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49TH SOCIETAS ETHICA ANNUAL CONFERENCE

“ETHICS AND MIGRATION”

August 23-26 2012 Societas Ethica, the European Society for Research in Ethics held its 49th annual conference. The conference theme was “Ethics and Migration” and the setting the Romanian city Sibiu in Transylvania. The site for the conference mirrored the theme. Transylvania has during the centuries been a place for waves of migration, for example, already in the 12th Century it received many German immigrants. It is also today a home for hundreds of thousands of Roma people.

Migration is so far a neglected issue within applied ethics. This is surprising due to both the seriousness of the issue and the ethical dilemmas it poses. With this conference the Societas Ethica, wished to bolster the ethical discussion on migration. The conference channels illustrated the range of ethical issues that migration raises:

Many people migrate from poverty and oppression but are stopped at the borders of the rich nations in Europe and America; what are their obligations towards the migrants? How is migration related to global justice?

Migrants and refugees are vulnerable. They have lost their communities and citizenships. What are the rights of migrants and refugees? Who is obliged to protect their rights?

Fortress Europe has unfortunately become a reality. With surveillance, fences and barbed wire Europe tries to keep the migrants at a distance. But, what are the moral obligations of the individual European nations and of the European Union? What do we owe them?

Immigrants who have successfully entered Europe are often met with hostility and end up in segregated communities. What are the ethical challenges of segregation and conflicts based on religion and ethnicity?

The unknown person, the different, the Other, is often despised and persecuted. European history shows ample of evidence of this fact. How should minorities, like for example the Roma people, be respected and included by the majority populations and by the states?

The first key note speech was held by Dr Gernot Haupt, Alpen-Adria University Klagenfurt over the theme “Antigypsism and migration”. Haupt showed with plenty of examples how the Roma people in Europe have been victims of constant policies of exclusion; from repression to extermination culminating in the Holocaust in the 1930s and 1940s. Haupt expressed critique of the present attitude of the majority in societies with Roma minorities. Their message is; it is always they, the Roma, who must change, not we!

Dr Matthew Gibney from Oxford University addressed the topic “Refugees and justice between states”. He noticed that presently the majority of the world’s refugees go to neighboring poor countries and hence that the refugee situation exacerbate the global inequalities. How can this change? Are not for example nations responsible for creating massive streams of refugees, like the United States after the attack on Iraq in 2003, obliged to host the resulting refugees?

Dr Michelle Becka from University of Frankfurt am Main talked about “Ethics on the border. Towards a theological horizon in the discourse of migration”. She emphasized that being a stranger is an important theme in the biblical tradition; migrants are in focus for

theological ethics. When the humanity of migrants is reduced due to oppression and segregation it is crucial for theological ethics to emphasize the need for solidarity.

In the last keynote speech Dr Oliver Bakewell from Oxford University talked over the theme “The relationships between migration and human development”. His lecture focused on the potential positive effects of migration for development through Diasporas communities with links to their homelands, remittances, i.e. the financial support that immigrants send back to their home countries, etc.

More than 40 participants, among them many young scholars from all over Europe but also from India, the United States, Hong Kong and Australia, presented high quality paper. As the only European society open for scholars in moral philosophy, theological ethics and applied ethics, Societas Ethica has a great potential to influence and stimulate the ethical discussions in Europe.

Göran Collste
President of Societas Ethica

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Quality of Government and the Treatment of Immigrants

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Abstract

Normative questions concerning the treatment of immigrants can be approached from various perspectives: consequentialistic, deontological, fairness-based, rectificatory, or similar. In this paper, the implications of the idea of quality of government for the treatment of immigrants are examined. It is argued that an acceptable definition of quality of governance includes a principle of beneficence, which prescribes a beneficial treatment of immigrants whenever laws and policies allow. The principle, which is not novel in itself, is presented in a more specified form and is provided with a philosophical justification.

Keywords: quality of government; immigration ethics; principle of beneficence; community principle; immigration policy

In this paper, I will address the general question: what responses to immigration are morally required. I will do so in a rather indirect way, and through only a limited perspective: by exploring the normative implications of an idea of quality of government on public authorities' treatment of potential citizens. Given that one accepts a particular normative conception of quality of government, then one is *prima facie* also morally committed to certain normative requirements regarding the treatment of potential citizens.

The discussion will proceed as follows. First, after a short presentation of the idea of quality of government, I will defend the significance of such approach to normative questions concerning immigration. Many will perceive the drawing of implications from a particular conception of quality of government as irrelevant to normative issues concerning immigration. It should be the other way around, it is sometimes argued: that one must start with the normative requirements concerning immigration and from there draw out implications on what quality of government is. I will therefore expound what I believe to be the benefits of starting with a particular conception of quality of government. Second, I identify and describe a particular component of quality of government – *the principle of beneficence* – as particularly pertinent to our normative thinking concerning immigration. In the third part of the paper, I provide a justification for why the principle of beneficence should be included into the definition of quality of government. Following my general approach, my suggested justification avoids relying on normative views directly concerned with immigration. Finally, in the fourth section, I explain why the principle applies not only to matters directly relevant to citizens but also to dealings with potential citizens.

The novel contribution made by this paper is unlikely to be its normative views, nor any actual prescriptions. In fact, I take the normative principle here defended to be something of an obvious truth. But not everyone accepts the principle, and it is routinely rejected or ignored in public discourse, in politics, and sometimes in philosophy. Therefore it is not without merits to attempt to express and justify the principle of beneficence in a more philosophical manner. The rest of the paper is dedicated to that ambition.

Why Bother Thinking about Quality of Government?

There are many definitions of quality of government (QoG). Some focus on economic performance, some on institutional size, some on impartial implementation, and so on.¹ In what follows, I will use QoG to denote a *moral ideal pertaining to the use of public authority by state institutions and public officials*; that is, QoG is concerned with the moral quality of the nature and acts of the agents that are vested with public authority.

Defining such a broad concept with any precision is not easily done, and in my view no one has succeeded in such an undertaking. For my purposes below however, it suffices to single out a particular element of QoG for extra attention, while only outlining the other elements. As a moral notion, it formulates an ideal that guides whatever falls within its scope. It therefore sets a moral norm, be it *prima facie* or actual. Since a moral notion, it cannot be worked out *a*

¹ For historical perspective on the origins of and introductions to the concept, see Martin Doornbos, “«Good Governance»: The Rise and Decline of a Policy Metaphor?”, in: *Journal of Development Studies* 37 (6/2001); Cynthia Hewitt de Alcántara, “Uses and Abuses of the Concept of Governance”, in: *International Social Science Journal* 50 (155/1998); Thandike Mkandawire, “«Good Governance»: the itinerary of an idea”, in: *Development in Practice* 17 (4-5/2007); Thomas Weiss, “Governance, Good Governance and Global Governance: Conceptual and Actual Challenges”, in: *Third World Quarterly* 21 (5/2000). For a short list of recent definitions and their respective meanings, see Merilee Grindle, “Good Enough Governance Revisited”, in: *Development Policy Review* 25 (5/2007), pp. 556-557. For a discussion of recent definitions, see Bo Rothstein, *The Quality of Government: Corruption, Social Trust, and Inequality in International Perspective*, Chicago 2011.

priori or through the natural sciences; at least this is the prevailing perception among many moral philosophers and ethicists. Rather, a morally loaded definition must rest on appeals to intuitions, principles and background theories. Such an approach is sometimes referred to as Wide Reflective Equilibrium, once introduced by John Rawls. In short, a moral judgment can be regarded as reasonable when considered convictions, moral principles and background theories support each other in an equilibrium.² Now, I will assume that a reliance on something at least similar to Wide Reflective Equilibrium is reasonable when discussing moral definitions as well, and the ideal QoG must thus constitute such equilibrium.

With such methodology underpinning any reasonable definition of QoG, my own preferred definition is a complex one, describing QoG as being made up by a set of principles, values and norms which by themselves are insufficient but necessary, instead being jointly sufficient. Below, some, but not all, of the components of QoG are mentioned (figure 1). Most of them are well-known, requiring little explanation. Most important for our present purposes, however, is to take note of the components labelled as *moral minimalism*, *rule of law*, *efficiency* and *stability* – they play a crucial role in constraining the principle of beneficence.

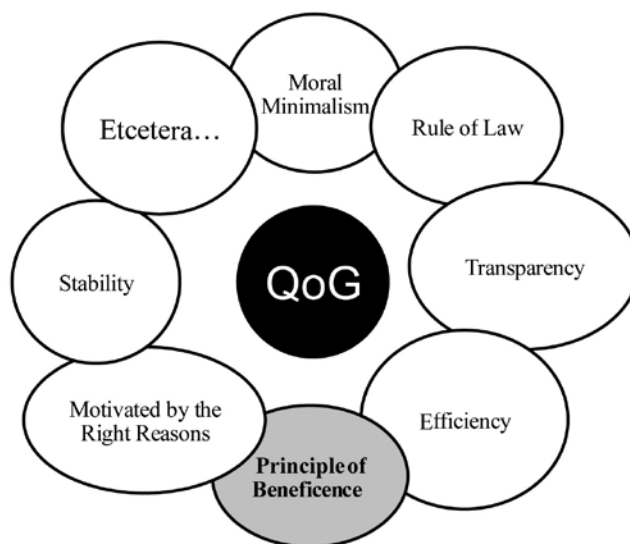


Figure 1

Having sketched the idea of QoG, why should we choose it as our starting point when discussing how public authorities ought to treat immigrants? To most people, the most direct way of approaching such a question is also the appropriate one. Intuitively, this seems perfectly reasonable. Surely, it can be argued, if a particular conception of quality of government turns out to be at odds with what we, after due reflection, perceive to be the morally required response to immigration, then that conception of QoG must go; not the normative view of immigration. I will not deny such intuition, since I think that it expresses an important moral insight.³ But that does not mean that the idea of quality of government is of no relevance to our view of what is required of an ethically sound institutional response to immigration. If what I have

² The idea of reflective equilibrium is presented in John Rawls, *A Theory of Justice*, Cambridge, Mass. 1971, and is elaborated by Norman Daniels in “Wide Reflective Equilibrium and Theory Acceptance in Ethics”, in: *The Journal of Philosophy* 76 (5/1979).

³ Call it the Closeness Principle: more precise and concrete moral judgment, after having been subjected to proper intellectual and emotional reflection, should be given precedence before equally stringent but more abstract moral principles and judgments, *ceteris paribus*.

assumed above is correct, then whatever normative principle(s) is expressed in a definition of QoG is relevant to how a moral immigration policy should be constructed, as they should – ideally – cohere in a Wide Reflective Equilibrium. This also means that trying to work out the ethical response to immigration in isolation from QoG would render the discussion incomplete.

It can be objected that one need not deny the relevance of a more holistic approach to the normative questions concerning immigration by *starting*, or even *focusing*, on immigration directly. The perspective provided by QoG can be sneaked in later in the process, so to speak, after having formulated some tentative moral requirements. Clearly, this is one possible way to approach the issue. A reasonable process leading up to a moral conclusion should take all considerations into account; it does not stipulate a particular work order. My contention is that there are reasons – empirically based reasons – for preferring a more indirect approach.

First, trying to settle normative questions regarding immigration in isolation is arguably undoable. Such discussion is, I think, bound to break down quarrelling over details and alleged facts and statistics: details, facts and statistics that are themselves disputed so never allowing any progress. A certain epistemic uncertainty, or a lack of a consensus on epistemic certainty, will cause the discussion to come to an early halt. This is, I think, an empirical observation of the debate that many would accept as correct.

Second, it must be observed that the debate over what should constitute an ethical – and a political – response to immigration is a debate soaked with intense emotions; emotions that are not always aligned with rational argumentation and analysis. To dive straight into such discussion is therefore a non-ideal strategy, bound to generate stalemate as soon as the emotions start running high.

Both these observed problems can, I believe, be mitigated – if not completely overcome – by taking the idea of QoG as our starting point. Starting with a moral discussion from an essentially institutional perspective helps reduce emotional biases and makes some of the contested statistics and facts irrelevant. Unburdened by emotional baggage, some of the discussions can be advanced in a direction that the participants can calmly accept.

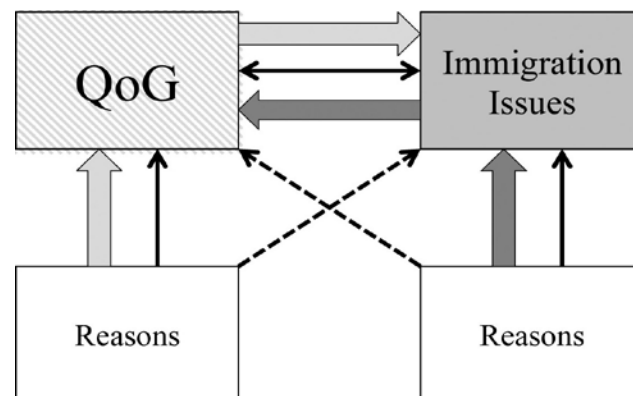


Figure 2

As shown in figure 2, the reasons that directly inform an ethical discussion on immigration might not necessarily be a part of a justification of QoG, or *vice versa*. The different directions of various reasons lend some plausibility to my two arguments above.

Third, using QoG as a starting point also mirrors the often forgotten fact that the agent primarily being responsible for responding to immigration is the state. As a moral agent, the state is situated in a rich web of responsibilities and duties, and the actions of the state in a

particular case are not always determined by ethical considerations stemming directly from the dilemma at hand. Hence, starting with the QoG helps to remind us of this fact.

Now, no conception of QoG will provide us with a blueprint of a moral response to immigration. What it will assist us in, however, is establishing a basic attitude, with which we can approach and analyse institutional responses to immigration in particular settings. What we can expect to find, by starting the discussion with the concept of QoG, is a *prima facie* duty to be generous in our response to immigration when laws and policies allow us to. Other reasons and circumstances might, in the end, adjust that duty in some ways, but a clearly worked-out conception of QoG will be a consideration not easily dismissed. Some headway will therefore be done if we start with QoG.

The Principle of Beneficence

While outlining the bare bones of what I take to be a viable concept of QoG, I suggested that such concept should include what I call the *Principle of Beneficence* (hereafter PB). Succinctly put, PB can be expressed as follows:

(PB) Under conditions of uncertainty, public agents ought, *ceteris paribus*, when exercising public authority, to treat the subjects under their authority in accordance with the most beneficial alternative materially and ethically available.

Such definition obviously needs some explaining. First, by “conditions of uncertainty” is meant conditions where *laws and explicit policies* are ambiguous, vague, in conflict, or simply silent. Conditions of uncertainty also include conditions where there is a shortcoming on the agent side (for instance, the public agent lacking some capacity), or when lack of factual input or external circumstances make a law or policy impossible to apply. Without reliable facts and probabilities, which laws and policies are meant to rely on when applied, further room for manoeuvre for the public official is created. Epistemic uncertainty therefore adds to an overall condition of uncertainty, allowing PB to come into play. As any government body and official must, under the rule of law, operate on the basis of and in accordance with positive laws and explicit policies, beneficial treatment cannot, and should not, be at odds with existing laws and policies, short of an extreme emergency.⁴

This limitation is premised on the assumption that the existing laws and policies are not strikingly unjust or undemocratic. It would be an odd thing to claim that immoral positive laws should somehow circumscribe an obviously moral, but not promulgated, response to immigration. Such moral minimalism is arguably also a part of QoG: a Nazi government engaged in genocide would not be regarded as having QoG no matter what other qualities it exhibits when implementing the genocide. Such moral ethos would be expressible in the idiom of basic human rights, although not necessarily so.⁵ Now, it is important to note that such moral ethos only establishes a bare minimum: while ruling out deliberate killings and flagrant violations of individual liberty and integrity, as well as, *ceteris paribus*, denying asylum to those that would otherwise risk life and liberty, it does not rule out putting a stop to almost all immigration. The moral minimalism required by QoG does not, for instance, prevent a state from closing its borders for immigrants looking for work or immigrants having relatives within the country’s borders.⁶ (Someone disposed to defend open borders is bound to disagree with me

⁴ This crucial feature is also a reason why I have avoided any talk about policy implications; PB is, ultimately, a kind of normative meta-principle, which may or may not be enshrined in explicit policy.

⁵ For the most well-known example of a minimal morality, see Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad*, Notre Dame, Indiana 1994.

⁶ The reason underpinning this view is a commitment to a political community’s right to self-government; a

here, but I think such a position – if based on some kind of standard deontology – will inevitably fail to take seriously its own premises.) So, moral minimalism functions as a baseline that is further added to by PB; which in turn is allowed some space when laws and policies fail to provide adequate guidance.

At this point it should also be noted that PB is dependent upon the existence of laws and policies. The subject of a government is in no position to claim any services from the government, above what is required by minimal morality and what is stipulated in laws and policies, and whatever he or she receives from the government exceeding such minimal and positive standards is given not because of legally recognised claims, but because of the benevolence of the government. The priority of existing laws and policy is firmly entrenched in the idea of the rule of law, which is an inescapable component of QoG. This fact makes PB describable as a principle operating in the “gaps” of existing institutional frameworks.

Second, by “subjects under their authority”, is not only meant citizens but also potential citizens. This is crucial to note, as an obvious rejoinder to my overall argument is that PB only applies to citizens, not to dealings with potential citizens. Now, I disagree with such rejoinder and I will defend the inclusion of potential citizens in the next section; for now I rest, content to have pointed this out.

Third, “beneficial” is not a subjective notion, but inter-subjective. According to what I have in mind here, a person or a group is treated beneficially when that person or group is treated in accordance with what can reasonably be regarded as favouring his/her/its interests. Hence “beneficial” is in my view weakly paternalistic; it makes no direct allusion to the individual’s first- or second-order preferences, although it can indirectly take them into account (since it is generally perceived as better to have one’s preferences satisfied than not having them satisfied). Moreover, the term “reasonably” above refers to the epistemic uncertainty that is inescapable in such judgments and the intersubjective effort to overcome it. Hence the interest of the subject is what is deemed to be, after due reflection and deliberation among competent citizens, overall favourable to oneself. This might appear to be a cumbersome description, but I think that it is the best we can do, if we are to avoid the rather absurd position that a person’s interest is what one currently perceives to be beneficial to oneself, or the equally disturbing position that there are some expert groups that are to be trusted with such judgments.

Fourth, by “most beneficial alternative materially or ethically available” is not only meant an alternative not ruled out by the minimal morality, by the positive laws and policies existing within the community, or by material circumstances; crucially, a viable alternative must also be consistent with thicker, local conceptions of justice. This should not be regarded as a costly concession to relativism; instead it is a consequence of using QoG as our chosen starting point. Considerations of functionality and self-preservation are pivotal to QoG, and implementing beneficial alternatives above the requirements of minimal morality, but at odds with other local moral norms, are bound to be detrimental to such functionality and self-preservation, as it will generate envy and spite. Hence PB does not commend or allow unrestricted favouring.

Fifth, and last, the *ceteris paribus*-clause warrants a comment. Clearly PB does not exhaust the realm of morally relevant principles and values that are not codified into positive law and policy, and such other values can interact with PB. For instance, in a case where some communal values seem to be at risk, PB can be overridden, although not dispensed with. Of course, this reflects the *prima facie* character of PB: my overall aim in this paper is not to establish PB as requiring particular actions, but rather to show that PB is a relevant consideration that must be taken into account and, when taken into account, must be given some weight.

right entailing control over borders, although always tempered by the other contents in minimal morality. For a classic statement of this view, see M. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality*, New York 1983.

Consider what I take to be a paradigmatic instance of PB: the deeply entrenched judicial principle that everyone is innocent until proven otherwise. Rather than treating citizens like criminals, the judicial system will not consider you an offender unless that has been established by due court proceedings. This principle holds even for individuals and groups where we have some rather strong – but not conclusive – reasons for believing that they are in fact criminals. For instance, it seems quite plausible to assume that a member of a criminal gang has committed criminal acts, even if we have no way – logically or empirically – to infer that his or her membership is also proof of criminal acts. Still, most democratic and liberal institutions will treat him or her as innocent.

PB is thus to be described as a principle running alongside ordinary laws, policies and principles of justice, or as a meta-principle. This is important to note. For instance, PB could be seen as a complement to Rawls' principles of domestic justice – PB is *not* to be seen as belonging to local justice or the law of peoples.⁷ PB fills the gaps and handles the conflicts within domestic justice, and indicates a normative baseline for whom to admit into the political community. It is a principle that purports to guide both the behaviour of individual government officials and the behaviour and structure of government agents. This is not to say that PB is a part of non-ideal theory, which is concerned with circumstances of non-compliance; rather PB is the forgotten twin that comes, or should come, hand in hand with positive law and policy, or concrete principles of domestic justice.

Justifying the Principle of Beneficence

What would then justify making PB into a relevant moral consideration? As my overall approach is indirect, I will avoid giving reasons that stem from the debate over immigration. Instead I will suggest three reasons that directly support the inclusion of PB into QoG.

First, there is the argument from intuition. The essence of the argument can be phrased as a rhetorical question: who would not prefer a state that would give them the benefit of the doubt? Surely, we would prefer a just state and a relatively rich state, just as we would prefer to have nice parents-in-law and an expensive car in the garage. Beneficence is an additional good-making quality in general, lending quality to both states and in-laws. It therefore seems natural that we intuitively would prefer a state acting in accordance with PB, than one that does not.

That said, it is not a self-evident intuition; we can deny it without inconsistency, and in some cases perhaps even for good reasons. We might prefer government institutions to act less benevolently toward their citizens for various reasons: it could foster independency; it could produce better overall outcomes, and so on. However, what I wish to establish here is PB as a *general* or *prima facie* principle, not as a law of nature. Short of special cases and in the absence of special circumstances the intuition seems to have, in so far it is indeed widespread, certain force.

Second, it can be argued that PB is required if we assume a particular view of human beings in general, or of citizens in particular. Human beings *deserve* to be treated in accordance with PB, not because of some action or accidental characteristic, but because of some value intrinsic to human beings. This establishes PB as a normative principle.⁸ In familiar terminology, humans are ends in themselves, have dignity, or are made in the image of God – all characteristics that

⁷ For the distinctions, see John Rawls, *Justice as Fairness: A Restatement*, edited by Erin Kelly, Cambridge, Mass. 2001, pp. 11-12.

⁸ If relying on such justificatory approach, one will end up with what Matthew Gibney has labelled the “principle of humanitarianism” (see “Liberal Democratic States and Responsibilities to Refugees”, in: *The American Political Science Review* 93 (1/1999)). It should be noted that Gibney's principle is arguably much narrower than PB, as it refers to what is someone's due through *need* or *vulnerability*. This, I believe, is a crucial difference. Another difference that should be noted is the broader justification supplied for PB.

are commonly said to confer some special status or value upon us. Such argument may or may not be ultimately based on intuitions; hence I have described it as a distinct argument.

The previous two arguments, or families of arguments, are likely to be considered by some philosophers either as wishful thinking or, at best, as unsubstantiated claims. In so far as PB is not trivial – as I have argued above – it is not intuitive, and whatever dignity humans might have, it has yet to be properly expounded. Although I think such criticism may not turn out to be convincing in the end, it is prudent not to base PB solely on the first two arguments. I therefore propose a third argument, which tends to be less intuitive: an argument using what I label *the community principle* (CP).

My community principle bears affinities with G. A. Cohen's original version, but deviates slightly from it; the original is concerned solely with relations between citizens.⁹ In my version, the community principle amounts to this:

(CP) Any democratically legitimate government ought, *ceteris paribus*, to strive to create and sustain good relations to its citizens; relations that enable its role as a well-functioning mediating institution between citizens.

Succinctly put, every government intending to serve its people, in its every capacity and *qua* government, should facilitate its own performing of facilitating requires creating a sense of community not only between citizens, but also between public authorities and citizens. Further, CP seems to be readily implied by the other components in QoG; by the stability requirement, as well as by the commitment to a minimal morality.¹⁰

Obviously some explaining is needed here. I take it as generally and intuitively sound, *albeit* we might quarrel over some details, that a government – or state, more generally – that is founded on democratic legitimacy has as its purpose to enable or further the ends of its citizens, in their collective as well as individual capacity, as far as possible. (There are, of course, a number of problems associated with such conception of public authority, but they are problems internal to the conception: I doubt that many people would opt for a wholly different understanding.) This furthering of individual and collective ends has as its ultimate rationale a kind of collective self-interest: the government, as an agent of the people, acts so to benefit the people in general.

Now, if intended to serve its citizens in the way described above, the government, broadly understood, will enable this end by cooperating with its citizens, as far as possible. This is the core of CP: community does not only, and should not only, hold between citizens *qua* citizens; it should also, optimally, hold between public authorities and the citizens. Interpreted as an ideal, such community has a further consequence: cooperation with citizens should be facilitated, *ceteris paribus*. This implies not only that acts contrary to facilitating such cooperation should be avoided; it also implies that when an opportunity to further the spirit of cooperation arises – such as in case of gaps and conflicts in laws and policies – it should be seized.

Let me provide a hypothetical but simple example to illustrate the general idea. In a small town, the authorities decide to do something about the Wild West parking mentality often displayed by its many tourists. They therefore prohibit all parking in a particularly crowded area, with the exception of clearly marked parking spaces. Adhering to national regulations, the

⁹ Cohen's community principle is presented and explained in his *Why Not Socialism?*, Princeton 2009. Cohen claims that "the requirement of community [...] is that people care about, and, when necessary and possible, care for one another, and, too, care that they care about one another", and, most crucially, that such requirement has egalitarian consequences (pp. 34-35).

¹⁰ It might be objected that some groups and organisations are created only for some purpose limited in time, and therefore adding any kind of stability or general continuity requirement could even be harmful. To that I reply that it certainly might be the case with various organisations, but such temporal limitations are unlikely in the case of states. QoG also, it can be argued, implies CP since CP is an important condition enabling the state to fulfil any duties imposed by the commitment to a minimal morality.

local authorities put up the required signs. However, since the area contains numerous streets in a fairly complex pattern, and since parking has been free in the area for as long as anyone can remember, many drivers simply fail to notice the prohibition, and – as a result – get parking tickets. When they complain about the lack of information – there are not enough signs, they say – the authorities reply that they have done what is required of them, full stop. While not *prohibited* from adding more traffic signs, the authorities simply have no *obligation* to do so. The immediate outcome is disappointed citizens, who feel mistreated by the local authorities. Feeling this way, next time the citizens encounter the authorities, they will remember how their complaints about the traffic signs were met, and they will try to maximise their gains, and to minimise the authorities' gains, rather than to seek mutual advantage and fair cooperation.

Now, the local authorities acted according to existing laws and policies, and no flagrant injustice was committed. Still, the result was angry citizens with less respect for, and a decreased willingness to cooperate with the authorities. In the long run, the effect of behaviour similar to the local authorities' is likely to prove detrimental to society. The remedy suggested is PB. While CP does not straightforwardly entail PB, it is, I believe, a reasonable consequence of it. In that way CP, if accepted, works as an argument in favour of PB.

The argument relying on CP can also be given a negative form. Any administrative entity, of the size of a state and which cannot freely choose whom to deal with, that does *not* rely on PB will face considerable costs, measured in material terms or in terms of trust. A straightforward denial of PB would mean that the public officials could, under conditions of un- certainty, choose an alternative *not* beneficial to the subject in question, be it a neutral or a straightforwardly detrimental alternative; a strategy that is bound to generate substantial distrust and anger among the citizens, the ultimate consequence being that citizens will avoid dealing with state officials. One prominent example stems from fiscal policy and its implementation: when the citizens feel that they are given unfair treatment by the authorities, they will tend to become more active in the black market.¹¹ Such costs are not merely a moral concern – when costs become high, well-needed resources must be more tightly prioritized – or a matter of functionality, but also a matter of distributive efficiency; another component in QoG.

Now, it should be kept in mind that the argument relying on CP can be given a further moral underpinning, ultimately to be grounded in moral principles and values. While I will not expound such basis here, it is crucial to recognise this possibility, as I have framed PB as a *moral* principle.

Beneficence and Immigration Policy

Having a reasonably clear picture of PB, we must then ask what relevance it has when it comes to immigration. In what follows, I shall confine myself to the question why immigrants, with citizenship still pending or residency only temporarily granted, should be included into the sphere covered by PB. Traditionally, and intuitively, the state's legitimate concern is its citizens, and citizens of other states are other states' concern. However, such view is an oversimplification that ought to be corrected, since it is at odds with minimal ethical requirements and since it relies on an erroneous description of contemporary immigration. As a case in point, consider the case of Baby Manji.¹² Baby Manji, a result of transnational

¹¹ It should be noted that the option of staying, somehow, neutral is unlikely to satisfy citizens. And indeed, it seems somewhat odd if the public officials would, *ceteris paribus*, choose not to favour the citizen when no good reason militates against such treatment.

¹² The case is described in Kari Points, "Commercial Surrogacy and Fertility Tourism in India. The Case of Baby Manji", The Kenan Institute for Ethics, Duke University. Available at <https://web.duke.edu/kenanethics/CaseStudies/BabyManji.pdf> (accessed February 18, 2013). A more paradigmatic way to lose one's citizenship is by a state dissolving; through internal problems or by invasion.

commercial surrogacy arrangements, was the genetic offspring of the male in the commissioning couple, Mr. and Mrs. Yamada, and an anonymous egg donor. The Japanese couple had contracted an Indian surrogate to bear their child. However, even before Baby Manji was born, the arrangement proved fragile. The Yamadas divorced and the former Mrs. Yamada no longer wanted the baby. As the contract was not legally binding, she had no legal obligations to care for the child. The surrogate's obligations had ended by the birth of Baby Manji, and neither the egg donor had any legal obligations to care for the child. Mr. Yamada still wanted the baby, but things quickly got complicated. Japanese authorities recognise a child as a Japanese citizen only if the birth mother is Japanese – but Baby Manji's birth mother was Indian. Adoption was ruled out, since Indian authorities did not allow adoption of baby girls by single males. Even leaving India seemed impossible for Baby Manji, as an Indian birth certificate, and any subsequent travel documents, needed the identity of the mother to be established: but in the case of Baby Manji, there appeared to be three possible mothers! As a result, Baby Manji had no legal parents, no birth certificate, and no citizenship.¹³

The case of Baby Manji seems to raise (at least) one question and to underscore (at least) one fact: does a state – and therefore its government – have a *moral duty* to care for individuals that lack protection, given that the state is in a reasonably good position to provide such protection?¹⁴ I find it hard to deny such moral responsibility, and few would. Moreover, as a matter of *fact*, people do not fall neatly into the legal categories they are supposed to, therefore denying the government the opportunity to treat individuals in accordance with the citizen/non-citizen distinction. As reality does not conform to legal (and neither to intuitive) distinctions, we must have some way to handle such indeterminate cases.

While few would deny that the involved states had a *prima facie* responsibility toward Baby Manji, it could be argued that stateless individuals only make up an insignificant part of the totality of immigrants. Expanding a state's legitimate concern to such individuals would certainly be an improvement, but it would imply that PB is very limited in scope. Let me therefore present three reasons why the broader category of potential immigrants (whether they seek citizenship or merely a temporary visa) is the legitimate concern of PB.

First, it appears to be practically unfeasible to determine the country of origin for most immigrants lacking official documents. The relevant documents may have been deliberately destroyed, or never issued; in either case a government will generally be unable to determine age, status or home country of most immigrants that for some reason lack official documentation. This fact supports PB as a pragmatic principle: applying PB may not always be objectively just but, given reasonably available information, it seems that PB can be accepted as not *unreasonably unjust*.

Second, if we accept that every state has a *prima facie* responsibility for a stateless person, we should then acknowledge that such principle has a normative dimension at its core, not only in its very prescription. Even if X is, legally, a citizen of state S, it does not follow that X is protected by S in the way that makes X's position relevantly different from a stateless person Y's position. That is, a person might be stateless in a *morally relevant sense* despite having a legal citizenship.¹⁵ Hence even immigrants with official documents, or whose country of origin can be established, can fall into the category that is a legitimate concern for public authorities.

The two reasons provided above might still be said to be, even if valid, rather limited in scope. Even if we would grant that PB applies to stateless individuals, their very statelessness

¹³ The predicament of Baby Manji eventually got resolved, as Mr. Yamada was finally given permission by Indian authorities to bring Baby Manji with him to Japan.

¹⁴ That is, a state burdened by unusually unfavourable circumstances might be exempted from such duty; as will, say, the German state if a stateless refugee is found along the borders of, say, Canada.

¹⁵ For a discussion of different types of citizenships, and of moral citizenship in particular, see M. Walzer, *Obligations: Essays on Disobedience, War, and Citizenship*, Cambridge 1970.

can, on most moral accounts, be said to be a sufficient reason to welcome them as citizens, unless some other country clearly is in a better position to take them in. Of what use is PB then? In order to fend off the accusation of redundancy, I suggest that we consider a third reason for expanding the state's concern – and thus PB – to potential immigrants. The third reason that I have in mind is *internal* and *pragmatic* to its character; that is, it does not appeal to any grounds other than the wellbeing of the community itself, which I take to be, per definition, the chief concern of any political community. The first premise is the one just stated: the first duty of any political community, *qua* community, is its own survival and functionality, which in turn is instrumental for the citizens' wellbeing.¹⁶ The second premise is liable to empirical falsification or verification, as it claims that the way *current* members benefit or burden society is in part determined by what treatment they received earlier; as *potential* members, if they were ever in such position. Underpinning the second premise is simply the assumption that the government has very little to lose, but much to gain, in extending PB to potential citizens. If treating potential members and inhabitants badly, or in a way that creates bitterness or spite, it will hurt community in the future; if treating potential members and inhabitants generously, giving them the benefit of the doubt, it will foster a sense of community vital to the functioning of the community. This argument thus relies on CP, which was expounded above.

As mentioned, the second premise is empirical to its nature. I do not claim that it is obviously true. Some commenting is therefore needed. First, I believe that the premise holds true in normal circumstances, but not necessarily beyond them; "normal circumstances" meaning that there are no extraordinary circumstances, internal or external, present that severely limit the political community's capacity to harbour immigrants. In unusual circumstances, ignoring PB might be required in order to adhere to the first premise stated above. Second, the extension of PB must also be reasonably restrained in order to ensure the community's future prosperity. In short, extending PB is conditioned upon the government and its officials exercising good judgment in respect to the first premise. For instance, this implies that a certain group of people that for good reasons are deemed to have, say, malign intentions might be excluded from the scope of PB, and not merely having PB outweighed by other reasons in their particular case. This is the result of what I take to be a sound priority given to the first premise. If the normality condition and the good judgment condition are fulfilled, then the second premise holds good and, in conjunction with premise one, suggests an extension of PB to potential citizens and temporary subjects.

A second worry with my third argument for extending PB to people seeking citizenship or temporary shelter, and for the extension of PB in general, is that it has the notion of potentiality at its centre. A common complaint is that potentiality seems to suffer from a regression problem. For instance, a person living on the other side of the planet, with no intention of leaving her country and with no foreseeable circumstances that will cause her to do so, may still be called a "potential" citizen, as she is not *currently* a citizen of S, but it is nevertheless within the realm of what is logically and materially *possible* that she will, one day, be given citizenship in S. While one could certainly, in a cosmopolitan spirit, argue that this means that PB should be universally extended, as almost everyone is then a potential citizen, I think such stance is unattractive for a number of reasons. I will therefore try to delimit the idea of potentiality relied upon here.

Potentiality can, I think, be interpreted as a *descriptive* or a *prescriptive* notion. On the descriptive interpretation, a person P is a potential citizen if and only if P is situated on a certain

¹⁶ This is not to say that a political community has a duty, in conditions of extreme scarcity, to invade their neighbours. The duty to ensure the wellbeing of its citizens stems from the rights of the individuals – human rights, one might say – to a decent life; rights that every human being share. Hence the duty of a state cannot exceed the basis provided by the citizens' rights, which are constrained by the same rights held by everyone else.

causal path to citizenship, the broadness or narrowness of the path being defined by a set of necessary or enabling conditions that will ensure P's movement toward citizenship. In moral matters, I do not think a purely descriptive interpretation of potentiality is acceptable, as the set of conditions preferred always have consequences that will require moral assessment. A descriptive interpretation is therefore likely to spill over into a prescriptive one. On the prescriptive interpretation potentiality is in part defined by normative considerations. For instance, P can be a potential citizen because of having certain rights, or because needing citizenship, or for concerns stemming from distributive justice. Prescriptive potentiality thus helps delimit a subset of the set of (logically and materially) possible citizens.

If relying on a prescriptive notion of potentiality then, we must supply a normative criterion in order to delimit the group of non-citizens to which PB will apply. I therefore propose the following criterion:

Potentiality Criterion: Every P is a potential citizen of S, so that PB should be applied to P, *if and only if* (i) P has expressed (explicitly or implicitly) a rational desire to become a citizen of S, and (ii) P is not the object of another state's duty to care for, all things considered.

While (i) expresses a necessary intention on behalf of P, (ii) is less straightforward. Briefly put, (ii) states that *unless* some other state has an *actual* duty to care for P, then S has a *prima facie* duty to care for P. Other states can have an actual duty, legal or moral, for many reasons. For instance, some other state might be in a substantially better position to welcome P, or some other state might have a duty to care for P for reasons of compensatory justice. When no such reasons determine the duty of another state, then, provided (i) is fulfilled, S has a *prima facie* duty to care for P. Now, note that "care for" is left intentionally vague: it does not amount to a duty to give P citizenship, nor any other specific action for that matter. What the duty to care for amounts to, is simply to take P's wellbeing, *as a non-citizen*, into consideration. This may imply, for various reasons, that P ought to be given citizenship, or it may not; the point here is that (ii) in conjunction with (i) is sufficient reason for S to apply PB to matters concerning P.

Concluding Remarks

In a way, the real challenge remains. PB as a theoretical principle might be successfully expounded and defended, but bearing both its *prima facie* and "gappy" character in mind, its actual effects on the use of public authority remain to be seen in each case. Several worries on the practical level have not been discussed. What effect will it have on real life political action? What relevant gaps are there, which will allow PB to come into play? Will PB not be crowded out by other, arguably more urgent concerns and principles? Having portrayed PB as a *prima facie* principle, I will not deny – and have not denied – that such outweighing can occur; nor will I deny – and have not denied – that such weighing is a challenging task, as almost always is the case in ethics. Nevertheless, I believe that PB will have, if taken seriously, a considerable impact on the use of public authority. When laws allow, PB constitutes an important normative consideration, a general attitude of generosity that ought to be prominent in any institutional response to immigration purporting to be compatible with QoG. Expounding PB in a philosophical coherent way and providing a justification – there might be others – for PB is a first and necessary step.

Die Öffentlichkeit der Buße

Eine theologische Kritik an einem Zentralbegriff der Diskursethik

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Abstract

Dieser Beitrag entwirft einen Begriff von Öffentlichkeit für ein ethisch relevantes Nachdenken über die Befreiung aus Schuld und Unrecht. Die weithin übliche Verengung der Buße allein auf die Privatbeichte widerspricht der Aufgabe einer theologischen Ethik, die Menschen zur „befreienden Umkehr zum Geschöpf-Sein“ (H.G. Ulrich) ruft. Von der Gegenüberstellung „öffentlich“ - „verborgen“ her lassen sich theologische Kriterien für eine Öffentlichkeitsarbeit gewinnen.

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1. Öffentlichkeit als Offenheit für die Schuldfrage

Mit der Verhaftung von WikiLeaks-Gründer Julian Assange im Dezember 2010 wird deutlich, dass auch die Öffentlichkeit einer liberalen Gesellschaft gefährlich sein kann. Assange und seine Anwälte befürchten eine langjährige Haftstrafe in den USA. Von Anfang an führte das Veröffentlichende von Verborgenen und bisher Unbekanntem auch zu gefährlichen Reaktionen.

Gefährlich war die Veröffentlichung von Schuld auch schon zu Zeiten des Alten Testaments, etwa wenn Jer 36 von der Verbrennung einer Schriftrolle durch König Jojakim berichtet, in der von der Schuld des Königs an der Misere seines Volkes die Rede war.¹ Die von WikiLeaks veröffentlichten Geheimdokumente ermöglichen es, die Schuldfrage neu zu stellen.

Dass das Rühren an verborgener Schuld gefährlich ist, wird nicht deutlich, wenn der Öffentlichkeitsbegriff von der bürgerlichen Gegenüberstellung des 19. Jhs. her als „publicité“ im Gegenüber von „öffentlich und privat“ bzw. „public and private“ begriffen wird.² Dem akademischen Diskurs über das, was Öffentlichkeit sei, liegt mittlerweile ein normierendes Modell zugrunde, das B. Peters auf die Grundelemente Gleichheit, Diskursivität und Offenheit zurückgeführt hat.³

Im Rahmen dieses Modells wird Assanges Verhaftung daraufhin befragt, wie der Fall das Verhältnis des Staates zum Internet verändert und was es für die Pressefreiheit bedeutet, dass ein Mensch für öffentliche Äußerungen von langer Gefängnishaft bedroht ist. Wenn aber in den Dokumenten auch diplomatisches oder militärisches Versagen öffentlich wird, so führt deren Veröffentlichung allein noch nicht zu einer Umorientierung hin zum Guten. Neben einer Aufdeckung und Bearbeitung von Schuld bedürfte es dazu auch einer Erklärung der Verantwortlichen: „Ich habe gefehlt.“

Die Schuldfrage liegt außerhalb des säkularen Diskurses. Sie bedarf einer begründeten Hoffnung⁴, die eine diskurstheoretisch verstandene, säkulare Öffentlichkeit nicht zu vermitteln vermag. Schuld wird nicht dadurch überwunden, dass sie „aufgearbeitet“ oder „bewältigt“ wird. Sie zielt auf Vergebung und auf einen neuen Anfang. Diese Dimension gerät aus dem Blick, wenn in der Diskursethik unspezifisch von „Religion“ die Rede ist.⁵

Auch wenn J. Habermas seine Ignoranz gegenüber religiösen Öffentlichkeiten eingeräumt hat⁶, bedarf das diskurstheoretische Normalmodell einer Korrektur. Mit dem Postulat eines medial vermittelten, „herrschaftsfreien“ Diskurses wird lediglich die Herrschaft des medialen Diskurses über jene Diskurse begründet, die für viele Menschen unmittelbar handlungsleitend

¹ G. Wanke, *Jeremia. Teilband 2: 25,15-52,34*, Zürich 2003, 332, weist darauf hin, dass Jer 36,3 eine deuteronomistische Erweiterung darstellt. Sie ist allerdings nicht in einem abwertenden Sinne „sekundär“ oder „nachrangig“, sondern lediglich eine zum Verständnis der Geschichte notwendige Erklärung für die zornige Reaktion des Königs. Ob das Verhalten des Königs vielleicht noch einen anderen Grund hatte, ist nicht überliefert.

² So J. Habermas, *Strukturwandel der Öffentlichkeit. Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft*, Frankfurt / Main 1990 (Unveränderter Nachdruck der zuerst 1962 erschienen Ausgabe, ergänzt um ein Vorwort) oder W. Huber, *Kirche und Öffentlichkeit*, Stuttgart 1973.

³ Vgl. B. Peters, *Der Sinn von Öffentlichkeit*, Frankfurt 2007.

⁴ G. Sauter, *Begründete Hoffnung. Erwägungen zum Begriff und Verständnis der Hoffnung heute*, in: *EvTh* 27 (1967), 406-434.

⁵ So die Beiträge von J. Habermas und Ch. Taylor in E. Mendieta/J. VanAntwerpen (Hg.), *Religion und Öffentlichkeit*, Frankfurt 2012, 28-52 und 53-88. Zur Kritik dieser Verwendung des Religionsbegriffs vgl. im selben Band J. Butler, *Ist das Judentum zionistisch?*, 102-133; besonders: 104.

⁶ J. Habermas hat diese Versäumnisse später eingestanden. Ders., *Further reflections on the public sphere*, in: *Habermas and the Public Sphere*, hg. v. C. Calhoun, Cambridge 1992, 421-458; sowie Calhoun in *Religion und Öffentlichkeit* 2012, 184.

sind: Nachbarschaften, Arbeitskollegen, Stammtische, Vereine, Gewerkschaften, Bürgerversammlungen oder kirchliche Gruppen. Wer diese Diskursflächen verliert, betreibt Politik ohne die Menschen oder Theologie ohne die Gemeinden.

2. Theologische und „gemalte“ Öffentlichkeit

Der säkulare Diskurs hat nur selten die Kraft, Menschen zum Handeln zu bewegen. Woher kommt eine Hoffnung, die dazu bewegt, Gefahren auf sich zu nehmen und eine gute Botschaft zu bezeugen? Die theologische Bestimmung von Öffentlichkeit geht von Voraussetzungen aus, welche die Diskurstheorie nicht selbst gewährleisten kann.

In der Tatsache, „daß die Heimlichkeit durchbrochen wird, das Verborgene und Verdeckte öffentlich gemacht wird“⁷, steht nicht mehr das Private im Gegensatz zur Öffentlichkeit, sondern das Verborgene. H.J. Iwand spricht von einer Öffentlichkeit „im Gegensatz zu all den dunklen und finsternen Mächten, die ein wesentliches Interesse daran haben, die Ereignisse und Geschehnisse nicht beim Namen zu nennen, die nicht wollen, daß ihre bösen Werke ans Licht kommen“⁸. Der theologische Öffentlichkeitsbegriff nimmt die „selbsteigene Öffentlichkeit des Evangeliums“⁹ wahr. Diese Öffentlichkeit entsteht durch „das Offensein für das Reich Gottes“¹⁰. Iwand unterscheidet diese Öffentlichkeit vom diskurstheoretischen Begriff: „Die Öffentlichkeit, in der wir heute leben, ist keine Öffentlichkeit, obschon sie so genannt wird, sondern sie ist eine nach vielen Richtungen hin tendenziös gefärbte, dies oder jenes verdeckende... *gemalte Öffentlichkeit*.“¹¹ Iwand geht bei den Aufgaben der Kirche in der neu zu bauenden Nachkriegsöffentlichkeit vom Bild des Zeugen oder Botschafters aus, dem – auch bei Gefahr für Leib und Leben – eine Botschaft anvertraut ist.

