can be considered de facto citizens.

Citizenship, therefore, is not strictly just a legal concept, and can lend itself to various interpretative schemes. My stake in this paper concerns the scholarship that reflects, questions, and re-configures citizenship as a conceptual category in the ambit of political theory. In this sense, I focus broadly on conceptualizations that explicitly read into citizenship national identification, national attachment or national belongingness and proceed from thereon to indicate how migration has a de-nationalizing effect on how citizenship is understood.

More particularly, I concentrate on Seyla Benhabib and her cosmopolitan re-writing of citizenship. The reason for choosing Benhabib is twofold. First of all, I intend to question how her professed moral-political analysis (moral universalism and moral-political equality) spells out citizenship. Secondly, I try to partially vindicate what I think is innovative in Benhabib's work: her argumentative line of cosmopolitan justice leads her to address the just distribution of political membership and envisage naturalization as human right.

My prospective contention is that the cosmopolitan norms argument is superfluous and undermines the construct of democratic theory. The ethical implication is a conceptual trick that ends up explaining too much – all positive transformations in terms of policies of inclusion and human rights legislation can always be traced back to the cosmopolitan ideal – and at the same time too little – criminalizing migration is the result of non-ethical politics. In order to show this, I proceed with highlighting the internal inconsistencies of Benhabib's work and then try to re-visit the idea of naturalization as fundamental right.

The thesis is divided in three parts dealing first with the theoretical background that informs Benhabib's work. Her normative stance challenges both Rawls's understanding of justice at global level and to a certain extent Habermas's discursive theory of democracy. Methodologically, she draws on the critique of transnationalism scholars that challenge the category of analysis of nation-state as container for society and social processes. The second

part is dedicated to exposing Benhabib's main arguments and implicitly hints at the debatable sides of her contentions. The last part represents my own reading of Benhabib and reconsideration of political membership as fundamental right. This should be regarded as a theoretical exercise whose modest ambition is to challenge the lens that reads political practices. It questions how we read, and only secondarily what we read.

II. Setting the terms of the debate: justice, democracy and transnational migration

This chapter outlines the broader conceptual framework and theoretical context that can account for discussing Benhabib's reconsideration of political membership. There are roughly three tracks that intersect in Benhabib's work to actualize the reconsideration of citizenship: a normative commitment to cosmopolitan justice, a conceptual engagement with deliberative democracy, and the methodological approach proposed by transnational migration perspective. Mapping out these theoretical demarcations will help better individualize the stake in contemporary debates revolving around citizenship in the context of migration, as well as single out Benhabib's particular standpoint.

II.1 Justice: limits and limitations

One relevant aspect of Benhabib's scholarship is that it comes in a long line of theoretically engaging Rawls's liberal theory of justice.¹ Therefore, a brief discussion of Rawls is pertinent in as much as it will allow us to map out the relation between liberal justice and political democracy and the transition to the cosmopolitan approach. In his seminal work on western political thought, Sheldon Wolin understands *A Theory of Justice* as an attempt in political philosophy to reconcile freedom and equality in order to spell out the prerequisites for a particular political order, namely liberal democracy. Although today we take for granted liberal democracy at least as a category of practice, it is not immediately obvious why democracy is theorized as a form of liberalism.² For Wolin, the sixties in the West recast democracy "in terms of smaller scales, participatory possibilities rather than leadership

¹One can note several relevant scholars on either political theory or moral philosophy who have explicitly engaged Rawls's understanding of justice in their opus. To give just several examples: Robert Nozick in *Anarchy, State and Utopia*, Michael Walzer in *Spheres of Justice*, Michael Sandel in *Liberalism and the Limits of Justice*, Alasdair MacIntyre in *After Virtue*, and Susan Moller Okin in *Justice, Gender and the Family*.

²Bonnie Honig, *Democracy and the Foreigner* (Princeton: Princeton University Press, 2001), 8.

[which] severely strained the liberal-democratic alliance.”³ Moreover, as Russell Hanson notes until late nineteenth century democracy was regarded as an unstable and even dangerous form of politics.⁴ In the case of the United States especially – as the run-of-the-mill goes, the oldest modern democracy – the constitutional proposals of the Federalists were directed precisely at remedying the rule of the people through mechanisms of representation and checks and balances, leaving rather little space for popular participation per se:

“By democracy is intended a government where the legislative powers are exercised directly by all the citizens, as formerly in Athens and Rome. In our country this power is not in the hands of the people, but of their representatives. The powers of the people are principally restricted to the exercise of the rights of suffrage.”⁵

On the other hand, the liberal concern regarding the form of government has been in terms of limiting the political authority so as not to trespass unjustifiably the inalienable freedom of individuals: limited government.⁶ When we superimpose the idea of justice above the supposed connection between liberalism and democracy, emphasis is laid on how to address wrongs in society, i.e. inequalities. Justice in connection to freedom stipulates in Rawls’s understanding equal rights and liberties for all, whereas justice in connection to social equality states that inequalities are justifiable so long as this “they are to be of the greatest benefit to the least-advantaged members of society and offices and positions must be open to everyone under conditions of fair equality of opportunity.”⁷

The point is not to critically engage Rawls’s theory of justice, but to highlight one particular aspect that Benhabib explicitly addresses: the assumption of a closed society, an assumption which is further on theorized in Rawls’s *The Law of Peoples*, his later commitment to global justice. Cosmopolitan justice for Rawls works with the same logic of the veil of ignorance only that this time behind the veil the individual is replaced by an

³Sheldon S. Wolin, *Politics and Vision. Continuity and Innovation in Western Political Thought* (Princeton: Princeton University Press, 2004), 524-525.

⁴Russell L. Hanson, “Democracy” in *Political Innovation and Conceptual Change*, Terence Ball and others, eds. (Cambridge: Cambridge University Press, 1989), 68.

⁵Ibidem, 77-78.

⁶Judith Shklar, *Ordinary Vices* (Cambridge: Harvard University Press, 1984), 214.

⁷John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), 61.

equally debatable conceptual construct: people.⁸ People – never explicitly referred to as nations – share certain basic features such as a constitutional democratic government, common sympathies and a certain moral nature.⁹

One contradictory aspect in Rawls is to what extent his notion of people differs substantially from that of states. First of all, although Rawls clearly argues that peoples are not to be mistaken for states, it will be rather hard to support such argument precisely due to the way peoples are constructed: they represent unitary actors with a constitutional democratic government, a particular kind of sovereignty mechanism that can trump and restrict state's internal sovereignty (including the right to declare war), and advance a particular foreign policy keen on shaping all societies as liberal.¹⁰ Secondly, people also exemplify the closure mechanism with the question of migration only marginally tackled with.

Since Benhabib's stake is to connect the idea of global justice in the context of migration, she follows Katrin Flikschuh's definition of cosmopolitan right which refers to relations between persons and states –as distinct from right of a state – dealing with specific relations between persons within a state – and the right of nations concerning inter-state considerations.¹¹ However, one cannot help notice the conceptual imbrications of state and nation still, and that neo-Kantians as well work with the assumption of enclosed societies and polities as well. In light of this, the Calhoun-Nussbaum debate¹² would seem rather obsolete since cosmopolitanism is recognizant of bounded political communities. In point of fact,

⁸Seyla Benhabib, *The Rights of the Others. Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004), 22.

⁹John Rawls, *The Law of Peoples with the Idea of Public Reason Revisited* (Cambridge: Harvard University Press, 1999), 23-24.

¹⁰Ibidem, 36, 82.

¹¹Katrin Flikschuh, *Kant and Modern Political Philosophy* (Cambridge: Cambridge University Press, 2000), 184.

¹²In point of fact the debate is formally known as the Calhoun-Brubaker debate (see Craig Calhoun, "‘Belonging’ in the Cosmopolitan Imaginary," Rogers Brubaker, "Neither Individualism nor Groupism," and Craig Calhoun, "The Variability of Belonging: A reply to Rogers Brubaker," *Ethnicities* 3, no. 4 (2003): pp. 531-568), but since Calhoun criticizes at length Nussbaum's individualistic moral cosmopolitanism opposing it to ethnic or national solidaristic practices of belonging, I believe the critique is more specifically directed towards the cosmopolitan embrace-all-humanity approach rather than against Brubaker's methodological distinctions between ethnicity, race, and nation as practical categories and groupness or nationness as contextually fluctuating conceptual variables.

Nussbaum's moral sentiment of love for humanity has conceptually moved towards a globally sensitive patriotism, accommodating particular belongings with universal moral concerns and responsibilities. The "uneven dialectical oscillation within ourselves"¹³, she concedes, avows for the constraint of global justice to overlap and integrate more particular solidarities: "national sentiment is also a way of making the mind bigger, calling it away from its immersion in greed and egoism toward a set of values connected to a decent common life and the need for sacrifices connected to that common life"¹⁴.

The reason for mentioning Nussbaum's cosmopolitan critique of particularistic attachments - is related to the second Rawlsian principle since theoretical engagements with distributive justice in bounded communities usually read solidaristic behavior as a recite of collective belongingness. From the willing-to-die-for-their-country argument to welfare policies of redistributing wealth, distributive justice is read in connection to forms of affiliation and identification with bounded communities. To give just two relevant examples, Anderson argues that:

"Regardless of the actual inequality and exploitation that may prevail in each, the nation is always conceived as a deep, horizontal comradeship. Ultimately it is this fraternity that makes it possible, over the past two centuries, for so many millions of people, not so much to kill, as willingly to die for such limited imaginings."¹⁵

More to the point, Kymlicka, a supporter of a multicultural conception of liberal nationhood equally considers that:

"The sort of solidarity essential for a welfare state requires that citizens have a strong sense of common identity and common membership so that they will make sacrifices for each other, and this common identity is assumed to require or at least be facilitated by a common language and history."¹⁶

¹³Martha Nussbaum, "Towards a Globally Sensitive Patriotism," *Daedalus* 137, no. 3 (2008): 80.

¹⁴*Ibidem*.

¹⁵Benedict Anderson, *Imagined Communities. Reflections on the Origin and Spread of Nationalism* (New York: Verso, 1991), 7.

¹⁶Will Kymlicka, *Multicultural Citizenship. A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995), 77.

Such an approach is implicit in Rawls's second principle of justice whereby the difference norm corresponds to what he calls a natural meaning of fraternity.¹⁷ Such interpretation can also lead to conceptualizing inequalities as outside the system: "a misfortune resulting from unpredictable social starting points and 'natural' individual talents".¹⁸ Therefore, it is reasonable to assume that the social solidarity - national belongingness nexus is overestimated and ignores the fact that state institutionalized social policies of distribution and welfare are tax-driven, and, as we all know taxation is by definition involuntary. And so, the possible causal relation between migration and the tragedy of commons is highly arguable.¹⁹

Equally, the underlying aspect of reality that rights have costs also undermines the prospects of cosmopolitan distributive justice. In this analytical context, human rights no longer appear simply as private goods or possessions²⁰, but public and as such dependent on collective contributions.²¹ To talk of rights like that does not mean to spell out the ultimate truth about the moral worth of rights. What such correlation does it "to explode a powerful illusion about the relationship between law and politics and bluntly recognize that it is the extractive power of government to allocate and redistribute public resources that substantially affects the scope and predictability of our rights."²²

In other words, whether we take into consideration principles of justice at national level or the global one, there is no point to specifically spell out any belongingness – social

¹⁷ John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), 105.

¹⁸ Sheldon S. Wolin, *Politics and Vision. Continuity and Innovation in Western Political Thought* (Princeton: Princeton University Press, 2004), 532.

¹⁹ The contention that multicultural societies lead to a diminution of welfare state policies has been challenged in Keith Banting and Will Kymlicka, eds. *Multiculturalism and the Welfare State* (Oxford: Oxford University Press, 2006).

²⁰ For a historical reconstruction of the concept of rights from moral standard of right conduct to the subjective sense of rights as possession or claim see Richard Dagger "Rights" in *Political Innovation and Conceptual Change*, Terence Ball and others, eds. (Cambridge: Cambridge University Press, 1989), 292-308.

²¹ Stephen Holmes and Cass R. Sunstein, *The Cost of Rights* (New York: W.W. Norton & Company Ltd., 1999), 20.

²² Ibidem, 29-30.

solidarity connection. This does not mean of course that practical understandings of such correlations do not produce real political consequences, especially at national level.

Circling back to Rawls, his theory of the law of peoples reproduces the same logic of enclosed society that is argued at domestic level. Since a global veil of ignorance would imply that “people do not know, for example, the size of the territory, or the population or the relative strength of the people whose fundamental interests they represent, they do not know the extent of their natural resources, or the level of their economic development, or other such information”²³, why would peoples not decide to be one people? For it is clear that although behind the veil, they do know something for sure: that they are one people different somehow from another and so on and so forth.