Deliberative Theorien haben die Verbindlichkeit des Zeugen für sein Zeugnis genauso verabschiedet wie die Vorstellung, dass die Öffentlichkeit einen Beitrag zur Überwindung von Schuld leistet.¹² Für sie ist Öffentlichkeit vielmehr ein Forum der Vernunft zur Optimierung von Strukturen und Systemen, ein Behälter für weitgehend beliebige Inhalte. Was vermag die so verstandene Öffentlichkeit der strukturellen Vereinnahmung durch politische Interessen, Marktzwänge oder andere Dispositive¹³ entgegen zu setzen? Eine medial verstandene Öffentlichkeit alleine gewährleistet noch keine Freiheit. Denn die Diskurse einer deliberativen Öffentlichkeit können im Austausch der Argumente eine Wahrheit ans Licht bringen, sie können aber auch den Menschen in seinem Selbstbezug verstärken, wie I. Kutter über die Internet-Suchmaschine „Google“ feststellte:

⁷ H.J. Iwand, *Die Kirche und die Öffentlichkeit*, in: Nachgelassene Werke II, München 1966, 29-45; hier: 30.

⁸ H.J. Iwand, a.a.O. 30.

⁹ E. Wolf, *Brief an Helmut Thielicke vom 28.12.1945*, zitiert nach M. Greschat (Hg.), *Die Schuld der Kirche. Dokumente und Reflexionen zur Stuttgarter Schulderklärung vom 18./19. Oktober 1945*, München 1982, 172-179; Zitat 176.

¹⁰ H.G. Ulrich, *Kirche und Öffentlichkeit im Kontext einer theologisch-politischen Ethik. Grundlegende Aspekte bei H.J. Iwand*, bisher unveröffentlichter Vortrag vor der Hans-Iwand Stiftung am 30.8.2012 in Nürnberg.

¹¹ H.J. Iwand, a.a.O. 31; Hervorhebung GB.

¹² Die Schuldfrage wird von T. Rendtorff im Interesse einer öffentlichen Plausibilisierung von Ethik geopfert. Er bestimmt Verantwortung als „Leitbegriff einer neuen, zukunftsorientierten Ethik“, weil er „auf plausible Weise eine praktisch-ethische Haltung zu kennzeichnen vermag, die umgangssprachlich als verantwortlich bezeichnet zu werden verdient“ (*Vom ethischen Sinn der Verantwortung*, in HCE III, Freiburg / Gütersloh 1982, 117-129; hier: 117). Mit der Schuldfrage hat Verantwortung als „der lebensvolle Praxisbegriff der Ethik als Theorie menschlicher Lebensführung“ (a.a.O. 119) nichts zu tun, denn es ist etwas „anderes...“, wenn von Verantwortung gesprochen wird, um begangene Taten einem bestimmten Subjekt zuzurechnen... Dieses vor allem im juristischen Kontext wichtige Verständnis von Verantwortung... [hat] für das Gesamtverständnis der Ethik keine konstitutive, sondern eine mehr nachgängige Relevanz“ (a.a.O. 119f.).

¹³ Vgl. M. Foucault, *Der Wille zum Wissen. Sexualität und Wahrheit I*, Frankfurt 1977; H. Steinkamp, *Die sanfte Macht der Hirten. Die Bedeutung Michel Foucaults für die Praktische Theologie*, Mainz 1999.

„«Die perfekte Suchmaschine versteht genau das, was man meint, und liefert genau das, wonach man sucht.» Das war die Vision von Larry Page, als er Google im Jahre 1998 mitgründete. Seither arbeiten die Kalifornier daran, diesem Ziel näher zu kommen. Vor drei Jahren ist ihnen ein großer Schritt gelungen. Tippten bis dahin zwei Nutzer die gleichen Wörter in Googles Suchmaske, bekamen diese dieselbe Antwort. Heute bekommt jeder Suchende eine individuell auf ihn zugeschnittene Reaktion des Computers. Doch so beginnt sich die Welt des Suchenden auf die beschauliche Sammlung seiner Vorlieben zu verengen. Aus dem Tor ins World Wide Web wird ein Tor, das letztlich zu ihm selbst zurückführt.“¹⁴

Orientiert an immanenten Kriterien wie Plausibilität, Kundennähe oder Marktrelevanz wirft die „gemalte“ Öffentlichkeit – unabhängig vom Medium – den Menschen zurück auf sich selbst. Das Gute findet darin keinen Raum, wenn es nicht Zeugen oder Botschafter gibt, die anderes gehört haben und verkünden. Das Messen von Quoten und Auflagen fragt nur nach der Quantität des Diskurses, aber nicht nach dessen Qualität. Eine Öffentlichkeit, die das gute Leben nicht aus dem Blick verliert, bedarf unter bestimmten Umständen einer Begrenzung der Diskursintensität, wie sie etwa beim Ausschluss der Öffentlichkeit vom Gerichtsverfahren¹⁵ oder im Beichtgeheimnis vorliegen, das gerade nicht der Verdeckung, sondern dem Auffinden von Wahrheit dient, wie noch zu zeigen ist.

3. Paradigmen christlicher Buße

Die Bußbotschaft der christlichen Kirchen findet ihren Anfang in der Reue Gottes. In Hos 11,8 kehrt der Gott Israels um von seinem strafenden Zorn und besinnt sich auf die Liebe zu seinem Volk, seinem geliebten Sohn. Von den der Umkehrbotschaft der alttestamentlichen Propheten führt eine direkte Traditionslinie zu Johannes dem Täufer. Von ihm übernahm Jesus von Nazareth den Ruf: „Kehrt um und glaubt an das Evangelium, denn das Reich Gottes ist nahe herbei gekommen!“¹⁶ Daran schließt die Apostelgeschichte an, wenn Petrus aufruft: „So tut nun Buße und bekehrt euch, daß eure Sünden getilgt werden“ (Apg 3,19; vgl. 2,38).

Die 2000jährige Geschichte der kirchlichen Buße kann hier nicht im einzelnen nacherzählt werden.¹⁷ Die vorherrschende Bußform im ersten Jahrtausend markierte die vom Abendmahl ausgeschlossenen durch besondere Kleidung, Verhaltensweisen oder den Aufenthalt an besonderen Orten während des Gottesdienstes. Und selbst als im Mittelalter die Beichtstühle das „Was“ der Buße vor unbefugten Ohren schützten, war das „Dass“ der Buße weiterhin öffentlich. Wer sich im Rahmen der kirchlichen Öffentlichkeit bewegte, konnte sogar sehen, wer den Priester zur Beichte kontaktierte. Die Personalunion von Beichtvater und Verkündiger gewährleistete – in menschlich unvollkommener Form – die Trennung von Inhalt und Person. Hier hat das Beichtgeheimnis seinen Ort. Der Priester verantwortet, dass die Sünde in einer ihr entsprechenden, depersonalisierten Form öffentlich wird.

Die christliche Buße war nie ein „privates“ Geschehen. Sie war stets öffentlich. Sie lässt sich an vier Paradigmen entfalten mit einem je spezifischen Ort in der *polis*. Die *ekklesiale* Form der Buße war in der Alten Kirche als kanonische Buße üblich. Sie markiert die Grenzen der Kirche im Gegenüber zu einer nicht-christlichen Gesellschaft.¹⁸ Die *therapeutische* Form

¹⁴ I. Kutter, *Das ewige Update*, DIE ZEIT 32/2012 (2.8.2012), 21.

¹⁵ Gerichtsverfahren sehen in Deutschland grundsätzlich nicht die Aufzeichnung von Bild- und Tondokumenten vor (§ 169 GVG) und kennen unter bestimmten Bedingungen den Ausschluss der Öffentlichkeit (§§ 171a-172 GVG).

¹⁶ Diese Zusammenstellung aus Mk 1,15; Mt 3,2; 4,17 erhebt nicht den Anspruch einer historischen Rekonstruktion. Lk ergänzt die Mahnung „Tut Buße!“ noch durch den Warnruf: „Sonst werdet ihr alle umkommen!“ (Lk 13,3.5)

¹⁷ Zu den historischen Umständen vgl. G. Kretschmar, *The Church's Ministry of Reconciliation: A Service to Humanity throughout the Ages*, in: *Studia Liturgica* 18 (1988/2), 22-39.

¹⁸ Vgl. a.a.O 27f.

der Buße orientiert sich am eremitischen Ideal.¹⁹ Ihr Leitbild ist Christus, der Arzt. Sie führt im politischen Leben zur Anmaßung von Bischöfen, die weltlichen Herrschern ihre Moralvorstellungen als Medizin zu verordnen.²⁰ Das im IV. Laterankonzil mit der Vorschrift einer regelmäßigen und allgemeinen Beichte geschaffene²¹, *juridische forum internum*²² führte zur Überwindung eines durch den Rachedgedanken geprägten Fehderechts mit maßgeblichen Auswirkungen auf die Entwicklung des materialen Rechts, des Verfahrensrechts und der Rechtsorganisation.²³ Diese wichtige Aufgabe findet mit der Reichsrechtsreform 1495 und der folgenden Säkularisierung des Rechts ein Ende. Seitdem ringen insbesondere die römisch-katholische und die lutherische Kirche²⁴ mit dem Verschwinden der Beichtpraxis.

Heute lässt sich die öffentliche Buße in *pädagogischen* Formen beobachten, die auf öffentliches Lernen abzielen. Ein Beispiel für diese Form des Lernens ist die deutsche Bußgeschichte seit dem Holocaust. Wer hätte vor zwei Jahrzehnten gedacht, dass heute in Städten, von denen der Holocaust ausging, wieder im Land der Täter jüdisches Leben in neugebauten Synagogen möglich ist?

4. Buße als ethische Praxis am Standort der Hoffnung

Diese erstaunliche Geschichte nahm ihren Anfang nach dem Zweiten Weltkrieg, als mutige Deutsche ihre Schuld veröffentlichten, obwohl sie juristisch keine Schuld auf sich geladen hatten. Die Frage der 1968er-Generation an ihre Väter und Mütter: „Was hast Du damals getan?“ war nur möglich, weil das Schuldbekenntnis der EKD (1945) und das Darmstädter Wort (1947) die Schuld in einer Weise benannten, dass sie fortan nicht mehr totzuschweigen war. H. Asmussen, M. Niemöller und andere haben sich die Schuld ihres Volkes in stellvertretender Solidarität²⁵ angeeignet²⁶, weil sie auf die Vergebung auch der schwersten Schuld hofften. Als Vordenker der öffentlichen Buße hat D. Bonhoeffer in dem Satz „Ich habe gesündigt“ den Anfang stellvertretender Schuldübernahme gesehen. Er schrieb im September 1940:

„Umkehr gibt es nur auf dem Wege der Erkenntnis der Schuld an Christus. ... Der Ort, an dem diese Schuldenerkenntnis wirklich wird, ist die Kirche. Das darf jedoch nicht so verstanden werden, als ob die Kirche neben anderem, was sie ist und tut, auch noch der Ort der Schuldenerkenntnis ist. Sondern die Kirche ist eben jene Gemeinschaft von Menschen, die durch die Gnade Christi zur Erkenntnis der Schuld an Christus geführt worden ist. Daß die

¹⁹ A.a.O. 29ff.

²⁰ Kretschmar nennt a.a.O. 28f. die Art und Weise, wie Ambrosius von Mailand den Kaiser Theodosius der Bußdisziplin unterwarf. Das Ende einer politischen Praxis der therapeutischen Buße kann wohl mit dem Bußgang Heinrichs IV. nach Canossa und dem Investiturstreit markiert werden.

²¹ Vgl. M. Ohst, *Pflichtbeichte. Untersuchungen zum Bußwesen im Hohen und Späten Mittelalter*, Tübingen 1995.

²² Vgl. B. Fries, *Forum in der Rechtssprache*, München 1963; W. Trusen, *Forum internum und gelehrtes Recht im Spätmittelalter. Summae confessorum und Traktate als Wegbereiter der Rezeption*, in ZRG.KA 57 (1971), 83-126; Ders., *Zur Bedeutung des geistlichen Forum internum und externum für die spätmittelalterliche Gesellschaft*, in ZRG.KA 76 (1990), 254-285; J. Goering, *The Internal Forum and the Literature of Penance and Confession*, in *Traditio* 59 (2004), 175-227; L. Kéry, *Forum externum, Forum internum*, in HRG I, Sp. 1641-1643, Berlin 2008².

²³ Vgl. K. Kroeschell/ A. Cordes/ K. Nehlsen-von Stryk, *Deutsche Rechtsgeschichte, Bd. 2: 1250-1650*, Köln u.a. 2008 (9. Auflage).

²⁴ Zur lutherischen Entwicklung seit der Reformation vgl. P. Zimmerling, *Studienbuch Beichte*, Göttingen 2009; Th. Böttrich, *Schuld bekennen - Versöhnung feiern. Die Beichte im lutherischen Gottesdienst*, Stuttgart 2008.

²⁵ Das Stuttgarter Schuldbekenntnis spricht von der „Solidarität der Schuld“ (KThGQ V, 187).

²⁶ Bei der Begegnung mit den Vertretern der Ökumene am 18.10.1945 „sprachen Asmussen, Niemöller und Niesel ihre persönliche Schuld, die ihrer Kirche sowie ihres Volkes aus und baten um Vergebung.“ (G. Besier / G. Sauter, *Wie Christen ihre Schuld bekennen. Die Stuttgarter Erklärung 1945*, Göttingen 1985, 31).

Kirche der Ort der Schuldkenntnis ist, ist also eine tautologische Aussage. Wo es anders wäre, wäre die Kirche nicht mehr Kirche. ... Der Blick auf die... Gnade Christi befreit gänzlich vom Blick auf die Schuld der anderen und läßt den Menschen vor Christus in die Knie sinken mit dem Bekenntnis: mea culpa, mea maxima culpa. Mit diesem Bekenntnis fällt die ganze Schuld der Welt auf die Kirche, auf die Christen, und indem sie hier nicht geleugnet, sondern bekannt wird, tut sich die Möglichkeit der Vergebung auf. [...] Das freie Schuldbekenntnis ist ja nicht etwas, das man tun oder auch lassen könnte, sondern es ist der Durchbruch der Gestalt Jesu Christi in der Kirche, den die Kirche an sich geschehen läßt oder sie hört auf, Kirche Christi zu sein.“²⁷

Die öffentliche Buße steht für Bonhoeffer im Zentrum des Christentums. Sie benennt Schuld öffentlich in der Hoffnung auf Vergebung. Heuristisch bedarf es einer dem Menschen ganz und gar äußerlichen Verortung der Vergebung, da sonst ihr Bekenntnis mit der Durchsetzung einer herrschenden Gruppenmoral verbunden bleibt. Das „Jenseits von Schuld“²⁸ ist eine heuristische Notwendigkeit. Dieses für die Erkenntnis von Schuld notwendige Jenseits ist der Kirche in der biblischen Botschaft von der Überwindung von Tod und Schuld durch Jesus Christus anvertraut.

Die Botschaft begründet eine zur Wahrheit führende Öffentlichkeit und begründet die Buße. Das Bekenntnis „Ich habe gesündigt“ bildet den Anfang der Befreiung des Menschen aus seiner Verstrickung in Unrecht und Schuld, wenn damit die Umkehr zur geschöpflichen Existenz des Menschen gemeint ist.²⁹ Dieses Bekenntnis vor Gott sagt, dass es nicht um moralisches Fehlverhalten geht, sondern um eine Verflechtung in die Schuld, welche weitere Teile der menschlichen Existenz umfasst. Der Bekenkende sagt weiterhin, dass er willens und fähig ist, Konsequenzen zu ziehen und dass das Bekenntnis nicht allein aus Kalkül und Strategie erfolgt. Es ist getragen von der Hoffnung auf Vergebung, die dem Menschen von außen entgegen tritt. Das Vertrauen auf die Vergebung befähigt, strafende Konsequenzen als hilfreich zu akzeptieren. Die Buße ist kein Wert und keine Handlung, sondern eine ethische Praxis am Standort der Hoffnung³⁰.

5. Orte öffentlicher Buße in einer freiheitlichen Gesellschaft

Die Buße zielt in ihrer Geschichte auf die Veröffentlichung der verborgenen Wahrheit und die Änderung von Verhalten und Einstellung einzelner Menschen oder ganzer Gesellschaften. Der Beichtstuhl war ein klassischer Ort kirchlicher Öffentlichkeitsarbeit. Dieser Kasten unterscheidet sich von anderen Kästen medialer Öffentlichkeitsproduktion. In ihm interagieren Sender und Empfänger und die Öffentlichkeit schaut von außen zu. Radio, Fernsehen oder das Internet produzieren hingegen erst Öffentlichkeit durch die Interaktion von Sender und Empfänger oder verschiedener Sender untereinander. Der Öffentlichkeitsbegriff der Diskursethik versucht die Multipolarität zu erfassen, verliert dabei aber das Jenseits des Diskurses.

Der theologische Öffentlichkeitsbegriff verbindet die Veröffentlichung von Schuld mit der begründeten Hoffnung. Das Öffentlichwerden von Schuld dient nicht einer mehr oder weniger reuevollen Selbstkritik oder führt zum Ablegen der Vergangenheit im Sinne des Widerrufs

²⁷ D. Bonhoeffer, *Ethik*, DBW 6, Gütersloh 1992, 125-132. Zur Datierung vgl. M. Greschat u.a. (Hg.), *Die Schuld der Kirche*, München 1982, 20-24.

²⁸ H.G. Ulrich/ U. Espeel, *Schuld, sühnende Praxis und ihre politische Präsenz*, in: C.A. Leyton (Hg.), *Der andere 11. September. Gesellschaft und Ethik nach dem Militärputsch in Chile*, Münster 2010, 224-252, hier: 238f. Vgl. E. Lévinas, *Jenseits des Seins oder anders als Sein geschieht*, Freiburg / München 1992.

²⁹ H.G. Ulrich, *Wie Geschöpfe leben. Konturen evangelischer Ethik*, Münster 2007².

³⁰ H.G. Ulrich, *Eschatologie und Ethik. Die theologische Theorie der Ethik in ihrer Beziehung auf die Rede von Gott seit Friedrich Schleiermacher*, München 1988.

früherer Überzeugungen. Sie zielt auf eine Selbstdifferenzierung von der Schuld bei gleichzeitiger Anerkennung der unauflöslichen Verflochtenheit in eine Geschichte, zu der die Schuld gehört.³¹ Schuld wird nicht gesühnt, indem eine schlechte Geschichte aufhört und eine neue, gute beginnt. Von daher gibt es auch kein „Ende der Schuld“. Vielmehr zielt das Bekenntnis von Schuld auf eine Frage, die Kontinuität herstellt: Wie können wir in Zukunft (wieder) zusammen leben?

Die Frage nach dem Ort der Buße in der freiheitlichen Gesellschaft, ist die Frage, ob darin die „Freiheit zum Bekenntnis“³² existiert. Eine ethisch qualifizierte Öffentlichkeit bedarf *dieser* Freiheit, und nicht der Möglichkeit, dass jeder aus seinem Privatleben veröffentlichen darf, was ihm wichtig erscheint. Zur Debatte steht damit die Frage, ob ein Bußbekenntnis heute überhaupt zur Vergebung führen kann? Wie kann beispielsweise ein europäisches Schuldbekenntnis abgelegt werden für die Verstrickung in die Zusammenhänge des Kolonialismus?

Der Bedarf für öffentliche Buße lässt sich an vielen Beispielen zeigen. In den folgenden Beispielen büßen Amtsträger ihr Fehlverhalten durch Rücktritt. Das Versagen einer Institution macht einen Umbau notwendig.

1. Der ehemalige deutsche Verteidigungsminister Karl Theodor zu Guttenberg tritt im März 2011 zurück, nachdem ihm die Universität Bayreuth den Dokortitel aberkannt hat. Die Staatsanwaltschaft Hof stellt das Strafverfahren am 23.11.2011 nach der Zahlung von 20.000 EUR an eine gemeinnützige Stiftung gemäß §153a StPO ohne Urteil ein. Tags darauf veröffentlicht eine große Zeitung ein Interview mit zu Guttenberg, in dem er seinen Fehler eingesteht, erklärt und bedauert.³³ Guttenberg wollte eine „Bußzeit“. Die veröffentlichte Meinung verweigert ihm die für eine Rückkehr in die Politik nötige Absolution.

2. Bei der Love-Parade in Duisburg am 24.7.2010 sterben in einer Massenpanik 21 Menschen und über 500 Besucher werden verletzt. Dem Oberbürgermeister Adolf Sauerland kann juristisch keine Schuld angelastet werden. Dennoch wird er - auch von Parteifreunden - zur Übernahme „politischer Verantwortung“ gedrängt. Sauerland tritt nicht zurück. Die Berichterstattung der Presse sucht einen Sündenbock. Sauerland entschuldigt sich zu spät, im Juli 2011, und räumt ein, er habe die „moralische Verantwortung früher übernehmen müssen“.³⁴ Es kommt nicht zur Rekonziliation und er wird im Februar 2012 abgewählt.

3. Die Landesbischöfin Hannovers Margot Käßmann tritt nach nicht einmal vier Monaten im Amt als EKD-Ratsvorsitzende am 24.2.2010 zurück, nachdem sie betrunken am Steuer eines KfZ angehalten wurde. Auf dem Ökumenischen Kirchentag in München im Mai 2010 bringen viele Menschen zum Ausdruck, dass sie ihr verzeihen. In ihre Ämter kehrt sie nicht zurück, entfaltet aber eine neue Wirksamkeit als Theologieprofessorin, Publizistin und Botschafterin des Rates der EKD für das Reformationsjubiläum.

4. Nachdem im November 2011 die Morde der rechtsextremen Terrorzelle „Nationalsozialistischer Untergrund“ (NSU) bekannt werden, spricht Bundeskanzlerin Merkel auf der Gedenkfeier für die Opfer und ihre Angehörigen von einer „Schande für unser Land“³⁵. Anfang Juli 2012 bittet der Präsident des Bundesverfassungsschutzes Erich Fromm um seine Versetzung in den Ruhestand, die Präsidenten der Bundespolizei werden kurz darauf abgelöst.

³¹ Vgl. Ulrich, *Wie Geschöpfe leben*, 118-121, Sauter, *Wie Christen ihre Schuld bekennen*, 65-83.

³² Sauter, *Wie Christen ihre Schuld bekennen*, 71f.

³³ „Es war kein Betrug“, in: DIE ZEIT 48/2011 (24.11.2011) [<http://www.zeit.de/2011/48/DOS-Guttenberg>, Zugang am 24.3.2012].

³⁴ „Sauerland entschuldigt sich“, in: wdr.de, 12. Juli 2011 [http://www1.wdr.de/themen/archiv/sp_loveparade/loveparade626.html]; [Sauerlands zweitklassige Entschuldigung](http://www.spiegel.de/panorama/loveparade-unglueck-sauerlands-zweitklassige-entschuldigung-1704772.html), in: Spiegel Online, 11. Juli 2011 [<http://www.spiegel.de/panorama/loveparade-unglueck-sauerlands-zweitklassige-entschuldigung-1704772.html>], beide am 25.3.2012].

³⁵ D. Bax, „Eine Schande für unser Land“, in: taz.de, 23.2.2012 [<http://www.taz.de/Gedenkfeier-fuer-NSU-Opfer-in-Berlin/!88346/>], Zugang am 28.8.2012].

Die Schuld, die zum Versagen der Institutionen geführt hat, wird nicht in den Medien veröffentlicht, obwohl ein parlamentarischer Untersuchungsausschuss arbeitet. Die Veränderungen erfolgen institutionenintern.

Die Reihe der Beispiele ließe sich erweitern. Das Gesagte genügt um zu zeigen, dass es für einen Neuanfang entscheidend ist, in welcher Öffentlichkeit Schuld zur Sprache kommt. Wo das Gegenüber nicht „zur Öffentlichkeit im Angesichte Gottes“³⁶ wird – etwa als Selbstinszenierung – bleibt das Schuldbekenntnis ein leeres Ritual. Wo keine Sanktion oder Strafe drohen, gibt es auch keine Gnade oder Vergebung. Deshalb ist der Rücktritt eines Politikers angezeigt, wenn die Staatsanwaltschaft Ermittlungen aufnimmt. Eine juristische Aufarbeitung ist auch dann unerlässlich, wenn ein institutioneller Neubeginn notwendig ist.

Ein neuer Anfang braucht die glaubwürdige Schuldübernahme des Täters oder der Täterin („Ich habe gesündigt“), eine angemessene Bußzeit und ggf. Taten der Wiedergutmachung. Das charismatische (zu Guttenberg, Käßmann) oder institutionelle (Sauerland, NSU) Urteil entscheidet über ihre Dauer. Wenn es der veröffentlichten Meinung gelingt, Wahrheit ans Licht zu bringen, dann ist sie durchaus zu einer öffentlichen Buße fähig. Oft genug aber bedarf es dazu anderer Öffentlichkeiten, wie etwa eines Gerichts oder – wie am Beispiel der schuldhaften Verstrickung der Deutschen ins Unrecht des Nationalsozialismus gezeigt – des theologischen Urteils der Kirchenleitung.

Die Möglichkeiten der Umkehr und des Neuanfangs³⁷ wird von der daseinsinterpretierenden Optimierungslogik des Diskurses nicht erfasst. Sie kommt erst als ethische Lebensorientierung in den Blick.³⁸ Mit den genannten Beispielen ist zu fragen: Warum kann der Amtsträger nach einer Bußzeit sein Amt nicht wieder ausüben? Von einer Suspendierung bis zur Rekonziliation macht das Disziplinarrecht nur selten Gebrauch. Das aber entspräche der Logik der Buße.

Dazu ein Beispiel aus einer anderen Kultur: Afrikanische Kirchen verschiedener Denomination kennen einen Bußunterricht. In der Evang.-Luth. Church in Namibia (ELCIN) finden unverheiratete Mütter, auch Väter und Menschen mit anderen Verfehlungen Abwechslung zu ihrem tristen Alltag in den Slums in einem Glaubenskurs.³⁹ Der Ausschluss vom Abendmahl durch den Kirchenvorstand erzeugt einen mäßigen sozialen Druck. Nach der Teilnahme am Kurs erfolgt die Wiedenzulassung zum Abendmahl. Die meisten Poenitenten empfinden das nicht als Strafe, sondern als Hilfe. Selbst Bischöfe können nach Verfehlungen vom Amt suspendiert werden, um nach einigen Monaten wieder rekonziliert zu werden. Letzteres ist nur möglich, weil ein Gremium die Rekonziliation zuspricht und die Praxis in der Lebenswelt verankert ist.

Für die Öffentlichkeitsarbeit von Institutionen mit einem bestimmten Auftrag lässt sich aus dem Gesagten das Kriterium gewinnen, was in ihren Äußerungen an Verborgenen zur Sprache kommt. Dabei geht es weder um das Malen bevorzugter oder um das Ausschließen ungehörter, unerhörter Botschaften, sondern um die Bindung dessen, was öffentlich werden soll an die Aufgabe der Institution. Für die Öffentlichkeitsarbeit der Kirche lässt sich mit Bonhoeffer die Leitfrage gewinnen, ob in ihren Äußerungen verborgene Schuld oder das Evangelium zur

³⁶ Sauter, *Wie Christen ihre Schuld bekennen*, 79.

³⁷ Zum neuen Anfang vgl. H. Arendt, *Vita activa oder Vom tätigen Leben*, Piper Verlag, München Zürich 2007⁶, 18. 300-311.

³⁸ Zur „Unterscheidung zwischen ‚Moral‘ und Ethik, zwischen Daseinsinterpretation und Lebensorientierung“ vgl. H.G. Ulrich, *Anthropologie und Ethik bei Friedrich Nietzsche*, BEvTh 68, München 1975, 77-111; hier: 77.

³⁹ Das hier Zusammengefasste konnte ich während eines mehrmonatigen Gemeindepraktikums in der ELCIN im Jahr 2000 erfahren.

Sprache kommt. Institutionelle Selbstdarstellungen haben keinen Wert für die Veröffentlichung von Wahrheit.⁴⁰

6. Zusammenfassung

Es konnte gezeigt werden, dass ein aus der Gegenüberstellung zum Verborgenen abgeleitete Öffentlichkeitsbegriff jenem, der aus der Gegenüberstellung zum Privaten hergeleitet wird, die Kategorie der Buße bzw. der Umkehr hinzufügt. Das Auffinden von Wahrheit ist nicht gleich zu setzen mit dem Verrat von Geheimnissen. Ein theologisch gefüllter Begriff von Öffentlichkeit folgt einer Spur, die Th. Rentsch ausgelegt hat:

„Das Thema des Bösen und der Sünde wurde in der Philosophie des vergangenen Jahrhunderts erstaunlicherweise lange Zeit verdrängt und tabuisiert. ... [Die Gründe] für diese auffällige Verdrängung ... scheinen ... mit einem oberflächlichen Aufklärungsverständnis und einer subkomplexen Anthropologie zusammenzuhängen.“⁴¹

Es ist Ausdruck dieser „subkomplexen Anthropologie“, wenn Ethik nur das gute Leben des moralisch gerechtfertigten Subjekts im Blick hat und nicht die Möglichkeit der Umkehr von Menschen oder Institutionen thematisiert. Ethik muss danach fragen, wie der Mensch aus seiner Verstrickung in Schuld und Unrecht frei werden kann.

Öffentliche Buße, so konnte angedeutet werden, ist eine Möglichkeit solche Wege zu finden. Ein Begriff von Öffentlichkeit muss über die bloße Pressefreiheit hinaus berücksichtigen, dass er die Freiheit zum Bekennen einschließt.

⁴⁰ So auch der Vergleich von Selbst- und Fremdwahrnehmung kirchlicher Öffentlichkeitsarbeit bei D. [Meier](#), *Kirche in der Tagespresse. Empirische Analyse der journalistischen Wahrnehmung von Kirche anhand ausgewählter Zeitungen*, Erlangen 2006.

⁴¹ Th. Rentsch, *Die Rede von der Sünde. Sinnpotenziale eines religiösen Zentralbegriffs aus philosophischer Sicht*, in: M. Lasogga u.a. (Hg.), *Gegenwärtige Herausforderungen und Möglichkeiten christlicher Rede von der Sünde. Klausurtagung der Bischofskonferenz der VELKD*, Hannover 2010, 9-35, hier: 9.

The Roma Minority in the Czech Republic: Scapegoats of Modern History?

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Abstract

In this paper I am focusing on the situation of Roma minority in the Czech Republic concerned with the high levels of social exclusion in many aspects of their lives. Among the main aims of the paper is to show that the current situation of Roma in the Czech Republic is not the question of mentality like the majority prefers to think, but the social pre-conditions, historical “heritage” and the changing economic situation in the country. Personally I am involved in the projects on communities’ inclusion on local and international levels both in the non-governmental and academic spheres; the Roma integration programs have been part of my professional activities. Such interdisciplinary approach can contribute from my point of view to more objective outcomes and more humane papers.

Keywords: social exclusion, scapegoat, anti-gypsyism, Roma people, Czech Republic

Introduction

These days Europe represents the Union of 27 member countries, vast lands and a common space where Europeans can practice their rights and move freely. For the rest of the World and for Europe itself this is a place of peace, stability, and rising standard of living. Europe promotes values like human rights, democracy and freedom but under this surface there still exists discrimination, nationalism and xenophobia – these altogether building the real picture of Europe today.

The rise in the levels of intolerance inside the communities towards some particular ethnic or other groups can be explained by the economic crisis in almost all the member states of the European Union and the aftermaths. However, such a situation is not something brand new and has been known throughout the history of mankind. Whenever a crisis situation or a natural disaster (famine, plague or invasion) emerges – the “scapegoat”, the weakest element of the community, is blamed and punished for the sins, crimes and sufferings of others, so the majority could feel more united and safe.

In his book Tom Douglas¹ develops and explains in details the *scapegoat* concept from religious to family contexts, showing to the reader that the blaming itself and the wish to transfer the blame have been always among us. He stresses that during the recent decades this social pattern has become widespread on a daily basis in society.

I do agree with Douglas and would like to add that more and more often one can hear such kind of statements from public: “I am not responsible for anything; all is caused by governments, politicians, companies, immigrants, gypsies...” It is not surprising that this behavioural model is easier to follow due to the fact that it is more convenient to blame others than to step in and take the responsibility for your own life, for the critical and conflict situations in the society. And in that way, scapegoating has always been present within the realities of our societies.

While preparing this paper I did a lot of research on the “scapegoating phenomenon” from the angles of religion, history, family, and public; and I can honestly say that this issue fascinates me as a researcher and motivates me as an educator to explain to the public and youth why some particular groups are being targeted and discriminated against by the majority.

In general, the scapegoating social behavioural pattern can be associated with choosing some particular people/group of people, who are weak or easy to be targeted as victims to transfer sins/frustration/stress/hate of the community/nation onto them. Thereby people who transfer it get rid of anxiety and stress, feel more secured and relaxed. Today, in terms of public scapegoats, different groups of society are targeted all over Europe: in Central Europe – immigrants and Roma people, in Northern Europe – immigrants, in the Balkan states – homosexual people.

One of the largest and more vulnerable minorities in Europe nowadays, being daily highly discriminated against and on a legal basis, is the Roma community. Estimated to be 12 million people² and being distributed all over Europe, they constitute a very diverse group in terms of religion, language, occupation, economic situation and ways of living. Notwithstanding being so different, the Roma community is generalized, stigmatized and connected with all the possible “evils” like crimes, drugs, prostitution, etc. Such a way of perceiving Roma in society led to the establishment and prospering of the anti-gypsyism in Europe.

¹ Tom Douglas, *Scapegoats: Transferring Blame*, New York 1995.

² Arno Tanner, Finnish Directorate of Immigration, *The Roma of Eastern Europe: Still Searching for Inclusion* (2005), more on <http://www.migrationinformation.org/feature/display.cfm?ID=308>, viewed on 12.08.2012.

Anti-gypsyism is a modern term related to the existence of prejudices and stereotypes in regard to the Roma minority. Furthermore, anti-gypsyism has become so casual and so normal in the behavior of the majority and in the statements of officials, media and police that this altogether leads to physical attacks and related violence towards the Roma members, strengthening even more the intolerance level in society.

Anti-gypsyism can be explained by the absence of will to recognize the history of the Roma minority in terms of previous slavery³ and suffering (including the genocide during World War II⁴), the unwillingness of the society and politicians to address the issue, which needs a humanitarian approach with understanding and patience. Sadly till now people all over Europe prefer not to see, not to think and not to imagine themselves in the situation of the Roma community members.

In many cases, entire Roma communities are living in inadequate conditions without access to water, electricity, sewerage and heating. To this should be added that after the fall of Communism the Roma community experienced great problems due to the unemployment and since then their situation has got very close to complete exclusion from decent work chances in the European Union. The Roma minority is being segregated and discriminated against at the highest level within every sphere: in education – by being denied access to schools, or being put in schools for children with mental disabilities or by being separated from the larger populations of students; in health – due to the absence of funds to pay the insurance and lack of the identification documents; in public services – due to the public sentiments and marginalized life style; and directly – by constructing walls between the Roma and the majority⁵.

This paper intends therefore to attract attention to the inhuman and frightening case of social exclusion of Roma minority in the Czech Republic as it occurs today, in the 21st century, in the very heart of Europe.

Research gaps

While analysing the dimensions and extent of social exclusion of the Roma community in the Czech Republic, one would be confronted with the lack of this “ethnically sensitive” data in public statistics. However, this situation is similar in a lot of European states.

Clear and up-to-date statistical figures are therefore important in order to be able to argue and prove a certain position in terms of the Roma situation in the country, in terms of discrimination cases and human rights of this minority group.

Another challenge can be linked with the exact number of the Roma population due to the fact that the Roma community members rarely affiliate themselves with the Roma nationality but with the nationality of the residence country or of the country of origin⁶. It is illegal nowadays to request nationality/ethnic specific data other than one's declared nationality; this leads in its turn to the situation when only a small Roma population will actually declare Roma nationality.

³ By previous slavery I mean the enslaving of Roma people throughout history from the time of the Byzantine Empire to the second half of the 19th century (for example on the territory of Romania), when slavery was finally abolished.

⁴ By genocide of Roma people I mean the Porajmos as in the attempt made by Nazi Germany, the Independent State of Croatia, Horthy's Hungary and their allies to exterminate the Romani people of Europe during World War II. The estimated number of killed varies from 200,000 to 1,500,000 people.

⁵ Details can be found as well on <http://www.amnesty.org/en/news-and-updates/feature-stories/europes-roma-community-still-facing-massive-discrimination-20090408>.

⁶ In cases when people were born in another country and then migrated to the current hosting country, for example Slovak Roma community members in the Czech Republic identify themselves as Slovaks not as Roma or Czechs.

These two factors can partially explain why according to Census 2001, the share of Roma minority was only 0.3%, which is approximately 12000 people, while the experts and non-governmental organizations estimate the number to be about 3% and 300000⁷ respectively.

To be able to have the overall picture of the Roma community situation in the Czech Republic in the author's point of view it is important to have at least a short overview of the historical background of their settlement in the Czech Lands from the moment of their arrival.

Historical overview of the Roma minority in the Czech Republic⁸

Many historians refer to the 14th and 15th centuries for the arrival of the Roma community to Central Europe and the Czech Lands in particular. This could be called the "Golden Age of Roma in Europe" as they were given protection and some privileges. Back to 1423, the Czech king Zikmund was stating that there should be no prejudices within his kingdom for "gypsies".

In 1427 the archbishop of Paris excommunicated the Roma from the Church and the attitude of the population dramatically changed; with this act the centuries of the cruel anti-Roma discrimination began and the persecution, tortures, execution of the members of the Roma community were not considered as a crime anymore.

The persecution stopped in the 18th century with the decree of Maria Theresa, whose purpose was to assimilate the Roma into the rest of the population. Among the forced assimilation measures were prohibition of nomadic life-style, separation and re-education of Roma children within the major population families. In the 21st century these measures got to be considered as violating human rights, but it is worth mentioning that these measures led to the overall assimilation of the Czech-Moravian Roma.

The 19th century and industrialization changed the whole society and its mentality; and the Roma population could not find the right place for themselves again. Before World War II, the majority of Roma was still illiterate, discriminated against and unmotivated to change their conditions. The greatest tragedy occurred under the Nazi regime when the original "Czech" Roma, assimilated at great cost, were almost exterminated⁹.

After the war many Roma migrated from Hungary, Slovakia and Romania to the Czech Lands for the open positions in the industrial sector; here they had to face the issues of language barriers, difference of mentalities, and segregation.

Within the majority of Czech society, the overestimation of the financial factors and the thought that only material conditions and given jobs would change the situation of Roma and their social behaviour led to the Roma society's degradation caused by the cultural shock in an unfamiliar place, by the elimination of traditions and values within the Roma community, and erosion of traditional family life.

It can be seen in the historical perspective through the centuries that Roma have represented an outcast population on the edge of social exclusion. The 20th century was of high importance and influenced the Roma situation dramatically by extermination of settled Roma during World War II, by the social engineering experiment of forced resettlement from rural areas and by the switch to the market economy, which led to greater unemployment among this social group.

⁷ Details can be found as well on <http://www.visegradinclusion.org/page/situation-of-roma-in-czech-republic:72/>, viewed on 01.08.2012;

⁸ The overview was carried out on the materials of research of Tomas Sirovatka, *The Challenge of Social Inclusion: Minorities and Marginalized Groups in Czech Society*, Brno 2006, materials on website <http://www.visegradinclusion.org/page/situation-of-roma-in-czech-republic:72/>, viewed on 25.07.2012, and on the website of Radio Prague and its pages on history of Roma in the Czech Republic: <http://romove.radio.cz/en/article/18913>, viewed on 01.05.2012.

⁹ According to experts only 10 percents of the Czech Roma survived the genocide during the World War II.

During the last decades the Roma have been viewed as a “weak element of the society”; therefore, the system of material support from the government’s side was initiated. From my point of view, this step has contributed to a reinforcement of the hostile sentiments on the part of the major society towards Roma. It is usually said that the transformation process brought new rights and freedom for people; I had rather insist that for the Roma community in the Czech Republic it made life and survival even harder.

Reality of the Roma population in the Czech Republic

Europe, which is generally so culturally and ethnically different, lately has witnessed a “minority trend” when the minority groups celebrate their difference, organize cultural festivals, maintain and preserve their heritage. The Roma minority faces totally different issues in the meantime. Why is that so?

Well, Roma as a minority group is not connected with one particular state, which could possibly in its turn assist, support, maintain and motivate the Roma population to preserve their culture, language and history.

Roma as a group of people, who have been living on the European territory for centuries, being citizens even in the official documents, still do not possess the same benefits as the major population. Why is this so?

Talking about Roma in the Czech Republic, Petr Mares¹⁰ states that the most disturbing fact is the absence of dialogue between the dominant population and Roma people. Moreover, people who speak about the Roma issue in the Czech Republic (academics, middle-class representatives) are usually of non-Roma origin, and have never experienced poverty, segregation, marginalization in their lives. I do agree with Mares in this; poor knowledge and coverage of the Roma situation cause inefficient policies and failures of integration and assistance programs designed for Roma.

Recent research of public opinion from May 2012¹¹ has shown that the majority of the Czech high school students do think that the Roma population is the biggest challenge for the Czech society nowadays. The research states that the negative attitudes have increased since 2009 threefold and has equaled 75 percent (negative perception of Roma people).¹² I would like to mention that such a situation is not surprising and just reflects the main trends in the Czech society, media and politics. It appears that what makes it difficult for the majority to understand the reality of the Roma population, and what makes it easy to blame and judge their “poor situation” is firstly the lack of will and knowledge about historical patterns and social processes.

In the minds of the majority all the “troubles” are caused by the trendy term “Roma mentality” and their incapability to work and integrate within the rest of the population. However, the reality is more sad and complex. It is not the mentality, but the social pattern of historical discrimination and exclusion over the centuries.

The exclusion of the Roma population presents a complex set of social problems, which are so interconnected that solving only one will not bring any progress and effective results in the long-term perspective. That is one of the explanations why a lot of Roma integration programs fail and do not bring even small changes to the community.

¹⁰ Petr Mares, *Social exclusion and social inclusion: the Czech perspective*, Brno 2006.

¹¹ Gwendolyn Albert, “Czech high school students said to be most exercised over co-existence with Romani people”, 2012, http://www.romea.cz/english/index.php?id=detail&detail=2007_3402, viewed on 15.08.2012.

¹² Interview with Ondrej Liska, Czech Politician, on Roma Integration, 2012, <http://www.soros.org/voices/interview-ondrej-liska-czech-politician-roma-integration>, viewed on 17.07.2012.

With the help of the research made by Simkova Ivana and Klicova Katerina¹³ on the living conditions and specifics of social exclusion of the Roma Community in the Czech Republic, I would try to present the social exclusion set, which the researchers found to be valuable. The studied dimensions were found relevant for the situation of the Roma population in the Czech Republic by comparing the social exclusion areas with the European Union inclusive policy.

Access to Education

Being an educator and a youth worker, I would like to state that in the long term perspective, education is one of the tools that has the potential to lead to the (re)construction of identity, to the greater integration and employment chances among youth. Education is not only the tool but an open space for interaction and socialization where a lot of social issues can be solved and overcome by youngsters and educators. The limited access or no access to education is one of the dimensions of the social exclusion.

According to the Research on Inter-Ethnic Relations¹⁴, carried out in 2002, 70% of Roma obtain elementary education, 21% - vocational training, 5% - high school and 2% - university degree. Why is this so?

Public opinion again reflects the Roma mentality problem and cultural specifics of children from this community because they are not able, on the same conditions as the majority, to enter elementary school, "all the time ill or absent from school", and leave school early... With the knowledge of social patterns and of the Roma situation, one can consider "these cultural specifics" as the direct consequences of the segregated/marginalized community lifestyle of their parents and relatives.

How can you provide snacks for your child while in school and a place to do his/her homework afterwards when your whole family lives in poverty? How can you assist and help your child with homework when you are without education yourself? How can your children possibly know how to interact with other kids from the major population when from their birth they live within the isolated communities, avoided by the rest of the population on an everyday basis? How can your child be on time and attend school every day when there are only 2 buses from the place where you live? These questions can be raised further.

To sum up, Czech Elementary School welcomes children with a good command in language, additional skills and the full support of parents. By definition one can understand that Roma children do not fit into these conditions and, therefore, are unable to enter the education system as the major population does. As a consequence, Roma kids are distributed to segregated classes or schools with low-level curriculum better known as the schools for mental disabilities.¹⁵

"There has been virtually no change on the ground in the Czech Republic since the European Court of Human Rights found three years ago that the country had discriminated against Roma children by educating them in schools for children with mental disabilities."¹⁶

¹³ Ivana Simikova, Katerina Klicova, Living conditions and specifics of social exclusion of the Roma Community in the Czech Republic, Brno 2006.

¹⁴ *Research on Inter-Ethnic Relations, Scientific Report*, Social Studies Department, Masaryk University, Brno 2002.

¹⁵ Details can be found as well on <http://www.soros.org/voices/what-we-learned-leicester-bringing-inclusive-education-roma-children-czech-republic>, viewed on 17.07.2012, and <http://www.amnesty.org/en/news-and-updates/report/czech-republic-must-eliminate-second-rate-education-for-roma-20100113>, viewed on 15.07.2012.

¹⁶ Thomas Hammarberg, Council of Europe Commissioner for Human Rights, http://www.coe.int/t/commissioner/news/2010/101122czechrepublic_EN.asp, 2010, viewed on 20.07.2012.

Tackling employability

In all the European countries the rate of unemployment among the Roma population is up to 46% in comparison with the rest of the population with 10%.¹⁷ According to statistics 90% of Roma population are unskilled workers, which can be explained by low levels of education and qualification. Before the economy transformation, Roma were employed in the industrial sector and when the market economy came – Roma were the first to be fired because of their “low skills”.

Experts and NGOs estimate that about 50% of the Roma population are in the condition of long-term unemployment for 10 and more years. Why is it important to mention long-term unemployment within the social exclusion set? First of all because the long-term unemployment leads to the dependence on state assistance, followed by the loss of confidence and motivation to change the situation, to break the circle of unemployment, and to losing of working skills and habits.

In their attempts to survive in the modern world, being unable in many cases to legally enter the labour market, Roma become involved into illegal activities and the grey economy which do not provide regular income, social service and protection.

In the Czech Republic official discrimination is prohibited on any basis, and the “low skills and lack of qualification” excuse is often used by the employers to reject “unwanted candidates”. While working with Roma population, cases of discrimination are often stated by the members of Roma community, which in their turn lead to unwillingness to try to find a work. However, it is not only the discrimination that influences non-acceptance of the potential Roma candidate for a job position.

When you were not working for a lot of years, when your community has no positive examples of working members – how can you know how to behave properly at the interview, how can you possess the necessary skills which are significant to enter the labour market? Inability of Roma applicants to present themselves in a good way in front of an employer makes the latter uninterested in hiring Roma in order not to deal with other related problems that can occur (training, adaptation, etc.).

Unsurprisingly, in the family with both parents unemployed/employed in the grey sector nobody can talk about the social habits transferred to the child, social skills gained by the child which all of which, after all, affect the whole generation. According to the Human Development Challenge of Roma Integration Research, 40% of Roma youth (15-29) has never worked, which makes this generation highly vulnerable in terms of their future.

How do Roma live?

In the first part of the paper I have tried to show that the “poor situation” of the Roma population is not something new for the Czech Republic; however, it is worth mentioning that the transformation period has deepened the existing historical poverty of segregated/marginalized classes and added more vulnerable groups to the ranks of “poor”.

Social assistance, which was designed with good intentions to help people “meet the ends”, while resolving the issues, is, first of all, a short-term measure, which does not help the long-term unemployed groups. With such a situation socially marginalized families and communities are caught in the debt circle, living on the edge of their capacities. And here comes the question: how can you control the situation and think of solutions – when the only thing you need to do for your family is to secure the payment of necessities by borrowing the next sum of money?

Poverty is not only about money and unemployment; poverty is a set of conditions in

¹⁷ Tomáš Sirovatka, Human Development Challenge of Roma Integration Research, Romany people in Czech Republic, Brno 2002.

which people exist for a period of time (sometimes even the whole life) and try to survive. That is another world, which the majority prefers not to see but to judge.

In the Czech Republic and Slovakia Roma have been living in/relocated to housing without access to clean water, without adequate sewage facilities and without infrastructure to secure the majority from “seeing” the Roma in their everyday lives. Such poor housing leads to poor health and short life expectancy, to subsequent discrimination on the labour market, and to subsequent unemployment/grey market involvement/illegal activities.

Once more – this is not the issue of mentality – these are the social conditions!

Segregated and marginalized

Although among the basic human needs there are the secure housing and the existence of housing as a shelter, for a lot of Roma this is pure luxury. In the Czech Republic the Roma population lives in the particular locations where they form the majority, which means that we are dealing with residential segregation. In the majority of cases they live in the old housing stock which the city council owns and (to be honest and objective) is not appropriate for living for the majority society.

For the Roma community family values and family bonds are of high importance, they cannot deny the family members and relatives when they are in need. This “closeness” influences to some extent living conditions (overcrowded flats) and lack or absence of private space for any member of the family. Even if at the beginning the Roma family stays in the same neighbourhood as the majority, when the first debts occur they would be forced to move to the “Roma locations”. These areas can be considered as by the government artificially formed enclaves¹⁸ or ghettos¹⁹ for the “weak elements” of the society. The flat owners misuse Roma’s lack of knowledge and education while performing official procedures, what leads to the formal agreement of Roma to be relocated.

The importance of social networks

Social networks have proved to be an important part of the everyday life of every person in this world, providing the space for socialization for their members, supporting and giving new ideas, reflecting on the problems and giving a hand when needed. As was mentioned in the historical overview of the Roma settlement on the territory of the Czech Lands, the social experiment and artificial social constructions implemented into the Roma community have had the most tragic impacts on the whole Roma identity and set of values.

Based on the family bonds and traditions, the communities of Roma were not used to mixing with each other because they were so different from each other in terms of traditions, values, language, religion, etc. Social engineering wanted this to be possible and people from different communities were mixed up, artificially united under one roof in enclaves/ghettos. Hostile to each other through centuries, and now forced to live together without the opportunity to change residence, people are unwilling to form any kind of network with each other and to be active in terms of social and public life. One of the local NGO working with Roma families²⁰ stated that people living in these localities live in a state of some kind of lethargy with the absence of hope and will to help themselves. They live with the basic needs, thinking only about tomorrow, in fear and permanent danger, feeling

¹⁸ By enclave I mean here a part of the city where the ethnic group lives, being surrounded by the area where the majority predominates.

¹⁹ By ghetto I mean here a part of the city, occupied by the particular ethnic group, that may be locked inside due to the social or economic reasons, or because it was forced by the majority or the government.

²⁰ *People in Need*, Social Integration program, <http://www.clovekvtisni.cz/index2.php?id=113>, viewed on 15.07.2012.

all the misery of life... Being involved in the social integration program myself, I can state that this kind of thinking is more than common.

One of the keys for the social inclusion is the ability to use the social networks; however, often when the priorities of the family and community on the whole are the basic needs, it is very difficult to be involved in any kind of social networks and social activities.

Once more, the Roma community is mainly based on family values and therefore the social networks and social assistance and social interactions are reduced to family and family members. Sadly and unfortunately family solidarity for these devastated communities in many cases plays the role “of a stone on the neck”, which will determine the whole extended family to sink; in other words, it would cause greater financial problems, deepening the poverty state and “killing” the ambitions of youngsters.

Abusing the services...

Being a scapegoat of the modern society, the Roma community is suspected of abusing the social system with all the possible social services and benefits. However, in the reality for the majority of Roma, who do not know of the possibility of using the system due to their poor education and lack of knowledge, due to the mistrust towards the government and the major population, and of course due to the spatial and social isolation, that is not the case.

Back to the social networks of the Roma community, a lot of services such as home nursing, elderly home care, kindergartens, are conducted by the members of the extended families in line with family traditions and values; therefore, they do not use the public services for this.

Why should we care?

The most important point of the social exclusion I wanted to highlight within this paper is its complexity in terms of numerous pre-conditions and factors interconnected with it; that in its turn makes it difficult to research, to find out the core elements for particular cases. It is, therefore, of high importance while working with the socially excluded groups/communities to be able to overview the whole “social exclusion set”²¹ presented by the most influential factors.

But why should we care about an individual who does not participate in the main activities of the society? For the majority of the society that is the first argument while tackling the issue of excluded and marginalized groups all over Europe. Such an attitude is provoked by the lack of knowledge, by the inability to see the overall picture of the situation and to adequately reflect on it. Educating the public in regard to this important issue should be one of the priorities of the universities, non-governmental organizations and governments themselves.

I partially agree with the arguments of Brian Barry on social exclusion in the society²². Barry states that social exclusion can be concerned with the violation of social justice in regard to equal opportunities, and in regard to political participation, which leads in its turn to the situation when the minority can not influence any events or change any patterns in the public and social life.

²¹ I use the term “social exclusion set” to depict the multi-essence of the exclusion processes in the communities. Close definitions in their meaning are the “cycle of social exclusion”, introduced by the Social Exclusion Unit in 2004, which can be found in “Breaking the Cycle: Taking Stock of Progress and Priorities for the Future”, report of the Social Exclusion Unit 2004 (Office of the Deputy Prime Minister, London, UK), http://webarchive.nationalarchives.gov.uk/http://www.cabinetoffice.gov.uk/media/cabinetoffice/social_exclusion_task_force/assets/publications_1997_to_2006/breaking_report.pdf, viewed on 11.07.2012.

²² Brian Barry, Social exclusion, social isolation and the distribution of income, Hills 2002.

Academic and public debates polemicize on Barry's statements, trying to work on the terms of social exclusion, social isolation, voluntary exclusion, etc. In this context the situation of the Roma minority cannot be associated with voluntary exclusion due to the fact that the majority of factors from the social exclusion set, presented by the author, are out of Roma control. Therefore, this kind of exclusion is indeed unjust, inhuman and violent from the author's point of view.

Is it healthy to maintain stratification in the society or can it be dangerous even for the majority? The human history provides us with a lot of examples of population stratifications in different societies; however, in the 21st century, boasting around the Globe about our modern values and humanity should not be an option.

The End?

Nowadays we believe, living in a secure and stable state, that if we pay taxes, work on a daily basis, vote and perform our responsibilities, that in case of social situations like the loss of job, individual/family crisis, disaster – the government will take care of us... However, when the issues related to your situation get complicated, the government would fail to address them efficiently.

The case of Roma population is just a “perfect example” of showing how the majority prefers not to see the problems, not to remember the historical and social patterns but to enjoy the short-term peace and stability.

One should not be surprised by the failures of the majority of integration and social assistance programs in connection to Roma population. If you take a heterogeneous community, artificially grouped in enclaves/ghettos with long-term unemployment, low education and qualification, add to this the discriminative and even xenophobic sentiments of the majority, stir it and you will get a perfect social exclusion set where the opportunities for the involved communities are blocked.

The situation of the Roma population has been connected with the whole future of their community, making it impossible for the youth to get up off their knees, to speak up and to try to change the situation. That is why it is of high importance for the majority to understand this challenge, to address the problem of the complexity of social exclusion, and to help the Roma community members to be included in the social and public life.

Ethik an der Grenze

Zu einem möglichen theologisch-ethischen Horizont im Migrationsdiskurs¹

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Abstract

Contrary to actual reservation theological ethics are able to and should make an original theological contribution to the discourse of ethics of migration. Referring to the motif of blessing in the biblical narration of the call of Abraham and to the reflection of special experiences in the borderlands in American border-theology solidarity and responsibility are developed as important principles in theological ethics of migration. The difficulties of theological ethics are discussed and finally some options are indicated.

Keywords: ethics, migration, blessing, border-theology, responsibility, solidarity, theological ethics

¹ Bei diesem Beitrag handelt es sich um eine überarbeitete Fassung eines Vortrags auf der Societas Ethica Tagung 2012 in Sibiu. Einige Anregungen aus dem Kommentar von Marianne Heimbach-Steins und aus anderen Wortmeldungen wurden dankbar aufgenommen.

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Einleitung²

Im Kontext von Migration, die zunächst kein Problem ist, sondern ein – nicht neues – Phänomen, erwächst eine Vielzahl von Fragestellungen und Problemen, die der ethischen Reflexion bedürfen – sowohl individualethische als auch sozialetische, die mehr oder weniger miteinander verschränkt sind. Eine theologische Ethik, die sich diesen Problemen stellt, greift auf die Analysen und Diskurse anderer Disziplinen zurück. Anders als interdisziplinär ist theologische Ethik nicht möglich. Diesem Aufsatz kommt jedoch zu, sich der Frage nach dem spezifischen Beitrag zu stellen, den eine genuin theologische Ethik leisten kann. Der Eindruck, der dem zugrunde liegt, ist, dass die theologische Ethik zu Migrationsfragen nicht nur insgesamt eher wenig sagt, sondern auch auf eine seltsame Weise profillos bleibt.

Ich meine aber, dass eine genuin theologische Ethik einen *eigenen* Beitrag zur ethischen Diskussion von Problemen der Migration zu leisten hat und, so die These, auf Grundlage der ihr eigenen Motive und Traditionen sehr wohl auch leisten kann. Es besteht die Gefahr, dass sich die theologische Ethik voreilig selbst beschränkt und begrenzen lässt.³

Um einen möglichen Beitrag einer theologischen Migrationsethik zu erörtern, werden im Folgenden zwei voneinander unabhängige Zugänge zu Migration erläutert: Gen 12 ist eine Erzählung, die den Aufbruch mit der Verheißung des Segens verbindet und die Anknüpfungspunkte für theologische Optionen bietet; die „hispano“-amerikanische Bordertheology macht die Grenze zum Ausgangsort ihrer Reflexion und eröffnet dadurch neue Perspektiven. Beiden Ansätzen folge ich in meinen Überlegungen, die jeweils in ethisch relevante Kategorien münden: Solidarität und Verantwortung. Nach der Reflexion beider hinsichtlich ihrer Relevanz im Kontext von Migration endet der Beitrag mit Anmerkungen zur Problematisierung und zur Akzentuierung einer theologischen Ethik der Migration.

Zugang 1: Die Geschichte von der Berufung Abrahams

In der biblischen Tradition spielen das Aufbrechen, Unterwegssein und Fremdsein immer wieder eine große Rolle. Das Schutzgebot gegenüber Fremden ist eindeutig in seiner Aussage und hat große Bedeutung an verschiedenen Stellen in AT und NT. Die Erinnerung an die eigene Fremdheit in Ägypten und die Befreiung aus derselben ist verknüpft mit der Selbstoffenbarung Gottes (Ex 20,2) und prägt als solche die Glaubensgeschichte Israels und die moralischen Gebote des Bundesbuchs. Häufig zitiert ist im Zusammenhang von Migration auch das Buch Rut, das u.a. im Blick auf die Vielschichtigkeit von Identitäten interessant ist.⁴ Viele andere Texte in AT und NT wären zu nennen. Ich beschränke mich im Folgenden auf die Berufungsgeschichte

² Angesichts der Aufgabenstellung, mit diesem Beitrag im Rahmen der Tagung eine genuin theologisch-ethische Perspektive zu liefern, und in der Annahme, dass grundlegende Klärungen zum Thema Migration an anderer Stelle stattfinden, vermeide ich an dieser Stelle einführende und grundlegende Klärung zum Themenkomplex Migration. Der Begriff von Migration, der hier zugrunde liegt, entspricht den anerkannten Definitionen von Migration (durch UN und IOM) als internationaler Migration, d. h. der Verlagerung des Lebensmittelpunktes über Landesgrenzen hinweg für mehr als ein Jahr. Auch eine Problematisierung des Migrationsbegriffs wäre sinnvoll, da mit ihm bereits viele Festlegungen und Zuschreibungen verbunden sind. Aus Platzgründen verzichte ich darauf. Vgl. einführend: Arnd Bünker, „Migration – Grenzen öffnen!“, in: *Diakonia* 42 (2011), S. 146-149.

³ Weniger als eine These handelt es sich um eine nagende Frage: Wo stehen wir als theologische Ethikerinnen und Ethiker? Diese Frage kann auch hier nicht systematisch beantwortet werden. Es werden eher Anstöße zum weiteren Nachdenken gegeben.

⁴ Vgl. Marie-Theres Wacker, „«Nomadische» Zugänge zur hebräischen Bibel“, in: Virginia Azcuy, Margit Eckholt (Hg.), *Citizenship – Biographien – Institutionen. Perspektiven latein-amerikanischer und deutscher Theologinnen auf Kirche und Gesellschaft* (Intercambio-Schriftenreihe, Bd. 1), Wien 2009, S. 167-178.

Abrahams⁵, die einen anderen Aspekt betont, auf den ich an dieser Stelle aufmerksam machen will⁶:

Gen 12,1: Der Herr sprach zu Abram: Zieh weg aus deinem Land, von deiner Verwandtschaft und aus deinem Vaterhaus in das Land, das ich dir zeigen werde.

Gen 12,2: Ich werde dich zu einem großen Volk machen, dich segnen und deinen Namen groß machen. Ein Segen sollst du sein.

Gen 12,3: Ich will segnen, die dich segnen; wer dich verwünscht, den will ich verfluchen. Durch dich sollen alle Geschlechter der Erde Segen erlangen.

Gen 12,4a: Da zog Abram weg, wie der Herr ihm gesagt hatte, und mit ihm ging auch Lot.

Mit Abraham beginnt nach der Urgeschichte die Geschichte der Menschheit im AT, die sogenannte Patriarchen- oder Erzelterngeschichte. Gen 12,1-4a kennzeichnet den Übergang zwischen beiden.⁷ Es ist der Beginn der Bundesgeschichte – des Bundes Gottes mit dem Volk Israel. Diese Geschichte der Menschheit beginnt mit einer Migrationsgeschichte:

Die sogenannte Berufungsgeschichte Abrahams ist zunächst eine große Zumutung. Aus einem Milieu von Halbnomaden stammend, dürfte Abraham diese Lebensform noch einigermaßen vertraut gewesen sein. Doch hier geht es um ein Überschreiten und Verlassen der ihm vertrauten Gebiete, es geht um das Überschreiten einer Grenze. Er soll das Haus seiner Väter verlassen, also das Gebiet, in dem ihm der Schutz der Sippe sicher ist. „Das Ziel des Berufenen ist noch nicht klar, seine erste Aufgabe ist zunächst gewissermaßen vorbehaltlose Mobilität.“⁸ Die Zumutung ist der Aufbruch ins Ungewisse und in die Schutzlosigkeit. Die folgende Segensankündigung ist an den Auszug gebunden. Es bedarf eines radikalen Aufbruchs.⁹

In der Erzählung folgt nach der Zumutung die Segensverheißung. JHWH sagt Abraham seinen Segen zu, dabei handelt es sich an dieser Stelle nicht um den performativen Akt des Segnens selbst, sondern um eine Segensankündigung. JHWH verheißt Abraham Land, Segen und einen großen Namen und er übernimmt den verlorenen Schutz. Auf diese Segens-

verheißung folgen zwei weitere, die hier nicht weiter verfolgt werden können. Religionsgeschichtlich am bedeutendsten ist für das Judentum die Landverheißung in Gen 12,7, die später im Sinne einer privilegrechtlichen Bundestheologie zur quasi-juristischen Landübereignung wird (Gen 15).¹⁰ Die Berufungsgeschichte Abrahams steht in diesem Erzählbogen, hat aber eine Sonderstellung, denn sie leitet ihn ein, sie führt den Segen als das zentrale Motiv der Erzelterngeschichte ein.

Doch wem gilt der Segen und was bedeutet er? Die erste Frage ist vieldiskutiert, denn es geht um die Stellung Israels in der Heilsgeschichte und um die Möglichkeit der Teilhabe für „die Völker“ an diesem Segen, um die Frage, ob Abraham als Gesegneter Segensparadigma

⁵ Deutscher Text gemäß der Einheitsübersetzung.

⁶ Vgl. zum komplexen Verhältnis von Bibel und Ethik: Marianne Heimbach-Steins, „Christliche Sozialethik – im Gespräch mit der Bibel“, in: Marianne Heimbach-Steins, Georg Steins (Hrsg.), *Bibelhermeneutik und Christliche Sozialethik*, Stuttgart 2012, S. 11-36; sowie Stephan Ernst, *Grundfragen theologischer Ethik. Eine Einführung*, München 2009, S. 51-97.

⁷ Zwischen 11,31 und 12,1 besteht nur eine geringe Zäsur. Vgl. zur Sprachkritik: Ina Willi-Plein, *Das Buch Genesis. Kapitel 12-50* (Neuer Stuttgarter Kommentar), Stuttgart 2011, S. 27. Inhaltlich und strukturell bezieht sich die Berufungsgeschichte vielfach auf die Urgeschichte. Vgl. die Argumentation bei: Magdalene Frettlöh, *Theologie des Segens. Biblische und dogmatische Wahrnehmungen*, Gütersloh 2005, S. 274.

⁸ I. Willi-Plein, *Das Buch Genesis*, S. 28.

⁹ Vgl. M. Frettlöh, *Theologie des Segens*, S. 301.

¹⁰ Vgl. Erich Zenger, „Die Vorpriesterlichen Schichten“, in: Erich Zenger *et al.*, *Einleitung in das Alte Testament*, Stuttgart 2008, S. 180.

oder Segensmittler für die Völker ist.¹¹ Frettlöhs sorgfältige Argumentation, die die Sonderstellung Israels hervorhebt, uns aber als Mitgesegnete begreift, ist schlüssig. „Am Anfang der Erzelternerzählung wird nicht nur das Handeln JHWH's an Abraham, sondern auch die Beziehung zwischen Abraham und den ‚Familien des Erdbodens‘ auf den Begriff des Segens gebracht. ‚Segen‘ wird zum Interpretament der Geschichte Israels mit seinem Gott, und zwar gerade auch in ihrer Außenperspektive, in ihrem Bezug auf die Menschheitsgeschichte. [...] Das Segnen Abrahams (V. 2aß) zielt auf die universale Teilhabe aller Bewohner der Erde an Gottes Segen.“¹² Durch die Anerkennung des Gesegnetseins Abrahams haben auch die Völker Anteil am Segen Gottes.

Der biblische Begriff des Segens selbst ist komplex. Aus dem nicht-kultischen Bereich stammend, ist er im Alten Testament letztlich an Gott gebunden, auch wenn das Segnen Gottes und das Segnen der Menschen unterschieden werden.¹³ Der Begriff *Segen* geht ursprünglich aus der Grußformel hervor, er umfasst in seiner weiteren Entwicklung verschiedene Dimensionen: das Gedeihen zu fördern, etwas in seiner Besonderheit hervorzuheben (*signare*) und jemandem (etwas) Gutes zu sagen. Als Gemeinsamkeit zwischen den Wortbedeutungen könnte man die besondere gegenseitige Zuwendung der Beteiligten betrachten, bei der es darum geht, sich Aufmerksamkeit und Beachtung zu schenken.¹⁴ „Der Segen ist hier die intensive Form der Präsenz und der Zuwendung der Segnenden, die sich auf die Gesegneten lebensförderlich auswirkt.“¹⁵

Die besondere Form der Zuwendung, die sich lebensförderlich auswirkt, als eine Art allgemeinen Kern des Segens zu sehen (ohne ihn enttheologisieren oder individualisieren zu wollen), ist bemerkenswert und bietet einen Anschlusspunkt für über den biblischen Text hinausgehende Überlegungen zum Motiv des Segens. „Du sollst ein Segen sein“ lässt sich, nicht identisch mit dem Abrahamsegen aber durch ihn motiviert, auch auf andere übertragen. Dabei ist besonders auf den Subjektwechsel abzuheben: Die Tatsache, dass es nicht heißt „Ich segne dich“, sondern „Du sollst ein Segen sein“ kann analog bzw. als Metapher darauf aufmerksam machen, dass Menschen anderen zum Segen werden.

Segen steht in einem engen Verhältnis zur Solidarität. Denn die Bekundung der Solidarität geschieht häufig durch das Aussprechen von Segen- und Anerkennungsformeln.¹⁶ Auch in Gen 12, 1-4a ist diese Beziehung vorhanden: „Ich will alle segnen, die dich segnen, wer dich verwünscht, den will ich verfluchen“ kann als Abwandlung der uralten Solidaritätsformel, durch die Blutsbrüderschaft begründet wurde, verstanden werden. Gott sagt zu, die zu segnen, die Abraham und das Volk Israel als gesegnet anerkennen, mit ihm freundschaftliche Beziehungen aufnehmen und sich mit ihm solidarisch bekennen.“¹⁷ Der Segen bekräftigt eine Beziehung der Solidarität und er verleiht ihr, wenn wir der oben genannten Begriffsbestimmung folgen, durch die Hervorhebung der Lebensdienlichkeit eine besondere Tiefe.¹⁸

¹¹ Die komplexe Auseinandersetzung, die vor allem, aber nicht nur, zwischen von Rad und Westermann stattfindet, lässt sich hier nicht ausführen. Sie ist aufgearbeitet in dem hervorragenden Werk von M. Frettlöh, *Die Theologie des Segnens*, S. 275-302.

¹² *Ibidem*, S. 273.

¹³ Zur komplexen Diskussion, vgl. M. Frettlöh, *Die Theologie des Segnens*, S. 43-72.

¹⁴ *Ibidem*, S. 72.

¹⁵ *Ibidem*.

¹⁶ Vgl. in Anlehnung an Josef Schabert: M. Frettlöh, *Die Theologie des Segnens*, S. 67.

¹⁷ Josef Schabert, *Genesis 12-50* (Die Neue Echter Bibel. Kommentar zum Alten Testament mit der Einheitsübersetzung, Bd. 2), S. 128.

¹⁸ Außerdem wäre auf die Performativität des Segnens als wirklichkeitsverändernde Kraft einzugehen. Das lässt sich an dieser Stelle leider nicht weiter ausführen.

Solidarität

Die Pastoralkonstitution des 2. Vatikanischen Konzils „*Gaudium et spes*“ betont die Einheit der Menschheit und fordert eine wachsende Solidarität. In dieser Grundhaltung sind Freude und Hoffnung, Trauer und Angst aller Menschen von Interesse, besonders die der Armen und Bedrängten. Diese Konzilstheologie weitergedacht können wir der Solidaritätsforderung mit Migranten – als Arme und Bedrängte unserer Zeit – Nachdruck verleihen.

In dieser Linie ist auch das gemeinsame Wort der Kirchen in Deutschland zu Migration und Flucht von 1997 zu sehen.¹⁹ Es unterstreicht, dass das biblische Ethos uns in die Pflicht nimmt, jeden Menschen in seiner Würde zu sehen und ihm verantwortlich und gerecht zu begegnen (96). Um zu verdeutlichen, wie dies aussehen könnte, knüpfen wir nochmals beim Motiv des Segens an. Migranten heute als Gesegnete anzunehmen, scheint abwegig zu sein.

Die geprägten Bilder von den Einwanderern als Bedrohung sind so dominant, dass es schwer fällt, den Segen zu erkennen, der die Menschen sind. Doch auch und gerade diese Dimension von Verheißung in der Migration ist wach zu halten und zu erinnern. „Ein Segen sollst du sein“ – das bedeutet zuallererst zuzulassen, dass andere uns zum Segen werden, indem wir sie wahrnehmen, annehmen und davon ausgehen, dass sie uns etwas zu sagen haben in unserem Zusammenleben!

Dazu ist es allerdings nötig, den Migranten als Menschen zu sehen und die gängige Fixierung auf Defizite im Umgang mit Migranten zu durchbrechen: Der einwandernde Mensch wird häufig reduktiv betrachtet! Besonders auffallend ist in diesem Zusammenhang die Reduktion auf die Arbeitskraft, sie reduziert den Migranten auf seine – für die Aufnahmegesellschaft nützliche – Arbeitskraft. Es gibt jedoch noch eine andere, subtilere Form der Reduktion – und diese geht ausgerechnet mit den Maßnahmen der Integration einher und prägt tiefgehend unser Bild von dem Migranten. Ohne die grundsätzliche Sinnhaftigkeit von Integration bezweifeln zu wollen, ist zu konstatieren, dass diese den Menschen als defizitär betrachtet: Es fehlt ihm etwas, das ihn zum Leben in dieser Gesellschaft qualifiziert.²⁰ Dieses Defizit ist auszugleichen, etwa durch Erlernen der Sprache, der Kultur etc. Das ist als Forderung legitim. Wenn Zugehörigkeit in Form von Staatsangehörigkeit gerade nicht durch Geburt (*ius sanguinis*) gegeben sein soll, bedarf sie einer „Aktivität“, die in bestimmter Weise eingefordert werden kann. Aber die Sichtweise wird zum Problem, wenn sie zur einzigen und die öffentliche Wahrnehmung prägende Sicht auf die Migranten wird und damit eine Festschreibung einhergeht: Der Einwanderer als Mangelwesen.²¹ Der Mensch verschwindet hinter der Zuschreibung.

Eine Begegnung mit den Menschen, die die Grenzen überschreiten, ist nur möglich, wenn davon ausgegangen wird, dass sie uns etwas zu sagen haben und die Haltung der Selbstzufriedenheit beendet wird. Entscheidend ist dabei der Perspektivwechsel, der Wechsel vom Objekt zum Subjekt. Gen 12,2 auf den Migranten gewendet heißt: Er soll ein Segen sein – d. h. nicht einfach Adressat *meines* Handelns, sondern jemand, der nicht nur Defizit ist, sondern auch mir etwas zu sagen hat.

¹⁹ Kirchenamt der Evangelischen Kirche in Deutschland, Sekretariat der Deutschen Bischofskonferenz in Zusammenarbeit mit der Arbeitsgemeinschaft Christlicher Kirchen in Deutschland, „... und der Fremdling, der in deinen Toren ist.“ *Gemeinsames Wort der Kirchen zu den Herausforderungen durch Migration und Flucht* (Gemeinsame Texte, Bd. 12), Bonn 1997.

²⁰ Butler sieht diese Konstitution von „Mangelwesen“ bei Staatenlosen, vgl. Judith Butler, Gayatri Spivak, *Sprache, Politik, Zugehörigkeit*, Zürich 2011, S. 25.

²¹ Zur Reduzierung von Menschen, die einwandern, auf den ökonomischen Nutzen vgl. Kirchenamt der Evangelischen Kirche, Sekretariat der Deutschen Bischofskonferenz, „... und der Fremdling, der in deinen Toren ist.“, S. 140.

Diese Annahme, dass der Andere etwas zu sagen oder zu geben hat, ist ein Grundmoment der Solidarität. Fehlt dieses Moment der Gegenseitigkeit, ist nicht von Solidarität die Rede, sondern von Wohltätigkeit. „Solidarisch be- deutet also, zwei grundlegende christliche Dimensionen miteinander in Ein- klang zu bringen: die Bereitschaft zu geben (Engagement für Veränderung) und die Bereitschaft anzunehmen (nämlich die Gnade).“²² Der Einschluss in die Solidaritätsbekundung beinhaltet die Durchbrechung der Selbstgenügsamkeit und die Bereitschaft anzunehmen. Doch die Solidarität geht darüber hinaus.

Die Solidarität unternimmt den Schritt hin zur (Wieder-)Herstellung von Gerechtigkeit. Sie ist eine konkrete, partikulare Option, um Gerechtigkeit herzustellen und zu korrigieren. Um diese Gerechtigkeit herzustellen, muss bei den am meisten Benachteiligten angeknüpft werden – aus der Forderung nach Gerechtigkeit folgt deshalb eine Option für die, denen Rechte verweigert werden, deren Subjektsein verhindert wird, für die „Opfer“²³, die (von Entscheidungen) Ausgeschlossenen. Solidarität verlangt nach einer Option.

„Option‘ heißt immer, sich zuwenden, sich hingeben, sich verpflichten. Wenn man für die Armen optiert, entscheidet man sich gegen die Ur- sachen, die Strukturen, die Systeme, die die Armen arm machen und sie daran hindern, mit Würde diese historische *Conditio humana* als Söhne und Töchter Gottes, Brüder und Schwestern zu leben.“²⁴

Zugang 2: Bordertheology

In Lateinamerika und den USA hat sich eine Art Theologie zu treiben entwickelt, die die Grenze als Ort und die Grenzüberschreitung als Erfah- rung vieler Lateinamerikaner – auch Theologen und Theologinnen – zum Ausgangspunkt ihrer Reflexion macht.²⁵

Die Grenze als ein besonderer Ort, Räume, die unbestimmt blei- ben, Grenzorte und Grenzübereiche spielen in den Theologien einiger Latein- amerikaner und Lateinamerikanerinnen (vor allem in den USA) eine große Rolle. Die Rede von der Grenze konkretisiert sich bei Theologinnen wie Daisy Machado in den „borderlands“, die zweierlei beinhalten: „A place that can be identified on a map, yet it is also a place shaped and interpreted by the forces of immigration, capitalism, racism, poverty and the historical imagination.“²⁶ Die Grenze ist ein reeller Ort, ein konstruierter Ort, eine Metapher. Ge- gensätze treffen aufeinander: „A place of both economic promise and des- pair and a place where violence and the loss of life have become common place occurrences.“²⁷ Es ist ein Ort, der in vielerlei Hinsicht ambivalent ist. Literarisch hat Gloria Anzaldúa das Leben an und auf der Grenze brillant und mit großer Wirkgeschichte ins Wort gebracht mit ihrem Buch „Borderlands“ von 1987. Sie beleuchtet diese Räume narrativ und poetisch, assoziativ und durchgehend zweisprachig. In der lateinamerikanischen Tradition, auf die sie immer wieder Bezug nimmt, ist das Motiv der Grenze vielfältig besetzt, insbesondere

²² Jon Sobrino SJ, „Gemeinschaft mit den gekreuzigten Völkern, um sie vom Kreuz abzu- nehmen. Kirchliche *Communio* in einer pluriformen und antagonistischen Kirche“, in: Ludwig Bertsch SJ (Hrsg.), *Was der Geist den Gemeinden sagt. Bausteine einer Ekklesiologie der Ortskirchen* (Theologie der Dritten Welt, Bd. 15), Freiburg 1991, S. 131.

²³ Die Rede von Opfern ist wegen der Gefahr von Viktimisierung ambivalent, ich setze sie deshalb in Anführungszeichen.

²⁴ Pedro Casaldáliga, „Quedan los pobres y Dios“, in: <http://servicioskoinonia.org/relat/relatdatos1.html?CASALDALIGA> gesehen am 24.07.12.

²⁵ Die Erfahrungen sind – nicht zuletzt aufgrund der Kolonialzeit und der gewaltsamen Verschiebung der Grenze zwischen Mexiko und den USA, verschieden von den Erfahrungen der Migranten in Europa. Dennoch ist vieles vergleichbar. Vor allem aber haben wir hier bislang in Europa kaum Ähnliches in der Theologie entwickelt.

²⁶ Daisy Machado, „The border: gender, identity and race“, in: Raúl Fornet-Betancourt (Hrsg.), *Migration und Interkulturalität. Theologische und Philosophische Herausforderungen*, Aachen 2004, S. 43.

²⁷ D. Machado, *The border*, S. 43.

aufgrund der vielen erfahrenen und doch konstruierten Grenzen zwischen den sogenannten Rassen, aber auch zwischen Nationen. Die klassischen Kategorien „race, class, gender sind die Indikatoren, in welchen Bereichen Grenzziehungen stattfinden. Anzaldua charakterisiert die Grenzen folgendermaßen: „Borders are set up to define the places that are safe and unsafe, to distinguish us from them. A border is a dividing line, a narrow strip along a steep edge. A borderland is a vague and undetermined place created by the emotional residue of an unnatural boundary. It is in a constant state of transition.“²⁸ Die Besonderheit des Ortes ist belastet durch die Geschichte und belastet die Lebensgeschichten vieler.

Die Unbestimmtheit der Grenzorte ermöglicht gleichzeitig, dass sich hier etwas ereignet. „The U.S.-Mexican border es una herida abierta where the Third World grates against the first and bleeds. And before a scab forms it hemorrhages again, the lifeblood of two worlds merging to form a third country – a border culture.“²⁹ Die hybride Kultur, die entsteht, die *mestizaje*³⁰, hat in Lateinamerika seit Jahrhunderten und an der genannten Grenze insbesondere große Wirkkraft. In Europa hat die Hybridität zwar mittlerweile in verschiedene Theorien Eingang gefunden (Postcolonial studies, Interkulturalität etc.), jedoch ohne eine vergleichbare Wirkmächtigkeit. In der Praxis und in den Diskursen über Integration in Deutschland scheint es solche Übergänge und Momente des Hybriden kaum zu geben: Man ist entweder Deutscher oder Ausländer bzw. „Mensch mit Migrationshintergrund.“³¹

Im Sinne Anzalduas gebraucht die Theologin Nancy Bedford die Metapher der Grenze: „Wenn wir ‚im Übergang‘ sind, tauchen Zwischenräume auf und bilden sich Subjektivitäten ‚zwischen‘ oder jenseits der Summe von ‚Teilen‘, in die wir üblicherweise zerlegen, wenn wir die Polaritäten von Geschlecht, Rasse oder Klasse reduktionistisch denken. In anderen Worten, in den Zwischenräumen können wir auf neue Weise denken.“³² Der Moment des Übergangs und das damit verbundene unbestimmte „Zwischen“ birgt aufgrund seiner Offenheit die Möglichkeit zu Neuem. Hier werden – potentiell oder real – Dichotomien aufgehoben, können Festschreibungen durchbrochen werden. Theologische Rede ist aufgefordert, den besonderen Erfahrungen auf der Grenze Rechnung zu tragen. Auch hier birgt der Übergang einen Moment der Verheißung.³³ Wenn Grenze als theologischer Ort verstanden ist, gilt es, Hoffnungen zu stärken, Leid beim Namen zu nennen, Unrecht anzuklagen und Veränderungen zu gestalten.³⁴ Entscheidend ist in der Position von Theologinnen wie Bedford

²⁸ Gloria Anzaldua, *Borderlands. La Frontera. The New Mestiza*, San Francisco 2007, S. 25.

²⁹ *Ibidem*, S. 25.

³⁰ *Mestizaje* ist ein ambivalenter Begriff. Lange Zeit versuchte man (etwa von Seiten verschiedener Regierungen) durch diesen Begriff eine einheitliche nationale Identität zu schaffen, die die verschiedenen indigenen Elemente zu unterdrücken versuchte. Heute wird der Begriff im Sinn der Hybridität und Melange gebraucht, der die Vielfalt gerade nicht vereinheitlicht. Gleichwohl ist sich Anzaldua der potentiellen Gewalt des Begriffs stets bewusst. In diesem kritischen Bewusstsein der Kolonialgeschichte gebrauche ich den Begriff hier.

³¹ Das betrifft die Außenwahrnehmung. Im Blick auf Identitäten in der Selbstwahrnehmung gibt es eine solche Eindeutigkeit kaum.

³² Nancy Bedford, „Gärten anpflanzen, den Bäumen des Lebens lauschen“, in: V. Azcuy, M. Eckholt, *Citizenship*, S. 179-192, hier S. 185.

³³ Das ist gilt insbesondere auch im Blick auf die Konstitution von Identitäten, ein im Kontext von Migration und Ethik hoch relevantes Thema, das ich an dieser Stelle nicht bearbeiten kann. Vgl. Hille Haker, *Dangerous Responsibility*, unveröffentlichtes Manuskript, Chicago 2011. Zur Ambivalenz in diesem Kontext vgl. Jeanett Rodriguez, „Tripuenteando. Un viaje hacia la identidad, la academia y la solidaridad“, in: María Pilar Aquino (Hrsg.), *Teología feminista intercultural*, Mexiko 2008, S. 119ff. Rodriguez betont, wie verletzlich diese Art der Identität ist, da der Anspruch Brücke zu sein für sie auch bedeutet, von allen mit Füßen getreten zu werden und nirgends dazuzugehören.

³⁴ Die theologischen Überlegungen in diesem Bereich befinden sich noch in einem Anfangsstadium. Es gibt mehr Desiderate als systematisch theologische Reflexionen. Gleichwohl ist es bedeutsam, die Relevanz des Ortes erkannt zu haben, weil damit die Lebenswirklichkeit vieler Menschen und ihre Glaubenserfahrung

oder auch Machado, dass sie die Bedeutung der Grenzorte und der Übergänge wertschätzen und darin ein Potential entdecken, das bislang nicht hinreichend genutzt wird, ohne dass sie dabei diesen Ort überhöhen oder verklären. Wenn die Grenze idealisiert wird, wird die Theorie fleischlos.³⁵ Die Grenze bleibt ambivalent. „Fakt ist, dass bei Betrachtung der wahren und konkreten Geschichten Migranten die von den postkolonialen Theoretikern gefeierten Zwischenräume und hybriden Räume eng und unbequem werden können.“³⁶ Denn sie beinhalten Entbehrungen, Schmerzen, Angst, Leid und Todesgefahr. 17 000 Menschen haben neueren Schätzungen zufolge in den vergangenen zwanzig Jahren auf ihrem Weg nach Europa das Leben verloren. Die Realität, die sich in dieser Zahl ausdrückt, sollte die theologisch-ethische Reflexion beeinflussen!

Die Bordertheologie, auf die ich mich hier beziehe, hält die Spannung aufrecht. Sie betrachtet die Migranten als theologische „Subjekte“ und lässt von dem Ort der Grenze her die Gottesfrage stellen. Sie erkennt das Potential der Metapher, aber überfrachtet sie nicht. Die Migranten sind keine Metapher, sie sind real, ihre Migration ist ein realer Vorgang, ein körperlicher Vorgang, gebunden an materielle Veränderungen, physische Orte, Bedürfnisse, denen zu entsprechen ist – wir nennen das Grundrechte! – die aber auf dem Weg auf der Strecke bleiben. Das ist, so Bedford, kein Gegenstand der Lobpreisung. Es erfordert Handeln.³⁷ Denn die Wahrnehmung, dass Menschen ihre Rechte vorenthalten werden, verlangt nach verantwortlichem Handeln.

Verantwortung

Auch in Anzalduas Texten ist in diesem Zusammenhang die Rede von Verantwortung. Sie, die weithin Erzählungen, Fakten, Ideen, Mythen und Metaphern aneinanderreicht, vertritt an wenigen Stellen einen normativen Anspruch: „The ability to respond is what is meant by responsibility“³⁸ lautet ihre Bestimmung von Verantwortung.³⁹ Der hier angedeutete Begriff von Verantwortung ist anschlussfähig an eine uns vertraute Linie einer Ethik der Verantwortung.⁴⁰ Es ist nicht Verantwortung im Sinne der Zurechenbarkeit, die hier gemeint ist, sondern Verantwortung im Sinne von zur Antwort gerufen sein, wie wir es von Lévinas kennen. „In this understanding, responsibility is a dialogical activity, guided more by the ‚other‘ than by the agent’s desires, interests or goals.“⁴¹ Diese Verantwortung gründet in der Überwindung der Gleichgültigkeit. Die Beziehung zum Anderen ist gekennzeichnet durch die Nicht-Indifferenz. „Hence, *if* the other enters the horizon of the self, the egocentric self is conversed into a state of responsibility, conversed to the recognition of the other as another person, resulting in the active compassion or care for the other.“⁴² Es ist unnötig, an dieser Stelle

in den Blick rückt.

³⁵ Vgl. N. Bedford, *Gärten anpflanzen*, S. 185.

³⁶ *Ibidem*, S. 186.

³⁷ *Ibidem*, S. 190.

³⁸ G. Anzaldúa, *Borderlands*, S. 42.

³⁹ Ihren Begriff von Verantwortung begründet sie nicht, eine Begründung des für sie Offensichtlichen liegt außerhalb ihres Interesses.

⁴⁰ Darüber hinaus verwendet sie Verantwortung noch in anderer Hinsicht. Sie spricht von der Verantwortung der Migrantinnen und Migranten – und zwar von deren Verantwortung selbst zu handeln. Es geht ihr darum, sich gleichermaßen nicht durch eine (ihre eigene!) Kultur entmündigen (oder beschützen) zu lassen und sich nicht – durch wen auch immer – zum Opfer machen zu lassen. Wir können diese Forderung aufgrund der Asymmetrie der Ausgangslage nicht übernehmen, denn dadurch würden wir das Leid nicht ernst nehmen und unsere eigene Verantwortung verdecken. Aber die Aussage mahnt uns aufmerksam zu sein für Entmündigung und Viktimisierung und sie zu durchbrechen.

⁴¹ H. Haker, *Dangerous Responsibility*, S. 6.

⁴² *Ibidem*, S. 8.

die Grundlinien eines Alteritätsdenkens zu rekapitulieren.⁴³ Nicht in der Autonomie ist gemäß Lévinas die Verantwortung begründet. Das Ich wird erst durch den Anderen, es wird durch den Anderen herausgerufen – meine Autonomie wird dadurch eher in Frage gestellt. Die Interpellation des Anderen ruft zur Verantwortung und damit zum Handeln.

Nun stellen sich mindestens zwei Probleme: Die Begegnung mit dem Anderen, etwa mit dem Migranten, wird durch Vorurteile, Stereotype und Abwehrmechanismen verdeckt, der Ruf zur Verantwortung wird ignoriert oder abgelehnt. Und *wenn* wir – zweitens – den Ruf ernst nehmen, so stellt er eine Überforderung dar, weil die Verantwortung gemäß Lévinas ins Unendliche geht – wir können ihr nicht gerecht werden, was häufig einen Grund für Resignation darstellt.

Eins ist, den Ruf hören, ihn zu erkennen. Das verlangt, im Migranten den Menschen zu sehen, mit seiner Geschichte und seiner Verletzlichkeit. Es bedarf vor allem der Sensibilisierung. Dazu ist es notwendig, dominante Bilder – von den Migranten als Flut, als Bedrohung – zu ersetzen und Diskurse zu unterbrechen.

Ein anderes ist die Überforderung durch den unendlichen Anspruch. Simon Critchley stellt – unter Bezugnahme auf Lévinas, Badiou und Knud Ejler Løgstrup – die These auf, dass jeder Ethik ein Begriff von ethischer Erfahrung zugrunde liegen sollte, die auf der maßlosen Forderung unendlicher Verantwortung beruht, der sich ein Subjekt in einer konkreten Situation treu verpflichtet.⁴⁴ Jedem Handeln geht daher nach Critchley die Bindung an ein Gutes voraus, das erst durch die Anerkennung als Gutes sichtbar wird.⁴⁵ Nach dieser Forderung formt sich das Subjekt, obwohl es sie niemals erfüllen kann. Die Forderung ist derart überwältigend, dass sie nicht erfüllbar ist. Die Unerfüllbarkeit der Forderung spaltet das Subjekt. Die Nicht-Übereinstimmung mit sich selbst kann nicht überwunden werden. Critchley betont, dass das Annehmen der Nichtübereinstimmung und das Aushalten der ethischen Forderung möglich sind und dass sie Handlungsoptionen eröffnen können. Er versucht gerade nicht, gegen die Unfähigkeit, vollständig mit sich übereinzustimmen, anzukämpfen und nach Authentizität zu streben. Da sich diese Authentizität nicht erreichen lässt, muss die Inauthentizität, die Gebrochenheit, angenommen werden.⁴⁶ Für ihn geschieht das durch den Humor als die Fähigkeit, zu sich selbst Distanz einzunehmen. Mir scheint darüber hinaus bedeutsam, dass auch der Glaube die Selbstdistanzierung und das Annehmen der Gebrochenheit ermöglicht.⁴⁷ Die Selbstdistanz, oder in anderen Worten: die Annahme der Kontingenzt, ermöglicht ein Handeln, das nicht perfekt sein muss.⁴⁸ Der

⁴³ Zur Alterität und kultureller Fremdheit vgl. Michelle Becka, *Anerkennung im Kontext interkultureller Philosophie*, Frankfurt 2005.

⁴⁴ Vgl. Simon Critchley, *Unendlich fordernd. Ethik der Verpflichtung, Politik des Widerstands*, Zürich-Berlin 2008, S. 51-68.