It is in this context that Benhabib questioned the Rawlsian relative silence in matters of migration and seeks to address it by conceptualizing just membership.²⁴ Although he acknowledges a right to exit of individuals as well as a qualified right to limit migration for recipient societies²⁵, the right to immigrate is not properly tackled with. This is the backdrop of justice in enclosed societies– individuals enter by birth and exit by death, which is transferred conceptually to the issue of justice in-between closed societies. Fully aware of the qualitative difference that Kant established between a cosmopolitan right to temporary sojourn and the privilege to permanent residency, Benhabib is intent on bridging this gap.²⁶

II.2 Democracy: borders and boundaries

A noticeable aspect when going through the current literature on citizenship is that sometimes liberal democracy tends to be used interchangeably with nation-state. As Robert

²³John Rawls, *The Law of Peoples with the Idea of Public Reason Revisited* (Cambridge: Harvard University Press, 1999), 32-33.

²⁴Seyla Benhabib, *The Rights of the Others. Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004), 3.

²⁵John Rawls, *The Law of Peoples with the Idea of Public Reason Revisited* (Cambridge: Harvard University Press, 1999), 39.

²⁶Seyla Benhabib, *The Rights of the Others. Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004), 38.

Dahl admits “democracy’s outer edges are likely to remain coterminous with those of the national state because of the inverse relationship between efficacious popular control and consequential decision –making”.²⁷ Historically, the explanation behind this relates to the extension of the suffrage in the late nineteenth century nation-state to the entire nation (considering, of course, male suffrage alone) i.e. the entire citizenry.

Taking on Gellner’s understanding of nationalism as a political principle exposing the congruence between the political unit and the national one²⁸, the body of citizenry is formally delimited in cultural terms as nation(al). Gellner was not so much concerned with what exactly that culture presupposed substantially, how national culture was experienced or lived through, but with its functional formality, meaning the standardization and homogeneity of culture compatible with an operative industrial society. Partially contra Gellner’s functionalist explanation, Breuilly understands nationalism as essentially a political form per se. If we accept Breuilly’s claim that “nationalism is about politics above all else and that politics is about power”²⁹, the historical connection between nation and democratic self-determination becomes more clear.

In other words, the expression “all French have a right to vote” is equally relevant for the evolution of the nation-state (the French – French nation) as it is for the democratic constituency (all people vote). In the philosophical idiom of the Enlightenment with its emphasis on common reason against traditional status societies the ruling definition of the nation was essentially political:

“The nation was something that free citizens were going to create: it did not pre-exist their intervention as a perennial fact but would emerge as a new kind of community, based on natural rights rather than privileges or restrictions, in which liberty was to be understood as civic participation in public life in the full sense of the term.”³⁰

²⁷Robert Dahl quoted in Jan Shapiro and Casiano Hacker-Cordón, “Outer Edges and Inner Edges” in *Democracy’s Edges*, Ian Shapiro and Casiano Hacker-Cordón, eds. (Cambridge: Cambridge University Press, 1999), 3.

²⁸Ernst Gellner, *Nations and Nationalism* (Oxford: Blackwell Publishing, 2006).

²⁹John Breuilly, *Nationalism and the State* (Manchester: Manchester University Press, 1993), 1.

³⁰Perry Anderson, “Internationalism” *New Left Review* 14 (2002): 7-8.

Honig, as exponent of cosmopolitanism, contends that democracy is still predominantly thought in national terms.³¹ Such superimposition results from democracy understood as a form of government in the framework of a nation-state. But there is also another possible explanation for why sometimes scholarship uses interchangeably liberal democracy with nation state. Perry Anderson attributes the switch from nation-state parlance to liberal democracy idiom to the aftermath of the Second World War, when nationalism as the dominant means of discursive integration became devalued in the West. Such jargon change coincided with the effective consolidation of representative democracy:

“In the advanced capitalist countries, the decline of nationalism corresponded to the rise of liberal democracy as a superior legitimization of the social order, and as mechanism for integrating the population into it.”³²

Accordingly, Rawls’s theorization of justice assumed just that: a conception of a liberal-democratic political constitution already in place.³³ In this sense, Benhabib closely follows Habermas’s reconsideration of the nation-state as an unspoken given of political reflection³⁴, in his attempt of breaking up with the assumption of a closed society in Rawls. The nation-state form begged to be an analytical explanandum, not explanans, which for Habermas meant highlighting the contingency of the borders and boundaries. Since Rawls writes in the contractualist tradition, Habermas argues that such a conceptual gap in the legal construction of the state invites to a naturalist interpretation to be filled in and this is supplied by the idea of nation. More to the point, by appealing to the hypothetical state of nature in order to justify and to validate the foundation of the polity, “One cannot explain how the

³¹Bonnie Honig, *Democracy and the Foreigner* (Princeton: Princeton University Press, 2001), 8.

³²Perry Anderson, “Internationalism” *New Left Review* 14 (2002): 22.

³³Sheldon S. Wolin, *Politics and Vision. Continuity and Innovation in Western Political Thought* (Princeton: Princeton University Press, 2004), 533.

³⁴Perry Anderson, “Arms and Rights. Rawls, Habermas and Bobbio in an Age of War” *New Left Review* 31 (2005): 14.

universe of those who originally join ranks in order to form an association of free and equal persons should be composed - who should or should not belong to this circle.”³⁵

Bearing this in mind, there are certain aspects that need to be underlined when contextualizing Benhabib at the crossroad between Rawls and Habermas. First of all, in *The Law of the Peoples*, Rawls has been criticized by Habermas for lacking substantive intentions.³⁶ Notwithstanding, Habermas goes no further than that either, and as we shall see neither does Benhabib: both his conceptualization of constitutional patriotism and normative theory of discourse ethics are highly procedural. By denouncing culturally thick versions of national understandings, Habermas, too, has to rely on thin formal proposals.

Therefore, this configuration of a post-national understanding of the constitutional state describes an analytical difficulty. The Habermasian procedural jurisprudence contends that “the universalism of legal principles manifests itself in a procedural consensus, which must be embedded through a kind of constitutional patriotism in the context of a historically specific political culture.”³⁷ The European Union represents the possibility for this kind of universalized procedural liberal political culture to replace culturally thick national constitutions. Such constitutional principles will then be interpreted and deliberated by rational citizens engaging in communicative reasoning based on the principle of universal respect and egalitarian reciprocity.³⁸ For Habermas, the problem is to envisage a democratic culture permeable enough that corresponds to a European setting where, increasingly, states become immigration countries. This creates the need for social integration among diverse strangers.

³⁵Jürgen Habermas, “The European Nation-State – Its Achievements and its Limits. On the Past and Future of Sovereignty and Citizenship” in *Mapping the Nation*, Gopal Balakrishnan, ed. (New York: Verso, 1999), 287.

³⁶Perry Anderson, “Arms and Rights. Rawls, Habermas and Bobbio in an Age of War” *New Left Review* 31 (2005): 10.

³⁷Jürgen Habermas, *The Inclusion of the Other*, trans. Ciaran Cronin and Pablo de Grieff (Cambridge: MIT Press, 1998), 226.

³⁸Seyla Benhabib, *Critique, Norm, and Utopia. A Study of the Foundations of Critical Theory* (New York: Columbia University Press, 1986), 284-288.

In a way, Habermas puts Benedict Anderson's argument *pied en l'air*. Anderson conceived the nation as a political community of anonymity whose mutual strangeness is overcome by technologies of simultaneity.³⁹ Habermas's multicultural democratic state works with the same assumption of anonymity which pulls itself together in exercises of deliberative democracy, but not necessarily nation-building processes. Arguably, such democratic endeavor is not as post-national as Habermas would want us to think. Democratic political cultures are contextualized in national settings and become crystallized in national constitutions, in national jurisprudence, without necessarily being nationalizing and exclusionary. In this sense, citizenship and immigration laws could illustrate the case.

Brubaker, in researching comparatively France and Germany's citizenship laws, portrayed the former as the civic type of nation, and the latter as the ethnic type of nationhood. Joppke criticizes Brubaker's reliance on cultural idioms as an *explanandum* for falling prey to the enduring stereotypical civic/ethnic dichotomy, and argues that both France and Germany convey to a mixture, an intermingling of both *jus sanguinis* and *jus soli*.⁴⁰ More to the point, Joppke shows that in the case of contemporary European Union member states, citizenship is no longer subject to a thick politics of identity; quite the contrary, one can actually identify a universalistic trend in terms of the citizenship-identity nexus since "newcomers are expected to adopt and share the general set of rules and principles of liberal democracies, which are the same everywhere."⁴¹

Conclusively, Habermas's postnational trend would seem vindicated by Joppke's transnational regard on European Union member states' citizenship and immigration laws, where he identifies a universalistic trend in terms of identity – western liberal democratic

³⁹Bonnie Honig, *Democracy and the Foreigner* (Princeton: Princeton University Press, 2001), 40.

⁴⁰Christian Joppke, *Citizenship and Immigration* (Cambridge: Polity Press, 2010), n.p.

⁴¹*Ibidem*.

identity –closer also to Kymlicka’s stance on tamed liberal-nationhood.⁴² However, Habermas avoids the aspect of substantive distributive justice, postulating some sort of discursive equality whereby all individuals have equal right to take part in deliberative processes that affect their interests.

In Rawls, since rules of global justice must be valid for both liberal societies as well as non-liberal ones, the Law of Peoples, although it presupposes the obligation to assist burdened societies, is not as substantial as the requirements of justice within democratic societies:

“The difference principle, Rawls explains, does not apply between peoples, since the disparities in their wealth are due not to inequality of resources, but principally to contrasts in culture. Each society is essentially responsible for its own economic fate. Better-off peoples have a duty of assistance to those that are historically more burdened by their culture, but this does not extend beyond helping them achieve the sufficiency needed for a decent hierarchical order.”⁴³

By alleviating justice at international level of redistributive practices because of cultural differences only goes to show that the global veil of ignorance has somehow slipped away in the original position, otherwise how could we count for cultural differences at all? More to the point, whatever culture as common sympathies and moral nature is, it co-implicates political culture, which makes the difference between a liberal democratic culture and a decent one.

Habermas, on the other hand - although he concedes that each bounded democratic state has a particular political culture within which constitutional principles are interpreted, revised and contested - denies that there is a collective agency of a culturally unitary people i.e. nation that gets to deliberate; quite the contrary, human agency pertains to individuals qua democratic citizens engaged in democratic dialogue. Consequentially, democracy for Habermas becomes more than just an enclosed form of government; the premises of

⁴²Will Kymlicka, “Liberal Nationalism and Cosmopolitan Justice” in *Another Cosmopolitanism*, Robert Post, ed. (Oxford: Oxford University Press, 2006), 131.

⁴³Perry Anderson, “Arms and Rights. Rawls, Habermas and Bobbio in an Age of War” *New Left Review* 31 (2005): 7.

participatory democracy can potentially open up the public space precisely to those who are not articulated discursively as the people, i.e. migrants.

At first sight, Habermasian procedural justice of discourse ethics might appear more informed in matters of distribution; notwithstanding, because distributive justice appears consequential to the spread of human rights regimes (which for Habermas as well as Benhabib are derived from cosmopolitan norms), the postnational constellation lacks just as much in substantive propositions. Consequently, Benhabib, who closely follows the normative insights of discursive ethics, also clearly differentiates herself from other versions of cosmopolitan justice focusing on distributive justice.⁴⁴ It is not that she completely sets aside the problem of distribution of resources at global level; what Benhabib does is to take a step back and regard political membership as a resource in itself which must comply with principles of just distribution, hence the concept of just membership.

This again echoes her theoretical conversation with Rawls's second principle of justice. Regarding the level of intra-societal justice, Rawls exemplifies the case of a property-owning democracy:

"In a capitalist welfare state, however, economic power - and therefore also political power - is highly concentrated, so that a small elite dominates the political process. A property-owning democracy sustains a much broader distribution of wealth. To this end, a high and progressive inheritance tax-levied on the inheritor rather than (as is currently the case in the United States) on the decedent's estate—would be essential. This reform would engender a tendency for wealth to concentrate in households with high savings rates—something Rawls seems willing to accept on the assumption that inheritance taxes effectively ensure that large family fortunes are not passed on across generations."⁴⁵

Nevertheless, the levy mechanism is not applicable at inter-societal level. Rawls conceives the territorial space of a people as property. Thus migration should be restricted because the potential overuse of such property might jeopardize the possibility for territory-as-resource to support the people in perpetuity.⁴⁶ We have already seen that the justification

⁴⁴Seyla Benhabib, *The Rights of the Others. Aliens, Residents, and Citizens* (Cambridge: Cambridge University Press, 2004), 22-23.

⁴⁵Thomas Pogge, *John Rawls. His Life and Theory of Justice*, trans. Michelle Kosch (Oxford: Oxford University Press, 2007), 133.

⁴⁶John Rawls, *The Law of Peoples with the Idea of Public Reason Revisited* (Cambridge: Harvard University Press, 1999), 39.

for not applying the second principle at global level deals with cultural differences (just as at societal level inequalities result from unpredictable starting points and differentiated natural talents of individuals)⁴⁷, which excludes remedying inequality that results from the relational power positionality between the peoples.

When critically addressing the Rawlsian law of peoples, Benhabib hints precisely at this disparity which allows distributive justice internally, but severely limits it externally and relationally. Therefore, when Benhabib sets out to envisage principles for the just distribution of political membership in the context of transnational migration, what she aims at –although this is never explicitly assumed – is citizenship as property, not national territory as property, which we find in Rawls. If we are to argue that citizenship needs to be subjected to principles of just distribution, this means that political membership is property-like, a positional good:

“Positional goods as far as they generate substantial claims, certain rights in a material sense, cannot be democratized. While everybody can equally participate in voting, this is not possible with regard to participation in the consumption of material resources.”⁴⁸

Although such logic is presumed by Benhabib’s idea of just membership, she only addresses this procedurally, falling short from further investigating Rawls’s proposal for tax-levy on inheritors of large properties. In this sense, Shachar’s conceptualization of citizenship as a property regime pushes the argument further in terms of cosmopolitan justice. By exposing citizenship as a mechanism of intergenerational property inheritance, Shachar shows that political membership is a resource which is allocated through birth.⁴⁹ From this perspective, it makes little sense underlining the qualitative differences between *jus sanguinis* and *jus soli* because in both cases the allocation of citizenship relies on the accident of birth.

⁴⁷Sheldon S. Wolin, *Politics and Vision. Continuity and Innovation in Western Political Thought* (Princeton: Princeton University Press, 2004), 532.

⁴⁸Elmar Altvater, “The democratic order, economic globalization, and ecological restrictions – on the relation of material and formal democracy” in *Democracy’s Edges*, Ian Shapiro and Casiano Hacker-Cordón, eds. (Cambridge: Cambridge University Press, 1999), 44.

⁴⁹Ayelet Shachar, *The birthright Lottery. Citizenship and Global Inequality* (Cambridge: Harvard University Press, 2009), 1-43.

Shachar is not so much concerned with normatively justifying the boundedness aspect of political communities. In a sense, she takes it for granted; however, she wants to work through this contingent reality and bring out the aspect of distributive justice that results from a world of bounded political communities, divided as it is between the better off and worse off. The concern lies with the perpetuity aspect of citizenship transfer. By conceiving the mechanism of birthright privilege levy on citizenship, Shachar keeps bounded state citizenship in the game by attaching it the distributive justice dimension:

“The beauty of this model is that it does deprive the birthright beneficiaries of their citizenship entitlement; instead it distributes the social benefits that derive from membership in well off polities across borders to those who are left outside for no reason other than their station of birth.”⁵⁰

By shifting the focus from people who move to people who do not move, Shachar outlines the real challenge of citizenship as political membership: if we consider solely the equalizing effect that the formal legal status of citizenship brings about, we miss out on the thick disparities and unevenness of rights. Moving away from moral charity, Shachar ingeniously envisages international legal duties that result from citizenship as birthright inherited property.

Additionally, by borrowing the logic of inheritance in property theory and thus re-fashioning the understanding of citizenship, Shachar explicitly moves beyond reliance on human rights regimes and discourses. Citizenship as inherited property is clearly a political establishment which in its own turn produces a powerful legitimacy effect for the state as tax collector to enforce relations of entitlements and duties internally, but also to justly comply with the negative externalities that citizenship-as-property produces for the world wide worse off.

⁵⁰Ayelet Shachar, *The birthright Lottery. Citizenship and Global Inequality* (Cambridge: Harvard University Press, 2009), 91.

II.3 Transnationalism: migrants and the nation-state

Transnationalism scholarship should be considered as a twofold critical response to both globalization as a conceptual framework as well as methodological nationalism. Focusing on social interaction and social processes, transnationalism bears a distinctive methodological and analytical approach seeking to transcend territorially pre-defined social processes.⁵¹ On this account, Brubaker, for example, seems rather skeptical of this approach in terms of the extent of empirical evidence, but also with regards to the theoretical weight of such critique.⁵²

However, Brubaker makes too polemical a point when he reproaches transnational studies for “channeling attention away from state processes, which remains a fundamental level of organization and fundamental level of power.”⁵³ The transnationalism approach should not be mistaken for the withering-away of the state thesis; its strong methodological commitment illuminates upon social networks and interactions as unhinged from a pre-given territorial unit, namely the nation state. Equally, transnationalism does not exclusively refer to migration. This allows for the study of multiple sets of dynamically overlapping and interacting transnational social fields that create permeable social bounded forms.⁵⁴ Therefore, the state itself, in this perspective, is exposed in its deterritorialized forms and transnationalized politics.⁵⁵

Another critique concerns the novelty aspect: transnational phenomena are not as new as one might think. Still Brubaker argues, quite ironically, that even before the invention of e-

⁵¹Sanjeev Khagram and Peggy Levitt, “Constructing Transnational Studies” in *Rethinking Transnationalism. The Meso-link of Organizations*, Ludger Pries, ed. (New York: Routledge, 2008), 21-39.

⁵²Rogers W. Brubaker, “In the Name of the Nation: Reflections on Nationalism and Patriotism” *Citizenship Studies* 8, no.2 (2004): 119.

⁵³Ibidem.

⁵⁴Sanjeev Khagram and Peggy Levitt, “Constructing Transnational Studies” in *Rethinking Transnationalism. The Meso-link of Organizations*, Ludger Pries, ed. (New York: Routledge, 2008), 22.

⁵⁵Conceptually the state – political authority – was considered coincidental with its territory (the Westphalian model); for a reconsideration of this see, for example, Neil Brenner, “Beyond State-Centrism: state, territoriality and geographical scale in globalization studies”, *Theory and Society* 28 (1999): 39-78.

mail and inexpensive telephone connections, migrants lived transnational lives.⁵⁶ Brubaker's argument however runs very close to the fallacy of adumbration: "when an idea is formulated definitely enough and emphatically enough that contemporaries cannot overlook it, it becomes very easy to find anticipation to it."⁵⁷

Notwithstanding, it is however true that transnationalism in connection to migration processes presents certain theoretical difficulties. Empirical studies show that second and third generations of migrants are well integrated in society – or assimilated in Brubaker's terms. Moreover, most studies were conducted on migrants migrating to the United States from Mexico or Central America, therefore the proximity of borders does not hold much promise for a truly transnational process. Despite such shortcomings, as Joppke so poignantly notes – whether we give into integration talk or simply call it by its name, i.e. assimilation – where does one exactly ask migrants to integrate in, since there is no unitary, monolithic society to integrate in? After all, Brubaker himself conceptually proposed to speak about ethnicity without groups, and groups without groupism; hence, the transnational analytical stance seems rather closer to his understanding rather than contradicting it.

In response to such critiques, Portes points that "the question is not whether the world manifests itself through and by new phenomena; the real difficulty in understanding the novelty of migration is that it results from changes of perspective in social sciences."⁵⁸ The thrust of transnationalism therefore is promoting a change in analytical lenses. This is the argument that Glick Schiller and Andreas Wimmer put forward when they criticize methodological nationalism.⁵⁹

⁵⁶Rogers W. Brubaker, "In the Name of the Nation: Reflections on Nationalism and Patriotism" *Citizenship Studies* 8, no.2 (2004): 119.

⁵⁷Robert Merton quoted in Alejandro Portes, "Introduction: The Debates and Significance of Immigrant Transnationalism," *Global Networks* 1, no.3 (2001): 183.

⁵⁸Alejandro Portes, "Introduction: The Debates and Significance of Immigrant Transnationalism," *Global Networks* 1, no.3 (2001): 183-184.

⁵⁹Andreas Wimmer and Nina Glick Schiller, "Methodological Nationalism and beyond: Nation-building, Migration and the Social Sciences," *Global Networks* 2, no.4 (2002): 301-334.

It is not only that temporally, the nation-state building process is more or less coincidental with the development of academic departments of social sciences at national level, but also the fact that such emerging epistemic communities have established a national-informed research tradition. Paraphrasing Billig, Wimmer and Schiller contend that banal nationalism “holds true not just for everyday discourses and practices, but also for grand theory’s encounters with the social world.”⁶⁰

What becomes especially relevant in terms of further discussing Benhabib’s work are two particular aspects. The first critical point refers to what I previously noted as the sometime interchangeable use of liberal democracy and nation state in contemporary scholarship. In this sense, Wimmer and Schiller show that:

“Another variant of ‘naturalizing’ the nation-state consists in downplaying nationalism’s role in modern state building by analytically separating the rise of nationalism from that of the modern state and of democracy. In this way, the national framing of the modern state building experience and of democratization become almost invisible.”⁶¹

Such criticism is particularly directed towards scholars such as Anthony D. Smith who conceives pre-modern ethnic communities as core elements of nation-states as well towards strains of political science who discuss democracy abstracted from the nationalist political project. Secondly, transnationalism reproaches “the territorialization of social science imaginary and the reduction of the analytical focus to the boundaries of the nation-state.”⁶²

Migrants upset the scheme of such bounded conceptual frames. The nation-state as the container model of society fused together four conceptually different notions of people: people as sovereign, people as citizens of the state, people as solidaristic group, and people as ethnic community united through common destiny and shared culture.⁶³ Wimmer and Glick Schiller’s argument is highly polemical and partially questionable since in their own turn they seem to conflate conceptual change with historical political change.

⁶⁰Andreas Wimmer and Nina Glick Schiller, “Methodological Nationalism and beyond: Nation-building, Migration and the Social Sciences,” *Global Networks* 2, no.4 (2002): 304.

⁶¹Ibidem, 306.

⁶²Ibidem, 307.

⁶³Ibidem, 308-309.

More to the point, the field of transnational studies itself still pays *volens nolens* lip service to methodological nationalism when they conceive transmigrants in terms of sending country/receiving country or home country/host country. “Country” might as well work as an euphemism to avoid the national model container for societal processes, but it could equally substantiate the fetishization of territory – as homeland. Additionally, the focus on ethnic paths of migrant incorporation – ethnic entrepreneurship – falls riskily close to the idea of ethnic community as shared culture, solidaristic form of belonging. Thus, we can begin to see the challenges that Benhabib addresses when she argues for disaggregated citizenship, deterritorialized jurisdictions of cosmopolitan norms and political membership as human right *tout court*.

III. Benhabib on citizenship, migration and the idea of just political membership

The focus of this chapter will be Benhabib's particular cosmopolitan position regarding citizenship in the context of transnational migration. Drawing from the theoretical background that informs her work – as delineated in the previous chapter – this part of the paper will firstly outline Benhabib's stance on the core concepts vis-à-vis competitive conceptual histories. In a second row, it will be critically shown to what extent Benhabib's position presents both serious shortcomings and strong arguments. Overall, it will be my endeavor to show that Benhabib's position, despite her own insistence, does not present a clear demarcation from the theoretical stance of her critics. Therefore, the normative cosmopolitan stance becomes analytically superfluous or excessive, obscuring the real stakes in re-addressing political thought and theory in the context of migration.

III.1 *Communicative reason and discursive politics*

It is my contention that one can better understand Benhabib's theoretical position by looking first at her work on *Critique, Norm, and Utopia*.⁶⁴ Benhabib describes herself within the ambit of practical philosophy, which seeks to bridge the gap between the teaching of ethics and politics, and a value-free model of social sciences.⁶⁵ This is a recite of the critique formulated by the Frankfurt School regarding prescriptive theories. In this light, communicative reason appears no longer prescriptive, but procedural: what matters is that when engaging in discursive justification of one's claims there has to be an implicit universalist ethical standpoint.⁶⁶ This consists of universal moral respect and egalitarian

⁶⁴Seyla Benhabib, *Critique, Norm, and Utopia. A Study of the Foundations of Critical Theory* (New York: Columbia University Press, 1986).

⁶⁵Ibidem, 5.

⁶⁶Ibidem.

reciprocity.⁶⁷ These principles stem from rationality as cognitive capacity, which is assumed to be the overarching feature of all humans.