⁴⁵ Für Christen stellt die Überlieferung der Schrift ein solches „Gutes“ dar, aus dem eine Verpflichtung resultiert: „Aus der Botschaft vom Reich Gottes und von seinem Heilswillen für die Menschheit ergibt sich ein biblisches Ethos, das die Menschen seinerseits in die Pflicht nimmt.“ Kirchenamt der Evangelischen Kirche, Sekretariat der Deutschen Bischofskonferenz, *„...und der Fremdling, der in deinen Toren ist.“*, S. 96.

⁴⁶ Critchleys Kritik eines falsch verstandenen autonomen Subjekts „rettet“ das moralische Subjekt als ein auf den anderen bzw. die andere angewiesenes, verletzliches und nie ganz durchschaubares Subjekt. Er steht damit der Kritik verschiedener feministischer Theoretikerinnen nahe, vor allem Butlers Kritik der ethischen Gewalt.

⁴⁷ Der saloppe Umgang mit Critchleys komplexer Argumentation kann dieser nicht gerecht werden. Es kann an dieser Stelle lediglich darum gehen, Optionen auszuloten, die sich aus Critchleys Argumentation ergeben können bzw. daran anschlussfähig sind.

⁴⁸ Es finden sich verschiedene Anknüpfungspunkte bzw. Übereinstimmungen zu verschiedenen Motiven der Theologie- und Spiritualitätsgeschichte (vgl. etwa die Reich Gottes Meditation von Oscar Romero: „Ich kann nicht alles tun, aber ich kann etwas tun, und ich kann es gut machen“). Moralische Erfahrung und religiöse Erfahrung nähern sich hier einander an.

Anspruch wird dadurch nicht gezähmt, er behält seinen „Stachel“. Doch die Resignation weicht der Möglichkeit zu je neuem Handeln (individuell und politisch), das durch die ethische Erfahrung motiviert ist.⁴⁹ Somit wird das Aufschieben der Verantwortung verhindert.

Und die theologische Ethik – warum tun wir uns so schwer?

Nach Darlegung zweier unverbundener theologische Zugänge und der Erörterung daraus resultierender Prinzipien im Kontext von Migration, stellt sich die Frage, warum einer theologischen Ethik das Formulieren von Optionen im Kontext von Migration offensichtlich schwer fällt.

Passt sich die Ethik zu sehr der Politik an? Ist die normative Kraft des Faktischen so stark, dass Ethikerinnen und Ethiker nicht mehr wagen, darüber hinaus zu denken? Ethik erschöpft sich nicht im politisch Machbaren – aber in der Diskussion über Ethik und Migration lassen wir uns, wie mir scheint, vorschnell selbst Grenzen setzen. „Was in anderen Ethikdiskussionen als selbstverständlich eingefordert wird, klingt im Bereich der Migrationsethik fast subversiv.“⁵⁰ Dieses Unbehagen sei durch folgenden Zusammenhang erläutert:

Staaten verbieten das Überschreiten der Grenze nicht grundsätzlich. Die Diskussion über den Zuzug qualifizierter Arbeitskräfte, die in den letzten Jahren angesichts des demographischen Wandels in einigen Ländern Europas zugenommen hat, ist ein Hinweis darauf, dass es sehr wohl eine erwünschte Einwanderung gibt. Der Staat stellt Kriterien auf, die über die Zuzugsmöglichkeit entscheiden. Das wird mit dem Verweis auf die Selbstbestimmung des Staates gerechtfertigt.⁵¹ Das Leitprinzip, nach dem diese Kriterien in der aktuellen Diskussion erstellt werden, ist dabei der volkswirtschaftliche Nutzen, nämlich die Fragestellung, welche Einwanderer für den jeweiligen Arbeitsmarkt von Nutzen sind.

Die Engführung auf das Nutzenprinzip ist problematisch: Ein Staat geht über eine bloße Wirtschaftsgemeinschaft hinaus – deren Leitprinzip könnte der Nutzen sein. Das Grundgesetz BRD und die Europäische Verfassung bekennen sich auf unterschiedliche Weise zu einer Rechts- und Solidargemeinschaft. Diese orientiert sich nicht allein am Nutzenprinzip. Dass dies in Politik – aber auch in der Ethik – so hingenommen wird und Fragen der Gerechtigkeit und des Rechts als nachrangig betrachtet werden, ist zu kritisieren. Es führt zudem zu paradoxen Zuständen und zu Situationen des Unrechts innerhalb des Rechtsstaates. Denn Menschen, die im Baugewerbe, in der Pflege etc. benötigt werden, werden in einen Zustand der Illegalität versetzt, in einen Status, der ihnen elementare Rechte – auf Grundversorgung und auf Schutz – entzieht.⁵² Ihre Rechtlosigkeit wird nicht nur hingenommen, sondern ihre Rechte werden aktiv dem Nutzenprinzip untergeordnet.⁵³

⁴⁹ Die ethische Erfahrung bei Critchley stellt die unendliche Forderung ins Zentrum der Subjektivität und begründet und motiviert die politische Praxis. Dieser Zusammenhang, der bei Critchley nicht durchgängig überzeugt, kann an dieser Stelle leider ebenso wenig vertieft werden wie die Frage nach Glaube und Theologie in diesem Kontext.

⁵⁰ Markus Zimmermann-Acklin, „Flüchtlingseleid: unter den Teppich gekehrt!“, in: *Das sozialetische Stichwort*, in: treffpunkt. Christlichsozialetisches Magazin der KAB 43 (2011) Nr. 3, 4.

⁵¹ Das Souveränitätsprinzip wird immer noch wenig in Frage gestellt. Darauf kann ich an dieser Stelle nicht weiter eingehen. Vgl. die gründliche Auseinandersetzung bei Markus Babo, „Grenzenlose Souveränität?“, in: Michelle Becka, Albert-Peter Rethmann (Hrsg.), *Ethik und Migration. Gesellschaftliche Herausforderungen und sozialetische Reflexion*, Paderborn 2010, S. 139-146.

⁵² Vgl. J. Butler, G. Spivak, *Sprache, Politik, Zugehörigkeit*, S. 19. Auch wenn es in der Bundesrepublik Gesetzesänderungen gab, bleibt die Situation unbefriedigend.

⁵³ Beispiel: Es gibt in der Bundesrepublik einen großen Bedarf an Pflegekräften, insbesondere in Privathaushalten – und somit bei seiner Erfüllung einen Nutzen für die Gesellschaft. Es gibt auch einen Nutzen für die pflegenden Frauen, die überwiegend aus Polen, aber auch aus anderen Ländern Osteuropas kommen. Für diesen Nutzen allerdings nehmen sie in ihrer Situation der Not und der Verletzlichkeit viel

Souveränität und Grenzen sind kein Absolutum, sie sind relativ. Und es bleibt kritisch anzufragen, ob das Recht des Staates auf Sicherung seiner Grenzen so weit geht, dass der Nutzen über dem Recht steht. Die ethische Reflexion wird vorzeitig aufgegeben, wenn Souveränität unkritisch als Faktum begriffen wird, handelt es sich doch um einen Begriff, der derzeit in der Diskussion und der Interpretierbarkeit ist.⁵⁴ Die Ausübung des Souveränitätsrechts unter Absehung von ethischen Aspekten führt zu einem immer stärkeren Druck, Grenzen unüberwindbar zu machen. Der enggeführte Diskurs über die sogenannte „Sicherung der Grenzen“ – genauer der „EU-Außengrenzen“ gegen eine vermeintliche Gefahr ist in seiner Engführung aufzubrechen, um nicht die ethische Reflexion selbst in eine vermeintliche Alternativlosigkeit treiben zu lassen. Die Spielräume, das Verhältnis von Souveränität und Menschenrechten anders zu bestimmen, sind längst nicht ausgeschöpft.

Um auf die Frage zurückzukommen, warum sich die ethische Reflexion in diesem Maße engführen lässt und wenig kreativ an Optionen arbeitet, ist zunächst auf die enorme Komplexität des Phänomens der Migration zu verweisen. Die verschiedenen Dimensionen, wie etwa Fragen nach Ursachen, nach Formen der Migration, Folgen, Spezifizierungen nach Regionen oder Geschlecht u.v.m., die in diesem Beitrag angesichts der Fragestellung ausgeblendet wurden, machen das Phänomen selbst schwer eingrenzbar und führen zu einer Vielzahl an ethischen Fragestellungen. Das Einzelschicksal eines Migranten ist nicht nur eng verbunden mit der wirtschaftlichen, politischen und gesellschaftlichen Situation in seinem Heimatland, sondern diese ist wiederum eingebettet in einen historischen Kontext und ein weltweites Wirtschaftsmodell, ist mit globalen ökologischen Fragen verbunden etc. Hinzu kommt, dass sich die strukturellen Probleme der Makroebene nicht nur in der konkreten Lebensgeschichte des Migranten verdichten, sondern auch mit der Lebensweise in den Industriestaaten eng verwoben sind: Die Nachfrage nach immer mehr billig hergestellten Produkten einerseits und die Beeinflussung von Märkten in „Entwicklungsländern“ durch EU-subsidierte Produkte bleiben nicht ohne Folgen für diese (Arbeits-)Märkte. Die Komplexität des Themas ist folglich kombiniert mit der engen Verschränkung von strukturellen Problemen mit Fragen nicht nur irgendeines guten Lebens, sondern auch mit der Infragestellung unseres guten Lebens.

Hinzu kommt, dass innerhalb der komplexen Fragestellung ein Konflikt besonders schwelt; die Migrationsthematik ist durchzogen von einem Grundkonflikt: Menschen haben ein Recht auf Ausreise, dem korrespondiert aber kein Recht auf Einreise. Das Souveränitätsprinzip erlaubt Staaten, Menschen in das Land hineinzulassen oder ihnen den Einlass zu verweigern. Es gibt vielfältige Argumentationen für oder gegen offene Grenzen,⁵⁵ wobei wenige – philosophische – Ethiker durchgängig für offene Grenzen argumentieren; sehr wohl aber einige Theologen.⁵⁶ Die Positionierung in dieser Frage, die hier nicht diskutiert werden kann, ist schwierig, aber ein Schweigen ist ein „stillschweigendes Einverständnis mit der Grenzziehung, mit der Migration definiert wird“.⁵⁷ Die Alternative „offene Grenzen –

in Kauf. Von den Rechten, die Frauen mit irregulärem Aufenthaltsstatus vorenthalten werden, sind die Schutzrechte von besonderer Bedeutung.

⁵⁴ Vgl. J. Butler, G. Spivak, *Sprache, Politik, Zugehörigkeit*, S. 27. Butler verweist auf aktuelle Diskurse, die nicht nur auf Arendt zurückgreifen, sondern vermehrt auf Schmitt und Agamben.

⁵⁵ Vgl. die sehr gute Systematisierung: Veit Bader, „Ethics of immigration“, in *Constellations* 12 (3/2005), S. 331-361.

⁵⁶ Vgl. etwa Michael Ramminger, „Durch einen Pass zum Menschen werden“, in: *Institut für Theologie und Politik* (Rundbrief, Bd. 37), Juli 2012. Ebenso Boniface Mabanza, „Recht auf Bewegungsfreiheit“, in: *Diakonia* 42 (2011), S. 158-163. Vgl. allgemein und sehr vielfältig zu einer Theologie der Migration: Daniel G. Groody, Gioacchino Campese (ed.), *Promised Land, a Perilous Journey: Theological Perspectives on Migration*, Notre Dame, IN, USA 2008.

⁵⁷ A. Bunker, *Migration – Grenzen öffnen!*, S. 147.

geschlossene Grenzen“ ist eine Engführung. Auch wenn man in diesem Punkt keine Positionierung vornehmen kann oder will, ist dadurch nicht der ethische Diskurs über Migration zu Ende!

Es bleibt zu schlussfolgern, dass die Diskurse über Souveränität, wie sie in anderen Disziplinen geführt werden, aufmerksam zu verfolgen sind, um die kreativen Potentiale zu entdecken und auszuschöpfen. Darüber hinaus ist es aber in besonderem Maße notwendig und sinnvoll, an einer anderen Stelle anzusetzen: Statt bei der Souveränität der Grenzen bei den Bedürfnissen und den Rechten der Menschen! Der Migrant ist ein Mensch, der ein Recht auf Leben hat und – in den Worten Hannah Arendts: ein Recht, Rechte zu haben. Diese Rechte werden jedoch in der Praxis häufig vorenthalten. Unter diesen Umständen ist aufzudecken und anzuklagen, wo diese Rechte verletzt werden, und es sind Wege zu suchen, wie sie zu gewähren sind.⁵⁸

Ethik an der Grenze

Es stünde einer theologischen Ethik gut an, mehr Mut zur Option haben – um dadurch ihrem eigenen Kriterium der Solidarität zu entsprechen. Im Blick auf kirchliche Grundvollzüge sprechen wir davon, dass durch die Heilserfahrung und -verheißung kirchliches Handeln immer schon „[...] unter der Möglichkeit und dem Impuls zur Transzendierung des Bestehenden“⁵⁹ steht. Auch die theologische Ethik ist aufgespannt zwischen Heilserfahrung und Verheißung. Im Sinne Critchleys, der selbst freilich nicht theologisch argumentiert, besteht auch in der Glaubenserfahrung eine besondere Bindung an ein Gutes, die das eigene Handeln in Bewegung setzt und damit einen Deutungshorizont und einen besonders starken Motivationsgrund liefert, warum wir moralisch handeln sollen.⁶⁰ Das bedeutet auch, „Bestehendes zu transzendieren“, Diskursgrenzen auf- und Zuschreibungen zu durchbrechen, kreativ weiterdenken und nicht die Ethik vorzeitig einem Primat des Machbaren zu unterwerfen, der womöglich ein Primat des Nützlichen ist.⁶¹ Es kann auch bedeuten, den Zustand des Dazwischen auszuhalten und die Unterbrechung als Ort des Dialogs und des Neuanfangs zu kultivieren. Auf diese Weise realisiert sich Verantwortung.

Option kann nun bedeuten, sich als Anwalt der Migranten in die politische Diskussion einzumischen: Dabei geht es nicht darum, fertige politische „Rezepte“ vorzulegen, sondern ihre ethischen Forderungen an eine verantwortliche Politik, in welcher der Mensch im Zentrum steht, zu formulieren. Sie kann dazu beitragen, Menschen zum Segen werden zu lassen – zur Wiederherstellung ihrer getretenen Würde – und zugleich helfen, die ihnen zustehenden Rechte einzufordern.

Eine Option haben (im Sinne der lateinamerikanischen Option für die Armen) verschränkt Individualethik und Sozialethik: Die persönliche Haltung der Entschiedenheit und das daraus hervorgehende Engagement sind verbunden mit strukturellen Veränderungen, weil die „Armen“ die „arm Gemachten“ sind und es sich daher um eine Frage der Gerechtigkeit,

⁵⁸ Zum Verhältnis von Menschenwürde und Menschenrechten bzw. zur Frage, warum jedem Menschen Rechte zustehen und warum nicht nur negative Rechte Priorität haben vgl. Marcus Düwell, „Menschenwürde als Grundlage der Menschenrechte“, in: *Zeitschrift für Menschenrechte* 4 (1/2010), S. 64-79.

⁵⁹ M. Heimbach-Steins, *Einmischung und Anwaltschaft*, S. 25. Vgl. zum diakonischen Auftrag der Kirche im Kontext von Migration auch: Barbara Weber, *Theologisch-ethische und menschenrechtliche Herausforderungen im Kontext von Migration – am Beispiel der Abschiebung*, 2012; M. Becka, unveröffentlichte Staatsexamensarbeit Goethe-Universität Frankfurt.

⁶⁰ Vgl. S. Critchley, *Unendlich fordernd*, S. 10ff.

⁶¹ Das ist nicht zu verwechseln mit einer in irgendeiner Weise realitätsfernen oder „weltent-hobenen“ Ethik und stellt auch nicht die Bedeutung der Interdisziplinarität infrage.

nicht der Wohltat, handelt. Ethik der Migration ist daher immer eng verknüpft mit einer Ethik globaler Armut bzw. globaler Ungleichheit.

Die Weiterarbeit an diesen Punkten könnte dazu beitragen, dass Ethik nicht nur Reden „über“ Migration ist, sondern einen Standpunkt markiert. Sie wendet dann nicht nur die Kategorien von Sesshaften an: „Wir – die Sesshaften, die Eingeborenen, die Beheimateten, die ‚Normalen‘ – begegnen helfend, abwehrend, unterstützend den Anderen“⁶² sondern lässt sich selbst und ihre Kategorien infrage stellen, sie durchbricht vermeintliche Eindeutigkeiten und eröffnet so neue Perspektiven.

⁶² A. Bünker, Migration – Grenzen öffnen!, S. 147.

Identity and Immigration: The inconsistency of liberal nationalism

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Abstract

In this paper, I set out to argue that liberal nationalism offers an incoherent perspective on the ethics of migration. Because of its emphasis on the value of national cultures (both majority cultures and minority cultures), liberal nationalism fails to justify an alleged “duty to integrate” on the part of the migrants, and it also fails to justify the limits on immigration for cultural reasons.

Keywords: liberal nationalism, ethics of migration, value of culture

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Introduction

In this paper, I set out to argue that liberal nationalism offers an incoherent perspective on the ethics of migration. Because of its emphasis on the value of national cultures (both majority cultures and minority cultures), liberal nationalism fails to justify an alleged “duty to integrate” on the part of the migrants, and it also fails to justify the limits on immigration for cultural reasons.

The liberal-nationalist position can be briefly summarized as follows:

- 1) Liberal nationalists reject ethno-genetic conceptions of nationhood. Instead, they seek to understand the nation in terms of culture.
- 2) National cultures are “imagined communities.” The belief of the members of these communities that they share a certain cultural identity is itself constitutive of this identity. National identity can therefore not be reduced to a set of objective, i.e., belief-independent, criteria, such as a shared language, shared customs, and so forth (even though these objective criteria will support the belief that the members share a certain cultural identity).
- 3) Liberal nationalists accept that national identities will change over time. In accordance with liberal ideals of rationality and democracy, national identities should be open to rational scrutiny and public debate.
- 4) Liberal nationalists hold that it is a proper task of nation-states to protect and promote their national cultures. As part of this task, nation-states may place restrictions on immigration and naturalization, if the national culture is under serious pressure from immigrant cultures.

Liberal Nationalists like David Miller, Yael Tamir, or David Kymlicka have been suggesting for years now that restrictions on immigration may sometimes be justified in order to protect the “national culture” of the host country. David Miller even suggested that “if there was no distinct culture to protect, there would be no reason for the state to exist as an independent entity.”¹ In this kind of argument, the “national culture” of the host country becomes the central value of immigration policy. It is easy to see how this idea influences the political discourse about immigration in the European Union, the United States, and other (relatively) affluent countries that attract large numbers of immigrants. Alongside complaints about the alleged negative economic impact of immigration, anti-immigration politicians often voice concerns about its alleged cultural impact, viz. that the presence of immigrants “dilutes” the national culture, and that immigrant groups who are large enough and cohesive enough fail to “integrate” into the host country’s mainstream culture, with negative consequences for both the immigrants and the natives.

Liberal nationalists realize that national identities are always developing and that national traditions are and should be open to rational scrutiny, and thus they see the integration of migrants as a process of mutual accommodation of national culture and immigrant culture(s).² David Miller asserts that a liberal nationalist would resist immigration only in two circumstances:

- 1) “[The] rate of immigration is so high that there is no time for mutual adjustment to occur [...]”.³
- 2) “[The] immigrant group is strong and cohesive enough to constitute itself as an independent nation.”⁴

¹ David Miller, *Immigrants, Nations, and Citizenship*, p. 375.

² Cf. Miller, *On Nationality*, pp. 125-128.

³ Miller, *On Nationality*, p. 128.

⁴ Miller, *On Nationality*, p. 129. This fear of segregation and secession also seems to be in the background of

This seems straightforward enough in theory, but as we will see, this position offers little normative guidance in practice.

My critique will proceed in three steps. First, I will scrutinize the assumption that national identities play a special role in the formation of personal identities, and that they ought to be protected for that reason. Second, I will show that the liberal-nationalist argument, insofar as it entails special rights for national minorities, has the—for the liberal nationalist, undesired—conclusion that firmly established immigrant groups ought to count as national minorities. And third, I will briefly point out how the liberal-nationalist argument is open to abuse in political discourse.

Formative Identities

I do not doubt that cultural differences are real,⁵ nor do I doubt that nations are real—though they certainly are not real in the sense in which we think of material things as real.⁶ But in a political sense, they are indeed real: Nations—or rather, their spokespeople—declare independence and enter into agreements with other nations, they claim to act in the interest of their members, and they erect walls around their borders. The global political and legal order *is* a system of sovereign nation-states. A person's nationality defines, among other things, the rights and liberties she will likely be granted, her chances of earning a decent income in her adult life, and it circumscribes the area in which she can move about without any restrictions. Thus given the sheer political and legal weight of the concept of nationality, it would be too quick and easy to dismiss nationality as a fictitious concept.

My issue with the liberal-nationalist position is that it tends to overstate the normative implications of cultural differences. The liberal nationalist needs to say more than that there are cultural differences, and that these differences matter to people—these are uncontroversial descriptive claims, but taken by themselves, they do not imply that these differences *ought to matter*, and that they justify unequal treatment based on cultural membership. The liberal nationalist needs to show why cultural membership in a nation is such an important good that it justifies the exclusion of would-be immigrants from different cultures. And this is, I believe, the problematic step of the argument.

Yael Tamir argues that “the justification of the right to national self-determination [and thus the right to exclude] rests on six counts.” I quote here three of Tamir's “counts,” because they are, in my view, the crucial steps of her argument:

“1. Membership in a nation is a constitutive factor of personal identity. [...] The ability of individuals to lead a satisfying life and to attain the respect of others is contingent on, although not assured by, the ability to view themselves as members of a worthy community. A safe, dignified, and flourishing national existence thus significantly contributes to their well-being.

2. Given the essential interest of individuals in preserving their national identity, it is justified to grant them a set of rights aimed at the protection of this interest. [...]

Will Kymlicka's argument for the distinction between immigrants (“polyethnic groups”) and national minorities (see *Multicultural Citizenship*, pp. 13-17). Kymlicka points out that some immigrant groups, namely European colonizers, have indeed become “nations”.

⁵ That is to say, I don't submit to the strong position of the cultural cosmopolitan who claims that there are no significant differences between cultures. I do, however, submit to a weaker position of cultural cosmopolitanism which holds that these differences carry little normative weight. For a classic, strongly-worded espousal of this weak cultural cosmopolitanism, see Waldron, *Minority Cultures and the Cosmopolitan Alternative*.

⁶ Cf. Miller, *On Nationality*, p. 17. The difference between nations on the one hand, and volcanoes and elephants on the other is that we think that the latter's existence does not depend on belief.

4. The existence of a shared public space is a necessary condition for ensuring the preservation of a nation as a vital and active community. [...]"⁷

Tamir's first point actually contains two separate claims: the first is the claim one's national identity is an essential aspect of one's personal, i.e., socio-cultural identity. The second is the claim that having one's national identity respected and recognized by others contributes significantly to one's well-being. On a modest reading, these two claims are relatively uncontroversial. Our national identities do have a significant influence on our socio-cultural identities; they shape our customs, our preferences, and our beliefs. The fact that I grew up in Germany, for instance, may explain my reluctance to jaywalk even when there is no car approaching. It may explain my taste for kale. It may even account for my belief that universal health care systems are in general a good and just thing.⁸ And despite the fact that I haven't been living in Germany for seven years, I may experience a sincere feeling of loss if the option of returning to Germany and building a life there was not open to me. That is to say, I value the opportunity to return to a social environment that I am already familiar with.

But many social networks other than nations shape our identities: Our families, our schools and teachers, the social class we were born into, the religious sect we belong to (or the fact that we belong to none), our friends and sexual partners, our professional community. Any of these can have as profound or more profound an impact on the way we navigate the world than the national culture we were socialized into. And for some of these, it can have a severe impact on our well-being if legal and moral authorities deny the importance of these social networks. Religious communities and their members suffer if local authorities deny them a place of worship. Gays and lesbians suffer if they face the choice to either deny or hide their sexuality or to face persecution. Members of some professions, e.g., undertakers, prostitutes, sewage and garbage workers, suffer from the social stigma attached to their professions.

So if nations and other social networks and cultural groups are similar in these important respects, then why should national identity enjoy a special status among these "formative identities"? Will Kymlicka has argued that national identities provide us with a context of choice, in which other formative identities become meaningful. Kymlicka suggests that "people's capacity to make meaningful choices depends on access to a cultural structure."⁹ Without the "anchor" of a national culture, family ties, professional ties, and relations to friends and sexual partners lose their focus. Joseph Raz and Avishai Margalit make the even stronger claim that

"[family] relations, all other social relations, careers, leisure activities, the arts, sciences, and other products of 'high culture' [...] all *depend* [...] on the sharing of patterns of expectations, on traditions preserving implicit knowledge, [and on] tacit conventions regarding [...] what is appropriate and what is not."¹⁰

What distinguishes national cultures from other social and cultural groups on this view is that national cultures supply the overarching structure in which groups and individuals pursue

⁷ This and the previous quote: Tamir, *Liberal Nationalism*, p. 73.

⁸ Notice also that my moral belief about the goodness and justice of universal health care is not entitled to respect or approval merely because it has been shaped by a particular culture. It is entitled to respect and approval, if and only if I can produce good, context-independent reasons which support the belief. Consider also the case of a gay rights lobbyist. The fact that she holds the firm belief that gays and lesbians are entitled to the same legal and moral rights as straight people, in particular the right to marry, may be explained by the fact that she is a lesbian. But the fact that she is a lesbian does not entitle her belief to respect and approval. Her belief deserves approval, if and only if she can support it with good, context-independent reasons.

⁹ Kymlicka, *Multicultural Citizenship*, p. 84. Tamir's appeal to the nation as a "public space" employs a similar idea. Tamir emphasizes the notion of the "contextual individual"—it is the cultural context that allows people to become "strong evaluators" and make autonomous and reflective choices, see, *Liberal Nationalism*, p. 36.

¹⁰ Raz/Margalit, *National Self-Determination*, p. 447-448. Emphasis mine.

their specific goals. This image is of course open to the objection that many nations severely limit the choices of some their citizens: They persecute gays and lesbians, discriminate against women, suppress certain religious groups, or, to take a less drastic example, refuse to fund the arts and sciences. Kymlicka recognizes this objection and counters it with a reminder that we must be careful to distinguish between liberal and illiberal societies, and should encourage illiberal cultures to adopt liberal values.¹¹

However, the more serious problem with the context-of-choice model, at least for my purposes here, is that it fails to distinguish nations from non-nations. Some religious communities structure the choices and activities of their members in a pervasive manner (and pious members of these communities may experience these restrictions as a form of freedom). Living an openly gay identity may be a strong influence on career choices—i.e., it would seem unreasonable to choose to work in a homophobic area or industry, if indeed you have a choice. Academia offers a whole wealth of “shared patterns of expectations, traditions preserving implicit knowledge, and tacit conventions about what is appropriate.” And thus it may be the religious, sexual, or professional identity of a person which “anchors” her choices, including, for instance, the choice to move to another country with the intention of obtaining citizenship there. The view then that national cultures are the only type of community that offers a “context of choice” is simplistic.

The fact that the context-of-choice model is simplistic, however, does not by itself constitute a good reason to reject the liberal-nationalist position. I have suggested that the liberal nationalist, in her emphasis on nationality, overlooks many other “formative identities.” But this may imply merely that her argument is incomplete: rather than demanding special rights just for nations, she should demand special rights for any group that is similar to nations in providing a context of choice for its members and shaping their socio-cultural identity in a deep way.

Groups that demand special rights frequently appeal to the idea that they offer belonging, meaning, and guidance to their members—that is to say, they offer the very same things that are thought to make national identities valuable.¹² Religious groups offer these goods, so they would be entitled to special legal-political recognition on these grounds. And indeed, states may recognize this entitlement in various ways: They can declare one religion as the official state religion (such as the Church of England); they can support the two main religions on their territory by allowing them to collect a “church tax” (as Germany does), or they may exempt some religious groups from some laws (e.g., they may allow Jews and Muslims to slaughter their animals in the traditional manner, even though this practice violates laws against cruelty to animals). Families—functional ones, at least—are also thought to be an important source of meaning, belonging, and guidance. And indeed, virtually all states offer special legal protection to families by privileging marriage over other forms of cohabitation and mutual care. The point here is not to argue for or against these practices. The point is to show that philosophers as well as politicians and legal practitioners recognize that non-national groups may be entitled to special legal and political recognition on the exact same grounds that nations supposedly are.

Once we recognize this point, it becomes clear that the difference between nations on the one hand and churches and families on the other hand lies in the fact that these groups claim different kinds of rights. Churches, families, and other “identity groups” usually place fairly specific demands within an existing legal and political framework. Nations, on the other hand, demand political and legal self-determination, i.e., they desire to set up their own legal and political framework. To rephrase this point in Yael Tamir’s terms: Nations demand their own

¹¹ See Kymlicka, *Multicultural Citizenship*, p. 94.

¹² Raz and Margalit (*National Self-Determination*, p. 448, emphasis mine) describe nations as “encompassing groups [in which individuals] find a culture which shapes to a large degree their tastes and opportunities, and which provides an anchor for their self-identification *and the safety of effortless secure belonging.*”

“shared public space” while other “identity groups” seek recognition within a given public space.

But to say that this is the crucial difference between nations and other “identity groups” yields an odd result: The defining feature of nations is that they aspire to be politically and legally self-determining—but this aspiration would itself constitute the reason why nations, in contrast to other groups, are entitled to self-determination. Yael Tamir appears to endorse this position when she writes: “Hence, when members of a particular group sharing some identifying national characteristics define themselves as a nation, they ought to be seen as one, lest they become victims of a needless injustice.”¹³ In the absence of any clear set of “identifying national characteristics,”¹⁴ Tamir’s claim in fact implies: Any group that declares itself to be a nation is one. This may seem like a harmless circularity; or even a useful circularity in cases where the members of the national group in question had been victims of oppression and injustice. But for most well-established nation-states, it will imply that their justification for promoting and protecting their national culture depends on the mere fact that they are well-established nation-states.

The liberal-nationalist position is philosophically appealing in cases of national groups, especially autochthonous minorities, which have been victims of the “needless injustices” invoked by Tamir. Its appeal weakens considerably, however, when we shift the focus to powerful nation-states with a long history of political “soul-making.” In these cases, the justification for the protection and promotion of their national culture becomes one with the fact that these states have in the past been successful in protecting and promoting their culture—often at the expense of minority cultures. This then is the major internal weakness of the liberal-national position: It implies, at least for some cases, that cultural might makes cultural right. I will now consider this weakness in the context of immigration and argue that liberal nationalists cannot, in fact, offer a coherent approach to this issue.

Immigrants as National Minorities?

Let us reconsider now to Miller’s two reasons for restricting immigration on liberal-nationalist grounds: the immigration rate is too high for mutual adjustment to occur, or the immigrant group is strong and cohesive enough to constitute a separate nation. I shall discuss these points from the perspective of Will Kymlicka’s distinction between polyethnic and multinational states, i.e., between states with immigrant groups and states with national minorities. The rationale for choosing Kymlicka’s perspective is that his distinction between immigrant groups and national minorities spells out an assumption which, although implicitly, is also present in Miller’s, Tamir’s, and Raz and Margalit’s arguments.

Kymlicka draws a strong distinction between nations (or national minorities) and immigrant groups. He justifies this distinction with an appeal to the fact that national minorities—e.g., the First Nations in Canada, the Texan Chicanos, the Australian Aborigines—were often forcibly incorporated into a larger state, while immigrants came voluntarily.¹⁵ As a recognition of this forcible incorporation, national minorities are entitled to self-determination rights while immigrants are not.

In response to this claim, we should note first that the argument from voluntariness only works in the case of first-generation immigrants. Second- and third-generation immigrants, if their immigrant communities retain their cultural heritage, are simply born into an immigrant network on the one hand and a national culture on the other hand—and they will often experience conflict between these two unchosen affiliations.

¹³ Tamir, *Liberal Nationalism*, p. 68.

¹⁴ That is to say, in the absence of a clear set of characteristics that would distinguish nations from non-nations.

¹⁵ Cf. Kymlicka, *Multicultural Citizenship*, pp. 20-21

Kymlicka acknowledges that immigrants can over time become “national minorities, if they settle together and acquire self-governing powers. After all, this is what happened with English-speaking colonists throughout the British Empire, Spanish colonists in Puerto Rico, and French colonists in Quebec.”¹⁶ Traditional immigrant societies like Canada or the United States usually operate on the assumption that immigrant groups will blend into the mainstream culture in the second or third generation. But what if this does not happen?

It seems to me that in such a case, the liberal-nationalist position must recommend that these immigrant groups be treated as national minorities. These groups have settled down, they reproduce their own cultural patterns, they form “parallel societies.” But of course, even liberal nationalists see such “parallel societies” as a failure of integration policy, and not as an important source of belonging. In fact, the political controversy in liberal democracies today revolves around the worry that certain immigrant groups will be cut off from mainstream society and its opportunities precisely because they have retreated—or have been pushed—into such “parallel societies.”

Giving up their Commitments

Can the liberal nationalist offer any good reason to oppose this development once it threatens to occur? It seems to me that there are two possible ways to preclude the formation of “parallel societies”: to set extremely strict quotas on immigration, so that few people with the same cultural background settle in the nation; or to prevent immigrants with the same background from settling in the same areas. Neither of these is in accordance with the commitments of liberal nationalists. The second way would require the complete, and potentially forcible heterogenization of areas where immigrant groups tend to concentrate—e.g., by up-scaling neighborhoods with many poor immigrant families. It would thus deny these groups the kinds of social networks they rely on for emotional, practical, and financial support when they first come to a foreign country. This practice would undercut the very commitment to community and cultural identity that liberal nationalism relies on.

Simply restricting immigration from certain cultural backgrounds would seem to reproduce illiberal notions of racial and cultural superiority by effectively branding certain groups as unfit to participate in the “open discourse” that it is supposed to be central for the revision and development of a liberal national identity. Miller’s claim that liberal nations may restrict immigration when they lack the resources to ensure mutual accommodation between immigrants and host society implicitly shifts the blame to the immigrants: *They* fail to integrate because *their* culture is too different, and they are perceived as being too numerous to allow successful integration.

My goal in pointing to these potential illiberal implications is not to support a strong version of multiculturalism against liberal nationalism. I am not claiming that immigrant groups ought to be regarded as national minorities. I am claiming that liberal nationalists, if they were consistent, ought to regard them in this way. But if I am right about this, then liberal nationalists face a dilemma in which they are forced to abandon their basic commitments. Either they give up their communal commitments and deny that immigrants may have a right to their cultural networks; or they give up their liberal commitments and resist immigrant influences on their own national culture. Liberal nationalists usually mask this inconsistency by talking about “mutual accommodation” and “democratic identities” which are open to revision and debate. But just what does mutual accommodation imply? The political reality in immigrant countries is, in any case, far from being accepting of immigrants groups as a welcome influence on the national culture—the immigrants are expected to assimilate to the predominant culture, but native citizens are not expected to accommodate or even know anything about immigrant

¹⁶ Kymlicka, *Multicultural Citizenship*, p. 15.

culture. Moreover, immigrant groups seem to be generally underrepresented in the political and cultural elites of immigrant societies, meaning that their actual influence likely does not match their demographic weight. As an example of mutual accommodation, liberal nationalists are prone to point out specific concessions for immigrant group, e.g., permission to set up religious schools or build houses of worship, if the immigrants are of a different religion. However, it seems to me that actual accommodation implies more than this, it implies, for instance, the social and political representation of these groups in accordance with their demographic influence.

I want to close with a few remarks on the relation between philosophy and politics. Liberal nationalists denounce what we could call “biologistic nationalism”—the idea that people have special value in light of their ancestry and genetic heritage—while endorsing a “cultural nationalism” which is not supposed to be tied to racial or ethnic categories. In fact, this distinction is what supposedly gives liberal nationalism its liberal character. However, if we observe the anti-immigration discourse in politics today—in the European Union as well as in North America—we find that often the cultural differences that are emphasized in this discourse are tied to racial categories. It is assumed or implied that certain groups, due to their ancestry and heritage, are incompatible with the so-called values of the host country. In Europe, we find this trend in particular in the discourse about Muslim immigration.

Now, the fact that these racial categories are being used in political discourse is certainly not the fault of philosophers. But I would want to suggest that these philosophers should be somewhat uncomfortable, if their ideas are so close to the slogans of politicians and propagandists that they are easily twisted and exploited.

Conclusion

I have argued that the liberal-nationalist approach to the ethics of migration is inconsistent and hence untenable. This does not mean that the theory of liberal nationalism should, as a whole, be rejected for this reason. On the contrary, the basic commitments of liberal nationalism capture some essential insight on the value of cultural belonging and the value of national identities. What I have argued here is that these insights, despite their merits, fail to give us guidance on today’s moral questions regarding the treatment of immigrants in modern nation-states.

My argument also does not imply a strong endorsement of open borders. Although I do, as a matter of fact, cautiously endorse open borders, I have only discussed here one possible argument against them. Other, stronger arguments may be available and would have to be contended with in a comprehensive defense of this stance.

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Justice and the Family in a Transnational Perspective

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Abstract

Contemporary theories of justice have only recently begun to take notice of international and global contexts and their implications. From a global perspective, it has also become necessary to revisit the old issue of family and justice – addressing, first and foremost, the current reality of “transnational” families. Such families challenge traditional models in order to meet their own, new subsistence needs.

Today, millions of women travel and migrate alone to find jobs in the ever-expanding market of the personal services and care sector. Family members may thus grow up and live in two or more different countries, fragmented, so to speak, and separated from one another most of the time. For these female migrant workers, new and old issues arise, as they endeavour to strike a balance between old family ties and the obligations imposed by new forms of employment.

Some of these issues are: gender equality, the tension between equality of opportunity, work, and family ties, the new character of old class, gender and ethnic inequalities, and so on. As the line between “rich” and “poor” countries is being re-drawn, both care labour commodification and its ethnic, gender and class distribution change accordingly, assuming new and unexpected forms, which we will try to analyse.

Keywords: Family and justice, Female migration, Globalization, Family reunion, Care labour

1 Introduction

Contemporary society holds a paradox: “the hyperliberal individual is not”, as Irène Théry writes, “a kind of free electron, but rather a convinced 'familist'” (Théry 2007: 150). Modern individualism pushes individuals to break traditional bonds but, as Tocqueville foresaw, does not induce them to live in atomistic solitude but, rather, to strengthen their bonds within the intimate circle of friends and family. Despite a great deal of catastrophic talk about the crisis of the family, in reality, there would appear to be a growing desire for family and a multiplication of its possible forms: from multi-parental and reconstituted families to homo-parental and mono-parental families, as well as families with adopted children and/or children obtained by means of new reproductive technologies. The family remains a central pillar of our societies, both for its redistributive functions of material and economic resources among the various family members and for its solidarity and care functions. Nevertheless, with rare exceptions, political theory has long neglected the issue of the relationship between justice and the family and continues to consider it a marginal subject.

According to John Rawls, the family raises a problem for the theory of justice, inasmuch as it fails to satisfy the fair opportunity principle. “[... T]he principle of fair opportunity”, Rawls (1971: 74) writes, “can be only imperfectly carried out, at least as long as the institution of the family exists”. The obstacle that the existence of the family poses to the realization of the principle of fair opportunity leads Rawls to ask a radical question: “Is the family to be abolished then?” (Rawls 1971: 511). The economic, social, cultural and class inequalities between families are such that unequal life chances between individuals born in different families are almost inevitable and completely dependent on luck. Rawls, quickly dismisses the idea, however – not because he believes that the family is a natural institution and thus an inevitable fact, but because it guarantees other fundamental and undisputed values (cf. Munoz-Dardé 1998). In *A Theory of Justice*, the importance of the family is associated with its role as a “school of moral education”; an institution essential to the moral development of children. If the goal of equal opportunity requires the replacement of the family with large public orphanages, such a solution would merely cause greater harm. For this reason, in Rawls's theory of justice, as in other liberal theories, the family is considered both an obstacle to equality of opportunity among individuals and a necessary condition for the creation of a more just society. Due to the particular emotional and affective relationship that links children to their parents, in fact, the family is the place where children acquire the basis of their own identity, self-confidence and sense of justice (cf. Brighouse, Swift 2008: 139). The existence of the family is thus seen as being in the best interest of the child and of society as a whole.

In the years since the publication of *A Theory of Justice*, gender theories have contributed to a broader understanding of the relationship between family and justice, exploring many different ramifications. They have stressed the fact that the issue of equality between families, as it affects individual opportunity, derives not only from familial context, but also from the status and legal recognition of different family models. When we speak of equality of opportunity between families, we cannot limit our considerations to the socio-economic conditions that divide them. There are, today, a variety of de facto family models, which often have little in common with the image of the straight couple with children who share the same genetic heritage. The inequality of legal status between different family models is also highly significant. In most Western democratic societies, heterosexual marriage still affords access to a privileged status, entailing special inheritance, social insurance and pension rights, a particular tax regime, the possibility of obtaining family reunification visas in case of migration of one of the two spouses, hospital and prison visitation rights reserved for spouses, etc. (Young 1997).

Gender theories have also raised the issue of justice within the family. Rawls' theory presupposes the existence of a just and democratic family, but never answers questions such as:

What is a just family? On the basis of what principles are the burdens and benefits of cooperation distributed among the various family members? And, especially, how is domestic labour divided within the family? Following John Stuart Mill, Rawls defines the family as a “school of moral sentiments”. Neither of the two authors asks himself, however, if the unequal distribution of care labour within the family may determine further inequalities in the labour market and the economic sphere in general, or in the public and political sphere; inequalities that may, in turn, contribute to the reproduction of intra-family inequalities, in a kind of vicious circle (Okin 1989). Underlining the role of the family in modern society, as a school of sympathy and equality, both Mill and Rawls realize the need to elevate its status, considering it not only a private institution but also an institution with social and political implications. From the point of view of gender equality, however, neither goes far enough in understanding all of the consequences that follow from the recognition of the public role of the family.

Thanks primarily to Susan Moller Okin and her *Justice, Gender and the Family*, published in the late 1980s, the issue of unequal distribution of domestic work within the family has become an area of concern in contemporary justice theories, and is considered one of the main obstacles to justice between the sexes. Other authors followed in Okin's footsteps. Care ethicists, such as Kittay (1999) and Tronto (1993), in particular, have worked on the issue of politicization of care, stressing its relevance as a “primary social good” (to use Rawls's terminology). According to these authors, the main objective of those who strive toward gender equality would appear to be reform of the welfare state inspired by the model of the “universal caregiver”, as conceived by Nancy Fraser (1997). In a post-industrial society, where the myth of the male breadwinner has been transcended and there is an increasing number of family models, the ideal of gender equality may be realized only by reforming the welfare state to recognise the fact that each individual may be, at one and the same time, both worker and carer, and to foster life/work reconciliation policies accordingly.

The redistribution of time between work and care-giving imagined by Nancy Fraser is, in some ways, comparable to André Gorz's ideas on the same subject. For Gorz, this is the only solution capable of contrasting a social model whereby the “development of personal services” presupposes a “growing state of social inequality, whereby one part of the population secures well-paid jobs for itself, while relegating another part to the role of servant”. “What we are seeing”, Gorz (1992: 173) wrote at the time, “is a South-Africanization of society, that is the realization of a colonial model within the metropole itself. We are also seeing what a German sociologist called 'housewifization', that is the transfer of the work traditionally done by the 'housewife' to an economically and socially marginalized mass” (*ibid.*).

In the re-emergence of the servant, Gorz saw a return of old colonial modes of governance in new forms. Western societies have not moved toward reform of the welfare state according to the universal caregiver model. Rather, neoliberal policies have universalized the adult earner family model, extending it to middle class women. Person-to- person services have been left to a labour market in which poor migrant women are the major labour force. Thus, there has been a redistribution of care work along lines of colour, ethnicity, gender and class. In Saskia Sassen's terms, what has happened is very close to the picture foreseen by Gorz. Sassen writes: “The expansion of the high-income workforce in conjunction with the emergence of new cultural forms has led to a process of high-income gentrification that rests, in the last analysis, on the availability of a vast supply of low-wage workers. This has reintroduced – to an extent not seen in a long time – the whole notion of the 'serving classes' in contemporary high-income households. The immigrant woman serving the white middle class professional woman has replaced the traditional image of the black female servant serving the white master” (Sassen 1998: 190).

In rich Western countries, gender equality is undergoing an externalization of traditional female care functions. Major income opportunities allow high-income classes to buy care

services on the market. Thus, inequalities between families grow further (Tronto 2002) and the invisibility of care work in the private domain is perpetuated (Williams 2011). The return of the servant within the family is a problem for the ideal of the democratic and liberal family as a “school of justice” (Tronto 2002). In *Spheres of Justice* (1983), Michael Walzer describes a family with live-in servants as “a little tyranny” – a point of view that can already be found during the Enlightenment, when the bourgeois middle class family was born: inside the sentimental family the servants were, in fact, seen as an element of disturbance for intimacy and a source of possible moral corruption for children.

Minors brought up by nannies from the Philippines, Puerto Rico or other faraway countries may be more open to diversity, or they may gradually form an idea of the world, whereby it is taken for granted that hard domestic and care work is distributed according to gender, class and ethnic lines. This is a troubling issue for liberals and for their vision of the family as *seedbed of democracy* (Tronto 2010).

This is not the only problem posed by the new global redistribution of care labour, however, from the point of view of justice. The widespread appearance, on the world scene, of migrant domestic workers, such as cleaners, live-in nannies, foreign baby sitters, “badante” or “Pflegerin” (Italian and German migrant “family assistant”, especially “elder-assistant”, respectively), forces us to rethink the entire issue of the relationship between family, justice and gender and race distribution of care work, in a global context. If the employment of migrant domestic workers may be seen as an attempt to surrogate missing and effective care-work reconciliation policies, it raises several problems in terms of gender equity – measured, for example, according to Fraser’s seven distinct normative principles: antipoverty, antidiscrimination, income equality, leisure-time equality, equality of respect, anti-marginalization and anti-androcentrism (Fraser 1997). Transnational care raises further, important, questions of justice, pertaining to the creation of an unequal distribution of care responsibilities across the world, i.e. between North and South, richer and poorer countries, and so forth. This is particularly the case if transnational care is considered in light of its background conditions, that is the ways in which unjust economic, social and cultural structures – both local and international – condition and, at the same time, enable the actions of women migrants (Eckenwiler 2009).