Benhabib re-worked the Habermasian standpoint amending this procedural ethics of rational consensus, which she found lacking with regards to at least the following aspects. First of all, communicative ethics – grounded as it is in the fundamental norms of rational speech⁶⁸ - contradicts the all-inclusive aspect of moral discourse, which includes all beings, not just rationally-defined humans.⁶⁹ This means that for discourse ethics to be morally valid, it has to at least not assume an exclusively *phonocentric* nature and *audist* structure of public arena that forecloses the political space for certain political subjects.⁷⁰ Therefore, Benhabib, partially in accordance with the feminist ethics of care⁷¹, argues for systems of moral advocacy:

“Depending on how strongly ‘the capacity for speech and action’ is defined, many beings whom we would want to recognize as moral agents and as moral victims, such as very young children, the mentally ill, would seem to be excluded from the moral conversation. Furthermore, there may be beings to whom we *owe* moral obligations and who may become moral victims by virtue of being impacted by our actions but who cannot represent themselves: sentient beings capable of pain, such as animals with developed nervous systems and, some would argue even trees and ecosystems, are alive and can be affected by our actions.”⁷²

Derivative of this aspect, Benhabib equally challenges the monological model of moral reasoning.⁷³ The problem with the assumption of rationality for all men is that it assumes a generic individual too abstract to allow for concrete differences: thus thinking from the standpoint of everyone else –universal position – ends up equivalent to speaking from the point of view of one – the rational autonomous agent.

⁶⁷Seyla Benhabib, *The Claims of Culture. Equality and Diversity in a Global Era* (Princeton: Princeton University Press, 2002), 11.

⁶⁸Seyla Benhabib, *Critique, Norm, and Utopia. A Study of the Foundations of Critical Theory* (New York: Columbia University Press, 1986), 286.

⁶⁹Seyla Benhabib, *The Claims of Culture. Equality and Diversity in a Global Era* (Princeton: Princeton University Press, 2002), 14.

⁷⁰Steven D. Emery, “In space no one can see you waving your hands: making citizenship meaningful to Deaf worlds” *Citizenship Studies* 13, no.1 (2009): 38.

⁷¹Seyla Benhabib, *Situating the Self. Gender, Community and Postmodernism in Contemporary Ethics* (Cambridge: Polity Press, 1992), 189.

⁷²Seyla Benhabib, *The Rights of the Others. Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004), 13-14.

⁷³Seyla Benhabib, *Situating the Self. Gender, Community and Postmodernism in Contemporary Ethics* (Cambridge: Polity Press, 1992), 163.

Since she wants to re-marry a universal ethical standpoint with the concrete plurality of democratic debate, Benhabib seeks to rescue communicative ethics by taming the excessively rationalistic formulations of Habermas: “consensus brought about through argument must rest on identical reasons that are able to convince the parties in the same way.”⁷⁴ This entails eliminating the teleology that resides in the idea of rational consensus and replacing it what she calls *a posteriori* realization: “the open-ended procedure of enlarged mentality which represents the capacity to reverse perspectives in practical disputes and the ability to reason from the standpoint of others involved.”⁷⁵

Such conceptualization keeps the procedural rules of the discursive game in place, but dilutes the thickness of substantialist universalism. Accordingly, what Benhabib calls interactive universalism no longer assumes the generalized rational individual of either Rawls or Habermas, but the concrete other which is evaluated as a potential partner in conversation.⁷⁶ Thus, interactive universalism becomes a process of moral learning which, importantly to stress for Benhabib, presupposes not only conversations, but also confrontations.⁷⁷ This would eventually lead to a sort of ethically informed politics, where discursive ethics provides the formal rules of the game with deliberative democratic politics happening everywhere, not just within the political space restricted to juridical calculus of rights, but also where anonymous and interlocking conversational contestations manifest.⁷⁸

Because of her commitment to bring ethics and politics together at analytical level, Benhabib refutes Arendt’s distinction between moral judgment which presupposes a unitary self and political judgment which assumes a plurality of positions.⁷⁹ Her concept of enlarged thinking aims at bridging also the separation that Arendt draws between public and private

⁷⁴Seyla Benhabib, *The Claims of Culture. Equality and Diversity in a Global Era* (Princeton: Princeton University Press, 2002), 143.

⁷⁵Ibidem, 145.

⁷⁶Ibidem, 14.

⁷⁷Ibidem, 38.

⁷⁸Ibidem, 21.

⁷⁹Seyla Benhabib, *Situating the Self. Gender, Community and Postmodernism in Contemporary Ethics* (Cambridge: Polity Press, 1992), 141.

sphere. Partially sharing the same position with Honig, Benhabib implicitly chooses to read Arendt not in the non-negotiability of private/public realms, but in the transgressive moments of her political thought.⁸⁰ For example, the idea of spontaneity would be self-contradictory if it restricts political subjectivization that engages private realm identities.

Notwithstanding, when we hear of conceptual hybrids such as interactive universalism that want to be equally all-embracing as well as contextually compatible, the first critical reaction would be that the concept either does too much or too little. It is hard to envisage how can one subscribe to moral universalism – whatever its core idea – and at the same time argue that universalism is inductive. In the same vein, it is my contention that what Benhabib starts to theorize as just membership stops short from successfully readdressing political theory in the context of migration, and gets lost in *a posteriori* sociological inquiry on recent political changes.

Circling back to the question of communicative ethics, I believe there are at least two particular aspects that can be relevant for politically thinking about citizenship and democracy, which is Benhabib's stake in *The Rights of the Others*. What the discursive model proposes is an understanding of political participation in democratic life as discursive will formation.⁸¹ The idea is not exceptionally new in its core assumptions. We find it in Aristotle where political action within the *polis* is first and foremost attained through speech and persuasive discourses, for the citizen was *zôon politikon* precisely because he was *zôon logon echon*⁸².

For the moment, we will leave aside the matter of the scale of the political community and to what extent it can be argued that change in size should produce change in form (from direct democracy to representative democracy), even though deliberative democracy does take

⁸⁰Bonnie Honig, *Political Theory and the Displacement of Politics* (Ithaca: Cornell University Press, 1993), 202.

⁸¹Seyla Benhabib, *Situating the Self. Gender, Community and Postmodernism in Contemporary Ethics* (Cambridge: Polity Press, 1992), 104.

⁸²Hannah Arendt, *The Human Condition*, trans. Claudiu Vereş and Gabriel Chindea (Cluj: Idea design & print, 2007), p.28.

its normative weight partially in relation to participatory direct-like democratic model. What interests us here is, just like Walzer so rightfully observes, the fact that “the ancient model of democracy does have a way of periodically reappearing in ideological dress whenever contemporary democratic life does not seem to encourage high levels of involvement or commitment.”⁸³

Benhabib contends that if we follow either Hobbes or Rousseau, the construction of the state of nature reflects the ultimate picture of individual’s autonomy.⁸⁴ Therefore, Hobbes’s men that sprung like mushrooms or Rousseau lonely savage reflect both a denial and a contradiction.⁸⁵ The denial consists in this image of a self-sustainable sovereign life that experiences no kind of domestic familial sphere - or if it does the contact is expedient – which in political theory becomes translated in the separation between private and public spheres.⁸⁶ On the other hand, the contradiction that Benhabib identifies runs deeper than the fact that women apparently did not take part in the social contract (which de-historicizes the private sphere altogether). In light of her understanding of political participation as discursive will formation, as interactive universalism, how could such mushroom-like men decide upon entering society?

If they had no communicational contact amongst each other, how would it then be possible that they all simultaneously and yet individually made up their mind – rationally - to enter the political organization? If one underscores not necessarily the solidaristic, but at least the interactive basis of communicative reason, the political foundation becomes delegitimized for it means that not all incorporated a posteriori took part to begin with. Secondly, I would argue that we can also intuitively connect this argument to the boundedness

⁸³Michael Walzer, “Citizenship” in *Political Innovation and Conceptual Change*, Terence Ball and others, eds. (Cambridge: Cambridge University Press, 1989), 218.

⁸⁴Ibidem, 156.

⁸⁵Ibidem.

⁸⁶Seyla Benhabib, *Situating the Self. Gender, Community and Postmodernism in Contemporary Ethics* (Cambridge: Polity Press, 1992), 154.

of politics. If communicative reason in Benhabib equally implies consensus and contestation, the boundaries of communities could be conceptualized as a recite of a plurality of conversational tactics, of various political discursive practices, *ceteris paribus* (i.e. the procedural rules of communicative ethics being in place).

Conclusively, what Benhabib finds arguable in any kind of political foundational act that relies on too narrow an understanding of an autonomous rational human agency, is that it cannot explicate the collective character of the decision that leads to the political community. It is in this line that we can identify the thrust of Benhabib's argument: looking back at contractualist theories of political foundation, that equally assume collective will formation a priori as well as a posteriori, one can identify justificatory clues for arguing the case of just membership.

III.2 Cosmopolitan norms and liberal democracy

For a better understanding of Benhabib's theoretical elaboration, it is best to proceed with outlining the definitions of the core concepts she uses. This way, one can better follow the internal logic of her arguments as well as identify subsequent inconsistencies. Accordingly, the chief constituent element for Benhabib is cosmopolitan norms which represent principles of justice that address the individual as both moral and legal person whose political arena is a world wide civil society.⁸⁷ However, cosmopolitan norms should not be mistaken for a *de facto* cosmopolitan law in the positivistic sense. They are constructed as a dynamic process of mediation whose thrust becomes evident whenever human rights become fully instantiated in national legislatures. This would seemingly reflect the constitutionalization of international law⁸⁸ whose political implication consist in a

⁸⁷Seyla Benhabib, "The Philosophical Foundations of Cosmopolitan Norms" in *Seyla Benhabib. Another Cosmopolitanism*, Robert Post, ed. (Oxford: Oxford University Press, 2006), 16.

⁸⁸Seyla Benhabib, "Democratic Iterations: the Local, the National, the Global" in *Seyla Benhabib. Another Cosmopolitanism*, Robert Post, ed. (Oxford: Oxford University Press, 2006), 72.

progressively higher threshold of justification from the part of the nation-states in terms of policies of exclusion.⁸⁹

The channeling of cosmopolitan norms into the legal stream is the recite of democratic deliberations. For Benhabib, the democratic logic is twofold: on one hand, democracy is an institutional model of organizing collective and public exercise of power, on the other hand democratic legitimacy is achieved whenever decisions regarding public concern result from procedural discursive practices among individuals considered as moral and political equals.⁹⁰ This two-tier understanding of democracy already heralds what Benhabib calls the paradoxical nature of democratic closure.⁹¹ Firstly, the conceptualization of individuals as equals imbricates the universally moral standpoint with the bounded political level. This means that there is never a perfect coincidental stance between institutionalized democracy and the *demos*:

“Popular sovereignty means that all full members of the *demos* are entitled to have a voice in the articulation of the laws by which the *demos* is to govern itself. Democratic rule, then, extends its jurisdiction in the first place to those who can view themselves as the authors of such rule. However, there has never been a perfect overlap between the circle of those who stand under the law’s authority and the full members of the *demos*.”⁹²

In this sense, the *demos* for Benhabib is always potentially limitless since the normative emphasis on an ethically informed politics does not allow the exclusion of any person from moral dialogue. Conversely, the historical account of modern democracy as the collective exercise of power goes to show that democratic will – interchangeably used with either self-determination or popular sovereignty –presupposes territorially enclosed polities. So, in the end it would appear that the tension between democratic legitimacy and democratic

⁸⁹Seyla Benhabib, “Democratic Iterations: the Local, the National, the Global” in Seyla Benhabib. *Another Cosmopolitanism*, Robert Post, ed. (Oxford: Oxford University Press, 2006), 71.

⁹⁰Seyla Benhabib, “Democratic Legitimacy and Public Goods” in *Democracy and Difference: Contesting the Boundaries of the Political*, Seyla Benhabib, ed. (Princeton: Princeton University Press, 1996), 68.

⁹¹Seyla Benhabib, *The Rights of the Others. Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004), 20.

⁹²*Ibidem*.

exercise of power is in fact reduced to the hiatus that exists between popular sovereignty and territorial sovereignty.⁹³

Conclusively, what Benhabib finds problematic is that sovereignty as state territoriality still provides a stronger justification for regulating political membership through policies of immigration and citizenship, than popular sovereignty. Benhabib initially argues that political philosophy has relied on misleading premises of social closure⁹⁴, but is it not at all clear to what extent one can really sharpen the analytical distinction between social closure and territorial closure.

Benhabib puts forward as a conceptual counterweight “the classical Westphalian regime of sovereignty, whereby states enjoy ultimate authority over all objects and subjects within a circumscribed territory and relations with other sovereigns are voluntary and contingent and limited in kind and scope to transitory military and economic alliances as well as cultural and religious affinities.”⁹⁵

This model has apparently become obsolete today when inter-state relations are increasingly constrained by liberal international sovereignty which implies subscribing to common values and principles of human rights, the rule of law and respect for democratic self-determination.⁹⁶ Such inter-relationality and interdependence would mean that states can no longer uphold exclusive and absolute internal jurisdiction in the name of territorial sovereignty. However, it would seem that the Westphalian model in the economy of the argument is more of a straw man. Benhabib is surely aware that what she calls the Westphalian model is just as much a call for a normative standpoint to measure reality against, as it is today the case of cosmopolitan justice framework that she subscribes to. In

⁹³Seyla Benhabib, *The Rights of the Others. Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004), 48.

⁹⁴Seyla Benhabib, *The Claims of Culture. Equality and Diversity in a Global Era* (Princeton: Princeton University Press, 2002), 168.

⁹⁵Seyla Benhabib, *The Rights of the Others. Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004), 40.

⁹⁶*Ibidem*, 41.

point of fact she subscribes to Krasner's thesis that shows how modern Western states were never absolute sovereigns.⁹⁷

What Benhabib seemingly hints at is that with the advent of the nation-state, territorial borders were crucial in circumscribing political membership as national citizenship: it reproduces the nation spatially.⁹⁸ We have already discussed in the previous chapter why, as far as Western Europe goes, modern democracy is conceived historically coincidental with the nation state. As far as political membership goes this meant coupling together in the idea of citizenship at least three dimensions: a collective identity, privileges of political membership and social rights and claims.⁹⁹ The debatable aspect for Benhabib is that national citizenship appears as passive, as conferred upon individuals by the state, which is the distributive authority of membership and obscures another side of citizenship as active consent and participation from the part of individuals.

At this point, it is not sure whether Benhabib's point is historical or theoretical. When she subscribes to Habermas's reasoning that democracies never democratically choose their social boundaries, we have to remember that Benhabib still holds analytically distinct territorial sovereignty from popular sovereignty. At theoretical level, when Benhabib engages contractualist theories of political foundation, she is however silent on the question of territoriality which she takes for granted. Always emphasizing the problematic of democratic discursive will formation, Benhabib leaves aside the matter of territorial delimitation which is attributed so much conceptual weight in her understanding of political membership.

It is important to come back on this aspect particularly because Benhabib at times uses interchangeably citizenship and political membership and it is relevant to acknowledge to

⁹⁷Seyla Benhabib, *The Rights of the Others. Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004), 18.

⁹⁸Seyla Benhabib, *The Claims of Culture. Equality and Diversity in a Global Era* (Princeton: Princeton University Press, 2002), 162.

⁹⁹Seyla Benhabib, *The Rights of the Others. Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004), 23.

what extent this is a matter of stylistic necessity or whether in fact points to a qualitative difference between the two. When briefly revisiting either Hobbes or Rousseau, Benhabib focuses exclusively on the idea of autonomy in connection to that of the collective will. But if we look at Hobbes, for example in relation to the idea of territoriality, one cannot identify a justificatory account whether all men participated at the foundation of the polity. If the state of nature meant the war of all men against men, it logically follows that all men become incorporated in the state of civil society.

What I mean by this is that at the highest level of conceptualization, it would make sense to argue that all men become members of the civil society. If individuals cede their natural rights to the political authority for the sake of protection, what we know about the act of political foundation is how, but not where it happens; since Hobbes apparently was not concerned with where exactly – spatially speaking – the war of all men against men took place or what were the spatial confines of the polity. In this sense, I believe the visual metaphor of Hobbes's Leviathan that relationally connected political members with the body politic might offer some clues:

“Created in Paris by Parisian engraver Abraham Bosse in collaboration with Hobbes, the frontispiece of Leviathan portrays a landscape of rolling hills, dominated by the figure of a giant whose torso emerges from the crest of the hills and towers heavenward. Densely packed human beings fill both arms and the entire torso, only dispersing in the area of the neck, in the shadowed zone below the chin. The eyes of each one, regardless of position, is directed toward the giant's head and returns through his eyes back to the viewers, who engage, at the same eye level, with the sovereign. The contradictory character of the body politic being a product of men, who are then subordinate to him, is expressed in the interplay of forms of eye contact between the citizens, Leviathan, and the viewers.”¹⁰⁰

What one can hint at from this optics of power that Hobbes alludes to is that the body of the sovereign constitutes and delimits political membership - the multiplicity of subjects' bodies are bordered by the body of the sovereign, whereas the space where sovereign power is exercised is never explicitly limited. This allowed for the emphasis to be on political subjectivity irrespective of what the state politically inscribes onto the *locus*. Benhabib

¹⁰⁰Horst Bredekamp, “Thomas Hobbes's Visual Strategies” in *The Cambridge Companion to Hobbes's Leviathan*, ed. Patricia Springborg (Cambridge: Cambridge University Press, 2007), 39-50.

contends that general war is replaced by property in Hobbes¹⁰¹ but does not seek to radicalize the argument in connection to territoriality.

Also when criticizing *The Laws of the People*, Benhabib fails to take notice of the territory – property connection. However her contention that “In choosing bounded political communities as the relevant unit for developing a conception of domestic and international justice, Rawls was departing significantly from Immanuel Kant and his teaching of cosmopolitan law.”¹⁰² is self-contradictory since she initially outlines that in Kant bounded territoriality is an essential precondition for perpetual peace to be achieved.¹⁰³ Conclusively, it would have made more sense linking the justification of Rawls for limited migration in relation to his understanding of the territory of a people as property.

On the other hand, Rousseau is more intuitive with respect to how fundamentally constitutive is the act of inscribing territory into space and possessing territory as property when the transition to civil society takes place.¹⁰⁴ As I have already mentioned above, Benhabib uses the idea of autonomy as a lecture key for contractualist theories. Nevertheless, my point in taking this rather cursory view on the idea of territory and property was to illuminate upon rights as entitlements.

We have already seen that conceptually Benhabib tries to formulate the paradox of democratic legitimacy as a hiatus that exists between popular sovereignty and territorial sovereignty, but the analytical distinction is thin since “at the same time that the sovereign defines itself territorially, it also defines itself in civic terms.”¹⁰⁵ This can also unambiguously be translated as the tension between rule of people – self legislation - and rule of law – self-

¹⁰¹Seyla Benhabib, *Situating the Self. Gender, Community and Postmodernism in Contemporary Ethics* (Cambridge: Polity Press, 1992), 156.

¹⁰²Seyla Benhabib, *The Rights of the Others. Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004), 75.

¹⁰³Ibidem, 35.

¹⁰⁴I refer here to Rousseau’s famous line from *Discourse on Inequality*: “The first man, having fences in a piece of land...that man was the true founder of civil society.”

¹⁰⁵Seyla Benhabib, *The Rights of the Others. Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004), 35.

constitution. Notwithstanding, since Benhabib theoretically emphasizes the co-originality thesis¹⁰⁶, it has to leverage self-constitution as the political moment of border marking since the law cannot extend but for the territory under its jurisdiction.¹⁰⁷ In this sense, Benhabib translates self-constitution into the legal form of constitution, whereas self-legislation is the deliberative process that amounts to it; otherwise, it would not make much sense distinguishing the two.

Accordingly, it is the self-constitution moment through the establishment of territorial jurisdiction that produces a two fold distinction: an external one - territorially enclosed membership whereby whatever falls outside such physical borders becomes disjointed from that particular rule of law, and an internal one, which is very metaphorically put in Benhabib's terms, as formal members of the sovereign body "who fall under the law protection, but do not enjoy full membership rights."¹⁰⁸

At this point it is relevant to clarify what exactly Benhabib intends by rights especially since her ultimate theoretical point is to argue for citizenship as human right. As the title of her book alludes, *The Rights of the Others*, citizenship as human right in fact refers to a particular path of acquiring citizenship, so it is naturalization as human right in the context of transnational migration. In the forefront, rights are definitional for citizenship; as political membership citizenship confers rights upon the holder of that membership. Additionally, rights are constructed as resources subject to distribution.¹⁰⁹

Richard Dagger tries to reconstitute a double history of rights – one etymological, and one conceptual. There are loosely two schools of thought one that traces the conceptual substance of rights to ancient Greek and Roman law, and another one that holds rights to be

¹⁰⁶The co-originality thesis is theorized by Jürgen Habermas. For a critique of Habermas see, Bonnie Honig, "Dead Rights, Live Futures: A Reply to Habermas's 'Constitutional Democracy'" *Political Theory* 29, no. 6 (2001): 792-805.

¹⁰⁷Seyla Benhabib, *The Rights of the Others. Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004), 35.

¹⁰⁸*Ibidem*.

¹⁰⁹*Ibidem*, 3.

characteristic of modern political and legal thought.¹¹⁰ For Dagger the consideration that could justify one conceptual history more than the other is to say that rights as we today consider them should be traced historically to the period where there is a clear distinguishable line between objective right as a moral standard of right conduct and subjective understanding of right as possessions, as a kind of property.¹¹¹ In other words, rights are distinctively modern.

For Benhabib rights are also fundamental, inalienable. Such conditionality of rights alludes to their universal character. Benhabib follows Arendt in tracing the connection between rights and citizenship in order to build up her theoretical case regarding the nation-state crisis of territoriality. There are essentially two aspects that are map out: the justificatory line for the universality of rights and secondly, the scope of legal regimes that guarantee these rights.

Benhabib recapitulates Arendt's reflection on the crisis of the modern nation state in the aftermath of World War I. The increased number of refugees in the inter-war period signaled the hiatus that exists between rights of man and rights of the citizen. The figure of the refugee reflects the paradoxical nature of rights professed as universal *qua* human beings, yet guaranteed *qua* citizen of a state. This aspect became evident when European states passed de-nationalization laws:

"The first introduction of such rules into the juridical order took place in France in 1915 with respect to naturalized citizens of 'enemy' origin; in 1922, Belgium followed the French example and revoked the naturalization of citizens who had committed "antinational" acts during the war; in 1926, the fascist regime issued an analogous law with respect to citizens who had shown themselves to be 'unworthy of Italian citizenship'; in 1933, it was Austria's turn; and so it continued until the Nuremberg laws on "citizenship in the Reich and the 'protection of German blood and honor'".¹¹²

The aftermath of World War Two however, did more than de-legitimize the natural law doctrines that justified legal rights of nation-state citizens. The failure of the League of

¹¹⁰Richard Dagger, "Rights" in *Political Innovation and Conceptual Change*, Terence Ball and others, eds. (Cambridge: Cambridge University Press, 1989), 294-296.

¹¹¹Ibidem, 297.

¹¹²Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998), n.p.

Nations to enforce minority protection at a supranational legal level has also shown that it would not make much sense to consider international legal accords as substantially more enforceable than domestic law.¹¹³ In this light, Benhabib chooses to read Arendt's right to have rights against her. Although she acknowledges that what Arendt had in mind was a particular model of civic nation where the qualification of citizenship results from the sole act of abiding the constitution – some sort of constitutional patriotism *avant la lettre* – Benhabib seemingly seeks to radicalize Arendt's right to have rights. If the second meaning of "rights" refers to entitlements in juridico-civil usage, the first "right" is over-stretched in the sense that it is no longer the bounded constitutional arrangement that decides the qualification of membership, but that recognition of membership stems from humanity itself.¹¹⁴

Such legitimacy results from the potential "legalization and juridification of rights claims of human beings everywhere, regardless of their membership in bounded communities."¹¹⁵ What Benhabib has in mind at global level is the correspondent logic of domestic constitution, but where the addressee is the international community. If human rights regimes and discourses manage to aggregate in some sort of transnational constitution with enforceable mechanisms this will make it harder for nation-states as bounded communities to justify policies of migrant exclusion.

This in Benhabib's terms would reflect the dis-aggregation of citizenship, since rights are no longer imbricated with national belongingness –what Benhabib calls national attachment or collective identity. The progressive incorporation of human rights in national legislation reflects that national attachment is unhinged from the idea of citizenship. In other words, conceptual frameworks that are delineated in terms of postnational or a-national

¹¹³Seyla Benhabib "The Philosophical Foundations of Cosmopolitan Norms" in *Seyla Benhabib. Another Cosmopolitanism*, Robert Post, ed. (Oxford: Oxford University Press, 2006), 20.

¹¹⁴Seyla Benhabib, *The Rights of the Others. Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004), 57.

¹¹⁵Seyla Benhabib "The Philosophical Foundations of Cosmopolitan Norms" in *Seyla Benhabib. Another Cosmopolitanism*, Robert Post, ed. (Oxford: Oxford University Press, 2006), 20.

citizenship signal the fact that collective identity defined nationally loses ground in the economy of citizenship. In this sense, Benhabib has theoretical precursors as well as successors.