In the next section, I will describe the traditional gender norms and family expectations that invariably constrain migrant women’s choices, focusing on the way in which such norms and obligations condition the manner in which women’s “double presence” or “double burden” is experienced. The third section will provide an overview of the factors that have led to the emergence of a new family form: the transnational family. I will show how the poor countries of origin of migrant workers (usually female) gain from the existence of transnational families (sometimes even in a legalized fashion). I will also analyze the obstacles that migrants encounter when they try to reunite their families in the receiving countries – an often a tragic problem, due largely to increasingly restrictive migration policies introduced, for example, by European countries. In the fourth section, I will address the role of migration and care policies in shaping the demand for migrant care labour and, in the final section, I will outline possible solutions for the multiple set of problems raised by “care drain”.

2 Female Migration and Family Obligation

In a gender perspective, the strong presence of women in migratory processes (about half of the migrant population) has some ambiguous aspects. This contemporary phenomenon, undoubtedly attests to the agency of women, their strengthened role in society and the possibility of changing old customs and traditions. At the same time, however, we cannot ignore the web of obligations and ties within which migrant women act and make their choices. The migrant woman carries not only the burden of her own expectations but, often, also the

expectations of those she has left behind, as well as moral obligations that may be very difficult and psychologically costly to neglect. In the case of female migration, such expectations are still linked to a traditional image of the woman's role within the family and, thus, to patriarchal culture (Parreñas 2008). Proof of this can be found in the fact that the figure of the migrant woman is stigmatized by the mass media and popular opinion in sending as well as receiving societies, irrespective of the fundamental contribution of migrant women to the economies of both countries. In a recent study of migrant Ukrainian women in Italy, the author stresses the extent to which these women feel the pressure of public opinion. They sometimes try to hide behind the rhetoric of "maternal sacrifice" and rarely present their migratory choice as part of "a self-realization project". A recurring theme in the justifications offered by migrant women for their choice "downplays aspects pertaining to autonomy and represents migration as a necessary act" toward the migrant's children or elderly parents. Such rhetoric "seeks to counter the accusations of rebellion and betrayal levelled at migrant women in their sending countries" (Vianello 2009: 99).

Recent studies on female migration have focused not only on the kind of work migrant women do in rich Western countries and the reasons behind the demand and supply of female labour, but also on the relationships these women are able to maintain with those they have left behind: children, parents and sometimes husbands (cf. Parreñas 2005; Bonizzoni 2009). When women – generally mothers who leave their children behind – migrate, what happens to their families? Who takes care of the children? What do the children think of their migrant mothers? In many respects, this is a delicate subject, addressed in sociological literature with a certain delay, for a variety of reasons (Isaksen, Devi, Hochschild, 2008: 409). Migrant women are strongly motivated to succeed in their migratory project – often the product of a long and arduous process, born within the family and undertaken with the knowledge that the remittances it will provide will ensure the family's survival as well as the possibility of improving the family's living conditions and affording the children better health care and education. Migrant women try not to think about or live under the shadow of possible failure of their project. At the same time, they try to overcome the sense of guilt for having left behind their children and elderly parents. In Western countries, those who hire migrant women, and have a desperate need of their labour to care for their own frail and elderly, are not particularly interested in the family status of the care givers or whether they have children. In the end, both employers and migrant women employees tend to avoid the subject, as we often do with subjects that evoke suffering and feelings of guilt or unease.

Sociological research has treated the issue cautiously, for another, possibly more sensitive reason. Many researchers in this field adopt a gender perspective and are well aware of the instrumental use that could be made of an argument regarding children left behind by migrant mothers. As often happens when we speak of women who are also mothers, it is easy to fall prey to the temptation to sacrifice gender equity in the name of justice towards children. There is the risk of legitimizing control of the movement of women across borders, evident in the nationalistic rhetoric used by the same sending countries that survive due to the remittances that migrant women send home (generally with greater regularity and for longer periods of time than male migrants). Periodically, in countries such as Bangladesh, the Republic of the Philippines and Ukraine – to mention just three of the countries that have been most affected by this phenomenon – public debate heats up over the social damage caused by migrant women to the children they leave behind, in terms of teen pregnancy, school performance and deviant behaviour, and the need to stop the migration of mothers. Migrant women are thus exposed to criticism for being selfish and materialistic or immoral, while, at the same time, they may also be portrayed as national heroines. With this very inconsistent rhetoric, national cultures attempt to confine female migrants within a system of moral obligations and expectations that will ensure their continued ties to the sending country and compel them to continue taking care of

their family and children at a distance (Vianello 2009). As they assume a breadwinner role, migrant mothers do not give up mothering or care functions toward their children but are, rather, forced to reinvent them.

As Joan Tronto (1993) teaches us, care can be articulated in different phases: caring for, caring about, care giving and care receiving. In long-distance relationships care giving is impossible. The migrant mother or daughter continues to *care for* and *about* her loved ones, but lacks the physical closeness that hands-on care requires. This can also influence the way in which the care receivers react to the attention that is focused on them. Mothers try to fill the void left in their families by sending money, gifts, photos, letters, keeping in touch and communicating frequently, thanks to low cost phone calls provided by cheap international rates or Skype. These new communication technologies produce a space-time contraction that, in turn, gives rise to the experience of a sort of “distant closeness”. “Two opposite processes are constructed around remittances”, Vianello (2009: 41) writes. “The first is an inescapable loosening of traditional social bonds generated by the circulation of money. The second, is the ceaseless effort of migrant women to mitigate the first process through practices of earmarking, aimed at imbuing [remittances] with relational and emotional values so that [they] may become a catalyst of social bonds.”

Through remittances, gifts and frequent phone calls, most migrant women continue to perform their maternal functions at a distance, within transnational families, trying to maintain an emotional bond with their children. Nevertheless, the children sometimes come to nurse a grudge against their mothers. They are unable to elaborate feelings of abandonment at the time of their mother’s choice to migrate or during the long period, sometimes even ten-fifteen years, that migration may last. The material welfare guaranteed by remittances thus does not always generate the expected positive effects. Affective emptiness may leave a gap that cannot be filled in children. On the other hand, there is the danger that they may become dependent on money coming home, with no clear awareness of all of the suffering and hard work it entails.

Black feminism and postcolonial feminism have warned us against projecting white women’s experience on women belonging to other cultures and ethnicities. They have also warned us against the danger of seeing third world women always as victims. In particular, bell hooks has taught us that issues such as reconciling child care and work have never been experienced by black women in the same way that they have been experienced by white women. If, for white women, the home was a golden cage, preventing them from working and being active outside the private sphere, for black women, the issues of greatest concern were racism, poverty, lack of education and lack of work. Indeed, for black women, the domestic space has never been a cage. It has, on the contrary, been a space of freedom, a space of “resistance” (cf. hooks) and humanity, a space to be conquered every day with hours of alienating work done inside the master’s house, in the fields, laundries or factories. Maternity itself has never been lived by black women as an exclusive role. They have been forced to work to maintain their families, and to resort to help from their communities for child care, thereby engaging in a kind of “revolutionary parenting”, as compared to the possessive maternity model on which white feminism has focused its attention (cf. hooks 1984).

For migrant women working in our homes, who turn to “care chains” comprising an almost exclusively female network of family relationships (although this is somewhat of a simplification), it is not only the bourgeois nuclear family model that is unattainable. For these women it is the very possibility of having a family within the same geographical area of the country in which they work – to whom they might return in the evenings or, at the very least, on weekends or once a month – that may be unattainable. Indeed, such families are often divided and fragmented over two or more states. Do these women and their families, deprived of the possibility of living together and of feeling the warmth of physical closeness, live under unjust

conditions? To answer this question we need to understand the reasons behind the existence of transnational families and the migration of women.

3 Transnational Families

Why do migrant men and women today, increasingly tend to maintain ties with their sending countries and live transnational family relationships? The literature offers various answers to this question. An important role is certainly played by the shortening of distances, thanks to low-cost flights and to the fact that new technologies make it inexpensive and easier to communicate on a daily basis. We must also not underestimate the role of discrimination and the difficulties of integration that immigrants encounter in destination countries. A decisive factor, however, would seem to be a veritable state-led policy of transnationalism. Sending countries take advantage of existing family relationships and adopt precise strategies aimed at strengthening the migrant's ties with their country of origin and maintaining a continuous flow of remittances (Ho 2008). According to a 2006 World Bank economic valuation, global remittances in 2005 amounted to \$230 billion (73% more than in 2001). In 2007, they reached \$318 billion, of which 240 billion went to developing countries (Sassen 2008). In 2011, officially recorded remittances amounted to \$372 billion (cf. The World Bank: [Remittance Flows in 2011: An Update](#)).

Saskia Sassen hypothesizes the existence of a “systemic link” between the circumstances that give rise to “survival circuits”, through which profits and foreign currency are accumulated because of the exploitation of the most disadvantaged, especially women, and the economic conditions of the countries we continue to call developing countries but which are, according to Sassen, countries with stagnant economies or in recession. Sassen argues that migrant women today are part of “survival circuits” that involve families, communities and states importing and exporting female labour. We are thus witness to a real “*feminization of survival*” (Sassen 2000). It is in these states' interest to maintain the networks of obligations that link migrants and their families at home – even resorting at times, as we have seen, to a national rhetoric that insists on the maternal role of women and their duties toward the household. This same rhetoric, however, would not appear to render redistribution of care roles within the family and between genders any easier. Fathers usually do not assume mothering functions when the mother leaves and children feel abandoned. When migrant women leave their children behind, they are forced to entrust them to other women: their own elderly mothers, sisters, older daughters, or poorer women who will, in turn, delegate their own maternal functions, in a predominantly female care chain of solidarity.

The reality of transnational families is linked in a complex fashion to migratory policies, and thus to the interests, survival strategies and logic of profit of both sending and receiving countries. Two of the factors that contribute to the fragmentation of families over geographic space pertain to the immigration policies of receiving countries, which seem to find it convenient to maintain a certain level of illegal migration to employ in precarious jobs, while making family reunification difficult for migrants (Bonizzoni 2004). Legal entry into a rich, Western country and regular work permits are very hard to obtain, especially for those coming from certain continents, such as Africa or Asia. Immigration policies tend to be increasingly selective and exclusive. It is still considered the right of sovereign states to exercise complete control over who may enter, letting in only those they may consider useful, possessing skills and qualities of excellence they believe will contribute to their own economic growth. Nevertheless, the existence of porous borders seems conceived to ensure a constant presence of irregular immigrants – immigrants who remain trapped within the borders of the state once they have entered illegally, and who will easily fall prey to exploitative, underpaid, precarious work relationships, sometimes approaching conditions of “neo-slavery”. The uncertainty that migrants experience as a result of their illegal status also deprives them, de facto, of their

fundamental human rights and freedoms (Santoro 2010). This situation, according to some authors, perfectly meets the demands of a post-Fordist economy. The new global capitalism requires flexible and submissive workers of a kind that illegal migrants, both men and women, cannot avoid being (Sciurba 2008). Illegal migrant workers find themselves in a vulnerable situation, in which many different axes of oppression often intersect: gender, class, race, ethnicity and, not least, the condition of foreigner without documents (Johnson 2003).

A legal migrant woman who wishes to reunite her family in the destination country will often have to face up to the fact that family reunification is simply not an option for her, primarily due to the nature of her work, which tends to be live-in or very poorly paid. Thus, migrant women, who come to fill the care gap in rich countries and provide the reproductive labour necessary for the future existence of our societies, often cannot bring their own children and, even more often, their elderly parents, to live with them. The right to family life is a universal human right enshrined in many international documents: e.g. articles 12 and 16 of the Universal Declaration of Human Rights, the preamble of the United Nations Convention on the Rights of the Child and article 8 of the European Convention on Human Rights. Family reunification, however, does not directly follow from any of these international documents, as it is subordinated to specific requirements established by receiving states exercising their national sovereignty (Honohan 2008).

This is one of the areas in which there is clear and open tension between human rights and national sovereignty. Family reunification today is in fact more subordinated than ever to the right of the state to control the quality of migration flows, as reaffirmed by the EU 2003/86/CE directive of 23 September 2003. This makes the requirements that migrants must satisfy in order to reunite their families even more demanding. For example, it allows the state: 1) to set strict conditions for the reunification of “children older than twelve years and also the possibility of deportation of children older than fifteen”; 2) “to lengthen the period of legal residence required to apply for family reunification” and 3) to “deny the renewal of the family member’s residence permit when the legal migrant worker no longer satisfies the conditions required for the exercise of this specific right” (Surace 2007). According to Lori Nessel, this phenomenon is not limited to Europe. Even in the United States, where family migration has traditionally been considered a pillar of the migratory system, there are several signals indicating a will to weaken the right to family reunification, which is still the main legal channel of entry for migrants. These include increasingly selective migratory policies in terms of nationality, ethnicity, and high-skilled qualifications (Nessel 2007-2008). A tendency to control the number and types of immigration is reflected, *inter alia*, in the introduction in many European countries of citizenship tests with an important variant, in comparison to the American model of civic testing, in “that it promotes ‘citizen’ values and skills not only among applicants for citizenship but also for various earlier gates [or doorways] of membership, including those where migrants seek permanent settlement and territorial admission” (EUDO).

These tests seek to verify not only the migrant’s linguistic skills but, in some cases, also their commitment to a set of core liberal values, such as gender equality. Some states, such as France (Murphy 2006), Denmark and the Netherlands (Nessel 2007-2008), even require immigrants applying for permanent residence permits to sign an integration contract. Measures such as these seem to mark a clear step backwards on the part of some European countries, regarding not only multicultural policies, but also a conception of citizenship based on knowledge of the nation’s constitutional principles (Orgad 2010). This will further impede family reunification and will force families to endure longer periods of separation, already extended well beyond the migrant’s initial expectation – even in countries such as Italy where legislation is not among the most restrictive. This is largely due to the complexity of the bureaucratic procedures required to demonstrate such things as the existence of family ties and degrees of kinship, adequacy of accommodation where the immigrant resides and intends to

lodge family members and, not least, certification of sufficient income. The length of the bureaucratic process and the slowness of the offices, often submerged by applications, are some of the reasons why it takes months and sometimes years before permission for family reunification is obtained. In the meantime, an immigrant may have to resubmit the application or part of the documentation, if it has expired. It is thus not surprising that many families decide to reunite by means of other, more informal channels, such as tourist visas. This results in de facto family reunifications that may render the lives of the reunited family, some of whose members remain without documents, even more precarious and difficult (Bonizzoni 2004: 131-134).

The difficulties that immigrant women must overcome in applying for family reunification, as described above, are actually greater than those experienced by men. The first fundamental obstacle is posed by the atypical work usually done by migrant women, such as round-the-clock family assistance, which may prevent migrant women from having autonomous accommodations or independent lives; or hourly domestic work, which very rarely affords sufficient income to meet the requirements for family reunification. For all the gender-neutral language employed, migratory and family reunion regimes often create situations of discrimination toward women, and appear strongly conditioned by the idea of the immigrant as *male breadwinner*.

It may be important for a single immigrant mother to bring her children, elderly parents or a sister with her, in order to help her with the every day organization and management of her life. Here too, family reunion policies are inadequate, in the sense that most European countries recognize only ties to spouses and children for the purposes of family reunification, while subjecting the entry of other relatives to further constraints and conditions and even greater administrative discretion. The family model that migratory policy envisages is thus culturally connoted and generally discriminates against gay couples and de facto couples (Surace 2007). On the basis of this model and in the current climate of security concerns, particularly with regard to migration, some states, including Italy, have used DNA testing to verify the existence of genetic family ties between parents and children, where suspicions have arisen – as if a family can be considered a mere biological entity (Taitz, Weekers, Mosca, 2002).

4 The Convergence Between Care and Migration Policy in Receiving Countries

Caring for sick, frail elderly and disabled people today, in our homes, are mostly migrant women from third world countries or the former Soviet Union and the former Eastern Block. Migrant women offer a low-cost solution to our care crisis. The expansion of the number of those in need of home-based care is caused by several factors, such as population ageing, advances in medicine resulting in longer life expectancy of people suffering from chronic and degenerative diseases, shorter hospital stays due to pressure to cut health-care costs, and a general tendency toward deinstitutionalization. At the same time, smaller family size which means fewer children to help care for aged parents, geographic mobility, the difficulty of managing family and work and the growing employment of women have made it harder than ever to find a family member who can provide unpaid care labour. These demographic and social changes are exacerbating the contemporary ‘care crisis’.

Data regarding demographic trends and population ageing in the West, in particular, are alarming. They speak for themselves about our need of a labour force in the care sector and how it will grow in the future: in 2006, approximately 500 million people were aged 65 or older; in 2030, according to projections, they will be about a billion, or one in every eight persons. “In 2050, the number of people aged 85 and older – those most at risk of needing long-term care – will increase by 350%” (Brown, Braun, 2008).

Demographic factors, as well as the shift from the “male-breadwinner” model to “the adult-worker” model, explain the care crunch in Western countries but, in and of themselves, fail to explain why European and other Western countries, have turned to the employment of migrant care workers to solve their care crisis. On the demand side it cannot merely be attributed to the lack of social welfare services in the long-term care sector. In the case of many European countries, we must also consider the shift, since the 1990s, from traditional services (or no services at all, as in Italy) to cash-for-care payments and, more generally, cultures of care that have shaped the demand for the care of children and older and disabled people (Williams 2011a, 2011b). As Fiona Williams explains:

The nature of care regimes in host countries clearly influences take up: where care provision is commodified and where care cultures favour home-based/surrogate care, reliance on low-paid end of the private market is more common (Williams 2011b: 22).

Migration policies are another important factor to be considered. In some cases, it is possible, in fact, to find a convergence between care and migration policies. In Italy, for example, the transition from a traditional family model to a “migrant-in-the-family” model of care (Bettio, Simonazzi, Villa 2006) can be explained by the dovetailing of these two policies: on the one hand, a subsidy for frail elderly people to enable them to purchase their own care; and, on the other hand, an inadequate entry channel for migration that guarantees a constant presence of irregular immigration, awaiting the regularisation of irregular domestic and other immigrant workers already living in Italy as overstayers.

Conclusion

The actual system of care drain has given rise to reproductive inequalities, the full, long-term effects of which cannot yet be foreseen. Surveys conducted on Mexican boys and girls, children of migrants, show, for example, that they have a weak propensity to invest time and energies in their education. They have greater economic opportunity to attend good schools, due to their mothers’ remittances but, instead, think of a future of migration for themselves as well (Mckenzie 2005). Research conducted on children of Ukrainian migrant mothers also produced similar results (Tolstokorova 2009). Children feel abandoned and sometimes suffer psychological damage. Dana Gabriel Verbal remembers that “in Romania – the first care-provider country for Italian families – this phenomenon has received a lot of media attention following several suicides of children, normally aged 10-14 years old, who were left in the care of their grandparents and strongly felt the absence of their mothers. Romanian media and NGOs have begun to talk of ‘de facto abandonment’ while, in Ukraine – the second care-provider country – the media talk about ‘social orphans’” (Verbal 2009).

Other negative effects include the depopulation of entire neighbourhoods and the resulting disappearance of the very dimension of conviviality and feelings of solidarity that have kept care chains alive until now. Care drain from third world countries or from states experiencing difficult political and economic transition processes, such as most Eastern Europe states, may thus result in a sort of erosion and degradation of the “*socio-emotional commons*” of the country, a deterioration in the society’s “life-world” (as Hochschild calls it, following Habermas), thereby depriving it of the affective and emotional life essential to the flourishing of every culture. Further important effects of migration concern the reduced fertility rate of transnational families.

Care ethicists, such as Joan Tronto, call for the recognition of the care workers’ contribution to the reproduction of rich Western countries, by according them the right to citizenship. There is no doubt that we need to reconsider the terms of just membership in society and to establish less arbitrary criteria for the granting, first of all, of residence and work permits and, then, the right to naturalization to those immigrants who wish to become citizens. Some migrants,

however, are indeed temporary and “often willing to accept conditions of work, housing, public education or health care far below the domestic standards the receiving society sets for its citizens” (Bauböck 2011). From this point of view, the most urgent reforms are, on the one hand, to give migrants the possibility to enter legally and obtain residence permits that would enable them to find regular employment and, on the other hand, to improve migrants’ rights (including family reunion).¹ No less important – especially if we consider that many care workers in Europe today are Romanians and Bulgarians who, since 2007, enjoy visa free access to the care labour market of other European countries – is the provision of incentives to regularize care and domestic workers, such as increasing public assistance in terms of cash payments.

In the short term, other policy solutions may be proposed. One could be “bringing in the father” (Gheaus 2011): introducing policies based on incentives to advance male participation in care in sending countries. Another solution could be supporting institutional care in the sending countries, funded in two possible ways: 1) by directing some of the taxes the sending countries “levers on remittances into childcare”; 2) by a “‘care drain tax’ from the countries that employ migrant care workers (Gheaus 2011).

In the long term, however, several justice issues remain unresolved.

The increasing poverty of third world countries and their growing dependence on remittances lead us to think that the reality of transnational families will last for quite some time, unless radical reforms are introduced by international bodies such the World Bank and the International Monetary Fund, in order to reduce the need for women to migrate.

Globalization today, presents two faces: a public face and a private one. Like the old distinction between public and private, the public face of globalization is “populated primarily by men at its top rungs decision-making”, while the private sphere is “sexualized, racialized and class-based” and is populated mainly by female migrant workers, who “perform intimate household services” (Chang and Ling 2000). Thanks to this new global division between public and private, care work is re-familiarized – still invisible and devalued, while old stereotypes regarding the natural caring abilities of women re-emerge. The “migrant-in-the family” model is questionable in terms of gender equity because, to the extent that it does a fair job in preventing poverty, it does not prevent the exploitation of women’s care labour, guarantee women equality of respect or income or combat the marginalization of women, and it certainly performs very poorly in terms of overcoming androcentrism (cf. Fraser 1997). The final, major issue, in terms of justice, is that of unequal distribution of care labour between rich and poor countries, as a consequence of the current “care drain”. Both the issue of gender equity and the issue of unequal global distribution of care labour demand imaginative solutions for the balancing of work and care, at a global level (cfr. Williams 2011b).

¹ The effort to protect migrants’ human rights “has led to to the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), which contains a comprehensive list of rights of both regular and irregular migrants and came into force in 2003”. As Bauböck (2011) underlines: “[...] no major receiving country of migrants has so far ratified the ICRMW”. In 2011, The General Conference of the International Labour Organization (ILO) adopted the *Convention Concerning Decent Work for Domestic Workers*.

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Is a Generous Immigration Policy a Way to Rectify for Colonial Injustices?

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Abstract

Migration from former colonies to former colonial powers represents a large part of the 20th century migration. The question discussed in this article is if a generous immigration policy on behalf of persons from former colonies is an appropriate means for the European nations and former colonial powers to compensate for colonial injustices.

Keywords: rectificatory justice, compensation, immigration, culture, remittances, brain drain

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Introduction

Migration from former colonies to former colonial powers represents a large part of the 20th century migration. This migration has been facilitated by generous laws regarding immigration and citizenship. For example, before 1949, every person born in the British Empire was according to common law a British subject and Commonwealth citizen. As a consequence many Indians, Pakistanis and people from the Caribbean immigrated to the United Kingdom. In spite of more restrictive immigration acts intended to limit the number of immigrants, the total number of Commonwealth immigrants to the United Kingdom is estimated to 2.5 million from 1962 until 2011.¹

Immigration to France shows a similar picture. All in all in 2005 France had almost 5 million immigrants, i.e. people born outside of France. About 1/3 of the total foreign born immigrants in France come from the former colonies Algeria and Morocco and approximately 6% of the French population consist of people of Maghreb origin. Similar to Britain, even France provided the citizens from its colonies privileged immigration status. For example the Evian Accords regulating the relations between France and Algeria after Algeria's independence stated a "freedom of movement" between the two countries.² Likewise, post-war immigration to the Netherlands consisted mainly of immigrants from former colonies, not least Moluccans who were provided residence when they were refused to form their own state by Indonesia.³

More recently, anti-immigration sentiments have grown in Europe, including former colonial powers like Britain, the Netherlands, Belgium and France. A relatively open immigration policy towards former colonies has changed to restrictive immigration laws. Should immigration laws be strict or generous? Should Europe opt for welcoming a substantial number of asylum seekers and other immigrants or close its borders? Today, immigration is a much discussed issue and there are many arguments raised in the debate for and against generous immigration laws. This article is limited to discuss one argument that is not very common in the debate, namely that a generous immigration policy is a way for former colonial powers to rectify for colonial injustices.⁴

Let me begin with the following parable:

Assume that I live a life in prosperity and welfare. My next door neighbour, on the other hand, lives in poverty and misery. Let us also assume that many years ago my grandparents invaded the land of my present neighbour's grandparents and our present difference in welfare is related to this historical fact. Then, it seems that my neighbour with good reasons could demand to enter my house and benefit from my wealth, and thus, that I have a moral obligation to compensate my neighbour. And this obligation is generated by the acts of my forefathers.

The parable illustrates – indeed controversially – how the "global village" that we now inhabit came about. "Colonialism is a practice of domination, which involves the subjugation of one people to another", according to Stanford Encyclopaedia of Philosophy.⁵ Colonialism,

¹ http://en.wikipedia.org/wiki/Immigration_to_the_United_Kingdom_since_1922, viewed on 29.10.2012.

² Phillip Chiviges Naylor, France and Algeria. A History of Decolonization and Transformation, Gainesville 2000, pp. 65, 83-84.

³ Focus Migration, <http://focus-migration.hwwi.de/The-Netherlands.2644.0.html?&L=1>, <http://focus-migration.hwwi.de/France.1231.0.html?&L=1>, viewed on 29.10.2012.

⁴ Aristotle distinguishes between *distributive* and *rectificatory* justice. Distributive justice focuses on distribution of scarce resources and goods. Rectificatory or corrective on the other hand is backward-looking and focuses on correction for past deeds. It is in Aristotle's sense that I use rectification in this article. Aristotle, *The Nichomachean Ethics*, Book V:4, Oxford 1980.

⁵ Stanford Encyclopedia of Philosophy, "Colonialism", <http://plato.stanford.edu/>, viewed on 17.05.2012.

and in particular its later stage imperialism,⁶ implied subjugation and exploitation of colonized peoples as well as violations of democracy and human rights. In some countries, like Uganda and Malaysia, the imperial reign was mild, while in others like Congo and South West Africa the natives were harmed in most ways we can think of. They were discriminated, killed, tortured, and used as forced labour. Their land and their cultural artefacts were taken away from them. Thus, colonialism implied in different ways that injustice was done to the colonies and there is a pending need for rectification.⁷

What then does rectification require? In line with recent discussions on historical justice I will stipulate the following requirements for rectification for past wrongs⁸

1. acknowledgment of past wrongs on the side of the victimizer,
2. that something of value is offered the former victim as compensation, and
3. that the motive behind the offer is to apologize.

How then are past wrongs compensated? What could the former colonial powers offer? There are a number of possible options; from official excuses to writing off debts of former colonies, development aid, and favourable trade rules just to mention a few examples. Hence, there are various possible ways to compensate and the question posed in this article is whether a generous immigration policy on behalf of persons from former colonies is a feasible option. I will leave aside the first and the third requirements for rectification and focus on the second: compensation. I will also leave aside other controversial issues related to the question of historical rectification, like the time-limit for historical redress, if claims of rectification can be inherited, etc.⁹

Is a generous immigration policy feasible as compensation for colonial injustices?

Why, then, would a generous immigration policy be an appropriate way for former colonial powers to compensate for past wrongs? In this part of the article I will discuss arguments for and against generous immigration laws as a possible way to compensate for colonial injustices.

First, a generous immigration policy for immigrants from former colonies would imply a symmetrical means for rectification. While colonialism, at least in a number of cases, implied migration of Europeans to the colonies (Rhodesia, Kenya, South West Africa, Algeria, etc.), migration in the opposite direction is an appropriate way to rectify. Europeans who migrated to the colonies benefitted from the resources of the colony in the first place and the present

⁶ There are multiple definitions of the term “imperialism”. In this context I refer to the period of colonialism that started around 1860 and lasted till the independence of the colonies, and continued indeed even after their independence, see Andrew Porter, *European Imperialism, 1860-1914*, Hampshire-London 1994; Michael Barratt Brown, *After Imperialism*, London 1963.

⁷ See Niall Ferguson, *Empire: The Rise and Demise of the British World Order and the Lessons for Global Power*, New York 2004; Jeremy Sarkin-Hughes, *Germany’s genocide of the Herero: Kaiser Wilhelm II, his general, his settlers, his soldiers*, Cape Town 2011; Gardner Thompson, *Governing Uganda. British Colonial Rule and its Legacy*, Kampala 2003; Adam Hochschild, *King Leopold’s Ghost, A story of greed, terror, and heroism in colonial Africa*, Boston 1999.

⁸ See for example Renee Hill, “Compensatory Justice: Over Time and Between Groups”, in: *The Journal of Political Philosophy*, 10 (4/2002), pp. 392-415; Janna Thompson, *Taking Responsibility for the Past, Reparation and Historical Justice*, Cambridge 2002; John C. Torpey, *Politics and the Past. On repairing historical injustices*, Lanham 2003.

⁹ In Göran Collste, “«... restoring the dignity of the victims. » Is Global Rectificatory Justice Feasible?”, in *Ethics and Global Politics*, 2/2010. I elaborate an argument for the need for rectification after colonialism.

immigrants from former colonies to Europe can benefit from the welfare of the nowadays affluent European nations.

An obvious problem with this argument is that if it is taken literally, it implies that citizens from former colonies who did not receive many immigrants from Europe, like Uganda and Sudan, would be discriminated against. If the aim of generous immigration laws is to rectify for historical wrongs, then the fact that many Europeans migrated to a particular colony seems to be arbitrary and irrelevant. Instead, it is the anguish of colonization that is the decisive reason for rectification.

Second, during colonialism different kinds of links between colonizer and colonized were established which are beneficial for present day immigration. Colonized peoples were often culturally influenced – or perhaps better, dominated – by the colonial power and they adopted its language and religion. In comparison to immigrants from nations who lack historical bonds, the cultural commonalities established during colonialism facilitate for immigrants from a former colony to assimilate in a former colonial nation like the United Kingdom or France. This fact also undermines a frequent communitarian argument against immigration. For example David Miller argues that liberal democracies have reasons to limit immigration in order to preserve and defend their “public culture”. According to Miller, immigration will endanger the preservation of the national language of the receiving nation and pose a threat to things people value like “...its public and religious buildings, the way its towns and villages are laid out...”.¹⁰ Now, immigrants from former colonies who share language and culture with the receiving nation will not pose this assumed threat of immigration. Thus, Miller’s argument is of less relevance for immigrants from former colonies who are familiar with the culture and master the language.

An argument for seeing a generous immigration policy as an appropriate way to compensate for past wrongs is that emigration is valuable for the former colony. Remittances from immigrants to their home countries are welcome financial contributions to people in the homeland who often live in poverty. For example, according to different estimation remittances from Algerian workers in France enabled in the 1960s between 1.25 and 2 million Algerians to subsist.¹¹ The volume of remittances is expanding. In 2004, the World Bank estimated that the annual value of transferred remittances was about

\$150 billion which was three times the value of the development assistance provided to low-income nations, and remittances “...now play an essential role in sustaining national and local economies”, the UN Global Commission on International Migration reports.¹² However, even if remittances are welcome and much needed contributions to people living in developing countries, they have so far had a minor long-term impact on the economic situation of developing countries. Only about 10% of the remittances go to savings or investments and remittances are an integral part of a global structure characterised by inequality and dependency.¹³ Hence, although remittances are alleviating poverty in the short term, the consequences for long term economic development in a former colony may even be counterproductive. Therefore, to see remittances from immigrants to their home countries as a way for colonial powers to compensate for colonial wrongs is unconvincing.

The flip side of a generous immigration policy and increased migration from a former colony to Europe is the exit of the best educated work force from the developing nations,

¹⁰ David Miller, “Immigration: The Case for Limits”, in: Andrew Cohen, Heath Wellman (eds.), *Contemporary Debates in Applied Ethics*, Wiley 2005, pp. 200-201; see also Michael Walzer, *Spheres of Justice*, New York 1983, p. 39.

¹¹ P. C. Naylor, *France and Algeria*, p. 65.

¹² Migration in an Interconnected World. Report of the Global Commission on International Migration 2005, <http://www.unhcr.org/refworld/publisher/GCIM.html>. p. 26, viewed on 17.05.2012.

¹³ Ibidem.

the so called “brain drain”. The developing nation has invested in the education of these emigrants but will not gain from their work. Instead they move to a developed nation to practice their profession. This implies e.g. that nurses and doctors from developing nations so much needed at home are employed in developed nations. The Global Commission on International Migration provides some striking figures; from 2000 to 2004 16,000 African nurses registered to work in the United Kingdom alone and only 50 out of 600 doctors trained in Zambia since its independence are still working in their homeland, and of 1200 physicians trained in Zimbabwe only 360 were still practicing there in 2001.¹⁴ The fact that highly educated professionals as well as workers in the most active phase of their lives leave their poor home country to work in a developed nation is detrimental to development.¹⁵ Thus, generous immigration laws in Europe seem to be a mixed blessing for the former colonies. From their point of view, if a generous immigration policy implies that they lose many educated citizens, it might rather look like a continuation of the old colonial regime than a means of compensation for former exploitation.

A common argument for closed borders is that the citizens of a nation contributed to the formation and development of their nation and as a consequence they have the rights to the results of their efforts.¹⁶ This is an argument for closed borders but not against a generous immigration policy as a means for compensation. Quite the opposite; if the argument is valid it would be a sacrifice to open the borders for immigrants. This sacrifice could be motivated by a duty to compensate for past wrongs.

However, from the viewpoint of colonial history the premise of the argument is unconvincing. Can creation of a nation’s wealth solely be explained by the contributions of its own citizens? First, it seems that arbitrary circumstances like access to natural resources and historical conditions, i.e. to use Rawls’s vocabulary, luck in the natural global lottery, might be one factor behind a nation’s prosperity. But in our case more important are the possible economic contributions gained from colonial exploitation. It is a fact that the colonies to some extent, even though economic historians disagree on to what extent, contributed to the creation of wealth in the colonial nations.¹⁷ Given the premise that those who contributed to the wealth of a nation also have a right to the results, and the factual claim that colonialism at least to some extent helped the economic development of the colonial nation, even descendents of former colonized peoples have a right to the results. This is indeed an argument for a generous immigration policy because it implies that the colonized peoples who contributed to the wealth of the colonial nation are entitled to immigrate to get their fair share of this wealth – not as compensation for past wrongs, but rather because they contributed to the wealth of the former colonial nation.

If a generous immigration policy is a means for compensating colonized peoples for past wrongs, this would imply that immigrants from former colonial nations would be given priority to immigrants from other nations. But is this not unfair to immigrants from developing nations that were not colonized? One could argue that it is a matter of luck if you are born in a former colony or not. Why should this luck help you cross the border to a developed nation? This objection to giving priority to immigrants from former colonies is valid *prima facie*. However, it disregards the duty of justice that follows from past wrongs. The relations between on the one hand the former colonial power and its colony, and on the other hand the colonial nations and any other nation are not similar from a moral point of view. While

¹⁴ *Ibidem*, p. 24; Solomon R. Benatar, “An examination of ethical aspects of migration and recruitment of health care professionals from developing countries”, in: *Clinical Ethics*, 02.02.2007.

¹⁵ Gillian Brock, *Global Justice. A Cosmopolitan Account*, Oxford 2009.

¹⁶ Luis Cabrera, *The Practice of Global Citizenship*, Birmingham 2010.

¹⁷ Daron Acemoglu, James Robinson, *Why Nations Fail. The Origins of Power, Prosperity and Poverty*, London 2012.

the former relation has generated a duty of rectification there is a further moral reason for former colonies to give priority to immigrants from a former colony.

Finally, we must raise the question: who benefits from a generous immigration policy? Presuming that the primary recipients of compensation for previous colonial injustices are the previous colonized nations, a generous immigration policy would be the wrong means. First, as we have noticed it would only benefit a minor part of the population of the former colony, i.e. those who are able to leave their home country and their relatives who will receive remittances. More important however, the beneficial consequences for the former colonized nation are highly dubious. A nation cannot prosper if the educated people leave and the poor and uneducated remain. Hence, one should look for other more appropriate means for compensation for the colonial past.

But is not my question, if a generous immigration policy is a way to compensate previous colonies for colonial wrongs, wrongly posed? It assumes that the ethics of migration has something to do with the relation between nations while the real ethical issue is the basic individual rights of migrants, as for example Joseph Carens emphasizes in his critique of Michael Walzer's position that receiving nations have the right to refuse entry to immigrants.¹⁸ The right to migrate is even stated in the Universal Declaration of Human Rights, article 13 (1). However, this objection to my argument is flawed for two reasons. First it fails to recognize that there are instances when a nation's interest could precede individual rights and secondly, that the conflict also can be described as a conflict between individual's rights; on the one hand individual's right to migrate, on the other hand individual's rights to health care and other vital goods.

First, in some exceptional situations the collective interest of a nation could precede individual's rights. For example, if a nation is hit by a natural catastrophe or threatened by a military attack, the government may have to force people to help to relieve victims or enlist in the army even at the expense of some of their individual rights. In a similar way it is at least possible that politicians in a developing nation can consider restrictions of for example emigration of doctors and nurses if that would imply that the citizens would have access to life-saving health care that they otherwise would be deprived of. Hence, it is not unreasonable to raise the question if fulfilling rectificatory justice could imply restrictions of emigration, or for that matter a less generous immigration policy on the side of the receiving nations.¹⁹ It is worth noticing that in the discussion of when national interests collide with migrants' rights the issue are usually the rights of the receiving nations, i.e. mainly the wealthy nations in Europe and North America.²⁰ The interests of the developing nations are rarely discussed.

Secondly, the conflict between the interest of the developing nation and individual migrants can also be seen as a conflict between different individuals' basic rights. On the one side are the rights of the migrants and on the other the rights of individuals who run the risk of being without necessary health care because of emigration of doctors and nurses. The argument that a generous immigration policy could be detrimental to the interest of the former colony implies that migration may violate the basic rights to health care and other primary goods of many individuals living in the former colony.

¹⁸ Joseph H. Carens, "Aliens and Citizens: The Case for Open Borders", in: *The Review of Politics* 49, (2/1987), pp. 251-273.

¹⁹ For a discussion of justification of immigration restrictions see Kieran Oberman, *Can Brain Drain Justify Immigration Restrictions?*, unpublished manuscript
http://iisdb.stanford.edu/evnts/5944/Oberman_BrainDrain_20101.pdf viewed on 18.12.2012.

²⁰ M. Walzer, *Spheres of Justice*; D. Miller, "Immigration".

Conclusion

Migration from former colonies to former colonial powers represents a large part of the 20th century migration. The question discussed in this article is if a generous immigration policy on behalf of persons from former colonies is an appropriate means for the European nations and former colonial powers to compensate for colonial injustices.

I have found that there is indeed a valid argument for preferring immigration from former colonies to former colonial nations compared to immigrants from other nations. While the immigrants from former colonies commonly share the culture and language of the receiving nations it would facilitate integration and thus undermine the communitarian argument that a generous immigration policy will lead to cultural clashes. Emigration from developing nations has both positive and negative economic consequence. Immigrants send large amounts of remittances back to their country of origin. However, migration also implies a brain drain from the poor nations to the wealthy. The majority of migrants are people with incentives and education, much needed in their home countries. Besides, remittances tend to preserve a relation of dependency between the former colonial power and the colony. Hence, migration is on the whole a bad affair for developing nations. Then, neither is it an appropriate means for former colonial powers to compensate their former colonies for past injustices. Yet, this conclusion does not exclude the possibility that there are other humanitarian and cosmopolitan reasons for a generous immigration policy.²¹

²¹ See for example J. H. Carens, "Aliens and Citizens" and Seyla Benhabib, *The Rights of Others, Aliens, Residents and Citizens*, Cambridge 2004.

Caught Between Rights and Restrictions

An Ethical Analysis of the Rights and Capabilities of Undocumented Immigrants in the Netherlands

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Narratives by Billy Walkman

With gratitude to Ellen Fruijtier and Dr. J.M. Halsema

Abstract

Using the capabilities space of Martha Nussbaum as a measure of quality of life, this article analyzes what undocumented immigrants are actually able to do or to be within the rights and capability space made available to them by the Dutch immigration policy. It inquires into the practical implications of this policy by examining available quantitative data, supplemented with the testimony of one man, living illegally in the Netherlands. This article strives to answer the question whether the Dutch policy on illegal residents can ensure a life worthy of a human being, not a life of merely surviving. At the same time, it aims to urge the capability paradigm of Martha Nussbaum to address the issue of immigration; an ethical dilemma of human justice that is waiting at the sidelines of the theory.

Keywords: human rights, irregular immigrants, Dutch immigration policy, capabilities approach, Martha Nussbaum

Introduction

Sixteen years ago, in the year of 1996, Billy Walkman fled Liberia during the civil war and was stranded in Amsterdam. He was 19 at the time, and witnessed how his father and sister got murdered. The Dutch authorities did not grant Billy asylum, as he was unable to prove his Liberian nationality. Although Billy was born and raised in Liberia, his parents were Ghanaian immigrants, which complicated his case. However, knowing that other Liberians did get a refugee status, Billy decided to hang on in order to collect the right papers to prove his nationality. He was young, strong, and a believer. He could stay at the house of a documented country fellow, and had occasionally some work which generated some income. Fate turned against him when his host died in 2003, and he found himself on the streets. This is how Billy ended up in a shelter for drug addicts. In order to survive, he became the ‘assistant’ of one of them, meaning that it was Billy who had to keep the drugs on him, while the other tried to sell it to passers-by. He was caught by the police with 18 Ecstasy pills in his pocket. Fines added up to 240 Euro or three months in prison. Billy did not have the means to pay. It was the first time Billy was detained, and eight more times were to follow. Not for any criminal offence – he had sworn to himself to stay away from drugs forever – but for the fact that the authorities issued an exclusion order that declared Billy as undesirable; a public order measure that does not allow a pending application of residence, and makes continued presence on Dutch territory a crime. In 2006, Billy finally managed to have sufficient financial resources and the relational network to get his Liberian passport in order to prove his nationality. Too late for any status: the IND was quick to expel Billy to Liberia in response, albeit without the necessary stamps of approval from the Liberian Embassy. Observing his blank passport, the Liberian airport authorities refused Billy access, leaving the IND no other option than to take him back on their return flight. In the process, Billy’s passport was lost, and lost became Billy. In the past years, Billy has been presented 17 times to different African Embassies, neither of them willing to accept Billy as a citizen. He has accumulated four years’ time in alien detention. All this time, Billy was kept ‘ready for expulsion’. After each unsuccessful attempt by the IND Billy was released and left destitute.

The case of Billy Walkman must be a real headache for the Dutch authorities, and he is not the only one. In 2009, the Research and Documentation Centre (WODC) of the Dutch Ministry of Justice estimated that about 97,000 persons without residency rights live in the Netherlands.¹ In a growing socio-political climate that intends to criminalize irregular immigration, Dutch legislation mainly focuses on return policies. Measures are increasingly restrictive, including the detention of irregular immigrants and asylum-seekers, and marginalization of their standard of life. In 2011, 6,100 irregular immigrants were detained in order to be expelled.² The average length of detention was 78 days, one in six detainees stayed longer than six months in detention, and a number of detainees were imprisoned several times at short intervals.³ The effectiveness of this policy is questioned, as the Dutch authorities were unable to expel between 48% and 75% of the detainees (depending on the source of data) to their country of origin.⁴ Stretching this data to the total estimated number

¹ Peter G. M. van der Heijden, Maarten Cruyff, Ger H. C. van Gils, *Schattingen illegaal in Nederland verblijvende vreemdelingen*, WODC, Den Haag 2009, p. 1.

² J. Verhoef, P. C. van Dorst, M. B. van der Kleij, S. Andric, “Vreemdelingenbewaring: strafregime of maatregel om uit te zetten, over respect voor mensenrechten bij vreemdelingenbewaring”, in: *De Nationale Ombudsman*, 2012, p. IV.

³ *Ibidem*, p. 32.

⁴ Amnesty International, *Vreemdelingendetentie in Nederland: het moet en kan anders*, Alter-natieven voor vreemdelingen detentie, Amsterdam 2011; Schoordijk Instituut, *Terugkeer-mogelijkheden van vreemdelingen in vreemdelingenbewaring: het vergeten gelaat van de vreemdeling*, Vol I, 2004, p. XVI; The Dutch government insists that in the majority of cases, detainees are obstructing purposely their

of irregular immigrants indicates that between 46,000 and 72,000 people are unable to be expelled by the Dutch authorities. If these people do not voluntarily return to their country of origin, assuming they would be able to do so, they are in the Netherlands to stay, and prognoses predict that their numbers will not decrease in the near future.⁵

Focusing on the capabilities of undocumented immigrants, this article investigates whether the Dutch immigration policy, as it is today, is congruent with its statement that human rights are at its foundation and that it sufficiently respects and protects the human rights of irregular immigrants.⁶ The Declaration of Human Rights and additional treaties ratified by the Dutch government do not allow unlawful restrictions of the human rights of irregular immigrants. The first section of this article briefly outlines the main pillars of Dutch immigration policy. Subsequently, the second and more substantial section investigates what this policy means for the agency of undocumented immigrants in practice; what is the capability space they have available for functioning? As the collection of qualitative and quantitative data on undocumented immigrants is fraught with difficulty, literature review is complemented with the narratives of Billy Walkman, in order to illustrate the effects of Dutch policy for real people in real life. As for Billy, after 16 years of being silenced, he felt it was time for him to speak out. During a four hour interview, Billy Walkman told his story about the way Dutch law and regulations determine the scope of his capabilities, what he is (un)able to do and to be, by going through Martha Nussbaum's list of ten Human Capabilities.