To give just two examples, it was initially Soysal that argued the model of postnational membership in connection to people on the move. Even before Benhabib proposed her cosmopolitan reading of democratic citizenship, Soysal theorized political membership as fluid, multiple, and grounded in international human rights regimes looking first and foremost at the European Union.¹¹⁶

Hence, Benhabib too builds her argumentation in terms of Soysal's connection between citizenship and identity. To argue for postnational membership means, in the context of migration, to challenge the cultural thickness that the idea of national citizenship presumes. The idea of state as the organizational ambit for such political membership is left untouched: "the dissociation from nationness from the state and identity from rights within a postnational scheme projects multiple levels of participation in a polity."¹¹⁷

More recently Kostakopoulou advocates a-national conception of citizenship in the European context, which relies on individual-centered notions of domicile of choice, and where again the justificatory grounds consist in disassembling citizenship from communal/national affiliation.¹¹⁸ Although states are still taken to be the prevalent organizational units of political constituencies, it is not at all clear to what extent such model of a-national citizenship is internally consistent in its logic: on one hand, states still have the right to control and restrict admission into their territories – especially for people with criminal record – on the other hand, citizenship becomes a matter of individual choice of

¹¹⁶Yasemin Soysal, *Limits of citizenship. Migrants and Postnational Membership in Europe* (Chicago: Chicago University Press, 1994), 148.

¹¹⁷Ibidem, 165-166.

¹¹⁸Dora Kostakopoulou, *The Future Governance of Citizenship* (Cambridge: Cambridge University Press, 2008).

domicile.¹¹⁹ It would appear that at least in terms of theoretical trends, citizenship – no matter the stylistic innovation - continues to be conceptualized in relation to human rights regimes, configuring the individual as a significant actor on the international arena whose rights claims would no longer necessarily stem from national legislation but international law as a trans-state constitution.

Finally, the aspect of rights needs to be correlated with the role that transnational migration plays in determining the translation of cosmopolitan norms in human rights legislation at state (national, subnational, local) level. For Benhabib, people on the move equally refers to migrants, refugees and asylum seekers. Since the thrust of arguing for naturalization as human right is grounded in the dis-aggregation of citizenship from national collective identity, and it is legitimized through cosmopolitan norms, the relevance of migrants inside the theoretical framework works only half way. Indeed, migrants and asylum seekers could appeal to international legislation to claim their rights just as much as they could appeal to national legislation since for Benhabib it is the bounded political community that has to contextualize the universality of human rights.

However, when it comes to migration – collective identity side, the fact that individuals would develop and sustain multiple allegiances and networks across nation-state boundaries, in inter- as well as trans-national contexts does not spell out anything for citizenship per se since one does not know to what extent such attachments are incorporated or translated in understandings of citizenship law. Moreover, even if Benhabib assumes that at the level of society there are always competing conflictual cultural narratives – not one overarching national culture - it is implied that only through the variable of migration one can expose the misconstrued understanding of society as a national cultural unit.

¹¹⁹ Ayelet Shachar, “The Future of National Citizenship: Going, Going, Gone?” *University of Toronto Law Journal* 59, no.4 (2009): 579-590.

Conceiving naturalization as human right implies for states to have porous borders. The porousness of borders is a twofold conceptualization: on one hand, territorial, which means that states should not make use of highly restrictive technologies of security; on the other hand, legal, in the sense that asylum seekers and refugee have the right to first admittance, whereas migrants threshold for naturalization should be lowered and consider:

“That you must show certain qualifications, skills, and resources to become a member are permissible because they do not deny your communicative freedom. Length of stay, language competence, a certain proof of civic literacy, demonstration of material resources, or marketable skills are all conditions which certainly can be abused in practice, but which, from the standpoint of normative theory, do not violate the self-understanding of liberal democracies as associations which respect the communicative freedom of human beings *qua* human beings.”¹²⁰

It is rather hard to see, nevertheless, how exactly such presumably low standards of citizenship qualification are consistent with the idea of naturalization as human right *qua* human beings. Of course, Benhabib insistently returns to her critical standpoint that the way she conceptualizes political membership in bounded communities is national culture-proof, and regards only the political integration of migrants.

“Cultural communities are built around their members’ adherence to values, norms, and traditions that bear a *prescriptive* value for their identity, in that failure to comply with them affects their own understandings of membership and belonging. Political integration refers to those practices and rules, constitutional traditions and institutional habits that bring individuals together to form a functioning political community.”¹²¹

In this line of thought, Benhabib proceeds to show that her philosophical ruminations on the idea of citizenship are best advised by empirical case studies in the European Union context.

III.3 Democratic iterations, jurisgenerative politics and European citizenship

For Benhabib, the European Union epitomizes the transformation towards disaggregated citizenship rights. Although she signals the legal disparity between third country nationals and those who in light of respective state-member citizenship have the corollary of

¹²⁰Seyla Benhabib, *The Rights of the Others. Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004), 139.

¹²¹*Ibidem*, 120-121.

“European citizenship”¹²², Benhabib’s persuasively argues that the European Union is where such transformations are most visible: “Cosmopolitan norms today are becoming embedded in the political and legal culture of individual polities. Transformations of citizenship, through which rights are extended to individuals by virtue of residency rather than cultural identity, are the clearest indicators of such cosmopolitan norms.”¹²³

Against the theoretical background of global redistributive principles of justice, Benhabib continues to advocate a procedural model of transnational deliberative democracy. Two conceptual frameworks are at work here: democratic iterations and jurisgenerative politics. The former refers to “complex processes of public argument, deliberation, and exchange through which universalist rights claims and principles are contested and contextualized, invoked and revoked, posited and positioned.”¹²⁴ Such processes are not exclusively institutionally channeled; since Benhabib want to consistently keep in the game a context-transcending democratic culture and legitimacy, democratic iterations can equally manifest at the informal anonymous and weekly institutional levels of civil society.

Regardless of their origin, such processes can lead to jurisgenerative politics which are “iterative acts through which a democratic people that considers itself bound by certain guiding norms and principles re-appropriates and reinterprets these, thus showing itself to be not only the subject but also the author of the laws.”¹²⁵ As one can see, it is not at all clear the analytical distinction between the two. Even if we concede that the first level is discursive and conversational – democratic iterations – and the second one – jurisgenerative politics – is consequently the juridical formalization, the two are conceptually imbricated.

Benhabib discusses *l’affaire du foulard* in France, respectively Germany, as well as the case of voting rights at local level for foreign long-term residents in the province of

¹²²Seyla Benhabib, *The Rights of the Others. Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004), 158-162.

¹²³Ibidem, 177.

¹²⁴Ibidem, 179.

¹²⁵Ibidem, 181.

Schleswig-Holstein and the city state of Hamburg. Considering the rather convoluted normative argumentation that Benhabib constructs throughout two thirds of her book, one would expect the sample cases to reflect the implicitly progressive trend of cosmopolitan norms being internalized in the municipal law and thus reflecting either the unbundling of rights from citizenship as status or dis-aggregation of rights from a national-ized understanding of citizenship.

Despite her thorough exposé of democratic iterations, the legal outcome in all three cases is rather disconcerting in terms of rights of the others. France voted for banning the wearing of all religious symbols from public schools, and in Germany the school teacher was denied in court the wearing of headscarf during classes. Regarding the case of local voting rights, Benhabib places in comparative historical perspective the two German cases. In 1989, in the province of Schleswig-Holstein as well as in Hamburg, local decisions to allow foreign legal residents the right to vote in local elections was overturned by the Constitutional Court's decision.

Ten years after, the German case supports best Benhabib's contention regarding the transformative jurisgenerative politics as a recite of democratic iterations in the European Union context: citizenship law was modified to allow naturalization according to the *jus soli* principle, and resident members of the EU are allowed to vote in local elections as well as in European parliamentary elections. To what extent these cases are representative of the conceptual framework Benhabib articulates as well as the overall internal consistency of her argumentation constitute the gist of the following chapter.

IV. Political membership as human right

In this chapter I proceed with a critique of Benhabib's model of disaggregated citizenship. My critique will follow Benhabib's main argumentative lines and will endeavor to show the internal inconsistencies of the cosmopolitan framework she constructs. Additionally, my contention will be that the theoretical re-coupling between ethics and politics conveniently avoids the question of distributive justice and reduces democratic legitimacy to a matter of procedural discursive games. This way, the rights of others are either lost from sight or collapsed in multicultural talk. Additionally, the unbundling of citizenship from prescriptive understandings of collective identity, i.e. national culture as *ethnos*, is unimaginative and conceptually misleading. This way, Benhabib's just membership in the context of migration loses from sight that migrants are already privileged insiders of the bounded communities, and so the fact that human rights regimes gain some sort of institutional fixity in the municipal law does not actually spell out the unbounded-ness or context-transcending feature of democratic will.

IV.1 *The unbundling argument*

Benhabib argues that today we are faced with the end of the unitary model of citizenship. This means that already different forms of political agency manifest themselves that shape new modalities of political membership.¹²⁶ Conversely, unitary citizenship presupposed a particular configuration of state sovereignty and by implication inter-state relations – the Westphalian model. Never mind the considerable historical gap between the Westphalian peace concerned with territorial sovereignty of European monarchical powers and French and American revolutions which signal the progressive transition from subjects to citizens, from status to rights, from the divine right of the king to popular sovereignty, from

¹²⁶Seyla Benhabib, *The Rights of the Others. Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004), 63.

empire to nation-state. What is particularly puzzling about the so-called Westphalian model against which Benhabib puts forwards dis-aggregated citizenship is the fact that she herself is very much aware that as an ideal-type Westphalian sovereignty can hardly reflect unitary political membership.

Accordingly, the presumed coincidence between national territory and jurisdictional authority has been compromised by the very action of the state which was supposed to uphold it. Following Benhabib's own reflection, the transnationalization of the state began with the geographical discoveries and the colonization of the new found territories.¹²⁷ It is in the process of creating extra-juridical spaces, that the nation-state reveals its imposture. By de-territorializing its jurisdiction, the state bypasses the very principle of political legitimacy, for it is the nation state that professes its own fixity - the overlapping of territory, national culture and population under the same political authority.

If we are to follow the very same logic, human rights international accords are not that different. What I mean is that as a model of inter-state relations human rights charters reflect the same assumption of extra-territorial juridical spaces:

"Humanitarian interventions deal with the treatment by nation states of their citizens or residents; crimes against humanity and war crimes concern relations among enemies or opponents in nationally bounded as well as extra-territorial settings. Transnational migrations, by contrast, pertain to the rights of individuals, not insofar as they are considered members of concrete bounded communities but insofar as they are human beings simpliciter, when they come into contact with, seek entry into, or want to become members of territorially bounded communities."¹²⁸

Nevertheless, Benhabib points to a radical normative break arguing for human rights regimes in terms of their universal moral thrust. The Westphalian Eurocentric model of international relations, for one thing, justified competition over geographical discoveries in terms of *terra nullius*. The political organization and property relations of indigenous people were downgraded in order to substantiate the conquests. Francisco de Vitoria, the notable

¹²⁷Seyla Benhabib, "Twilight of Sovereignty or the Emergence of Cosmopolitan Norms? Rethinking citizenship in Volatile Times" *Citizenship Studies* 11, no.1 (February 2007): 23.

¹²⁸Seyla Benhabib, *The Rights of the Others. Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004), 10.

Spanish jurist of the 16th century “justified land appropriation of the New World in terms of *jus inter gentes Europaeas* which meant that the state was replacing as a new territorial order the previous spatial order.”¹²⁹ Equally, Locke although he begins with a limited right to land appropriation, ends up justifying unlimited appropriation through the introduction of monetary means.¹³⁰ The point that Benhabib makes by referring back to Kant and his critique of the *res nullius* argument is firstly, to reject the common possession of the earth as the basis of cosmopolitan right, and secondly, to advance communicative reason as the process by which cosmopolitan norms are being translated into human rights treaties.

I will leave the procedure of discursive ethics pending for the moment and return to the question of human rights regimes and discuss the conceptualization of transnational migrations. Whereas humanitarian intervention and crimes against humanity are legally codified to deal with inter-state relations, transnational migrations seemingly refer *par excellence* to rights individuals hold as human beings. What Benhabib tries to say in a very unkempt way is that although the right to freedom of movement, the right to asylum, and the right to nationality are recognized, these can be undermined if they come at odds with another codified right in international law, namely the sovereignty of states.¹³¹

Since these rights more or less explicitly encompass the idea of political membership and state sovereignty refers to the prerogative to legislate without legal limitation save itself and the reach of international law, a process of just mediation in-between would mean naturalization as human right (a radicalized version of the right to hospitality). However in

¹²⁹Carl Schmitt, *The Nomos of the Earth in the International Law of Jus Publicum Europaeum*, trans. G.L. Ulmen (New York: Telos Press Publishing, 2006), 127-128.

¹³⁰Land appropriation was justified in terms of the fact that whatever man removes from nature is mixed with his labor and so it becomes his property on condition that plenty enough and just as good is equally left for others to enjoy. This is justified in terms of preservation of life. However, Locke transgresses this initial limitation twofold: firstly, he conceives the lands of America as vacant and so liable to appropriation for there may still be enough land in the world for everyone to have. Secondly, the introduction of monetary means and the activity of commerce become justifiable grounds for individuals to appropriate land in excess. For the complete argumentation see C. B. MacPherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Oxford University Press, 1964), 201-211.