Through using the capabilities approach of Nussbaum as a quality of life measurement, van Egmond and Walkman aim to show that the limited account of human rights, which are granted to irregular immigrants within the Dutch immigration policy, do not allow them the basic human endowments that assure a standard of life which human dignity requires. Secondly, we aim to urge the capability paradigm to address the issue of immigration, in order to investigate the obligations towards non-citizens and to identify the duty holder. Martha Nussbaum states that domestically it is a nation's basic political structure which is responsible for distributing to all citizens an adequate threshold amount of all entitlements on her list. By concentrating solely on the duty governments have towards their citizens, the entitlements of non-citizens are left out of scope of her theory. In the context of this article: 'Does the Dutch government have a duty to ensure that the substantial number of irregular immigrants on its territory can live a life worthy of a human being, a life not merely of surviving but also one of human dignity? If not, who does?' This fundamental dilemma is waiting at the sidelines of this lecture. We aim to make it audible and want to recommend the capabilities paradigm to address this ethical dilemma of human justice.

Dutch policy

The Dutch government pursues a restrictive policy on illegal residents that should discourage 'unmeritable immigration' of underprivileged people and motivate them to return voluntarily to their country of origin.⁷ An important but internationally criticized pillar of this policy is its detention strategy, and the proposal being advanced on the criminalization of illegality. At the same time, this coalition agreement states that human rights are the foundation of the Dutch immigration policy.⁸ Human rights are based on the idea of human

expulsion.

⁵ Roel Peter Wilhelmina Jennissen, *De Nederlandse migratiekaart, achtergronden en ontwikkelingen van verschillende internationale migratietypen*, WODC, 2011, p. 325.

⁶ Regeerakkoord VVD - CDA, 30-09-2010, *Vrijheid en verantwoordelijkheid*, Den Haag, the Netherlands, 30-09-2010, <http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2010/09/30/regeerakkoord-vvd-cda.html>, click on PDF document "Regeerakkoord VVD – CDA", viewed on 06.06.2012, p. 21.

⁷ *Ibidem*, p. 23.

⁸ *Ibidem*, p. 21.

dignity, something that not only individuals with legal citizenship are entitled to, but each and every person, independent of one's role in society. The Netherlands as a state is part of most of the major international and regional human rights organizations. An exception is The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (MSC, 1990), one of the seven core international human rights treaties, which the Dutch government has not ratified.⁹ A brief outline of Dutch legislative and policy measures concerning irregular immigration:

1. A right to health care, a duty to pay for medical costs

People without a residence permit have a right to essential medical care, including research, treatment and routine care which are deemed necessary on medical grounds. This extends the policy of some European countries in which illegal residents are entitled to emergency care only. At the same time, illegal immigrants in the Netherlands are obliged to pay for the delivered care, while they are excluded from obtaining health insurance. As doctors have a duty to care towards everyone irrespective of their residency status, and whether or not they are insured or able to pay, a health care provider can turn to the Health Care Insurance Board (CVZ) – a government collective – for a reasonable reimbursement of unclaimed costs. Some costs are not claimable, like dental care, dietician, physiotherapy, optician, and interpreters.¹⁰

2. A right to education up to the age of 18

Education is not only a right but also an obligation for all children between the ages 5 and 18, including undocumented children. Dutch law states that children without residency papers may complete the education they are enrolled in when they turn eighteen. After their 18th birthday, applicants are denied access to a course. Until very recently, traineeship and apprenticeship were formally considered 'employment' by the authorities, and therefore required a special work permit for which undocumented minors were not eligible. A court verdict of May 2012 assured full access to education, and thus access to traineeship and apprenticeship, as they are essential parts of education.¹¹

3. Child rights

All children, including undocumented children, have the right to protection, healthcare, education and other basic services. Public health centres for children up to four years are freely accessible for all, including undocumented immigrants. Education is freely accessible for all children as well. Children are not allowed to spend more than two weeks in a row in alien detention.¹²

4. A right to legal assistance

Those without a residence permit are entitled to legal aid from a lawyer, but obliged to pay for the legal services they receive. When irregular immigrants are unable to pay, it is possible for a lawyer to apply for reimbursement. The payment of court fees to begin a legal process are mandatory, adding up to Euro 400 to 950.¹³

⁹ Amnesty International, *The Netherlands: The detention of irregular immigrants and asylum-seekers*, Amsterdam-London 2008, p. 13.

¹⁰ ASKV, *Dokters van de Wereld, Het Wereldhuis, Passport of Amsterdam*, Amsterdam 2012, pp. 6-13.

¹¹ *Ibidem*, pp. 21-25.

¹² *Ibidem*, pp. 14-20.

¹³ *Ibidem*, pp. 26-30.

5. Limited rights to housing and shelter

Dutch law gives irregular immigrants the right to rent accommodation in the Netherlands, but only from private landlords. Undocumented immigrants are excluded from receiving support from mainstream organizations like housing associations. People without residence permits are denied access to regular homeless shelters and crisis shelters, unless the temperature reaches below -5° C at night. Vulnerable groups such as children and the sick should be guaranteed access to food and housing. The Dutch courts have decided that parents and children should not be separated in case they have become homeless. In such case, the authorities must provide adequate shelter for the family as a whole.¹⁴

6. Exclusion from a right to work

People without a residence permit are not permitted to work, and not allowed to volunteer. However, if an undocumented immigrant is working, (s)he has the same rights under Dutch law as other workers. The law regulates the minimum wage, minimum holidays, and protection from unfair dismissal amongst other things. These rights can be claimed only when in possession of a work contract or other sufficient evidence, like payment slips or statements from colleagues. Irregular immigrants can join a union.

7. Exclusion from social services

The Linking Act (Koppelingswet) of 1998 excludes undocumented immigrants from public services and social benefits, and obliges each organization which offers a public service to check the residency status of the person involved. This means, e.g., that undocumented immigrants are not entitled to housing support, child benefit, unemployment benefits, a pension, health insurance or legal expenses insurance, or to open a bank account. Irregular immigrants are excluded from service from the Food bank [Voedselbank], an institutional body which provides free food to socio-economic poor individuals and families.

8. Exclusion from political rights

Without a residence permit, people are not allowed to vote. Undocumented immigrants have a right to demonstrate under the condition that it does not treat national security.

9. Identification requirement

The Identification Act of 1994 obliges anyone aged 14 and older to identify themselves by showing a valid ID. The police and other government officials with a monitoring or controlling role are allowed to ask anybody to identify themselves if this is necessary for carrying out their responsibilities. Controls take place in traffic, public transport, the working place, big events, in busy entertainment areas, and high-risk areas for public disturbances. Poor socio-economic areas where the majority of irregular immigrants live are regularly subject to controls. A minor violation allows a police officer to ask for an ID. A person may be arrested in case they fail to show valid identification, and there is a reasonable suspicion that the person is illegally resident.¹⁵

10. Exclusion order

An exclusion order is a public measure declaring a immigrant or asylum-seeker to be an 'undesirable alien'. It intends to protect the Netherlands against further public order infractions by the designated person.¹⁶ An exclusion order makes continued presence in or a return to the

¹⁴ *Ibidem*, pp. 31-35.

¹⁵ Amnesty International, *Vreemdelingendetentie in Nederland*, p. 25.

¹⁶ Dutch Government, *Alien Act 2000*, 2000, <http://www.legislationline.org/documents/id/4680>, chapter 6,

Netherlands a crime, it does not allow for a pending application for residence, and excludes one from the right to shelter and other basic facilities. Since 2002, an unconditional prison sentence of one month, or repeated minor criminal offences which incur a fine, suffice(s) to impose an exclusion order on irregular immigrants. Also, when irregular immigrants violate immigration regulation twice or more, such as the duty to report, an exclusion order can be imposed.¹⁷

11. Immigration Detention

Immigration detention aims to prevent irregular immigrants and asylum-seekers to enter the territory or to facilitate their expulsion. Immigration detention can be prolonged, in the Netherlands there is no statutory limitation on its duration. Detainees have the right to appeal their case before a district court within 28 days after detention. Detention may be lifted when it is considered unreasonably burdensome.¹⁸ The first judicial review looks at the lawfulness of the grounds for detention. Subsequent appeals review the lawfulness of continued detention. If authorities are actively engaged in activities ‘with a view to the expulsion’ within a period of reasonable time, or when the person concerned is shown to be actively obstructing this process, continuation is usually granted.¹⁹ Detention can be prolonged up to twelve or eighteen months. Although irregular immigrants are not detained as a disciplinary or punitive measure, its regime is based on one designed for regular prisons, and thus subjected to the same safety procedures, like the use of handcuffs, body search and visitation. At the same time, the regime is devoid of activities which aim for rehabilitation. Irregular immigrants in detention are locked up for 16 hours a day, with one other person in a room of 10 square meters. There are no educational activities, recreational activities are provided for one hour a day. Detainees are allowed to meet visitors for two hours a week.²⁰

Monitoring the Dutch policy: capabilities of undocumented immigrants

What does it mean to hold a right? The idea of capability can help to clarify the nature and scope of the idea of human rights, by providing an idea of what it means to *secure* human rights.²¹ The Capabilities approach and human rights approaches share the idea that all people have some core entitlements just by virtue of their humanity, and that public arrangements are necessary to protect these.²² However, it is the capability approach of Martha Nussbaum which emphasizes that the existence of an entitlement entails that society holds a duty to protect *and* promote these endowments; governments do not only hold a negative obligation (to respect human rights), but hold a positive obligation to defend and support human rights.²³ The capability approach intends to secure the ‘ends’ of the human rights discourse by insisting that it should be more than a ‘product’ of legal and institutional arrangements; rights and capabilities should contribute towards a life of human dignity.²⁴

viewed on 04.03.2012.

¹⁷ Amnesty International, *The Netherlands: The detention*, pp. 24, 27.

¹⁸ *Ibidem*, p. 43.

¹⁹ *Ibidem*, pp. 23, 24.

²⁰ J. Verhoef, P. C. van Dorst, M. B. van der Kleij, S. Andric, *Vreemdelingenbewaring: strafre- gime*, p. 19-23.

²¹ Polly Vizard, Sakiko Fukuda-Parr, Diane Elson, “Introduction: The Capability Approach and Human Rights”, in: *Journal of Human Development and Capability: A multi-Disciplinary Journal for People-Centered Development*, Volume 12, Issue 1, pp. 1-22, 2011, <http://dx.doi.org/10.1080/19452829.2010.541728>, viewed on 01.08.2012.

²² Martha C. Nussbaum, *Women and human development: the Capabilities Approach*, New York 2000, p. 5.

²³ M. C. Nussbaum, *Creating Capabilities*, Harvard University Press 2011, p. 65.

²⁴ P. Vizard, S. Fukuda-Parr, D. Elson, “Introduction: The Capability”, pp. 3-4.

Using the Capability Approach as a measure of quality of life in the context of this article allows us to concentrate on the capability space which is made available to irregular immigrants by the Dutch immigration policy. What are irregular immigrants actually able *to do* and *to be* within this context? Does the Dutch Immigration Policy allow a life in dignity, or a life of merely survival? Martha Nussbaum proposed a substantial list of ten Central Human Functional Capabilities as the constitutive parts of a life in dignity.²⁵ It is this list of human endowments which is used within the scope of this evaluation. There is a close relationship of content between the capabilities on Nussbaum's list and the human rights recognized in the Universal Declaration and other rights instruments, covering political and civil rights, and economic and social rights.²⁶

Two conditions complicate the process of monitoring. The first condition is inherent to Nussbaum's substantial list of capabilities. The natures of some of these endowments are hard to convert to quantitative data, and require intensive and time consuming qualitative research. Secondly, as been mentioned already, research among undocumented immigrants is met with obstacles; illegal residents tend to hide themselves in fear of being caught by the police.²⁷ Due to their preference to remain invisible to authorities, the available data is limited and outcomes rarely transcend a qualified estimate. It is for this reason that, complimentary to literature review, the testimony of Billy Walkman is given an important illustrative role within this evaluation.²⁸ The capabilities Billy has at his disposal are for an important part shaped by the Dutch immigration policy. His narratives can be taken as exemplary for the agency of the large number of irregular migrants that seem to be non-expandable by the Dutch immigration regime.

1. Life

Being able to live to the end of a human life or normal length; not dying prematurely, or before one's life is so reduced as to be not worth living.²⁹

No quantitative data has been published on the average life expectancy of illegal immigrants in the Netherlands. Billy tells us: "I came here in Amsterdam with four boys on a ship. I am the only one left. Two have died, maybe of drugs or sickness, I don't know. One has serious brain damage. He doesn't even recognize me anymore."

2. Bodily health

This capability includes general good health including reproductive health; to be adequately nourished and to have adequate shelter.³⁰

The average medical costs spent per insured Dutch person in 2011 was Euro 3.287,76. In the same year, the costs claimed by healthcare providers for uncovered medical costs of undocumented immigrants were around Euro 229 per undocumented immigrant³¹. The major

²⁵ Nussbaum's list of basic human endowments contains 1) life; 2) bodily health; 3) bodily integrity; 4) senses, imagination, and thought; 5) emotions; 6) practical reason; 7) affiliation; 8) other species; 9) play; 10) control over one's environment, both political and material.

²⁶ M. C. Nussbaum, *Creating Capabilities*, p. 62.

²⁷ Marianne Anna Schoevers, "Hiding and Seeking", Health problems and problems in accessing health care of undocumented female immigrants in the Netherlands, Enschede 2011, p. 18.

²⁸ I have chosen to write Billy's narratives as much as possible in his own words, prioritizing his spoken language above the English grammar rules according to the United Kingdom standard.

²⁹ M. C. Nussbaum, *Women and human development*, pp. 78-80.

³⁰ Ibidem.

³¹ College van Zorgverzekeringen (CVZ), *Zorgcijfersdata* [Healthcare statistics] <http://www.zorgcijfersdata.cvz.nl>, English summary on: <http://www.cvz.nl/en/healthcarestatistics/zvw-expenses.html>, viewed on 01.06.2012), 2012; College van

gap between these figures are an indication that irregular immigrants do not receive the same level of treatment as insured Dutch persons. Refugees, asylum-seekers and undocumented immigrants report lower utilization rates, and at the same time they suffer more health problems.³² Complaints that irregular immigrants brought to the GP were more serious than those of regular patients.³³ Billy explains: “When you do not have an [health]insurance, you won’t get the services you need. Unless somebody with documents will stand in front of you.” Doctors of the World the Netherlands, an international NGO which aims for equal access to healthcare, reports that 50% of the irregular beneficiaries of their program in 2011 did not have access to a general practitioner (GP), and therefore no access to care other than emergency care. However, after mediation of Dutch speaking health professionals, almost all of them were – leaving aside the limited number of health care providers that refused to take care for undocumented immigrants at all – quite easily registered at a GP practice. The reason why immigrants could not organize access themselves is reported to be due to the fact that they are uninformed about their right to healthcare, feared being reported to the Dutch authorities, or had been refused on former occasions: 29% of the patients seen by Doctors of the World the Netherlands were told that unless they paid cash they could not be cared for by that particular health institution.³⁴ Actually, only a small number of health professionals are aware of the regulations on healthcare to undocumented immigrants. Additionally, a difference in willingness to assist irregular immigrants can lead to seriously delayed care, and causes unequal distribution of illegal patients among health care providers and institutions.³⁵ Billy explains: “What is most important when you have no rights because you have not staying permit is the fact that your bodily health gets damaged. The body is in need of food, soap for hygiene, and when you are ill, it needs medication. Without money, you can’t have these.” Most reported health problems appear to involve infectious complaints, mental health, and dental problems.³⁶ Costs for dental care are not reimbursable for health care providers. A study among 100 undocumented women found reported 51% dental problems.³⁷ As for Billy, he only has his front teeth left. After getting a mouth infection during one of his detentions, thirteen teeth had to be extracted.

In 2011, 48% of the visitors of the consultation hours of Doctors of the World in Amsterdam Southeast reported mental distress. Many more reported psychosomatic problems, such as chronic headaches, back pain, and constipation. Research among illegal immigrants in Rotterdam in 2009 reported depression and stress to be the most severe medical problems, and observed a correspondence with the severity of complaints and the duration of illegal stay: the longer illegal immigrants stayed in the Netherlands, the more severe were

Zorgverzekeringen (CVZ), 6^e monitor Regeling Financiering Zorg Onverzekerbare Vreemdelingen, CVZ, Diemen, 2012.

³² Annette A. M. Gerritsen, Walter Devillé, F.A. van der Linden, Inge Bramsen, Loes H. M. van Willigen, Johannes E. Hovens, Henk M. van der Ploeg, “Mental and physical health problems of, and the use of healthcare by, Afghan, Iranian and Somali asylum seekers and refugees”, in: *Nederlands tijdschrift voor Geneeskunde*, <http://www.ntvg.nl/publicatie/psychische-en-lichamelijke-gezondheidsproblemen-van-en-gebruik-van-zorg-door-afghaanse-ir/volledig>, Issue 150, Week 36, 2006. p. 2; A. Schoevers, Maartje J. Loeffen, Maria E. van den Muijsenbergh, Antoine L. Largro-Jansen, “Health care utilisation and problems in accessing health care of female undocumented immigrants in the Netherlands”, in: *International Journal of Public Health*, Volume 55, Issue 5, 2010, pp. 422, 427.

³³ M.H.C. Kromhout, H. Wubs, E.M.Th. Beenackers, *Illegaal verblijf in Nederland*, WODC, Den Haag 2008, <http://www.wodc.nl/onderzoeksdatabase/1631a-literatuuronderzoek-illegalen.aspx?cp=44&cs=6799>, viewed on 07.04.2012, p. 50.

³⁴ Pierre Chauvin, Marie-Camille Mestre, Nathalie Simonnot, *Access to Health Care for Vulnerable groups in the European Union in 2012*, Médecins du Monde, France 2012, p. 8.

³⁵ M.H.C. Kromhout, H. Wubs, E.M.Th. Beenackers, *Illegaal verblijf in Nederland*, p. 54.

³⁶ *Ibidem*, p. 53.

³⁷ M. A. Schoevers, “Hiding and Seeking”, p. 56.

their complaints of stress and depression.³⁸ Other research shows that the occurrence of mental stress and dysfunctional behaviour are higher among irregular immigrants during and after immigration detention.³⁹

C. Kelk, Emeritus Professor of criminal and penitentiary law, states that “the [Dutch] detention situation is one of great powerlessness, lawlessness, and dependence. It contains many oppressive elements, which generate a high degree of psychological frustration and resentment among those who are subjected to it”. Australian research reports an association between the length of time in detention and the severity of mental disorder. Prolonged detention is regarded to be a major factor to mental deterioration, despondency, suicidal tendencies, anger, and frustration.⁴⁰

Undocumented immigrants live mainly in districts which are regarded as being socio-economically poor, and which are characterized by a relatively large number of legal immigrant residents.⁴¹ As far as is known, they mostly live with family members or acquaintances, or in hostels or private rented accommodation. According to the available literature, undocumented immigrants who rent in the private sector live in rather poor circumstances, subject to overdue maintenance and a lack of hygiene. The prices paid for a house, a room, or a bed are well known.⁴² Billy states: “Shelter is a real problem. Everywhere you go, you have to pay. You have to pay to sleep in somebody’s hallway, or even their storage box. At this moment, I pay 50 Euro to sleep in a chair in somebody’s living room, a room which is used by many other guys.” Concluding, the right to healthcare and shelter of irregular immigrants cannot be detached from the prohibition to raise an income through legal work. The inability to raise an income seriously risks depriving irregular immigrants of the capability to take care of their health and safety. The prohibition to work seems to work as a *corrosive disadvantage*, a concept introduced by Wolff and De-Shalit, referring to a deprivation which leads to failure in other areas.⁴³

3, Bodily integrity

Being able to move freely from place to place; having one’s bodily boundaries treated as sovereign, i.e. being able to be secure against assault, including sexual assault, child sexual abuse, and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.⁴⁴

Quantitative research data on the freedom of movement of undocumented immigrants date from 2008, and relate to the European context. Sixty percent of the respondents reported limiting their movements or activities because of fear of being arrested.⁴⁵ Billy states: “I avoid many places, like the shopping centre, because if the police sees me, they will put me in detention. They told me so, and they did it nine times before. I do not fight or do any criminal thing. If only they see my face, it is enough to put me inside detention. (...) I also fear the place where I am sleeping. There are many men there. They smoke, drink alcohol, and stay up late. I am worried the neighbors will call the police. They will put me in detention again.”

As for the safety of undocumented immigrants, their situation is often reported to be vulnerable for abuse and oppression, but few data are known. Counselors in Amsterdam South

³⁸ M.H.C. Kromhout, H. Wubs, E.M.Th. Beenackers, *Illegaal verblijf in Nederland*, p. 49.

³⁹ Amnesty International, *Vreemdelingendetentie in Nederland*, p. 6.

⁴⁰ Ibidem.

⁴¹ M.H.C. Kromhout, H. Wubs, E.M.Th. Beenackers, *Illegaal verblijf in Nederland*, WODC, Den Haag 2008, p. 4.

⁴² M.H.C. Kromhout, H. Wubs, E.M.Th. Beenackers, *Illegaal verblijf in Nederland*, pp. 28, 29.

⁴³ M.C. Nussbaum, *Creating Capabilities*, p. 43-45.

⁴⁴ M.C. Nussbaum, *Women and human development*, p. 78-80.

⁴⁵ P. Chauvin, L. Parizot, N. Simonnot, *Access to healthcare for undocumented immigrants in 11 European countries*, 2008 survey report, Médecins du Monde, France 2009, p. 102.

East state that undocumented women report that they have performed unwanted sexual acts in exchange for accommodation. Of the women who were registered in 2006 as victims to human traffickers (due to cross-border human trafficking, and after arrival in the Netherlands), 63% lived in the Netherlands without a residence permit. Reported numbers probably constitute a major underestimation.⁴⁶

Talking about his opportunities for sexual satisfaction, Billy laughs. “I have no privacy. There is no way I can meet a woman. I cannot take any visitor to the place I am staying, because it is not my home. And for the ladies: they only have a look at my ten Euro haircut and they will turn away. They like styles. I cannot talk to them.”

4. Senses, imagination, and thought

Being able to use the senses, to imagine, think, and reason – and to do these things in a “truly human” way, a way informed and cultivated by an adequate education, including, but by no means limited to literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing self-expressive works and events of one’s own choice, religious, literary, musical, and so forth. Being able to use one’s mind in ways protected by guarantees of freedom of expression, with respect to both political and artistic speech, and freedom of religious exercise. Being able to search for the ultimate meaning of life in one’s own way. Being able to have pleasurable experiences, and to avoid non-necessary pain.⁴⁷

As far as quantitative data goes concerning this capability we can only refer to the high rate of mental health problems which were reported.⁴⁸ Billy tells us: “The situation to be without rights because you have no documents causes brain damage. Because you cannot think in one direction, your thoughts are ever changing from one thought to another. Especially at night, when I cannot sleep because my brain runs overtime. It is because you cannot solve your own problems, you always need others. When you wake up in the morning, you don’t even know where to go. You are a useless person. You are a crazy man, walking the streets without going nowhere.” Like Billy, Kromhout relates the high occurrence of mental distress to a position of dependency, fear, and insecurity about the future.⁴⁹ Billy perceives his life as being deprived of adulthood. I recall him saying: “You now, when you are mature, you should be able to take care for yourself. But you cannot. You are always in need, you always need help. (...) The brain is always searching: where am I going to get life. And it makes the brain tired, that’s what damages a lot of people. You are trying to make something, but it will always collapse. You are still losing, losing everything. It’s like picking an apple. Everyone can do it, but when you do it, it falls, each time you try. In the end, you are not trying to pick it anymore.” It is not unlikely that the long time which Billy spent in detention has contributed to the emergence of these feelings of incompetence and frustration.

However, being pressured to say something about his talents, Billy said: “I am good with technical machines. Back in Liberia, I did have some training to become an electrician, just like my father. A couple of years ago, I had a black job at a large company. Within a month I became a *table chef*. Unfortunately, it all collapsed. When you get the opportunity, you can break out. People can see the qualities which are within you. But if you are not allowed to work, everything remains inside you. Like my friend. We came here together, on the same boat. He was a really good football player. ADO Den Hague [professional Dutch soccer club] selected him and trained him for some time. But his asylum was refused. Now, he can do nothing anymore. He lost his mind. The conditions made him bleed to death, although he is still alive.

⁴⁶ M.H.C. Kromhout, et al., *Illegaal verblijf in Nederland*, pp. 36, 37.

⁴⁷ M.C. Nussbaum, *Women and human development*, pp. 78-80.

⁴⁸ M.H.C. Kromhout, et al., *Illegaal verblijf in Nederland*, p. 45.

⁴⁹ *Ibidem*.

But if he was given the opportunity in the beginning, by now he could be driving a Mercedes Benz with a golden watch on his wrist.”

Not all undocumented immigrants and educational institutions are aware of the right to education for children without papers, but the majority of undocumented children do attend school. However, specific qualitative data are not provided. Studies carried out in 2002–2004 show that a number of children who were living illegally in the Netherlands struggle with their own psycho-social problems and/or with their parents’ mental problems. Among undocumented pupils being absent from school occurred relatively often, resulting from psycho-social and other problems and changing houses. It is probable that a number of children who are living illegally in the Netherlands do not go to school at all.^{50 51}

Billy’s lack of income influences his freedom of religious exercise, as well. He states: “I believe in God, everything is in his hands. I would like to go to church every Sunday. But, church involves a lot of things. You need clean clothes, for example. And you need small money to contribute to them. You can’t attend a ceremony without making a contribution. (...) Sometimes I get invited to a baptism at the church, but the situation will not allow me to go. People will give you a drink, they will give you meat, but they will expect you to contribute something. It puts me to shame to go without these things. So, my situation does not allow to move with them.”

5. Emotions

Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one’s emotional development blighted by overwhelming fear and anxiety, or by traumatic events or abuse or neglect. (Supporting this capability means supporting forms of human association which can be shown to be crucial in their development).⁵²

Emotions are hard to be captured in quantitative numbers, data on the emotional development of undocumented immigrants in the Netherlands were not to be found, except for the high occurrence of stress among undocumented immigrants and detainees, as has been stated above. English and Danish research among refugee children up to 18 report that post traumatic and stress related symptoms are more frequent within this group and show that these complaints increase the longer children stay in refugee centers or when they need to regularly change houses.⁵³ When Billy was first asked about his emotions, he mainly talked about the emotions of others, like the state of mind of the man who he’s staying with: “From the emotions of others, their body language, you can see if people want to help you or not. For example the guy where I am living. He is not fit. He cannot refuse people. He helps them, but his body language shows that he does not want it. It stresses him out. You know, all these people, his water bill will go high.” Asking him what impact this has on his emotions, Billy said: “What it means to me, is that you are preparing yourself, always. I have some emotion in me, because I don’t want anything to go wrong. I don’t want to do anything which puts him off. You are scared, because maybe the police is coming. I cannot face anymore police disturbances anymore. It panics me.”

⁵⁰ M.H.C. Kromhout, et al., *Illegaal verblijf in Nederland*, p. 58.

⁵¹ The right to education and the living conditions of children without documents is inadequately covered within the scope of this article.

⁵² M.C. Nussbaum, *Women and human development*, pp. 78-80.

⁵³ Joke Van Wieringen, Bram Tuk, “Migrantenjeugd en gezondheid”, in: *Migratie en Gezondheid, Feiten en Cijfers*, Utrecht 2011, p. 43.

Being asked about love, Billy expresses: “You have to love everybody, but in this modern world there are people who don’t like you. And others do want to see you. So, it’s balancing. I do not go to places where people don’t like me. I always try to avoid getting problems. You know, anyone can call the police if they don’t like you, and if they know I don’t have a staying permit.” Being asked about anger, Billy tells: “Sometimes I feel anger, not to someone, but on myself. Like when I was sleeping in a storeroom. Everybody is inside, but you have to hide yourself in the dark. You need to control your brain, otherwise you might even harm yourself. Like last year, an Iranian man facing the same conditions threw petrol over his body and burnt himself at the Dam square.”

Asking Billy about who is near to him, Billy expresses: “At this moment, nobody is close to me. Before, I had my girlfriend, I had my baby boy. Now, the people from the organizations which help me are closest to me.” The state of being constantly prepared to avoid trouble, to run if necessary, seems to push away Billy’s ability for emotional attachment. Again, Billy’s prolonged stay in detention might have an amplifying effect. The mental distress and dysfunction caused by prolonged detention raises the risks to the emotional capability of irregular immigrants.

6. Practical reason

Being able to form a conception of the good and to engage in critical reflection about the planning on one’s life. (This entails protection for the liberty of conscience).⁵⁴

In the absence of any data, I refer to the testimony of Billy. At first, Billy explains how he thinks about right and wrong: “To pick a good choice is up to myself. To pick a bad choice as well. As a mature person, you have to know what’s wrong or right. People can advise you, but you have to make the right decision. When you can control yourself, automatically you get choice.” Immediately, he goes on explaining the impact of living as an irregular immigrant on one’s sense of right and wrong: “This is what I mean: when people cannot control their brain, they cannot pick the right choice. When a question comes, and you cannot sit down and think about it, you might give the wrong answer. Some people will take a bad choice, just to survive. When people are damaged, they will say ‘I had no choice’.”

Independent of whether one comes with or without documents, migrating into another culture will be unsettling. Like Billy expresses: “Things were easy in Africa. I could go and get a fish from the river. But here you cannot. In Africa, you can go to the bush, pick some apples and sell them on the market. Here, you are not allowed to sell things without a license. Things that were normal, will cause problems here. And what’s not allowed, is wrong. What was a good habit in Africa, is a bad habit here.” However, Billy shows that being undocumented does make things more complicated: “Being undocumented, you will do things bad. Because what you need to do to survive is not allowed. Like where I am sleeping, with six people in a one bedroom apartment. When the police comes, they will arrest us, because it is not allowed. But I cannot sleep outside as well, because it is not allowed. So what am I going to do?”

7. Affiliation

A. Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another and to have compassion for that situation; to have the capability for both justice and friendship. (Protecting this capability

⁵⁴ M.C. Nussbaum, *Women and human development*, pp. 78-80.

means protecting institutions which constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech).

B. Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails, at a minimum, protections against discrimination on the basis of race, sex, sexual orientation, religion, caste, ethnicity, or national origin. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.⁵⁵

In the absence of research data, I refer to the testimony of Billy. Billy mentions that there are people who are dear to him, but the fact that they do not share their day-to-day life with him makes it a constant struggle to keep them close. According to Billy, he lost his son because he could not take care of him and his own mother. Although he tries hard to stay in contact, his efforts seem to be in vain. His mother is still alive. “Some people take care of me, but I would like to take care for them, as well. But I cannot. This disturbs me. Like the lady who is taking care for my mother. I would like to thank her, send her something, but I don’t have the chance. And they do not understand. They know I am in Europe, and that everything is there. So why don’t I help them? I had to explain them that I am not allowed to work, and that I am always in detention. She cannot believe me, but she has to believe me. It is the truth. I cannot do anything.” Asking Billy whether this affects his relationship with his mother, he says: “It does not disturb our relationship. She is always happy to hear my voice. She wants to see my face again. That is what I am fighting for, for her to see me again, and to see my son again.”

Contact with people that do surround Billy in his day-to-day life is difficult, according to Billy. “There is something here, in the *Bijlmer* [Southeast area of Amsterdam]. When people get to know that you don’t have status, they will not value you. They do not want to mix with me, others are always above you. (...) In the African community, I am not equal to someone with papers. In conversations, they always think that they are right and I am wrong. They always show me that I am below them. It makes you annoyed with yourself and with them. For example, if I am with someone with a Dutch passport, he can eat and drop his plate, and no matter how young this person is, he can make me clean it. And you have to accept, you can’t tell them that we are the same. I have to know how to live with them, but they will never know how to live with me. They don’t have to.”

How about contact with other undocumented people? Billy tells: “It is also difficult, because we all have problems, and we don’t want to burden each other. It isn’t friendship that brought us together, it is the conditions that brings us together. We live, but there is no happiness in our lives. We have to take care of ourselves. I put my towel somewhere, and it is used. I put my bread or soap somewhere, and it is gone. I don’t think I have real friends. I know people, but when it comes down to help, they don’t know you. And I have nothing to offer to them, only my advice when I can see they go through the same problem.”

How about contact with the Dutch community? Billy tells us: “Within the Dutch community, discrimination is everywhere. Some people do not even like to speak to me, because I am a black man. I understand, discrimination is a human condition. But in the end, we are all human.” Billy continues: “When it comes to respect, it comes down to people who are really sensible. The majority will not respect you, especially the Africans, they treat you any way they like. And you can never call the police when they cross the line. Sometimes I prefer to associate with white people, because they have their country. Only a country-owner can do something for me.”

⁵⁵ Ibidem.

Billy's affiliation with others is for an important part narrated in terms of their (in)ability and (un)willingness to help him. This is likely to be reinforced by the fact that he is ultimately depending on others to survive, while he hasn't the resources to help others in return. Billy's perception does not allow him to build relationships which are reciprocal, and the community around him responds negatively to that in return.

8. *Other species*

Being able to live with concern for and in relation to animals, plants, and the world of nature.⁵⁶

No relevant data was found. This endowment is not one which is associated with undocumented immigrants at first hand. Actually, it cost Billy quite some time to respond to this endowment. After a moment of initial silence, Billy responded: "Of course we are living with Mother Nature, so it must be important to you. It's normal, you cannot change it. Mother Nature can help humans, but she also fights them. If you do not have a place to sleep, a heavy rainfall, or the cold temperature, it can kill you. If you have no place to run to, to protect yourself, Mother Nature can kill you and you cannot fight her. So, I don't understand why the IND puts people on the street when they know we cannot fight Mother Nature. They do not give us a chance to secure from Mother Nature."

9. *Play*

Being able to laugh, to play, to enjoy recreational activities.⁵⁷

There are a small number of Dutch organizations in Amsterdam, most of them church-based, which support undocumented immigrants, and organize activities with, through and for irregular immigrants on a regular basis. These activities are educative or recreational, often accompanied by a meal and an opportunity to meet with others.

The Dutch detention regime has been criticized by various parties for the absence of educational and recreational activities.⁵⁸ The Dutch government shows no intention to reverse this policy 'since it does not contribute to their return'.⁵⁹ Amnesty International points out that the provision of daily activities for detainees is first and foremost to guarantee respect for their human dignity and to make life in detention bearable.⁶⁰

Billy states: "Of course I laugh sometimes, but it does not mean that I have access to happiness. You can laugh, you can enjoy, but it is not real. You are not in a position to face enjoyment." Billy stresses that he has no money to do any recreational activities. When asked about activities which do not necessarily involve any financial costs, like football, Billy tells: "To play football is possible. Sometimes I see fellowmen playing on the street. I can join them, but I don't feel real happiness on these things. Because my mind is telling me: 'If your leg breaks, you can't go to hospital, and you cannot walk'. I need my legs for transport. I don't have money for other transport. So, something in my mind is blocking me. You are stuck, every time you want to do something." Billy was asked whether he did any activity which is not directly related to survival. Billy told that he regularly spent the day in the library: "you have to choose the easy way. In the library there is no police control. When you play football, you can get a control. I can take shelter in the library. I sit behind the computer.

⁵⁶ Ibidem.

⁵⁷ Ibidem.

⁵⁸ J. Verhoef, et al., *Vreemdelingenbewaring: strafregime*, p. 20.

⁵⁹ Letter from the State Secretary of Justice to the Dutch Asylum Lawyers Association (Vereniging Asieladvocaten en -Juristen Nederland) on 7th of September 2007, Amnesty International, *The Netherlands: The detention of irregular immigrants and asylum-seekers*, p. 20.

⁶⁰ Amnesty International, *The Netherlands: The detention of irregular immigrants and asylum-seekers*, p. 20.

It is a way to get through the day.” Actually, Billy could not assert any activity which was purely recreational.

10. Control over one’s environment

A. Political.

Being able to participate effectively in political choices that govern one’s life; having the right of political participation, protections of free speech and association.

B. Material.

Being able to hold property (both land and movable goods), not just formally but in terms of real opportunity; and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure.⁶¹

Undocumented immigrants in the Netherlands are unable to vote, but they do organize themselves in order to influence policy making. In the past two years, undocumented immigrants have demonstrated on a number of occasions, which caused outrage of some political parties. Police force has been used to end demonstrations of irregular immigrants in order to secure national security. Demonstrators who could not show valid identity papers, were reported to be detained. In almost all cases, the Dutch court judged this measurement to be illegal.

The largest trade union of the Netherlands, *FNV Bondgenoten*, supports domestic worker without residence papers through information and mediation, but the number of memberships remain small. Being informed about their rights and duties they are better equipped to bargain better working conditions. The three most pressing issues, as forwarded by undocumented members of FNV are: 1) access to healthcare; 2) recognition of domestic work as regular work; 3) a work permit which gives them the opportunity to visit close relatives in their home country.⁶² FNV played an important role in contributing to the development of the ILO amendment to enhance the working conditions of domestic workers. Although Dutch government representatives supported the amendment, the Dutch ministry of domestic affairs stated, at the same time, that the Dutch Government was not to ratify the bill.⁶³

As for Billy, being asked about political participation, he replies: “It is impossible for me to be effective in political issues. I never voted in my life. You can use your mouth, but without rights, nobody will listen to you. I know there are specific refugee laws, but they seized that right from me because the IND declared me to be undesirable. I cannot fight the decision of the IND. I contacted Amnesty International, I have contacted the World United Nations in Washington DC, Red Cross International, even a Human Rights Organization in France to which they referred me. But no one is interested in a single case. They cannot fight to get my right for me.” However, the fact that Billy did this interview, and participated in the documentary *Verloren levens* [lost lives] of Kees Vlaanderen, in the beginning of 2012, shows that he did not give up on a better future.⁶⁴ When asked, Billy explains why he is not interested to join the union or demonstrations: “Migrant and refugee organizations tell you that you have rights, even as an undocumented person. But it isn’t that way, because I am not allowed to

⁶¹ M.C. Nussbaum, *Women and human development*, pp. 78-80.

⁶² FNV Bondgenoten, http://www.fnvbondgenoten.nl/nieuws/acties_en_campaignes/gewoon_goed_werk, viewed on 12.06.2012.

⁶³ FNV Bondgenoten, http://www.fnvbondgenoten.nl/nieuws/acties_en_campaignes/gewoon_goed_werk/nieuws/367164_ILOverdrag_huishoudelijk_werk_080611/, viewed on 04.06.2012.

⁶⁴ K. Vlaanderen, *Verloren Levens*, documentaire, HUMAN, 2012.

work. Without work you have nothing. You need income to survive. You have the right to see a doctor, but when you do not have the money to pay the doctor, you have no treatment. I have the right to see a lawyer, but you have to pay to start a procedure. I cannot rent a safe place to live, because I can't afford it. I am always depending. Somebody with papers need to go in front of you. I can see a lawyer, I can see a doctor, but unless somebody with documents is going in front of you, they are not doing anything. Who is going to tell the doctor or the lawyer to do anything? Nobody. They have the concrete power, because nobody tells them to do their work. Especially when you yourself are not able to pay them."

In 2004, estimations suggested that between 65,000 and 91,000 irregular immigrants were working on the Dutch labour market. Researchers expect that the need for (informal) labour-intensive work will increase.⁶⁵ Irregular immigrants work mainly in the hotel and catering industry, the construction industry, the agricultural and horticultural industries, the retail trade and informal domestic work. Studies among illegal workers working in agriculture show that the working conditions are poor and are reminiscent of exploitation: they work without employment contracts, are frequently underpaid, and suffered from periods of unemployment and debt.⁶⁶ While the minimum wage for someone above 23 years is Euro 8,40, Billy asserts that it is not uncommon to be paid Euro 5,00 per hour. Billy did several jobs in the past 16 years, like loading containers or working in the meat industry, but never signed an employment contract. Since he has been frequently detained, Billy does not work for companies anymore. He states: "It is too risk full. When the police comes, you are arrested, and I can't face any more detention."

Fear for another detention limits his employment options to working for private households, which are rarely checked or fined by the authorities. At the moment, Billy has weekly one cleaning job, offering him 25 Euro per week. Occasionally, he has an odd job, like helping people to move. "Last time, I took care for an elderly lady. I worked three hours and got five Euro, it was humiliating, I don't go there anymore. Somebody does you a favor by offering you a job, so they can give you what they want. If you accept it, you accept the conditions."

Arriving at the material resources and property rights that are at Billy's exposal, Billy initially gave an evasive answer: "Of course it's impossible to have a house, a car, or to have big money in my pocket." Billy had to be pressured to explain what he really owned, it was clearly embarrassing for him: "I have self-uses. I have a mobile phone, I have a watch." He was asked whether he has household items, a place to store his belongings, where he could save money, and keep his letters. "That is depending on whether you have a place that you can stay." During the times he could afford a room, it was possible for him to collect some household items. However, each time he had been detained, he had lost most of his belongings, like a mattress or kitchen utensils. At the time of the interview, it turned out that Billy had no wardrobe of his own, no place which he could lock, Billy's belongings fitted within the small backpack he carried around.

Conclusions

The research data available on the agency and functioning of undocumented immigrants in Dutch society is insufficient to draw up well-founded conclusions. With exceptions in the areas of healthcare and immigration detention, academic research among this vulnerable group has been rare. The fact that irregular immigrants are not within easy reach for research purposes does not justify this shortcoming. The issue of immigration and illegal residency has been on top of the Dutch political agenda in the past, so it should only be

⁶⁵ R.P.W. Jennissen, *De Nederlandse migratiekaart*, p. 311.

⁶⁶ M.H.C. Kromhout, et al., *Illegaal verblijf in Nederland*, p. 33.

reasonable that one has the tools and accurate data available to monitor the effects that this legislation has on the (group of) people that are directly affected. The testimony of one man cannot make up for this lack of data, but aims to make it audible that extensive research by social scientists needs to be conducted to obtain substantial and accurate data.

The Dutch immigration policy reduces the capability space available to undocumented immigrants. It is intentionally so, as the government closely links its legislation on irregular stay with its return policy, assuming that marginalizing the life of undocumented immigrants will motivate them to voluntary return to their countries of origin. The Dutch government asserts that the implementation of its immigration policy is within reason and respects the basic human rights of undocumented immigrants. This literature review and the illustrative testimony of Billy Walkman lead to suspicion that this is not the case. Although the Dutch policy on irregular stay facilitates the right to healthcare, education, and legal assistance, these regulations seem insufficient for full accessibility of these rights. The main obstacle is reported to be the lack of income because of the prohibition to work, making undocumented immigrants ultimately dependent on others, both professionals and private persons. The prohibition to work can be seen as a corrosive disadvantage, a type of capability failure which leads to failure in other areas. The inability to raise an income negatively influences virtually all aspects of a meaningful life, like one's capability of bodily health, adequate shelter, to affiliate with others, emotional attachment, and play. It creates a dependency on others that severely disrupts the possibility to build relationships in reciprocity, in turn making people vulnerable to disrespect, discrimination, and oppression.

Another corrosive disadvantage seems to be the detention policy of the Dutch government, which has been developed into one of the principal tools for 'combating' irregular immigration instead of an *ultimum remedium*. As research shows, and Billy's story tends to illustrate, immigration detention has a profound effect on the mental health of detainees, having a negative effect of one's capability of bodily integrity including the freedom of movement, the capability of emotions, senses, imagination, and thoughts.

Although some basic human rights are secured within the Dutch immigration policy, the prohibition of work and the detention policy threaten to undo these rights which are made available to undocumented immigrants, leading to a life that is deprived of those endowments that human dignity requires.

The capabilities approach of Martha Nussbaum allows monitoring of the effects of public policy on diverse facets of life, and allows exposure of types of capability failures that would otherwise be overlooked. It shows that a limited access to some human rights distorts the access to others, such as basic rights to food, shelter, healthcare, meaningful work, political rights, and recreation, which allow people to live a life in dignity. In the beginning of this lecture, the question was raised whether or not the Dutch government has a duty to ensure that irregular immigrants living within the Netherlands can live a life worthy of a human being; a life not of merely surviving but one of human dignity. Nussbaum's capability approach does not touch upon the issue of immigration, and leaves this question unanswered. Up to now, Nussbaum has concentrated solely on the duty government has toward its citizens. In her latest book, Nussbaum briefly comments that immigration is one of the topics that are waiting to be addressed within the capabilities paradigm. Through this lecture, we hope to underline the urgency of this dilemma.

The Outsourcing of Survival: Ethical Problems Regarding the Privatization of Migration and Integration Processes in the European Union

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Abstract

In many countries in Europe entrepreneurs take over the responsibility of the integration process. This paper criticizes a certain type of entrepreneurial role model as promoting a single input agent, only counting profit as its input. The possibility of a non-outsourced, conscience-based model for regulating the integration process is discussed as a possibility and as a stepping stone for critique of the entrepreneurial model's social claims as a whole.

Keywords: migration, ethics, conscience, outsourcing, profit, entrepreneurship

“An ever-present absent object of overpowering attractions inspires an impossible ritual quest for fulfilment. Not incidentally, this is good for business. The Commodity is the capitalist incarnation of the phallus as Master At- tractor. Love may be the light of one’s life, but a toaster is an acceptable substitute.”¹

(Brian Massumi, *A user’s guide to capitalism and schizophrenia*)

When more and more of our administrative processes are privatized and therefore moved from a public governmental or municipal sphere to a private and entrepreneurial one, we might need to reconsider some previously less-regarded problems in both ethics and economics and ethics and migration processes. Business ethics will no longer be striving to keep business proposals ethically cleansed of immoral economic claims but must include social ethics as well. Or is the privatization’s main gain to loosen the moral chains from the state and put the responsibility somewhere else? And is this new sphere even a moral one? Is morality possible in the hands of agents in a single input market system? What the consequences of entrepreneurial economics and the construction of an integration industry might become is what I will try to discuss in this paper. We do know that a migration affects one person’s whole life and often even the following generation.² Therefore a lot is at stake here. We will need a thorough ethical discussion to cope with these questions. This paper is intended as a beginning of such a discussion.

Before reading any further it can be of value if I present my conception of the goals of a discussion in ethics. I am inspired by the words of the Norwegian philosopher Arne Johan Vetlesen who begins his short introductory book *Hva er Etikk* (*What is ethics*) with the proposition that ethical questions always should be grounded in the feeling of something worthwhile being violated (“i en opplevelse av krenkelse”). It is when we feel something is going the wrong way we should aim towards ethics to find ways of criticizing what is wrong. The beginning of a true ethical question is empathy.³

The different process-management systems of our neoliberal age (such as Lean, Kaizen or Six Sigma) form both government and market actors alike today. It gives governments the possibilities and inputs to use private companies to do parts of what used to be, at least in former Social Democratic states as Sweden, the work of the state or, on a local level, a municipality. The process-management systems give the decision makers a tool to cut out parts of their work; work that perhaps could cost less to buy from a market regulated company than to organize themselves. Doing this, the government does not need to take administrative, economic or logistic responsibility for these parts of their actions anymore, but what about the moral responsibility? What happens when action that until recently was ruled by political decisions instead get its inputs mostly from the economic sphere? This is something we need to discuss, especially when these changes happen in a sincerely social and delicate sphere such as migration.

And what is the effect on the companies doing the sometimes quite dirty work? A main interest for the anti-deportation action groups in my home country Sweden has been the exposure and boycott of companies who profit from the demobilization of illegal migrants.⁴ Bus companies are one example among others. This is of course not a way of building bridges between the pro-migration movement and the entrepreneurs – rather a way of burning the few bridges remaining today. But is outsourcing a moral problem? Yes, maybe. During the

¹ Brian Massumi, *A user’s guide to capitalism and schizophrenia* - Deviations from Deleuze and Guattari, Cambridge, MA. 1992, p. 84.

² Stephen Castles, Mark J. Miller, *The age of migration* - International population movements in the modern world, London 1998, p. 19; Herbert Spaich, *Fremd in Deutschland* - Auf der Suche nach Heimat, Weinheim-Basel 1991, p. 182.

³ Arne Johan Vetlesen, *Hva er etikk*, Oslo 2010, p. 7.

⁴ Lena Andersson, Anna Becker, “Inte en sten – inte en rad”, in: *Feministiskt perspektiv*, 2012. <http://feministisktperspektiv.se/2012/06/29/inte-en-sten-inte-en-rad/>, p. 1, viewed on 18.02.2013.

later parts of the second world war/the great patriotic war Sweden sent back some hundreds of soldiers from the Baltic States who had been fighting together with the Third Reich against the Soviet Union. The “Baltutlämning” have since been a sore spot in the Swedish pride but some kind of reconciliation (among Swedes at least) have been achieved through various investigations.⁵ Would this have been possible if it were a transnational company behind the demobilization, let’s say for example Sodexho, G4S or Blackwater? Who would have taken the moral responsibility for the deportations? Is there a difference between saying, “I did this because my democratically elected government told me to” or “I did this because my boss at the company told me to”? This question might not be possible to answer here, but we should keep this in mind while we are discussing some other issues of ethics and migration, especially during the discussion about entrepreneurs and responsibility.

According to belief from current social research, the concept of globalization and our globalized world rests upon a common possibility of free movement. Free movement is thought to be the normality in the western world, even though the attacks of 9/11 have made the movement slower and more problematic.⁶ The flow of migrants today is the most intense ever, and it is increasing every year.⁷ Integration is for these people a prerequisite for social security in the countries and societies becoming their new homes. At the same time the concept of the migrant is something of an ideal for all humans living in the postmodern society. Migration is closely connected to contemporary themes regarding the employable person – a person who is flexible, moveable and changeable. Integrable you could say. And there is a fierce critique of these contemporary themes – not only from a nationalistic and conservative point of view.⁸ The push/pull movement of migration – where a person is pushed from the old home or pulled towards the new one has over time become known for being essentially individualistic and ahistorical.⁹ It has not been the case in the past and, as we can see when a migrant’s family tries to get together inside the European Union, is not the case today either. This paper is particularly interested in the concern for asylum-seekers; not with, for example, the former German *Gastarbeiter* system, even though the difference sometimes is not as easy to pinpoint as it seems. I am not interested in the migration nowadays of retired people from let’s say “Norway to Sweden” or “Sweden to Spain” where no other integration than a simple *Una cerveza por favor* is needed. Nor is my interest in internal refugees that already, although they might be scattered and uprooted from their homes, are integrated into society and culture even after being moved. I am interested in the around 300 people from Pakistan, India and Sri Lanka that died on Christmas Day of 1996 in the waters between Malta and Sicily after a collision.¹⁰ It is among the bodies floating after failed attempts to reach Europe and among the people working illegally after succeeding that we find real ethical questions. These are questions for which we actually have to find an answer.

But what is integration? J.W. Berry presents integration as the migrant being strongly oriented both towards his or her “old” culture and the culture of the new home;¹¹ this enables the migrant to understand the new environment. In this paper I will use ideal integration as a term for a process which creates a citizen that is self-sufficient and accepted in the society into which he or she is

⁵ Lars Gyllenhaal, *Tyskar och allierade i Sverige – Sveriges krigshistoria i nytt ljus*, Stockholm 2011, p. 164.

⁶ Didier Bigo, “Globalized (in)security - the field and the ban-opticon”, in: *Terror, Insecurity and Liberty - Illiberal practices of liberal regimes after 9/11*, London 2008, p. 36.

⁷ Khalid Koser, *International Migration - A very short introduction*, Oxford 2007, p. 1.

⁸ The Invisible Committee, *The Coming Insurrection*, Semiotext(e) Intervention series 1, Cambridge, MA, 2009, p. 50.

⁹ St. Castles, M. J. Miller, *The age of migration*, p. 20.

¹⁰ St. Castles, M. J. Miller, *The age of migration*, p. 84.

¹¹ John W. Berry, “Acculturation as varieties of adaption”, in: Amado M. Padilla (ed.), *Acculturation, theory, model, and some new findings*, West view press for the American Association for the Advancement of Science 1980.

integrated. I do not mean that they need to be assimilated; it just means that they can live in a self-valuable and self-sufficient way in their new home. My concept of integration thus relates to the possibility of a working livable multicultural society. As everyone knows this is a possibility not accepted by all parts of the common European politics today. In my opinion it is the only possibility of the future and also a society in which I myself would like to live and participate. As we have seen, it is easy to condemn the attempts that were made during the 19th and 20th century to create homogenous national states. It did not work, there was a big lack of meaning in the process of doing so, and a lot of people had to die to prove the point. It was during these times that the status of “foreigner” first was used to restrict workers’ rights, and it was during the same nation-building era that the construction of nations demanded that the role of immigrants in society be denied.¹² You could say that it was the beginning of all the ethical problems related to migration that we face today. It would be very ahistorical and not very responsible, to say the least, for an ethicist to deny the huge problems in the creation of a homogenous national state. The nation state carries both a problematic history and a dangerous luggage. It has to be closely and continuously monitored.

To clarify the main purpose of this article I will now try to recapitulate and regroup its central questions and theme. The purpose of this text is to try to understand how a certain type of entrepreneurship – a Schumpeterian version of being an entrepreneur as you will notice further on – affects and can affect the way migrants are treated when arriving to countries in Europe. This is from an ethical point of view but not, for instance, an economic or organizational point of view which would be another possible way to investigate this problem. Instead of a Schumpeterian single-input model of entrepreneurship, where the only valuable input for the entrepreneur is profit, we will study a model of multiple inputs which is grounded in conscience. But first we need to take a closer look at migration.

A contemporary view of migration and the problems migrants face

Why is integration, in the sense I describe it above, so important? According to research in the field of migration there are two factors that can help a migrant succeed easily; first if the culture is very similar, for example someone from Great Britain moving to Australia, second the so-called professional transience, for example me getting a job in Sibiu at University Lucian Blaga.¹³ If neither of these factors is the case – and as I described our example above it is not – the process needs, in my view, helping agents with a broader responsibility. Why? This is something I will describe below when I draw the line between conscience as a broader and profit as a thin, single input. The difference might be between a life of social participation or the alienation faced by the inhabitants of the *bidonvilles*. If we think that a functioning possibility to communicate with the society (through a common language), and the possibility to get a job that gives the person a salary et caetera, both are connected with a workable integration. It is also well proven in recent research that integration is a criterion for mental health and stability and that being a stranger in a new country puts you in a position where you are being met with uncertainty by the inhabitants; as an immigrant you are not a part of the affect-economy that the other inhabitants rely on.¹⁴ The other inhabitants will meet the migrant “mit einer Mischung aus Unsicherheit, Überheblichkeit und Angst.”¹⁵ How well the community where

¹² St. Castles, M. J. Miller, *The age of migration*, p. 48ff.

¹³ *Ibidem*, p. 14.

¹⁴ Sara Ahmed, *Vithetens hegemoni*, Stockholm 2011, p. 65; Parvin Pooremamali, *Culture, Occupation and Occupational therapy in a mental health care context -The challenge of meeting the needs of Middle Eastern immigrants*, Malmö University 2012, p. 14.

¹⁵ H. Spaich, *Fremd in Deutschland*, p. 15.

the migrant arrives can provide a climate in which he/she can flourish has a great impact on their wellbeing.¹⁶

In Sweden there are no societal tests or any language tests for migrants yet, but the education in becoming an integrated Swede is privatized.¹⁷ In the Netherlands the system is totally privatized. The *Inburgeringstest* could be described as the privatization of becoming a Dutchman. All the costs for the tests are to be paid for by the immigrant him- or herself with no involvement of the state.¹⁸ As we can see here the responsibility is moved from the government towards the migrant and the entrepreneurs that make money off the migrant's situation. This is a problem we will continue to discuss in this paper. It is also a continuous discussion in a lot of the European Union member states today. Even though we do not have any tests for migrants in Sweden today, this might change in a very short time, perhaps with the next election to Parliament. Privatization in this context is the process where an activity, for example providing education and accommodation for migrants, that previously has been done by state or municipality, instead is done by a private company. The privatization process is done through outsourcing – the process where a private actor is chosen – often through a procurement of the service. In this process a private company is chosen through bidding, where the lowest bid is the winner, and then gets the contract to provide the service that has been sought for.

What kind of moral involvement should we expect from these entrepreneurs engaged in the integration industry? I will try to propose conscience as a good ethical system to promote a moral involvement in the migrants' situation. The question is: does conscience fit an entrepreneur in a market economy if we stick to Schumpeter's version of the entrepreneur? To investigate this we have to discuss both conscience and the role of the entrepreneur according to Schumpeter. The first question is related to how we describe conscience.

What is conscience?

Conscience is an old and long discussed term in ethics, primarily used by Catholic moral theologians. It can be described as a feeling of right or wrong but should not be regarded as a subjective feeling just manufactured by the individual himself. Events stirring the conscience should not be regarded as a feeling exclusively connected to a group of individuals because they belong to a certain group, et caetera. The conscience is, or should be thought of, as universal.¹⁹ If we feel different from one another in a certain situation, we should also feel the need to discuss this from different angles. It is important to see the possibility of conscience as a moral norm not as a possibility of finding a moral blueprint somewhere inside every person, but as a possibility of a continuous discussion about morality and the feeling of conscience.

It is also important that we see conscience as a feeling, as something in the mind that we can choose to explore or not to explore. But conscience is also a skill. To quote Charles Curran: "Conscience is stimulated in many different ways through parables, stories, symbols, the liturgy, through the example of others as models, and through a myriad of life experiences." If we choose not to use this skill, the conscience will be crippled. The ethical warning system will not work anymore. We will later see what I mean by "single input agent" and how this agent is morally crippled from a conscience- based ethics point of view.

¹⁶ Ignacio Correa-Velez, Sandra M. Gifford, Adrian G. Barnett, "Longing to belong: Social Inclusion and wellbeing among youth with refugee backgrounds in the first three years in Melbourne, Australia", in: *Social Science & Medicine* No 71, 2010.

¹⁷ Jon Weman, *Åtgärdslandet - Arbetsförmedlingens svarta bok*, Stockholm 2011, p. 101.

¹⁸ Ines Michelowski, "What is the Dutch integration model, and has it failed?" in: *Focus Migration* No 1, 2005. See also <http://www.nt2examen.nl/inburgeringsexamen.htm>, viewed on 18.02.2013.

¹⁹ Charles Curran, *The living tradition of Catholic Moral Theology*, Notre Dame 1992, p. 160.

What is conscience then? It is possible to ground this ethical warning system in many ways. It has been used by Catholic theologians, as above, but that does not mean it has to imply a God, or a created world. It could be grounded for example in Kropotkin's thought of mutual aid; the altruistic system created during the late 1800 as a critique of Social Darwinism.²⁰ In a more advanced work we had to discuss this more, now we just have to note that there might be different ways of grounding conscience; both religious and nonreligious. Conscience is a phenomenon that has been continuously discussed in theology and philosophy since Augustinian.²¹ Not everything is clear if we compare conscience-based ethics with the ethics of rights, for example. We do not really know if they can actually work together.²² This might be problematic concerning ethics and migration because a lot of work that has been done in that field has been related to right-based claims. But I do believe that with the use of conscience it is possible to build a conscience-based ethical system. A conscience-based ethical system will in my point of view work with multiple inputs. By not defining what an input is (like pain, money, happiness or such) and instead working towards a broader scheme of feeling moral satisfaction, it is possible to end up in a broader moral fulfilment than what we will find in the single input agent below. But as I have been discussing above, we need more work in the field of conscience before we can be surer of how much we can rely on it. This counts both for secular and religious based ethics alike. The answer to how this ethic of conscience should be arranged is not constructed here, but it could be suggested that it should closely relate to thoughts of altruism. Another possibility is also to use the concept of affect-economy being, by some theorists in migration studies as seen above, what a newcomer in a society lacks. Towards the end of this paper we will return to conscience and how it is possible to integrate it into decision-processes and practical work in state and municipality.

Entrepreneurs as single input agents

The entrepreneur working for a government might have a different input and output than our common government official. Market economy is often seen as a single-input system, where only the financial gain, the profit, is countable as a gain. For example, a good day is shown by your final assets, not your feeling of worth. To save someone might be wrong in a system where profit is the single-input – if you lose time, assets or other, while saving. But of course this is merely an example; most people are, hopefully, more morally advanced than this. One way of describing how to be more morally advanced is through the concept of conscience. A person with a conscience is more morally advanced than an agent in a market economy – but if we use the *homo economicus* as a model of man, the financial system will try to convert all its participants into single input agents, and in the long run the system might make persons change. A difference in narrow and wide responsibility can be seen here, where wide responsibility is viewed as conscience.

A true entrepreneur must lack conscience. By saying this I do not mean that all people that are working in entrepreneurial circumstances lack conscience. But J. A. Schumpeter, the founder of the entrepreneurial view in economics, tells it to us like this; in trying to make us understand what a plausible capitalism is, he says that it must be grounded on the single input of profit. Otherwise it is not effective.²³ A non-effective entrepreneurial attempt would be illogical in a system with a single input of profit. The only thing the entrepreneur can do is to try to make as much profit as possible. From Schumpeter we can also draw a very interesting fact

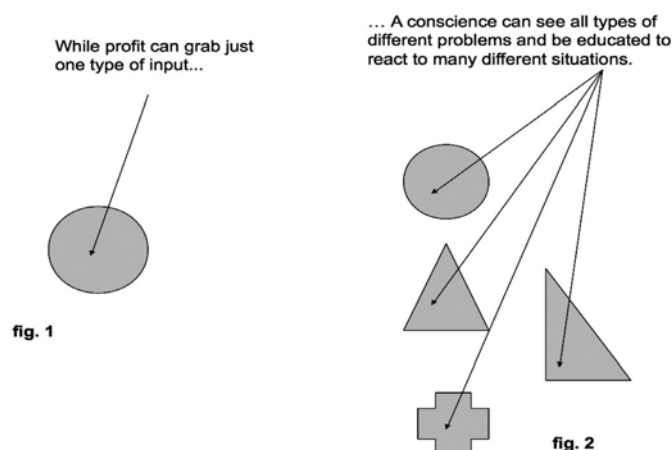
²⁰ Peter Kropotkin, *Mutual aid: A factor of evolution*, New York 1972.

²¹ Paul Strohm, *Conscience - A very short introduction*, Oxford 2011, p. 9.

²² P. Strohm, *Conscience*, p. 76.

²³ Joseph A. Schumpeter, *Capitalism, Socialism and Democracy*, London 1966, p. 73.

about capitalism and entrepreneurs. It has to be “creatively destructive” – to gain more profit it has to tear down a system that existed beforehand. This is what Schumpeter calls “the process of creative destruction”.²⁴ Important here is to pinpoint that the entrepreneur has no interest in valuing the older system in any other way than how he or she shall change it to earn more profit. Which does not mean it is more effective or better for the people otherwise affected by it. Single input does actually mean single input as you can see illustrated in the picture below (in fig. 1). Even if the entrepreneur would feel that what he or she is doing is morally wrong – if it means gaining maximum profit the entrepreneurial system would say that it is actually the right thing to do. This calls for moral problems in a variety of different ways. If we want the Schumpeterian entrepreneur to act morally we have to put profit behind the moral claims. There must be a way for the entrepreneur to gain money in doing a job that is good for all people included, not just themselves and their profit. Or we have to choose an entrepreneur that cares less about profit or includes more inputs (fig. 2). This is something that is not possible from Schumpeter’s point of view. But what about the customer? Is not the satisfied customer a key issue in capitalism? Yes. But why? We will discuss this in the upcoming paragraph.



What is a satisfied customer? It is something very different from a clear conscience. In the relation between a customer and a person that provides a service, it is possible to see a correlation between ethical behaviour from the provider and the satisfaction of the customer.²⁵ And satisfied customers are directly related to the outcome of the business. A satisfied customer comes back a second time and therefore is a reliable source of profit for the entrepreneur. The aim is not to clear the entrepreneur’s conscience regarding anything else than the conscience towards his or her investors or accountants. But isn’t it the government that is the customer in the migration scenario? Yes, probably. And in this case the government does not take the personal consequences of the integration process in the same way as the migrant does. There is a “by proxy” relationship here that distorts the moral view and makes it more advanced than an ordinary transaction between an entrepreneur and a customer. There might, for example, not be a second time for this customer if unsatisfied. A government might end a contract with an entrepreneur that does not act according to law or moral – but we cannot be sure that this changes the situation for the hundreds or maybe thousands of migrants that already have had to use the company for integration services. For them years might have passed

²⁴ J. A. Schumpeter, *Capitalism*, p. 83.

²⁵ Sergio Román, Ruiz Salvador, “Relationship outcomes of perceived ethical sales behavior: The customer’s perspective”, in: *Journal of Business Research*. No 58 (4/2005).

that is not possible to compensate for – not even in the juridical sense because the entrepreneur can always declare bankruptcy and thus be freed from guilt in the market economy. It seems therefore that entrepreneurs, working in this single-input way, might create an outcome that could be very dangerous from the migrant's point of view.

Here we can also find another problem – the problem of reciprocity. A customer (for example in our case the migrant studying a European language because language skills are needed to gain citizenship or at least to be integrated into the society) often has a direct relation to the entrepreneur that provides the service. If I buy a pair of trousers in a shop and they come with some kind of problem I can go back and claim a new pair. But the migrant is not really a customer in the same sense. He or she gets the services because the state or municipality has outsourced it to a company that provides it. The real customer, in a legal sense as seen above, is the state. This makes it really hard for migrants to complain in many different ways. First, are they really subjects of the state? How much power do they have to address the state and tell them that the education they get is not good enough? That it lacks something? Do they know that they can complain and how to do this in an effective way? The position where the migrant is placed in the system is a very tricky one. It is very easy for them to be misled about services that they are actually entitled to by law.

As we can see, there is a problem with an entrepreneurial model that only accepts profit as an input – what I have chosen to call a single input agent. But could we perhaps have other qualification criteria that guide the entrepreneur to value more inputs than just profit alone? Yes, this might be possible and could be done in two ways. The first way is to challenge Schumpeter's view of the entrepreneur by making other inputs than profit worth something. This could be done for example through education and might succeed, even though it would be a slow process. The other way is through the procurement criteria. The state or municipality could, through the criteria for awarding the procurement, be very clear in what kind of services they actually seek. Thus providing the entrepreneur with what we could call a semi-conscience criteria that are so strict that the problematic situations described above do not appear. This puts the responsibility in the arms of the contracting agent not the provider of the service. One way that has been used by venture capitalists to gain greater (in their case economical) control of entrepreneurs is through shared ownership.²⁶ If a state or municipality wants to gain the control over entrepreneurs in the integration industry this might be one of the ways to act in the contemporary economy. Through this sort of shared ownership a possibility arises to implement a system with more than one input, thus forcing the company to accept more inputs than just profit. Of course these inputs would have to compete with profit; that is just what the change is all about.

Another way to act, if it is possible to supply services for migrants without craving a profit, could be closer to a possibility to try to integrate conscience into the working processes in an organization funded by state or municipality. Conscience would in this case be integrated through a continuous discussion between workers and between the recipient migrants. What are the needs and how could they be met? How can we, with the fixed resources given to us through tax funding, create education and integration that works in a suitable way for both parties? Of course this is just the sketching of a model of conscience-related decision-making that needs more work and discussion before it can be presented. But it is still clear that the possibilities to meet the migrant's needs will be more likely to succeed than in a system that works through single-input.

²⁶ Rebecca Strätling, Frits H. Wijnbenga, Graham Dietz, "The Impact of contracts on trust in entrepreneur-venture capitalist relationship", in: *International Small Business Journal*, No 30, (8/2011)

Conclusions

The main objective of this paper is to show that entrepreneurial systems might cripple the feeling of conscience through the single input of profit. A conscience-based ethic could be used instead when dealing with questions of migration and integration. Here we define conscience preliminary as an inner rejection of ethically repugnant behaviour. I also define it as both a feeling and a skill. As a skill it gives us possibilities to try to change how we feel about certain things when we suddenly understand our moral feelings being less sensitive to important ethical questions. This is both a personal and a social phenomenon and has to be treated as such. The conscience needs more than one input and is therefore more advanced than the model the market economy uses, the *homo economicus*. However, continuing definitional work must be done to pinpoint ways of detecting and discussing conscience-based inputs.

The introducing quotation from Massumi's guide to the contemporary critique of capitalism as it has been formed by Deleuze and Guattari tells us something about the system in which the outsourced integration process exists. It is a system that, according to some, lacks true love and that puts the new piece of kitchen equipment in front of our relations to living human beings. Even though this might be a rather radical view of seeing the contemporary economic society I think it is worth meditation on these questions once in a while. If some parts of it are true it must guide us when we choose which system to apply in socially important processes, especially if we put ourselves in the position of the migrant.

Refugee Rights and Global Justice in Religious Ethics

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Problems concerning the meaning and implementation of refugee rights have been discussed with great intense within recent political philosophy. In her book on *The Rights of Others* Seyla Benhabib has argued that universal human rights should include not only persons with citizenship in sovereign states. All humans have rights and should be equally treated in virtue of their common humanity, not in virtue of citizenship. Therefore migrants and refugees should not be excluded from democratic processes in their host states. We should accept a human right to political membership as an important part of cosmopolitan federalism.

The rights of immigrants and refugees can be understood as a part of a theory of global justice. As Martha Nussbaum has shown in her book on *Frontiers of Justice* there are theoretical problems related to efforts to elaborate such a theory of global justice if we take our starting point within the social contract tradition. Here those persons who are supposed to reach an agreement under the veil of ignorance are supposed to be rational beings roughly equal in power. However, the subjects of justice include all humans. A theory of global justice which includes refugee rights should have a different starting point. The capabilities approach is an interesting alternative, and a principle of equal treatment and respect is important.

In this article a theoretical perspective on the rights of immigrants and refugees will be developed in a critical dialogue with Benhabib's discourse ethics and Nussbaum's capabilities approach. Of particular interest is whether a theory of global justice, which includes the rights of immigrants and refugees, presupposes a kind of cosmopolitanism and a revision of our understanding of state sovereignty. My thesis is that the principle of equal concern and respect is possible to defend as a primary principle, even if we respect borders between sovereign states. The main task, however, is to argue that human rights are moral imperatives to take seriously by all states in their process of self-legislation.

A main purpose of this article is to examine the contributions to these theoretical issues concerning refugee rights and global justice which have been given by two prominent representatives of different kinds of religious ethics. The Muslim philosopher Abdullahi Ahmed An-Na'im has in his interesting book *Muslim and Global Justice* discussed the contribution of Islam to a rights based theory of global justice. He is arguing in favor of a universal theory of human rights, even if he maintains that there are different arguments within various cultural contexts for the justification of these rights. One of his ideas is that this universality of human rights presupposes the possibility of global citizenship as the basis of equal treatment of all humans.

This theory will be critically examined and compared with the position taken by the Catholic political theologian David Hollenbach. In his book on *Refugee Rights* the protection of human rights of refugees and internally displaced people is defended from a natural law position. The pluralism across cultures and religious traditions should be respected, but universally it is possible to defend the dignity of all persons. This means that fundamental rights of refugees, such as the right to freedom of movement, can be affirmed on grounds internal to

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http://www.ep.liu.se/ecp_home/index.en.aspx?issue=97.

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different traditions. However, in order to implement these rights it is necessary to question the sovereignty of the national state and to promote a responsibility to protect. This is a thesis that I will argue against in my article.

The right to membership

In her influential book on *The Rights of Others* Seyla Benhabib has made quite clear that transnational migrations make us aware of a dilemma at the heart of liberal democracies. On the one hand we agree upon universal human rights, including the rights of refugees and aliens. The international human rights regime recognizes a right to emigrate, a right to enjoy asylum under certain circumstances, and a right to nationality. These are universal rights of all individuals as far as they are human beings, independent of whether they are citizens or not.¹

On the other hand we regard the democratic sovereignty of individual states to be important. This sovereign self-determination of each state includes its right to control its border as well as to monitor the quality and quantity of admittees. The national state has to make its own decision to grant entry to immigrants and to uphold the right of refugees. Even if the right to seek asylum is recognized as a human right, it is obvious that the obligation to grant asylum can be jealously guarded by national states as a sovereign privilege. Thus there is a tension between universal rights and sovereign self-determination.²

According to Benhabib this can be described as a paradox of democratic legitimacy. The democratic sovereign draws its legitimacy both from its act of constitution and from the conformity of this act to universal principles of human rights. At the same time there is often a tension between the commitment to these universal rights and the will of the people as expressed in the act of national self-legislation. Democratic states require borders, which means that there is a difference between citizens and residents who do not enjoy full citizenship rights. In this situation the rights of refugees, migrants and foreigners need to be negotiated in a tension between universal rights and the sovereign self-determination.³

Seyla Benhabib gives a sharp analysis of this dilemma in a critical dialogue with Immanuel Kant and his vision of cosmopolitan rights in *Zum Ewigen Frieden*. She is also inspired by Hannah Arendt and her critique of totalitarianism and the nation-state system in *The Origins of Totalitarianism*.⁴ In accordance with Arendt she argues that all human beings have “a right to have rights” and a right to belong to some kind of community. In order to respect these rights we need to reconsider different models of nation-state and democratic sovereignty, according to Benhabib.⁵

The main thesis of Benhabib is that a theory of global justice today should incorporate a vision of just membership. We should accept a human right to political membership, which means that we should respect the claims of immigrants, refugees and strangers, even if they are not citizens. According to Benhabib the status of alienage ought not to imply that a person’s fundamental human rights are not respected. Instead we should recognize the claim of refugees to first admittance, a regime of porous borders for immigrants, the right of every human being to be a legal person, and the right to citizenship on the part of the alien who has fulfilled certain conditions.⁶

From the position of discourse ethics Benhabib argues that we can justify such a human right to membership. This right entails a right to know on the part of the foreigner how

¹ Benhabib, Seyla: *The Rights of Others. Aliens, Residents and Citizens*. Cambridge University Press, Cambridge 2011, pp 2 and 10 f.

² Benhabib, Seyla, op. cit., pp 2, 10 f and 69.

³ Benhabib, Seyla, op. cit., pp 43 f and 46 f.

⁴ Benhabib, Seyla, op. cit., pp 28 f and 50 f.

⁵ Benhabib, Seyla, op. cit., pp 61 ff.

⁶ Benhabib, Seyla, op. cit., p 3.

conditions of naturalization can be fulfilled. These conditions should be made publicly available to all and transparent in its formulations. The procedure should be clear and administered in a lawful fashion, and the immigrant and the foreigner should not be criminalized. Through this right to membership the sovereign discretion of the democratic community is circumscribed – once admission occurs the path to membership ought not to be blocked.⁷

Democratic self-governance is important for Benhabib, but she argues against a Westphalian model of sovereignty, according to which states enjoy ultimate authority over all subjects and objects within a particular territory. Instead she prefers a liberal international sovereignty, which means that the formal equality of states is dependent on their acceptance of common values and principles, such as the human rights.⁸ The core of democratic self-governance is according to Benhabib the principle that those who are subject to the law should also be its authors. This ideal of autonomy should be defended, even if we today should accept that peoples are not homogeneous and that the territories over which they govern are not self-enclosed.⁹

According to Benhabib, citizenship is today disaggregated and we need to accept different forms of citizenship – transnational as well as subnational. However, she does not argue in favor of cosmopolitanism and global governance without borders. Instead she prefers what she calls a cosmopolitan federalism. This is a position which maintains that the borders should be porous rather than open. It regards first-admittance rights for refugees and asylum seekers to be important. However, it also accepts the right of democracies to regulate the transition from first admission to full membership.¹⁰

Seyla Benhabib has given a most important theoretical contribution to our reflections on refugee rights and democratic self-governance. I agree with her that the right to membership is important and should be incorporated in a theory of global justice. This means that we should respect the claims of immigrants and refugees, even if they are not citizens. The right to membership entails porous borders and a right to know on the right of the foreigner how conditions for participation in the democratic processes can be fulfilled. The basis for this right is the equal dignity of all human beings, independent of race, gender, cultural tradition or social position. To respect this dignity means to accept a principle of equal concern and respect, independent of citizenship.

At the same time Benhabib also gives strong arguments in favor of a respect for democratic self-governance. If we accept this idea, we should also respect the sovereignty of the national state. Both national sovereignty and the idea that those who are the subject of the law should also be its authors are important expressions of the autonomy of persons. In my judgment the right to this kind of autonomy should also be respected as a consequence of the equal dignity of all humans. Today we should accept that peoples are not homogeneous and that borders should be porous, but still we should respect democratic self-governance and state sovereignty. The principle of equal concern and respect is important as a universal principle of human rights and not only within a national state, but it is possible to defend even if we accept borders between sovereign states.

Global justice without a social contract

The right to membership is thus an important part of a theory of global justice. This is a theory of justice that takes seriously the challenges of globalization and is relevant for human relations across national borders. Most efforts to elaborate such a theory have been based on a

⁷ Benhabib, Seyla: *The Rights of Others*, pp 139 f.

⁸ Benhabib, Seyla, op. cit., pp 40 f.

⁹ Benhabib, Seyla, op. cit., pp 216 f.

¹⁰ Benhabib, Seyla, op. cit., pp 220 f.

social contractarian approach. From this perspective John Rawls, in his book *The Law of Peoples*, proposed some principles of rights and justice that can be applied to the global world order. These principles state that the world's peoples should respect human rights, and that peoples should assist other peoples who are suffering or living in difficult circumstances. However, they do not include the "difference principle", according to which a just distribution of welfare should be to the greatest benefit of the least advantaged.¹¹

More promising efforts to elaborate a theory of global justice from a contractarian perspective have been made by Thomas Pogge and Charles Beitz. They think of the original position as applied directly to the world as a whole and argue in favor of a distributive principle applicable to the global economic system. According to them the difference principle is important within a theory of global justice and there are strong reasons in favor of social equality.¹²

However, as Seyla Benhabib has shown, these theories of global justice have been silent on the matter of migration and refugee rights. They have not questioned the fundamental cornerstone of state centrism, which is the protecting of state boundaries against foreigners and refugees. Therefore Benhabib proposes an alternative theory of global justice, which includes the human right to membership. It is aware of the interdependence of peoples in a world society, even if it regards democratic self-governance to be important.¹³

Benhabib delivers a sharp critique of John Rawls's effort to develop a view of international justice. One problem is that Rawls regards a democratic society to be a complete and closed system. Another one is that individuals are seen as members of peoples and not as cosmopolitan citizens. As a consequence, migration is not considered an aspect of the Law of Peoples. Migratory movements are regarded by Rawls to be episodic and not essential to the life of peoples. One of the legitimate grounds for limiting immigration is according to him to protect a people's political culture and its constitutional principles. In Rawls's vision of a static, dull world of self-satisfied peoples cosmopolitan justice is sacrificed in the altar of states' security and self-interest.¹⁴

According to Benhabib there are severe problems also with the liberal cosmopolitanism defended by Pogge and Beitz. There are difficulties to extend the difference principle to the global arena, since there is little consensus about who is to count as the least advantaged. It is also difficult to see whether this theory is compatible with democratic self-governance. According to Benhabib democratic peoples themselves must form judgments about economic priorities. However, some cosmopolitans tend to undermine this right to self-determination.¹⁵

A sharp critique of theories of global justice within the social contract tradition is also given by Martha Nussbaum in her book *Frontiers of Justice*. Since these theories take nation-state as their basic unit, they cannot provide adequate approaches to a global justice which addresses inequalities between richer and poorer nations, and between human beings whatever their nation. John Rawls's proposal is a two-stage contract, where the choice in the original position is made in two stages. First the individuals within a society make a choice under a veil of ignorance, and then representatives of peoples decide upon the principles of international relations. The social contract in both stages is made between parties who are roughly equal in

¹¹ Rawls, John: *The Law of Peoples*. Harvard University Press, Cambridge 1999, p 37.

¹² Pogge, Thomas W (ed): *Global Justice*. Blackwell Publishing, Oxford 2007, pp 15 ff and 106 ff. For a critical discussion of the theories of Rawls, Pogge and Beitz, see Collste, Göran: *Globalisering och global rättvisa*. Studentlitteratur, Lund 2004, pp 119 ff and 151 ff. I have also discussed theories of global justice in Grenholm, Carl-Henric: "Justice, Sustainability, and Economic Globalization". Article in Niekerk, Kees van Kooten and Nissen, Ulrik: *Lidenskap og stringens*. Forlaget ANIS, København 2008, pp 179-194.

¹³ Benhabib, Seyla: *The Rights of Others*, pp 2 f and 72 ff.

¹⁴ Benhabib, Seyla, op. cit., pp 74 f, 87 ff and 92.

¹⁵ Benhabib, Seyla, op. cit., pp 106 ff and 115 ff.

power and resources, and the contract is imagined as one made for mutual advantage, which is defined in economic terms.¹⁶

This approach to global justice has grave difficulties according to Nussbaum. One is that it fails to take cognizance of the global economic order and the disadvantages it imposes on poorer nations, since it is starting from the nation-state as its basic unit. Another problem is that the approach requires that all parties are roughly equal in resources and power and believe that they have something to gain by entering into a contract. This is not a realistic assumption given the situation of the world. There are important inequalities between the peoples, even among liberal democratic states, which makes it difficult to understand how all peoples can be participants in the contract.¹⁷

Martha Nussbaum finds difficulties also with the global contractarian theories of Thomas Pogge and Charles Beitz. In their theory the parties who are contracting for a just global structure are individuals, not representatives of peoples. The outcome is a global application of the difference principle and a list of human rights which is considerably thicker than the one defended by Rawls. This is a far more appealing use of a contractarian approach to global justice according to Nussbaum.¹⁸

However, it is not reasonable. One difficulty with this proposal is its vague and speculative nature. Pogge and Beitz do not give clear information about the design of the global original position. It is unclear what information the parties will have and the theory seems to presuppose so much ignorance that it is utopian in an unrealistic sense. A second problem is that this theory does not take a clear position on the role of the nation-state. The state as an important expression of human autonomy is not taken seriously enough. Finally, Pogge and Beitz do not give us clear information about the circumstances under which the social contract is made. If the point of the contract should be mutual advantages among rough equals, this seems difficult to reconcile with the fact that there are vast inequalities in basic life chances among individuals in a global perspective.¹⁹

The conclusion of Nussbaum is that we need an alternative approach to global justice than the ones elaborated within the social contract tradition. This is the capabilities approach. According to Nussbaum this is an account of core human entitlements that should be respected and implemented by all nations, as a minimum of what respect for human dignity requires. She proposes a list of central human capabilities and argues that each of them is implicit in the idea of a life worthy of human dignity. The basic idea of human dignity means that we should always treat every person as an end in herself and never treat her as only a means to another end.²⁰

This capabilities approach of Martha Nussbaum is in many ways similar to the international human rights approach. She describes it as one species of such a theory of human rights. One similarity is its universalism, which means that a cross-national agreement on capabilities is assumed. Another similarity is its starting point in the ideas of human dignity and equality. According to Nussbaum equality of capability is an essential social goal as a prerequisite for the recognition of the equal dignity and respect of all human beings.²¹

Seyla Benhabib and Martha Nussbaum have in my judgment given important objections against contractarian theories of global justice. I agree with them that such a theory should not be elaborated from the perspective of a social contract. One reason is that contractarian theories

¹⁶ Nussbaum, Martha C: *Frontiers of Justice. Disability, Nationality, Species Membership*. The Belknap Press of Harvard University Press, Cambridge Mass. 2007, pp 225 ff, 232 ff and 240 ff.

¹⁷ Nussbaum, Martha: *Frontiers of Justice*, pp 262 f, 263 f and 271 f.

¹⁸ Nussbaum, Martha, op. cit., pp 264 f.

¹⁹ Nussbaum, Martha, op. cit., pp 265 f, 266 f and 268 ff.

²⁰ Nussbaum, Martha, *Frontiers of Justice*, p 70.

²¹ Nussbaum, Martha, op. cit., pp 78 and 292. The relationship between the capabilities approach and the idea of human dignity is also discussed in Nussbaum, Martha C: *Women and Human Development. The Capabilities Approach*. Cambridge University Press, Cambridge 2001, pp 70 ff.

presuppose a liberal view of human beings, according to which we can agree upon what justice means by making ourselves free from our social position and making a choice as individuals behind the veil of ignorance. However, people can never make such rational and independent choices, but are always formed by the particular social and cultural contexts in which they are embedded. Depending upon our social position, we will always have different perspectives of what justice means. This is particularly true if we are regarded to be representatives of a people or a cultural tradition in a global deliberation.

A more promising approach to a theory of global justice is the discourse ethics of Seyla Benhabib and the capabilities approach of Martha Nussbaum. These theories differ from each other, but they have one common starting point. This is a principle of the equal dignity of all human beings, independent of race, gender, citizenship or social position. In discourse ethics it is the basis of the principles of universal moral respect and egalitarian reciprocity. In the capabilities approach the idea of a life worthy of human dignity is the basis for the list of central human capabilities.

The idea of equal dignity of all humans can be interpreted in many ways, but one reasonable interpretation has been proposed by Ronald Dworkin. He argues that there are two basic ideas that justify that we take human rights seriously. One is the idea of human dignity, according to which all humans should always be treated as ends in themselves. The other one is the idea of political equality, according to which all humans are entitled to the same concern and respect. These two ideas justify the fundamental right to treatment as an equal, which is the right to be treated with the same respect and concern as anyone else. Dworkin argues as a legal philosopher, but I regard this to be also an important moral principle. Different from Dworkin I also regard this to be a principle for the treatment of all human beings, not only citizens in one particular state.²²

Muslims and Global Justice

So far my thesis has been that the rights of immigrants and refugees should be an important part of a theory of global justice. Such a theory should include a human right to membership. In agreement with Benhabib and Nussbaum I also maintain that a theory of global justice should not be elaborated from the perspective of social contractarianism. We need other approaches to global justice, such as the capabilities approach or the one that takes its starting point in discourse ethics. A primary basis for global justice and equal human rights is the idea of human dignity and equality.

In what ways can religious ethics contribute to such a theory of refugee rights and global justice? As Elena Namli has shown in a well-argued article on “Identity and the Stranger”, there are important resources within Judaism, Christianity and Islam to promote a more open attitude towards refugees and strangers than the one prevailing in contemporary European countries with their strict identity politics. The Torah, the Christian Bible, and the Qur’an describe a vulnerable stranger as either God himself or an instrument of God. In these texts we find strong support of the moral norm of unconditional hospitality, according to which we should welcome strangers and receive them with all the uncertainty that every estrangement bears within it. The idea of monotheism in Judaism and Islam as well as Christological patterns in Christianity support this duty of the stronger part to welcome the stranger.²³

In his book *Muslims and Global Justice* the Muslim legal philosopher Abdullahi Ahmed An-Na’im has discussed the contributions of Islam to a rights based theory of global justice. His thesis is that human rights are the framework for global justice and that these human rights

²² Dworkin, Ronald: *Taking Rights Seriously*. Harvard University Press, Cambridge 1978, pp 198 f and 226 f.

²³ Namli, Elena: “Identity and the Stranger: A Christological Critique of Refugee Politics”. Article in *Political Theology*, vol 12, nr 6, Equinox Publishing, Sheffield 2011, pp 818 ff and 827 ff.

should be understood broadly, including economic, social and cultural rights, as well as civil and political rights. The human rights paradigm should include not only individual rights but also a dynamic and creative understanding of collective rights. Of great importance for An-Na'im is the universality of human rights. They are rights of every human being, everywhere, without any other requirement of status or location other than being a human being.²⁴

The universality of human rights is according to An-Na'im problematic because of cultural relativity, which means that there are different perceptions of the world and different perspectives of a good human life within various cultures. However, An-Na'im maintains that this problem can be solved by a theory of overlapping consensus among religious and cultural traditions. Across different cultures we can reach a consensus on commonly agreed principles, even if we have different reasons for that commitment. We have some shared understandings of some values and norms, even if we do not have the same reasons for these convictions.²⁵

From this position of ethical universalism and overlapping consensus An-Na'im argues that the implementation of human rights presupposes that the cultural legitimacy for these rights is developed. Such a cultural legitimacy of these standards can be promoted by an inclusive dialogue among and within different cultural and religious traditions. In this dialogue it is necessary to involve believers in various religions, who can reconsider the interpretations of their tradition in its relationship to the universal human rights. Religious beliefs can support these rights, but often a serious reinterpretation of traditional conceptions is necessary.²⁶

This is obviously the case if Muslims would like to reconcile their understanding of Shari'a with the universal human rights. There are severe tensions between these rights and some ethical norms, principles and rules of public law that are included in traditional conceptions of Shari'a. According to An-Na'im several texts in the Qur'an and Sunna emphasize the inherent dignity of all humans in the sight of God. However, other texts establish a strict limitation of this equality since they support a hierarchy of status according to sex and belief. Shari'a family law is fundamentally premised on the notion of male guardianship over women, which obviously violates the human right of nondiscrimination on the grounds of gender.²⁷

Therefore a reconstruction and reformulation of the constitutional and legal aspects of Shari'a is necessary. Muslims should reconsider their interpretation of Shari'a in the present context of their own societies, in such a way that it can be reconciled with the universal human rights. A part of this reinterpretation is to abolish the principle of male guardianship over females and to remove every feature of discrimination against women. An-Na'im argues that it is important to distinguish between Islam and Shari'a in this process. His rather controversial thesis, which is not shared by all Muslims, is that Shari'a is a human interpretation of Islam, which should not be identified with the totality of the religion itself.²⁸

In his book Abdullahi Ahmed An-Na'im proposes a reasonable method for such a reinterpretation of Shari'a. The primary sources of Shari'a are the Qur'an and Sunna, and other sources include different forms of juridical methodology for developing principles out of these texts. However, according to An-Na'im it is important to remember that Shari'a is a human interpretation of the Qur'an and Sunna. It is elaborated by Muslim scholars and jurists, and this interpretation and implementation of the Qur'an and Sunna is the product of human comprehension in a particular historical and political context. Since Shari'a is a historically conditioned interpretation of the fundamental sources of Islam, alternative interpretations today are possible. A reconstruction of Shari'a in support of human rights would be fully

²⁴ An-Na'im, Abdullahi Ahmed: *Muslims and Global Justice*. University of Pennsylvania Press, Philadelphia 2011, pp 6 f, 216 f and 230.

²⁵ An-Na'im, Abdullahi Ahmed, op. cit., pp 15 f, 72 ff and 236 f.

²⁶ An-Na'im, Abdullahi Ahmed, op. cit., pp 3, 27 f, 65 f and 266.

²⁷ An-Na'im, Abdullahi Ahmed: *Muslims and Global Justice*, pp 89 and 136.

²⁸ An-Na'im, Abdullahi Ahmed, op. cit., pp 29 f, 137 f and 192.

Islamic according to An-Na'im, because it would be based on the text of Qur'an as interpreted by Muslims in the present context.²⁹

According to An-Na'im the universality of human rights is important as a framework for global justice. However, there are two paradoxes concerning the implementation of these rights. One is that the idea of equal rights of all humans is expected to be implemented by states with national sovereignty. The self-regulation of the state means that sovereign states are entrusted with the implementation of the universal human rights without any external intervention. The other paradox is that even if human rights are for all humans everywhere, the sovereignty of the states means that they take a particular responsibility for their own citizens and make a clear distinction between citizens and aliens.³⁰

To handle these problems An-Na'im argues that global citizenship is needed to play the role for universal human rights that is played by national citizenship for domestic constitutional rights. Global citizenship is a complement to national citizenship, and it does not abolish all legal and political distinctions between citizens and noncitizens of a state. However, some human rights must be secured on a universal basis, and this assumes the possibility of global citizenship as the basis of the ability to enforce them. Some civil rights are based on national citizenship, and in a similar way universal human rights are based on global citizenship.³¹

An-Na'im is aware that there are serious objections to the idea of global citizenship. One is that true citizenship entails not only rights but also political duties and responsibilities such as participation in political debate and law making. Another is that global citizenship may presume shared cultural, social and moral conceptions, but the rich and enduring diversity of human cultures and traditions will not make this possible or desirable. However, An-Na'im does not find these objections convincing. He still believes that global citizenship is necessary in order to implement the universal human rights.³²

In my judgment, Abdullahi Ahmed An-Na'im gives strong arguments in favor of a reinterpretation of Shari'a. If such a reinterpretation is possible, Islam can give an interesting contribution to a theory of human rights and global justice. There are important texts in the Qur'an and Sunna that emphasize the inherent dignity of all humans, and these can be taken as a starting point for a reinterpretation of such norms in Shari'a that seem to violate the human right of nondiscrimination. I also agree with An-Na'im that the universality of human rights presupposes that they are related not only to conceptions within Western liberalism but also to basic ideas in different religions, including Islam. A consequence of such a process might also be a reinterpretation of the meaning of human rights.