¹³¹Seyla Benhabib, *The Rights of the Others. Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004), 11.

order to justify the reality of state practices of exclusion, naturalization as a human right in point of fact would refer to those who already are insiders of the bounded political community. Therefore, since Benhabib too heavily relies on the idea of mobility, naturalization as human right comes to be “universally” invoked only by those who made it to the other side of the border. Moreover, if Benhabib’s intent was indeed to argue for naturalization as human right, her investigation of *l’affaire du foulard* or voting rights for foreign long-term residents makes no sense in the economy of the argument. Except for the latter, the veil cases specifically refer to French and respectively, German citizens. And so the conceptualization most susceptible to spell out something intriguing and original about political subjectivity gets obscured by court cases that fall under the multiculturalism framework.

It is my contention that Benhabib, because she is so overwhelmingly concerned with dis-aggregating citizenship from national attachment, by-passes her initial concern with the just distribution of political membership and proceeds with theoretical compromises, not moral-political mediations. As national attachment or national belongingness grows thinner, democratic attachments will be directed towards other institutional structures but for the nation state. Benhabib relies too heavily on a particular understanding of nations as ethnos, as “a community of shared fate, memories, solidarity and belonging.”¹³² This is consequential in the legal construction of the state whereby the demos – endowed with popular sovereignty – refers to the unity of nationhood.¹³³ Assuredly, Benhabib cannot be consistent unless she relegates cultural integration as national belongingness and recasts political integration as stemming from potentially transnational democratic attachments. This way, Benhabib argues, civil, social and some political rights are unbundled from national belonging.

¹³²Seyla Benhabib, “Democratic Iterations: the Local, the National, the Global” in *Seyla Benhabib. Another Cosmopolitanism*, Robert Post, ed. (Oxford: Oxford University Press, 2006), 65.

¹³³*Ibidem*.

IV.2 The qualification argument

Allegedly, citizenship unhinged from national attachment eases the paradox of democracy: thus, acts of self-legislation “we the people” resulting from the principle of popular sovereignty would no longer presuppose a thick cultural understanding of “we as a nation”.¹³⁴ This will legitimize the renegotiation and contestation of rights opening the space of democratic inclusion. Since Benhabib aims at conceptualizing political membership as human right, this has legal implications in terms of naturalization as means of acquiring citizenship. However, Benhabib stops disappointingly short from a consistent account.

If political membership in the context of migration could be re-conceptualized as human right, this would function as a levy against the state to unilaterally control borders through migration law. Equally, it would mediate the tension between citizenship by birth and citizenship by naturalization. I would like to be reminiscent upon the fact that in this hypothetical construct that I delineate the principled difference between *jus soli* and *jus sanguinis* does not hold anymore. Following Shachar, if political membership in bounded communities functions as a property right and thus subject to distribution, the inheritability of citizenship – the transfer to the next generation – points to the allocation of it as relying on the accident of birth.

If Benhabib wanted to substantiate how naturalization could have worked as human right she would not have justified state requiring migrants’ qualifying for naturalization.¹³⁵ This way Benhabib maintains and enforces the boundary between citizens acquiring citizenship in virtue of birth accidents and citizens acquiring citizenship through “qualified”

¹³⁴Seyla Benhabib, *The Rights of the Others. Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004), 45.

¹³⁵*Ibidem*, 140.

naturalization. How could political membership as human right justify this differentiation?

Benhabib finds the way out of her own theoretical paradox in virtue of discursive ethics:

“This right to membership entails a right to know on the part of the foreigner who is seeking membership: how can conditions of naturalization be fulfilled? The answer to this question must be made publicly available to all, transparent in its formulations. The human right to membership straddles two broad categories: human rights and civil and political rights. I am arguing that the entitlement to all civil rights and eventually to political rights must itself be considered a human right. This suggests that the sovereign discretion of the democratic community is circumscribed: once admission occurs, the path to membership ought not to be blocked.”¹³⁶

Such argument can stand two possible interpretations. Either Benhabib presses for a right to information as human right and thus saves procedural discursive ethics that holds all human beings to be potentially conversational partners as moral and political equals. In terms of naturalization and just political membership, this amounts to nothing. Or naturalization as human right applies to qualified insiders and therefore the argument is circular and tautological.

Taking my cue from Rancière’s critique of Arendt, I argue that, but for the example of voting rights for foreign residents, Benhabib’s court cases regard citizens and thus are self-defeating:

“Either the rights of the citizen are the rights of man—but the rights of man are the rights of the unpoliticized person; they are the rights of those who have no rights, which amounts to nothing—or the rights of man are the rights of the citizen, the rights attached to the fact of being a citizen of such or such constitutional state. This means that they are the rights of those who have rights, which amounts to a tautology.”¹³⁷

The reason for referring to Rancière has however more to do with challenging Benhabib’s justification of qualifications for migrants wishing to naturalize. Even if such requirements from the part of the state do not interfere with individuals’ communicative freedom, they nevertheless re-create the dual-track approach whereby non-members have to prove themselves more than already-in-place members. I do not refer here to Benhabib’s insistence on national belongingness.

¹³⁶Seyla Benhabib, *The Rights of the Others. Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004), 141.

¹³⁷Jacques Rancière, “Who is the Subject of the Rights of Man?” *South Atlantic Quarterly* 103, no.2/3 (2004): 302.

What I wish is to present a theoretical exercise that might illuminate best on the qualification argument. When it comes to naturalization, there is one particular requirement that apparently is more justified than other: not to possess a criminal record.¹³⁸ Considered in the contractualist tradition, the foundational moment of polity specifies that the political authority – the state - would hold the monopoly over the legitimate use of violence in order to protect everyone's freedom. Only in case of serious abuses and transgressions from the part of the political authority, can the people abrogate such right and reclaim it as their own under the form of civil disobedience. In this logic, when an individual performs a criminal act against another one what happens first and foremost in my understanding would be a breach in the social contract: the individual's coercive action not only breaks with state monopoly of legitimate use of violence, but most importantly it de-legitimizes his political membership, his part-taking in the social contract. If we conceive citizenship as a reciprocal relation between individuals – the collective will, popular sovereignty line – then the qualification regarding criminal record should apply equally: withdrawal of political membership right to the criminal citizen and denial of naturalization in the case of the nonmember criminal.

However, if for Benhabib the state cannot justify de-nationalization for whatever reasons – criminal record for example - it does not follow that the migrant, the would-be citizen has equal communicative freedom share in this process of justification: in a way, he is considered to have lost its claim to moral-political equality if prior to naturalization he has acquired a criminal record in his original or prior political constituency. In other words, to push the argument to the extreme, if one works with the presumption of moral-political equality in democratic discursive practices, then those who break the law in a contractarian perspective should be excluded whether they are foreigners or members.¹³⁹

¹³⁸Dora Kostakopoulou, *The Future Governance of Citizenship* (Cambridge: Cambridge University Press, 2008), 85-86.

¹³⁹Rainer Bauböck, *Transnational Citizenship. Membership and Rights in International Migration* (Vermont: Edward Elgar Publishing Limited, 1994), 238.

Coming back to the aspect of qualification, I do not wish to refer to practices of nation-states that alternatively apply the migrant as taker and migrant as giver rhetoric.¹⁴⁰ My argument is theoretical and draws on Rancière's understanding of democracy that in certain aspects approximates Benhabib's argument: equal speaking beings engaged in political conversations.¹⁴¹ We have already signaled that the normative ideal of ancient participatory, deliberative citizenship is subject to periodical reappearance whenever the political scene is supposedly confronted with anomy and non-involvement.

However there is one peculiar aspect of this ideal that modern understanding of democratic citizenship seems to be oblivious of: the drawing of lots.¹⁴² This is the tension driven formula of democratic life or the scandal of democracy as Rancière so ingeniously puts it: the drawing of the lots signifies a principle of political government whose legitimacy can only rest on equality: "Democracy is governed by those who have no qualification to govern; it dissolves any standard by which nature could give its law to communitarian artifice via the relations of authority that structure the social body."¹⁴³

The democratic law of chance radically breaks with the order of qualification: "it is the government of those who have no more title for governing than they have for being governed."¹⁴⁴ Benhabib, therefore, undermines her own argument of democratic legitimacy stemming from the unbound demos thesis, approving of states' requirement of qualifications for migrants. It is only at one point that she alludes to non-qualification in the case of moral advocacy:

"Wouldn't perhaps a truly cosmopolitan politics require that every human child receive a passport as a world citizen in addition to his/her local identification papers? Doesn't the category of "crimes against humanity" suggest that the human person ought to be given universal legal personhood?"¹⁴⁵

¹⁴⁰Bonnie Honig, *Democracy and the Foreigner* (Princeton: Princeton University Press, 2001), 8.

¹⁴¹Jacques Rancière, *Dis-agreement. Politics and Philosophy*, trans. Julie Rose (Minneapolis: The University of Minnesota Press, 1999), 33.

¹⁴²Jacques Rancière, *Hatred of Democracy*, trans. Steve Corcoran (New York: Verso, 2006), 41.

¹⁴³*Ibidem*.

¹⁴⁴*Ibidem*, 45.

¹⁴⁵Seyla Benhabib, "Hospitality, sovereignty, and democratic iterations" in *Seyla Benhabib. Another Cosmopolitanism*, Robert Post, ed. (Oxford: Oxford University Press, 2006), 175-176.

Conclusively, whatever thin requirements Benhabib tries to conceive such as income or civic knowledge in the case of non-members wishing to naturalize, she compromises her idea of naturalization as human right maintaining a hiatus within the demos whereby members are never required to qualify in order to obtain their political membership, whereas non-members' have to pass citizenship tests.

IV.3 The coercion argument

By referring back to how Kant found inspiration in Rousseau's idea of original contract Benhabib contends that:

“Ideally democratic rule means that all members of a sovereign body are to be respected as bearers of human rights, and that the consociates of this sovereign freely associate with one another to establish a regime of self-governance under which each is to be considered both author of the laws and subject to them.”

Besides the obvious aspect that Benhabib forces a human rights discourse upon an understanding of political foundation base on natural law doctrine, one should be more cautious about exalting the free consent of individuals since Kant read the social contract as based on sheer necessity, as a transition from unrestrained freedom to civil freedom by coercive order.¹⁴⁶ In other words, the unsociability of men continues in the political state whereby the sovereign power safeguards and assures that the freedom of each co-exists with the freedom of the others by all submitting to the legitimate use of sovereign's coercion.¹⁴⁷

Subsequently, considering how much Benhabib tries to conceive a balance mechanism against state discretionary politics of exclusion, what is surprisingly absent from her account is a fundamental feature of the state as the holder of the monopoly over the legitimate use of violence.

¹⁴⁶Immanuel Kant, *Political Writings*, ed. Hans Reiss, trans. H.B. Nisbet (Cambridge: Cambridge University Press, 1992), 46.

¹⁴⁷*Ibidem*, 23-24.

The crisis of territoriality in relation to sovereignty underlines only what one aspect: without normatively challenging the tension between universal human rights – emphasizing of course how processes of democratic iterations could become legally codified at global, national and local levels– and territorial closure, Benhabib could not have pressed for the relevance of cosmopolitan norms as opening up democratic imagination.¹⁴⁸ This is what I mean by the fact that I find the ethically informed cosmopolitan norms as an excessive argument. Therefore, I would argue that a more careful consideration of state's monopoly over coercion can better shed light upon the so called paradox of democratic legitimacy than the cosmopolitan normative arguments do.

Benhabib adopts a certain understanding of demos which is theorized in principle as unbounded. This means that territorial sovereignty needs to be also democratically justified. In order to challenge Benhabib's redundant reliance on cosmopolitan norms, I wish to follow the theoretical exercise that Abizadeh constructs.¹⁴⁹ The strength of her argument lies precisely in its clarity. She proceeds to show that in order to be internally consistent with the democratic theory of popular sovereignty and the political legitimacy that follows from this principle, state's justification in terms of the exercise of unilateral discretion on entry policy has to have two addressees: members and non-members alike.¹⁵⁰

Partially conceived as a challenge to Joseph Carens's defense of open borders on liberal grounds, Abizadeh justifies it on democratic grounds. However, even if Benhabib tries to challenge the exclusionary practices of states in the ambit of democratic theory, she lacks a thorough account of the state. In other words, her discourse theory of democracy misses out conceptually on the state, focusing too heavily on challenging only the understanding of nation as *ethnos*. Circling back to the aspect of coercion, Abizadeh's reconceptualization of

¹⁴⁸William E. Connolly, "Democracy and Territoriality" in *Re-imagining the Nation*, Marjorie Ringrose and Adam J. Lerner, eds. (Buckingham: Open University Press, 1993), 51.

¹⁴⁹Arash Abizadeh, "Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders" *Political Theory* 36, no.1 (2008): 37-65.

¹⁵⁰*Ibidem*, 38.

state unilateral control of borders equally renounces the human rights argument as tempering sovereignty¹⁵¹ and, as we shall further see, manages to also partially vindicate Benhabib's theoretical account of deliberative democracy based on discursive ethics.

The justification of border control equally concerns members and non-members because they are equally subject to state coercion: "Being subject to coercion through coercive threats is sufficient to trigger a demand for justification."¹⁵² The thrust of the argument relies on the principle of popular sovereignty whereby "the exercise of political power is legitimate only insofar as it is actually justified by and to the very people over whom it is exercised, in a manner consistent with viewing them as free and equal."¹⁵³ However, because democratic theory is silent on people's will deciding upon both civic and territorial boundaries, and thus only presupposes them, the bounded *demos* thesis is internally incoherent:

"But to speak of a collective will at all, the people must have some corporate existence; and for its will to be the legitimating source, rather than outcome, of political power, this corporate people must exist by virtue of some quality specified prior to, or independently of, the exercise of political power. Thus, on this mistaken reading, democratic legitimacy presupposes a pre-politically constituted, bounded, corporate people (whose will legitimates the exercise of political power)."¹⁵⁴

It is only after taking note of state coercive order and clarifying to whom state coercion refers that Abizadeh proceeds in the same line as Benhabib in terms of communicative reason and deliberative democracy. She conceptualizes coercive threat as communicative coercion:

"A coercive threat communicates the intention to undertake an action in the future whose (anticipated) effect is to prevent a person from choosing an option that otherwise might choose. So beyond directly thwarting the pursuit of some options, states also threaten persons with sanctions should they carry out proscribed actions."¹⁵⁵

¹⁵¹Arash Abizadeh, "Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders" *Political Theory* 36, no.1 (2008): 38.

¹⁵²*Ibidem*, 57.

¹⁵³*Ibidem*, 41.

¹⁵⁴*Ibidem*, 47.

¹⁵⁵*Ibidem*, 40.

Just like Benhabib, Abizadeh is concerned with the democratic legitimacy of the process of justification which equally co-implicates members and non-members because the unbounded demos thesis works conceptually with an understanding of demos as participatory.

This leads us back to the fact that:

“The legal recognition or denial of such a right must be the result of democratic processes giving participatory standing to foreigners asserting such a right. Democratic theory properly understood provides the inter-state framework of legitimacy within which foreigners’ claims to free movement can be democratically adjudicated.”¹⁵⁶

Notwithstanding Abizadeh’s elegant theoretical exercise, there is one perverse aspect. First of all, even if she demonstrates that the justification for the existence of borders relying on self-determination principle is incompatible with a unilateral regime of border control, the problem of democratic legitimacy of unbounded *demos* is maintained even at the level of multi-lateral border control. Internally, just like Benhabib argues, the European Union can be read as such mutual justificatory model. However, in relation to third country nationals, the tension re-appears. At any rate, Abizadeh manages to successfully re-connect the aspect of state coercion to the *problematique* of justifying distribution of political membership, unlike Benhabib whose insistence on border control and territorial sovereignty disregards coercion in the economy of her argument.

IV.4 The time argument

Benhabib argues democracy to be an institutional arrangement that organizes the collective exercise of power on a principled basis which holds that “decisions affecting the well being of a collectivity are the outcome of a procedure of free and reasoned deliberation among individuals considered moral and political equals.”¹⁵⁷ Because of the underlining tension that exists between democratic states as constitutionally bounded and *demos* as

¹⁵⁶ Arash Abizadeh, “Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders” *Political Theory* 36, no.1 (2008): 39.

¹⁵⁷ Seyla Benhabib, *The Claims of Culture. Equality and Diversity in a Global Era* (Princeton: Princeton University Press, 2002), 105.

unbounded, Benhabib take on a discursive theory of democracy is concerned with popular empowerment in the sense of contextual multifarious conversational processes whereby political potentialities of ordinary citizens manifest in terms of rights claiming.¹⁵⁸ As I have said before I find the moral argument superfluous or unnecessary in arguing political equality. There is no need to unveil liberal democracies as suffering from some sort of moral deficit and then expose the discrepancies between declared principles and reality as not sufficiently ethically informed.

If we decide to take literally the declared principles of freedom and equality for all, one has to re-claim them as such. What I wish to suggest is that rights remain potentialities, they are inscriptions, and so the only way to exercise them is for political subjects to put their rights to work and build cases for the verification of the power of this inscription; this displays political subjects are not definite collectivities, but open predicates.¹⁵⁹ And so, what deliberative democracy could at best point in terms of morality is the virtue of distrust.¹⁶⁰ Only distrustful political subjects engage deliberative processes to watch for their rights, to enact them.

Benhabib celebrates anonymous interlocking processes of rights claiming as part of the process that leads to the incorporation of cosmopolitan norms in the legal body of democratic majorities.¹⁶¹ What I think she alludes to is that the higher the level of deliberation, the more democratic legitimacy there is at institutional and legal level. But how exactly can the presupposition of anonymity inform a more participatory democratic life? Conversely, democratic processes of rights claiming are rather extent episodic and to a certain

¹⁵⁸Sheldon S. Wolin, "Fugitive Democracy" *Constellations* 1, no.1 (1994): 11.

¹⁵⁹Jacques Rancière, "Who is the Subject of the Rights of Man?" *South Atlantic Quarterly* 103, no.2/3 (2004): 303.

¹⁶⁰Judith Shklar, *Ordinary Vices* (Cambridge: Harvard University Press, 1984), 238.

¹⁶¹ Seyla Benhabib, *The Rights of the Others. Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004), 19, 181.

extent solitary.¹⁶² This way, the political membership becomes an interval between prescribed identities determined by juridical categories and the a-posteriori reconfiguration of rights.

The interval is political whereby the limitless, the universal of democracy is renegotiated and membership re-distributed.¹⁶³ But it would be my contention that the interval is also temporal and does not presuppose the progressive line that Benhabib tries to underline whereby cosmopolitan norms are increasingly and substantially codified in national and local legislatures. We have seen that however universal the juridical categories might be in scope, they will always necessitate “an exercise in political supplementation that actually verifies to which subjects these names can be applied and what power it is that they bear.”¹⁶⁴

Therefore my last point will concern the time lines of democracy. There are two core principles that Benhabib’s cosmopolitan understanding of democracy aims at: democratic empowerment and inclusion. I have delineated above the empowerment principle that functions as verification tests for the rights which are upheld by the written law. As for inclusion, this presupposes a time paradox at the level of democratic theory: “Men have to be prior to the law what they become by means of law.”¹⁶⁵ So the founding of the polity “is never fully legitimate at the moment of its constitution because of the temporal gap between act and consent.”¹⁶⁶ This can be translated as the alien-ness of law which is re-appropriated through those verification tests I mentioned earlier. In this sense, Honig, on considering democracy in the context of migration, reads Rousseau’s foreign founder as the expression of the paradox of

¹⁶²Jacques Rancière, *Hatred of Democracy*, trans. Steve Corcoran (New York: Verso, 2006), 96.

¹⁶³*Ibidem*, 62.

¹⁶⁴*Ibidem*, 59.

¹⁶⁵William E. Connolly, “Democracy and Territoriality” in *Re-imagining the Nation*, Marjorie Ringrose and Adam J. Lerner, eds. (Buckingham: Open University Press, 1993), 51.

¹⁶⁶*Ibidem*, 52 (Connolly gives a very savvy quote from Alice in Wonderland: “there’s jam yesterday, and jam tomorrow, but never jam today.”).

democratic legitimacy whereby the foreigner/the migrant becomes a generator of democratic agency.¹⁶⁷

Likewise, the temporal gap of democracy informs about the corporeality of the state.¹⁶⁸ Benhabib considers the crisis of territoriality in the sense of extra-territorial jurisdictions to which the individual can appeal in order to enact its rights, this consequently producing a de-nationalization of democratic political culture at state level. This way, I would say Benhabib misses on a particularly important aspect that could have render her convoluted argument on national attachment more intelligible and compelling in terms of argumentation. I contend that the focus should not befall on the rather questionable matter of attachment or belongingness, but on national time.

In this sense, I refer to Anderson's imagined community who rests on technologies of temporal simultaneity to overcome mutual strangeness.¹⁶⁹ Therefore, the so called multiplication of democratic sensibilities at transnational level points to the breach in the national time which has acquired a sort of fixity. It is in this light that I would read the migrant, who creates a breach in national time, and in that interval re-negotiates political membership.

In closing, I would argue that it is the eventful nature of democracy that can account for the vitality of political subjects enacting their rights, as well as for the possibility of expanding inclusion. No account of cosmopolitan norms is hence required. With respect to this idea of the episodic nature of democracy, I drew my inspiration from Rancière, but most

¹⁶⁷Bonnie Honig, *Democracy and the Foreigner* (Princeton: Princeton University Press, 2001), 22-31.

¹⁶⁸William E. Connolly, "Democracy and Territoriality" in *Re-imagining the Nation*, Marjorie Ringrose and Adam J. Lerner, eds. (Buckingham: Open University Press, 1993), 62.

¹⁶⁹Bonnie Honig, *Democracy and the Foreigner* (Princeton: Princeton University Press, 2001), 40.

significantly Wolin, who conceptualized fugitive democracy as a political moment in opposition to democracy as politics of government in the form of nation-state.¹⁷⁰

V. Conclusion

In this paper I have tried to investigate a particular cosmopolitan conceptualization of citizenship informed by Seyla Benhabib's work and sought to challenge it. Her model of disaggregated citizenship is similar in argument to other theoretical models – postnational citizenship, anational citizenship, citizenship unhinged, and transnational citizenship – in so far as they seek to analytically challenge the nation-state container model for society or democracy, but also to signal contemporary de-nationalizing trends in practice.

At the same time, Benhabib's philosophical reflection on the matter of political membership differs in terms of her normative stance. Within the ambit of cosmopolitan theory, Benhabib's democratic cosmopolitanism is concerned with the widening the space of deliberation and contestability in terms of rights claims as well as the space of democratic inclusion. She does not seek to envisage particular institutional structures of cosmopolitan governance. However, as we have seen, the example of the European Union illustrates for Benhabib one possible emergent form of such organizational structure whereby cosmopolitan norms are likely to trickle down to national and local legislature levels and be codified in terms of human rights.

In her conceptual construct, Benhabib equally co-implicates a philosophical rumination as well as a legal understanding of citizenship. Since she privileges a moral-political analysis, her position is rather hard to follow, undermining at times the thrust of her argument. My main contention has been that the normative cosmopolitan model works as an

¹⁷⁰Sheldon S. Wolin, "Fugitive Democracy" *Constellations* 1, no.1 (1994): 1-3, 13 (In the context of the nation-state form, the political – unbounded in principle – becomes domesticated through the drawing of borders and boundaries; this leads the nation-state to re-claim itself as the fixed center of political life.)

excess argument which unnecessarily complicates the democratic account: in other words, one need not appeal to moral equality to plead the case of political equality. In order to show this, I constructed my critique around one particular point that Benhabib makes and which so far has remained unnoticed by most of her critics: political membership as human right. In her attempt to radicalize the Kantian right to temporary sojourn, Benhabib manages to originally spell out naturalization as human right in the context of migration.

Nevertheless, this insight is never compellingly argued and becomes overshadowed by the procedural discursive politics and the insistence on moral universalism unbundling national attachments. Accordingly, I resolved to outline how this conceptualization could be supported by pointing to what Benhabib says, and undermines her own statement, and by which she does not say, and could enforce her hypothesis: the unbundling, the qualification, the coercion, and the time argument. My critique questioned the internal logic of Benhabib's cosmopolitan understanding of democratic citizenship in order to clear away the moral universalist stance and hence re-work political membership as a fundamental right within the ambit of democratic theory alone.

As a final note, I suggested that a possible re-conceptualization of democratic citizen as political subject enacting its rights should analytically account for the time of democratic life. If one wants to uphold the idea of human rights as universally valid because we are all human beings simpliciter and at the same time explain and justify variation across political constituencies I would say universalism should be at least complemented by an idea of rights as timeless.

In this sense, there is no progressive Marshallian line from civil to political to social economic rights. There is no cosmopolitan time of human rights. If we uphold the idea of the limitless of demos, the universal of democracy, rights become timeless. Therefore, it is the timelessness of rights that illuminates upon the momentary, episodic enactment of rights.

When individuals decide to put the universal to the test and verify their rights, they do that in virtue of democratic law of chance. This is what the ancient principle of the drawing of lots eventually comes to: anyone at all, any time, any where. Its timelessness is thought provoking, not its statistical recurrence.

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