However, I do not agree with An-Na'im in his thesis that the implementation of universal human rights presupposes global citizenship. This idea does not take the moral importance of national sovereignty seriously enough. As Seyla Benhabib and Martha Nussbaum have shown, there are strong arguments in favor of democratic self-governance. It is an important expression of human autonomy and freedom, which means that those who are the subjects of the law should be its authors. This kind of autonomy is also important if we want to respect the human dignity of all humans. We should take the universality of human rights seriously, but this includes that we respect the right to self-governance and state sovereignty.

The thesis of An-Na'im is based upon an understanding of human rights as primarily legal standards and not as political and moral norms. From a legal perspective he believes that global citizenship is necessary in order to implement human rights, in a similar way as civil rights are

²⁹ An-Na'im, Abdullahi Ahmed, op. cit., pp 88 f, 144 f, 154 f and 238. The interpretation of Shari'a is also discussed in An-Na'im, Abdullahi Ahmed: *Islam and the Secular State. Negotiating the Future of Shari'a*. Harvard University Press, Cambridge, Mass. 2008, pp 12 ff.

³⁰ An-Na'im, Abdullahi Ahmed: *Muslims and Global Justice*, pp 8 f, 231 f and 276 f.

³¹ An-Na'im, Abdullahi Ahmed, op. cit., pp 19 f, 22 f, 273 f and 284 ff.

³² An-Na'im, Abdullahi Ahmed: *Muslims and Global Justice*, pp 297 f.

based on national citizenship. However, I find it important to make a clear distinction between human rights as moral norms and human rights as legal standards. From a moral point of view the basis of human rights is not citizenship but the equal dignity of all human beings. This moral principle should be implemented in all national states, even if we respect their self-governance. A presupposition for this is not a different understanding of citizenship but recognition that human rights are moral imperatives that should be taken seriously by all states in their process of self-legislation. The most important task is to argue against legal positivism and a political process of legislation that does not take moral considerations seriously.

A Christian theory of refugee rights

We have seen that Abdullahi Ahmed An-Na'im believes that the universality of human rights assumes the possibility of global citizenship. This is a position which is based upon an understanding of human rights as primarily legal standards and not as political and moral norms. One problem with this position is that it does not take the moral importance of national sovereignty seriously enough. It is necessary to respect democratic self-governance and the borders between sovereign states. The democratic sovereignty of individual states cannot be disregarded even if we find it important to implement universal human rights.

A similar problem is related to the theory of refugee rights that is elaborated by the Catholic moral theologian David Hollenbach. In his book *Refugee Rights* he makes us aware that refugee and internally displaced people are often the forgotten victims of human rights violations. This is particularly true of internally displaced persons who are not refugees in a strict legal sense, since they have not been forced across an international border. The human rights issues raised by displacement have not been addressed in the same depth as other grave human rights issues.³³

David Hollenbach argues in favor of a human rights approach to the problems of refugees and internally displaced persons. These rights are moral as well as legal norms, why the law should be changed when existing legal standards fail to serve the moral imperative to respect the human dignity of refugees. The protection of these rights is defended from a natural law position. A basis is the idea of human dignity which is equal in every human being. This idea is deeply embedded in Christian faith and primarily the belief that every person is created in the image and likeness of God. At the same time it is compatible with reasoned reflections of human experience in many cultures. There are both Christian and rational arguments in favor of the equal dignity of all persons, which is the basis of a theory of human rights.³⁴

There are strong grounds in the Christian tradition for providing hospitality to migrants and protecting the human rights of refugees. The Hebrew Bible contains imperatives to show a special concern for the aliens and strangers in the midst of the people of Israel. In Catholic social teaching it is also quite clear that the equal dignity of all persons is a strong reason to respect the human rights of refugees and displaced persons. At the same time there are also strong reasons in favor of these rights within other cultural and religious traditions. In the defense of universal human rights there is a convergence of the Christian tradition with a global humanitarianism.³⁵

According to Hollenbach it is important to defend the idea that each individual state has the responsibility to protect its population from great crimes against human rights. This idea also

³³ Hollenbach, David (ed): *Refugee Rights. Ethics, Advocacy, and Africa*. Georgetown University Press, Washington 2008, pp 1 f.

³⁴ Hollenbach, David, op. cit., pp 2 f and 4 f.

³⁵ Hollenbach, David (ed): *Driven from Home. Protecting the Rights of Forced Migrants*. Georgetown University Press, Washington 2010, pp 4. See also the article of Agbonkhianmege Orobator on "Justice for the Displaced: The Challenge of a Christian Understanding" in Hollenbach, David (ed), op. cit., pp 40 ff and 47 f.

entails that there is a duty of the international community to prevent such crimes when a state is unable or unwilling to do so. Hollenbach argues that the responsibility to protect includes forced migrants and refugees. National governments have the duty to protect their citizens from abuses such as internal displacement, and if they fail to do so, the international community should come to their assistance. The responsibility to protect refugees is based upon the human rights of all humans and includes an international duty to assist war victims and persons who are forced to leave their homes due to different kinds of oppression.³⁶

Hollenbach argues that this responsibility entails two duties. First, a negative duty is the obligation not to commit grave evils such as genocide, ethnic cleansing or religious persecution. The states have a duty not to force people to become refugees or internally displaced. Secondly, a positive duty is the obligation of the international community to assist persons whose human rights are not respected. This means that economic interventions are sometimes necessary to meet human needs and reduce inequalities through development assistance. As an extraordinary measure military interventions are also possible to justify.³⁷

One thesis of Hollenbach is that the responsibility to protect means that we have to rethink the meaning of the sovereignty of the state. The modern nation-state system is challenged by our responsibility towards refugees and internally displaced persons, which does not stop at national borders. From a general perspective it is obvious that universal ethical ideas and values such as human rights imply limitations of national state sovereignty.³⁸

There are of course objections to this plea for a change of the nation-state system. One is that the primary objective of a country's foreign policy should be to promote the national interest, not to protect citizens in other countries. Another is that concern for order and stability in international affairs implies that we should respect territorial borders and national self-determination. Intervention in other countries will lead to dangerous international conflicts. According to Hollenbach these objections are not tenable. States have a responsibility to protect the citizens of their country, but the responsibility to protect humans from injustice and exploitation does not stop at the national border. It is also obvious that respect for sovereignty is not the only condition for peace in the world. Non-intervention can also have unacceptable consequences and imply that we accept oppression, injustice and violence.³⁹

David Hollenbach defends a cosmopolitan approach, where the common humanity of all people is seen as the basis of a worldwide moral community. According to this position, which is also said to be defended by Martha Nussbaum, we have a common moral responsibility to respond to the needs of all members of the global community. Hollenbach argues that cosmopolitanism can be defended from a Christian perspective, where all human beings are regarded to be created in the image and likeness of God. This implies that all humans have a common dignity and worth that reaches across the borders between nation states. These borders are subordinate to the respect of the shared dignity of every person, and we are all members of a single human family.⁴⁰

Even if he underlines the common humanity of all people, Hollenbach does not defend a radical cosmopolitanism which maintains that the moral and political significance of national borders should be challenged and reduced. National borders can play positive roles in the protection of human dignity, and we should resist interventions that turn a nation into the colony of another. We should also respect the differences among cultures, and distinctive identities of

³⁶ Hollenbach, David (ed): *Refugee Rights*, pp 177 f. Hollenbach, David (ed): *Driven from Home*, pp 1 f and 8 f.

³⁷ Hollenbach, David (ed): *Refugee Rights*, pp 186 f and 188 ff.

³⁸ Hollenbach, David (ed): *Refugee Rights*, pp 180 f.

³⁹ Hollenbach, David, op. cit., pp 182 f and 183 f.

⁴⁰ Hollenbach, David, op. cit., p 184. Hollenbach, David: "Migration as a Challenge for Theological Ethics". Article in *Political Theology*, vol 12, nr 6, Equinox Publishing, Sheffield 2011, pp 808 f.

peoples should be respected within a cosmopolitan universalism. The principle of subsidiarity in domestic and international affairs is also important. However, it is quite clear that a cosmopolitan approach means an increased role for a global political organization and a challenge to modern ideals of nation-state sovereignty.⁴¹

David Hollenbach argues quite convincingly that there are strong grounds in the Christian tradition to protect the human rights of refugees and internally displaced persons. A primary reason to protect these rights is the idea of human dignity which is equal in every human being. This idea can be justified in many ways, but in Christian tradition it is based upon the conviction that every human being is created in the image of God. A Christian view of *imago Dei* implies that all human have a common dignity and worth that reaches across the borders between nation states. Therefore we should accept a principle of equal treatment and respect.

However, Hollenbach's argument against the sovereignty of the state is not convincing. The responsibility to protect universal human rights means according to him that national sovereignty is challenged and external interventions are possible to justify. This is a cosmopolitan approach which in my judgment does not take state sovereignty seriously enough. It is quite different from the kind of cosmopolitanism defended by Martha Nussbaum. Her opinion is that we have a common moral responsibility to respect the dignity and rights of all human beings. However, at the same time she argues that the respect of this dignity also implies that we should accept national sovereignty. I find this position more reasonable than the one of Hollenbach.

In her critique of the social contract tradition Nussbaum objects to the idea that we have a right to intervene militarily or through economic sanctions if another nation does not respect human rights. Instead she defends the national sovereignty of the individual state. This is important to protect human freedom, which includes the ability to join with others to give one another laws. Being autonomous in this sense contributes to a fully human life, and is ultimately based on the dignity of the individual human being.⁴²

No existing state is just and human rights are violated by all nations. Our responsibility, Nussbaum argues, is to criticize every state that has violated important moral norms that can be justified. However, this does not mean that we should accept external interventions. We should work out international treaties protecting human rights and work to get the nations to implement these. We should also use diplomatic exchange as a way to draw attention to these issues. But we should respect the state and its sovereignty, The state is morally important, since it is an expression of human choice and autonomy.⁴³

Even if she is said to promote a kind of cosmopolitanism, Martha Nussbaum is quite clear that a world state is not desirable. The differences of culture and language make communication difficult within a global state, and we should not promote the kind of cultural and linguistic homogeneity which it seems to presuppose. A world state would also be dangerous, since external critique and internal democracy would be difficult to obtain. Instead, Nussbaum argues that national sovereignty has moral importance as a way people have of asserting their autonomy.⁴⁴ This is an argument that I find convincing. A reasonable theory of global justice should include both a right to political membership for refugees and a right to national sovereignty and democratic self-governance.

⁴¹ Hollenbach, David (ed): *Refugee Rights*, pp 185 f. Hollenbach, David: "Migration as a Challenge for Theological Ethics", pp 808 ff.

⁴² Nussbaum, Martha: *Frontiers of Justice*, pp 255 f and 257.

⁴³ Nussbaum, Martha, op. cit., pp 260 f and 261 f.

⁴⁴ Nussbaum, Martha, op. cit., pp 313 f.

Conclusion

In this article a theoretical perspective on the rights of refugees has been developed in a critical dialogue with Seyla Benhabib's discourse ethics and Martha Nussbaum's capabilities approach. Seyla Benhabib has argued quite convincingly that a human right to political membership is important and should be incorporated in a theory of global justice. This means that we should respect the claims of immigrants and refugees, even if they are not citizens. At the same time Benhabib gives strong arguments in favor of a respect for democratic self-governance. National sovereignty is an important expression of the autonomy of persons which should be respected as a consequence of the equal dignity of all humans.

The right to membership should be an important part of a theory of global justice. However, as Seyla Benhabib and Martha Nussbaum have shown, efforts to elaborate such a theory within the social contract tradition have not been successful. Since these theories take nation-state as their basic unit, they cannot provide adequate approaches to global justice. The assumption that all parties who are supposed to reach an agreement under the veil of ignorance are roughly equal in resources and power is not realistic given the situation of the world. More promising approaches to a theory of global justice are therefore the theories of Benhabib and Nussbaum. A common starting point for these theories is a principle of the equal dignity of all humans. This principle justifies the fundamental right to be treated as an equal, which is the right to be treated with the same respect and concern as everyone else.

From this perspective a main purpose of this article has been to critically evaluate the contributions to the issues of refugee rights and global justice given by two representatives of different kinds of religious ethics. Abdullahi Ahmed An-Na'im has shown that Islam can give an important contribution to a theory of human rights, given a necessary reinterpretation of Shari'a. The universality of human rights presupposes that they are related not only to conceptions within Western liberalism but also to basic ideas in different religions, including Islam. An-Na'im argues that the implementation of universal human rights presupposes global citizenship. This is a complement to national citizenship and the basis of the ability to enforce human rights universally. I find it difficult to accept this idea. One problem is that it does not take the moral importance of national sovereignty seriously enough. Democratic self-governance is an expression of human autonomy which should not be disregarded, even if we find it important to implement universal human rights.

The Catholic political theologian David Hollenbach had argued quite convincingly that there are strong grounds in the Christian tradition to protect the human rights of refugees and internally displaced persons. A primary reason is the idea of equal human dignity, which in Christian tradition is based upon the conviction that all humans are created in the image of God. Hollenbach defends a cosmopolitan approach, according to which we have a common responsibility to protect all humans from violations against human rights. This means that national sovereignty is challenged and external interventions are possible to justify. In my judgment this position is not convincing, since it does not take the state sovereignty seriously enough. As Martha Nussbaum has shown we have a common moral responsibility to respect the dignity of all human beings, but this implies that we should accept not only the right of refugees but also national sovereignty. A reasonable theory of global justice should include both a right to political membership and a right to democratic self-governance which includes a respect for the sovereignty of the national state.

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Anti-gypsyism and migration

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Abstract

Reflecting on identity is a key point in comprehending the whole Roma issue. The attribution of an identity from the outside on the basis of allegedly ethnical characteristics, e.g. the nomadic life, should be replaced with a self-determined identity, in which the ethnicity only represents one aspect among other characteristics. Heteronomous identification is a typical feature of a racist Anti-gypsyism afflicted by prejudices, expressed by extermination, expulsion and repression. Migration of Roma has always been the result of their expulsion by the dominant society. The exaggeration in the mass-media of a “migration issue” caused by the Roma in Western Europe serves the political interests of nationalistic trends and parties. The Biblical associations with wanderers and homeless should be replaced with the image of the healed lepers, which is a model for the inclusion of the marginalized.

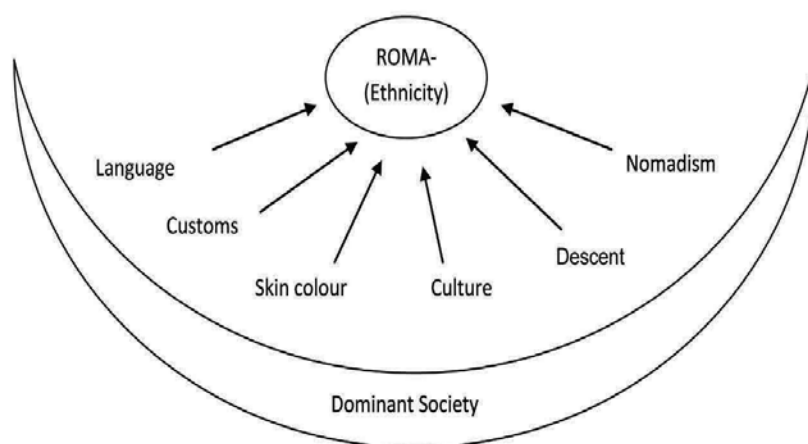
Keywords: Roma, Anti-gypsyism, migration, identity, exclusion, exegesis, racism, expulsion.

The topic of this paper is Anti-gypsyism and Migration.¹ First I would like to make clear, who we talk about, when we talk about Roma, because the question of identity or identification will be present in my whole lecture. Then I would like to integrate the topic of migration of Roma in a wider context of historical and present anti-Gypsy discrimination and explain the term “Anti-gypsyism” in order to be able to apply this concept to current problems of migration of Roma in Europe.

In France, in the cities of Lille and Lyon, Roma-camps have been erased by force during the last weeks although during his presidential campaign the new French president Hollande had promised to act differently than his predecessor Sarkozy.²

In Austria the Supreme Court has decided recently that bans on begging conform with the existing constitution. These prohibitions were put up by some provincial governments after foreign beggars “with dark skin” had appeared.³

Who do we talk about? If the newspapers write about “Roma-Camps” everybody seems to know who lives there.⁴ If the European Commission looks for Strategies of Roma-Integration, it seems to be clear who is concerned.⁵



As members of the majority – I would prefer to use the term dominant society to include the factor of power in the relationship – we normally assume that we can know and fix up the ethnicity of Roma along their attributes of language, customs, skin-colour, their descent or along certain, allegedly ethnically inherent behaviours such as nomadism. In this context it has to be mentioned that the term ethnicity is often used as a synonym for the politically incorrect term race

This traditional and unquestioned “knowledge” about Roma is not at all constricted to rightwing groups. I will show this with the help of an ex- ample of Roman Catholic documents

¹ Gernot Haupt, Antiziganismus und Sozialarbeit. Elemente einer wissenschaftlichen Grund- legung, gezeigt an Beispielen aus Europa mit dem Schwerpunkt Rumänien, Berlin 2006; G. Haupt, Antiziganismus und Religion. Elemente für eine Theologie der Roma-Befreiung, dargestellt anhand einer empirischen Untersuchung eines Roma-Viertels in Rumänien, Münster 2009.

² Richard Schittly, “A Lyon: Pas d’expulsion sans solution? Il faut nous dire lesquelles!”, in Le Monde, 15.08. 2012; Elise Vincent, “Après la polémique, les minces propositions de Hollande sur les Roms”, in Le Monde, 17.02.2012.

³ <http://www.verfassungsgerichtshof.at/> viewed on 20.08.2012.

⁴ Hans-Hagen Bremer, “Frankreich: Auch Sozialisten räumen Roma-Lager”, in Die Presse, 10.08.2012.

⁵ <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/400&format=HTML&aged=0&language=D E&guiLanguage=en> viewed on 20. 08. 2012.

about Roma. A speech by Pope Paul VI in front of an assembly of Roma in Pomezia 1965 is the first really relevant statement of the recent history. One famous sentence is quoted almost in every document of the Vatican concerning Roma up to the present. I will quote the first part as a whole.

Dear Gypsies, dear nomads, dear Gitanos, coming from all over Europe, to you our greetings. To you our greeting, you eternal pilgrims, to you, you voluntary fugitives, to you, who are always in flight, to you, who are restless to be on the way. To you without a house of your own, without fixed abode, without a friendly homeland, without church; you are in the heart of the church, because you are poor and need assistance, instruction, help. The church loves the poor and the suffering, the small ones, the dispossessed, the abandoned.” public society. You who lack qualified work, who lack social contacts, who lack sufficient means.

Greetings to you, who have chosen your little tribe, your caravan as your segregated and secret world. To you, who regard the world with distrust and who are regarded with distrust by all, you, who always and everywhere wanted to be foreigners, isolated, strange, excluded from all social circles, you, who have been on the march for centuries and do not know where to arrive and where to stay. You are not at the margins of the church, in a certain sense you are in the centre, you are at the heart. You are at the heart of the church, because you are alone: nobody is alone in the church; you are in the heart of the church, because you are poor and need assistance, instruction, help. The church loves the poor and the suffering, the small ones, the dispossessed, the abandoned.⁶

At the beginning the Roma were addressed not only as pilgrims, that is, this term which was used by themselves or which was ascribed to them when they appeared in Europe and that led to a friendly welcome and a benevolent support, but as eternal pilgrims. This notion follows the widespread myth that the gypsies had refused to help the Holy Family during their flight to Egypt and therefore have to pilgrim eternally around the world as punishment.⁷ In the following list all the common images and perceptions are projected onto the gypsies which even partially blame them for their situation. Gypsies are voluntarily exiled, are restless and unsteady, they do not have their own house and have no professions at all. That they are looked at with distrust is obviously caused by their distrust towards the world as was mentioned earlier. That they are isolated, strange and excluded from every social circle is obviously the result of their own wish to be foreigners always and everywhere (“voi que avete voluto essere forestieri sempre e dappertutto”). At last they are on their way without a goal, so they need instruction by the church.

⁶ Pope Paul VI (1965): “Cari Zingari, cari Nomadi, cari Gitani, venuti da ogni parte d’Europa, a voi il Nostro saluto. 1. Il Nostro saluto a voi, pellegrini perpetui; a voi, esuli volontari; a voi, profughi sempre in cammino; a voi, viandanti senza riposo! A voi, senza casa propria, senza dimora fissa, senza patria amica, senza società pubblica! A voi, che mancate di lavoro qualificato, mancate di contatti sociali, mancate di mezzi sufficienti! Saluto a voi, che avete scelto la vostra piccola tribù, la vostra carovana, come vostro mondo separato e segreto; a voi, che guardate il mondo con diffidenza, e con diffidenza siete da tutti guardati; a voi, che avete voluto essere forestieri sempre e dappertutto, isolati, estranei, sospinti fuori di ogni cerchio sociale; a voi, che da secoli siete in marcia, e ancora non avete fissato dove arrivare, dove rimanere! Voi nella Chiesa non siete ai margini, ma, sotto certi aspetti, voi siete al centro, voi siete nel cuore. Voi siete nel cuore della Chiesa, perché siete soli: nessuno è solo nella Chiesa; siete nel cuore della Chiesa, perché siete poveri e bisognosi di assistenza, di istruzione, di aiuto; la Chiesa ama i poveri, i sofferenti, i piccoli, i diseredati, gli abbandonati.”

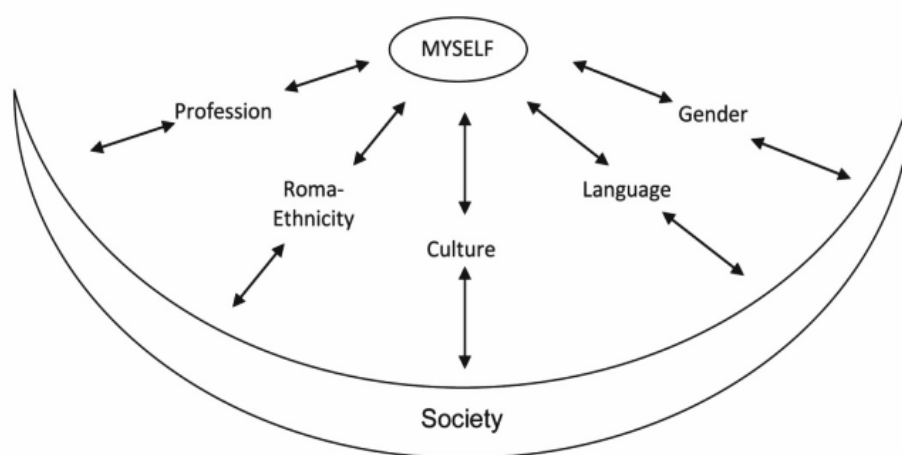
http://www.vatican.va/roman_curia/pontifical_councils/migrants/documents/hf_nomads/hf_p-vi_hom_19650926_intmeeting-nomads_it.html viewed on 20.08.2012.

⁷ Äneke Winkel, Antiziganismus. Rassismus gegen Roma und Sinti im vereinigten Deutschland, Münster 2002, p. 21; Ines Köhler-Zülch, “Die verweigerte Herberge. Die Heilige Familie in Ägypten und andere Geschichten von «Zigeunern» – Selbstäußerungen oder Außenbilder?”, in: Jacqueline Giere, Die gesellschaftliche Konstruktion des Zigeuners. Zur Genese eines Vorurteils, Frankfurt 1996, p. 46.

As a consequence the pastoral care of the gypsies is assigned to the Pontifical Council for the Pastoral Care of Migrants and Itinerant People where, besides socio-economic nomads (these are members of the civil aviation⁸, international students, circus and carnival people, people of the sea), ethnic nomads such as Roma and Sinti are also covered.⁹ As a consequence Tuareg from the Sahara, Maasai from Tanzania and Kenya and Pygmies from Central Africa have been invited to conferences of this Pontifical Council.¹⁰

These are the strange outcomes of a concept of identity, which assumes that it would be possible to define Roma along behaviours and customs such as nomadism, alleged criminality, begging and so on, that are attributed to them as being typical. But that is wrong.

Following the theory of the symbolic interactionism represented by George Herbert Mead¹¹, Erving Goffman¹², Lothar Krappmann¹³ and others I would suggest that ethnicity be understood not as an inherited marker, but as a result of a social interaction.



Ethnicity is therefore only one facet of my identity, which is more or less important – depending on the circumstances – and which can be more or less in the main focus of my self-image besides other traits of my identity like profession, gender, language and so on. Nevertheless ethnicity is always the result of an interactive process. The outcome may be a total acceptance of the labelling by members of the dominant society or the total denial or something in between these two extremes. This process is always a question of power to define someone or to define yourself.

In all of the European countries there is a big difference between the statistics of the official census and the estimates of experts concerning the figures of members of this minority. The reason is obviously that Roma do not want to be recognized and defined as Roma. In Romania for example in the census of 2002 there were 535,140 persons who declared to be Roma,¹⁴ the official national report of Romania to the EU in 2012 gives a number of

⁸ Such as pilots of military aircraft resort to the military chaplaincy.

⁹ http://www.vatican.va/roman_curia/pontifical_councils/migrants/index_ge.htm viewed on 20.08.2012.

¹⁰ Leo Cornelio, "Kirche und Zigeuner: Für «eine Spiritualität der Gemeinschaft». 5. Weltkongress der Zigeunerseelsorge in Budapest", at http://www.vatican.va/roman_curia/pontifical_councils/migrants/documents/rc_pc_migrants_doc_20_03119_Nomads_Budapest_documents_ind_ge.html viewed on 20.08.2012.

¹¹ George Herbert Mead, *Geist, Identität und Gesellschaft*, Frankfurt/Main 1968.

¹² Erving Goffman, *Stigma. Über Techniken der Bewältigung beschädigter Identitäten*, Frankfurt/Main 1975.

¹³ Lothar Krappmann, *Soziologische Dimensionen der Identität. Strukturelle Bedingungen für die Teilnahme an Interaktionsprozessen*, Stuttgart 1972.

¹⁴ Institutul Național de Statistică: Populația după etnie, <http://www.insse.ro/cms/files/rpl2002rezgen1/14.pdf>.

1,850,000 people¹⁵. In Austria only 10% of the estimated 30,000 – 40,000 Roma declared to be Roma at the last census.¹⁶ So this is not only a phenomenon of the eastern European countries.

But why is that so?

Without any doubt one of the most important reasons is the discrimination which the Roma had and still have to suffer. Many researches prove that Roma are amongst the groups who are most discriminated against in Europe. This has recently been confirmed by the survey of the Fundamental Rights Agency of the EU.¹⁷

That is why I would like to introduce and explain the term Anti- gypsyism here.

Anti-gypsyism, in German better known as “Antiziganismus”, is a term analogous to anti-Semitism and defines images and prejudices against “so called” gypsies as well as the stigmatizing of people as gypsies and the following discrimination, exclusion and persecution.¹⁸

Anti-gypsyism



Anti-gypsyism has a long tradition. On the large scale between exclusion and inclusion it reaches from extermination, the murder and physical annihilation, through expulsion, the eviction, and repression, the subjugation, to integration of Roma into different functional systems of society, whereas the last is a pre-stage to full inclusion. Up to now inclusion has remained rather wishful thinking and an aim that most European countries have not even started to achieve. It is astonishing and significant that there is no chronological development from the cruelest persecutions to less drastic ones or vice-versa, but that the different expressions of Anti-gypsyism can be used as appropriate to the respective function for the dominant society. So this makes clear that Anti-gypsyism has very little to do with the real Roma.¹⁹

Extermination, murder of Roma motivated through racism, was performed yesterday and exists today. Whereas the first Roma coming to Europe were well accepted as penitents and pilgrims, they were outlawed by the imperial decree of 1408.²⁰ In 1417 the archbishop

viewed on 20.08.2012. Relating to the preliminary results of the census of 2011, which will be published in 2013, there are actually and officially 619.007 Roma in Romania. Institutul Național de Statistică, Comunicat de presă privind rezultatele provizorii ale Recen- sământului Populației și Locuințelor – 2011,

<http://www.recensamanromania.ro/wp->

[content/uploads/2012/02/Comunicat DATE PROVIZORII RPL 2011.pdf](#) viewed on 20.08.2012.

¹⁵ Strategy of the Government of Romania for the Inclusion of the Romanian Citizens belonging to Roma Minority for the Period 2012-2020,

http://ec.europa.eu/justice/discrimination/files/roma_romania_strategy_en.pdf, viewed on 21.11.2012, p. 6.

¹⁶ Bevölkerung 2001 nach Umgangssprache, Staatsangehörigkeit und Geburtsland.

http://www.statistik.at/web_de/statistiken/bevoelkerung/volkszaehlungen_registerzaehlungen/bevoelkerung_nach_demographischen_merkmalen/022896.html viewed on 20.08.2012.

17 The situation of Roma in 11 EU Member States. Survey results at a glance.

http://fra.europa.eu/fraWebsite/attachments/FRA-2012-Roma-at-a-glance_EN.pdf viewed on 20.08.2012.

18 Markus End, "Bilder und Sinnstruktur des Antiziganismus", in Roma und Sinti. Aus Politik und Zeitgeschichte, Bd. 22-23/2011, Bonn 2011, p. 16

(= <http://www.bpb.de/apuz/33277/bilder-und-sinnstruktur-des-antiziganismus?p=all#footnode2-2>) viewed on 20.08.2012.

¹⁹ G. Haupt, *Antiziganismus und Sozialarbeit*, p. 111 ff.

²⁰ Katrin Reemtsma, *Sinti und Roma. Geschichte, Kultur, Gegenwart*, München 1996, p. 38 ff.

of Mainz ordered that “gypsies and other thievish vagabonds” should be executed without trial, because they led a wandering life.²¹ It is difficult to fix exactly how many Roma were systematically killed during the Nazi-regime but the figures reach several hundreds of thousands. Over 90% of the Austrian Roma were murdered in Lodz, Auschwitz and other concentration-camps²²; in Romania approximately 11,000 Roma starved to death in Transnistria due to the fascist general Antonescu – that is almost the figure of the Roma who were suffocated by gas in Auschwitz-Birkenau.²³ And there is no commemoration of these crimes! Antonescu today is celebrated as a hero in the fight against the communists²⁴, in Austria commemoration-plates in the former communities of the victims have been prevented by decisions of local councils over years.²⁵ Murder and physical annihilation happen even today: Right-extreme, paramilitary groups in Hungary throw Molotov-cocktails on Roma-dwellings and shoot families, including children, when they run out.²⁶

Expulsion of Roma motivated through racism exists today as it existed hundreds of years ago: In 1417 Roma were mentioned for the first time in Germany, in 1498 they were already banned from all German lands and the above mentioned Archbishop of Mainz ordered in 1714 to punish the wives and older children with beatings, branding and ban. At the borders of the countries so-called gypsy gallows were erected to warn and frighten the Roma from entering²⁷.

And today the chasing is euphemistically called “repatriation” and this is put into practice on Romanian Roma in Italy for example. Their settlements in Rome were cleared by bulldozers although the UNHCR protested vigorously²⁸. In Romania, where they were deported to, the minister for external affairs considered in a TV-interview publicly whether they should be reshipped immediately to camps in the Egypt desert. He did not have to resign.²⁹ I will soon come back to this form of Anti-gypsyism which is very important for the topic of migration.

Repression motivated by racism is so diverse in all functional systems of society that a summarized presentation here is impossible. Let me therefore only mention one fact which is nevertheless rather important to understand migration. Few people in Europe know that Roma were enslaved immediately after their arrival in Romania³⁰ in the 14th century. They were slaves of the so-called boyars, of the princes and of the monasteries, up to 1855 in Moldavian and 1856 in the Wallachian principality.³¹ This was only 150 years ago. The consequences of this forced labour for the actual social and economic situation of Roma can hardly be overestimated.

²¹ Guenter Lewy, “Rückkehr nicht erwünscht”. Die Verfolgung der Zigeuner im Dritten Reich, München 2001, p. 16.

²² Gerhard Baumgartner, Florian Freund, “Daten zur Bevölkerungsgruppe der burgen- ländischen Roma und Sinti 1945-2001”, in: Zeitgeschichte, 30. Jahrgang (März/April 2003), Heft 2, p. 91-105.

²³ Mariana Hausleitner, Brigitte Mihok, Juliane Wetzel (ed.), Rumänien und der Holocaust. Zu den Massenverbrechen in Transnistrien 1941-1944, Berlin 2001.

²⁴ M. Hausleitner, “Das Ende des Antonescu-Kultes? Zum Verhältnis von Geschichte und Politik in Rumänien nach 1990”, in Südosteuropa, 51. (7-9/2002), p. 412-430.

²⁵ Dieter Mühl, Die Roma von Kemetten, Oberwart 2003.

²⁶ Pester Lloyd 31/2010, 10.08.2010, http://www.pestertloyd.net/2010_32/32romamorde/32romamorde.html viewed on 20.08.2012.

²⁷ G. Lewy, Rückkehr, p. 14, 16.

²⁸ Council of Europe Commissioner for Human Rights, Memorandum following his visit to Italy on 19-20 June 2008, CommDH (2008) 18, 28 July 2008, para. 38, <https://wcd.coe.int/ViewDoc.jsp?id=1309811>, viewed on 21.11.2012.

²⁹ Cioroianu said during an Antena 3 TV programme on a Saturday that Romanians who steal and commit other crimes in other countries should be sent to do hard labour in disciplinary battalions. “I was thinking if we could buy a plot of land in the Egyptian desert where we could send the people who put us to shame”, Cioroianu said. “Roma Virtual Network” Wed Nov 7, 2007.

³⁰ South of the Carpathian mountains.

³¹ Viorel Achim, The Roma in Romanian History, Budapest-New York 2004, p. 7-26.

It is true that there were also times when Roma enjoyed periods of relative *integration*. The Roman-German Emperor Sigismund of Luxemburg issued a decree granting them security;³² being skilled blacksmiths they were appreciated by the Ottoman Empire; many Roma from Eastern Europe regret no longer being under communist rule because at that time they had at least a regular work and income: until recent times in the Western states they were accepted as traders and craftsmen in economic niches.

But as mentioned earlier the situation can change abruptly depending on the needs and function of the dominant society. Following a relatively tolerant attitude under the regime of Ceaușescu in Romania suddenly after the fall of communism in 1990/91 pogroms and murders on Roma occurred.³³ Evidently Anti-gypsyism has nothing to do with the real Roma, but depends on the political, social and economic needs of the dominant society.

Let us focus on the anti-Gypsy practice of *expulsion*. Roma have been expelled during their entire history and throughout Europe. Unlike the ex-termination, which ends with the death of those concerned, this method has the same intended outcome for the majority population and for those in power, that is to get rid of them, not to see them any longer, not to have to deal with them any longer, at best to use them as discouraging examples.

Some facts: in 1505 the Roma were mentioned in Great Britain for the first time, in 1530 the first law was made to expel them from Great Britain partly as far as America and Australia.³⁴ The Earl of Hessen-Darmstadt in Germany, Ernst Ludwig, declared in 1734, ‘gypsies’ had to leave his country within a month, otherwise they would lose their property and life. For capture and homicide of ‘gypsies’ a prize-money was promised.³⁵

About the year 1600 Roma from Portugal were deported to Angola and to some African islands. Roma from Spain, who were supposed to be heretics and magicians, were deported to Brazil. In 1665 Scottish Roma were banned and shipped to Jamaica and Barbados, Polish Roma were deported to Siberia. At the beginning of the 19th Century Basque Roma were expatriated to Louisiana. Similar procedures happened in the Netherlands and other Western European countries.³⁶

In Eastern European countries the situation was the same. In 1615 the city of Tallin (Estland) enacted that gypsies found on the marketplace of the city had to be arrested and publicly whipped at the pillory. In 1747 the general governor of Riga ordered that beggars, ‘gypsies’ and bear trainers should be expelled over the frontiers of the country, wherever they might be seen. In 1759 Tzaritza Elisabeth of Russia ordered officials not to allow ‘gypsies’ to enter the city of St. Petersburg and the surrounding area.³⁷

And here one more historic example for the ban on beggars:

After the death of the Austrian Emperor Joseph II and the failure of his policy of the assimilation of Roma, which was inspired by the age of Enlightenment, the expulsion of Roma started again. A decree from 1811 goes like this:

“Gypsies, who enter the country, are to be repelled. Some gypsies sneaked into the country in spite of this interdiction and spread throughout the land pretending to beg in the streets. They are a risk for the public security. The wandering of gypsies is prohibited in Austria. For street collection only natives with good reputation are accepted. Gypsies have to be

³² Ibidem.

³³ Isabel Fonseca, *Bury me standing. The Gypsies and Their Journey*, New York 1995, p. 140-197.

³⁴ Thomas Aczon, David Gallant, *Romanichal Gypsies*, Hove 2000, p. 44 f; p. 13.

³⁵ G. Lewy, *Rückkehr*, p. 16.

³⁶ Rajko Djuric, Jörg Becken, Bertolt Bengsch, *Ohne Heim - Ohne Grab. Die Geschichte der Roma und Sinti*, Berlin 1996, p. 83.

³⁷ Ljalja Kuznetsova, Reimar Gilsenbach, *Russlands Zigeuner. Ihre Gegenwart und Geschichte*, Berlin 1994, p. 101.

returned to their home country and the entry to our country has to be banned at the border.”³⁸



Warning signs for gypsies at the entry of the castle of Harburg bei Nördlingen 18th century³⁹

It is not necessary to stress the topicality of these historical experiences in the light of today's ban on begging in Austria and other European countries. I sum up these historical examples so extensively to demonstrate, that expulsion, which means forced migration if you want to call it this way, is not a local phenomenon, not a national phenomenon, not a new phenomenon. These countries from which Roma are deported today look back on a century- long experience. Expulsions can euphemistically be called push-factors of migration, the victims of such push-factors are called refugees.

Indeed, sometimes Roma have been treated as refugees. Roma from Serbia, Kosovo and Albania were accepted as refugees in Austria and Germany during the Balkan wars.⁴⁰ Roma who fled from the Pogroms in Romania to Germany in the early 1990s were condoned there.⁴¹ In 2009 such Czech Roma as the well-known journalist Anna Poláková applied successfully for asylum in Canada: in 2011 the Hungarian sociologist and advisor of the Hungarian government for Roma-related issues, István Kamarás fled to Canada⁴² until, yes, until Canada reinstalled the visas for Czech and Hungarian citizens,⁴³ until Germany signed a repatriation-treaty with Romania,⁴⁴ until Austria and Germany pushed the tolerated de-facto-refugees back to Kosovo or Albania, where they had almost no chance to rebound.⁴⁵

³⁸ Conscriptio Zingarorum, Komitatsarchiv Moson, at: Claudia Mayrhofer, *Dorfzigeuner. Kultur und Geschichte der Burgenland-Roma von der Ersten Republik bis zur Gegenwart*, Wien 1987, p. 33.

³⁹ See <http://lallarutschawo.npage.de/verfolgung.html> viewed on 20.08.2012

⁴⁰ Brigitte Mihók, *Zurück nach Nirgendwo. Bosnische Roma-Flüchtlinge in Berlin*, Berlin 2001.

⁴¹ Zoltan Barany, *The East European Gypsies. Regime Change, Marginality and Ethnopolitics*, Cambridge 2002, p. 253.

⁴² <http://www.roma-service.at/dromablog/?p=17228> viewed on 20.08.2012.

⁴³ Ibidem.

⁴⁴ Änneke Winkel, *Antiziganismus. Rassismus gegen Roma und Sinti im vereinigten Deutschland*, Münster 2002.

⁴⁵ Thomas Hammarberg, "Europäische Migrationspolitik diskriminiert Roma", <https://wcd.coe.int/ViewDoc.jsp?id=1587209&Site=COE> viewed on 20.08.2012.

And the pull-factors? The fear of the nomadic, mobile Roma-masses, that migrate to the west and endanger our wealth and security is often heard in political debates. However, the equation of Roma with mobile nomads is factually wrong. According to similar estimates of Roma-NGOs and scientists, over 90% of people denominated as Roma are sedentary, in some regions even 100%.⁴⁶ In the village where my institute has cared for a Roma-project now for more than 20 years it is necessary to support the people by financing and organizing the transport to the next district capital to get an ID-card or a birth-certificate, so that they can apply for the legitimate claims on the social security system in Romania.

There are no reliable figures about new Roma-migrants to Western Europe, because a selection along ethnic affiliation is no longer permitted, although it is practiced from time to time even now. The report of the Commissioner of Human Rights and the OSCE on “Recent Migration of Roma in Europe”⁴⁷ points out that the masses of Roma-migrants appearing in the yellow press are excessively exaggerated. In reality it is a matter of hundred, in Great Britain may be 5,000 – 6,000 persons. Some case-studies may show it more clearly: in Klagenfurt, the city I come from with about 100,000 inhabitants, 10 – 15 beggars according to the local chief-inspector of the police have been enough to cause a law against begging in the whole province of Carinthia.⁴⁸ A family of Romanian Roma with 20 members who looked for shelter under a motorway-bridge was on the title-pages of the local press for weeks,⁴⁹ in Barcelona, a city with 1.6 million inhabitants, according to a recently published profound study there are about 600 – 700 Roma who immigrated from Eastern Europe and between 5,900 and 7,100 live along the Mediterranean coast of Spain.⁵⁰ The actual evictions of so-called Roma-camps in Lille and Lyon concerned in each case about 150 – 200 people.⁵¹ That the new French president Hollande takes it into account to break his promises uttered during his presidential campaign makes it clear that these actions are symbolic acts, that these expulsions have the quality of an “event” as Michael Stewart describes it in his new book *The Gypsy “Menace”. Populism and the New Anti-Gypsy Politics*.⁵² These are artificially staged singular cases to which a symbolic meaning as a topos is allocated, that is, ostentatiously erected as a warning sign at the frontiers just like the medieval gallows. Michael Stewart says that stressing the difference and the otherness of the Roma functions like a catalyst because the economically and socially unsettled Europeans need the Anti-gypsyism as a background for the common feeling of unity.⁵³ It is astonishing that this populism is practiced not only by political right-wing movements as Jobbik in Hungary, but now also by the socialist French president Hollande. Considering that even in such allegedly open societies as Norway fierce anti-Gypsy currents appear nowadays, this theory seem to be confirmed.

Let us put the famous question of Immanuel Kant on ethics: what shall we do?

⁴⁶ Jean-Pierre Liégeois, Roma, Sinti, Fahrende, Berlin 2002.

⁴⁷ Claude Cahn, Elspeth Guild, “Recent Migration of Roma in Europe. Commissioner of Human Rights/Council of Europe 2010”,

<http://www.osce.org/hcnm/78034> viewed on 20.08.2012.

⁴⁸ Stenografisches Protokoll der 37. Sitzung des Kärntner Landtages - 29. Gesetzgebungsperiode, Donnerstag, 1. Februar 2007.

⁴⁹ <http://www.tt.com/Überblick/4645766-6/rumänen-müssen-zeltlager-in-terfens-räumen.csp> viewed on 20.08.2012.

⁵⁰ Teresa Sordémarti et al, “Immigrant and Native Romani Women in Spain: Building Alliances and Developing Shared Strategies”, in Journal of Ethnic and Migration Studies, Vol. 38, Nr. 8 (Sept. 2012), p. 1233-1249.

⁵¹ Deux campements de Roms évacués dans la région lilloise”, in Le Monde 09.08.2010 http://www.lemonde.fr/societe/video/2012/08/09/deux-campements-de-roms-evacues-dans-la-region-lilloise_1744621_3224.html?xtmc=roms_lille&xtcr=5, viewed on 20.08.2012.

⁵² Michael Stewart, *The Gypsy “Menace”. Populism and the new Anti-Gypsy Politics*, London 2012.

⁵³ M. Stewart, *The Gypsy “Menace”*, p. 10.

The European Commission has urged the member-states to present national strategies for Roma-integration. To read them properly, you must have some experiences of interpreting fictional texts. In addition to that, some of these papers only repeat recommendations that have already failed work during recent years. Of course, it sounds reasonable to make the migration of marginalized Roma to Western Europe unnecessary by improving their social and economic situation in their countries of origin. But the main fault in my opinion is the focus on changes on the side of Roma, and not on efforts to change the attitude of the dominant society, to fight Anti-gypsyism. The main fault is the opinion that “they” must change, not we.

I will explain this with two small examples:

Without any doubt there are many Roma who are not integrated in the ordinary *labour-market*. That is why in Slovakia, in Hungary and other countries neoliberal methods of labour-market-politics were introduced by linking the social allowance to the obligation of public work in order to motivate allegedly work-shy Roma to start regular work. Therefore special activation programmes were installed with help of the European Social Fund, the World-Bank and so on. The expenses for social allowance for the state of Slovakia could be diminished by 50% through this international funding. But many employers dismissed their workers and replaced them with workers of these activation programs who earned only 60% of the minimum-wage. A research of the UNDP showed that 60% of the participants of these activation programs did the same work as before. Some scientists call this modern slavery.⁵⁴

Second example – *education*. Without any doubt a low education-level is a handicap for integration into the labour market. Times are over when analphabetic people could survive as day-labourers in agricultural collective farms. But it is very often willingly forgotten that the majority often deprived Roma of education. In Austria and Germany the Nazi-regime prohibited the school-attendance of Roma-children. The effects on the second and third generation are still measurable. And in many countries Roma were and are displaced to so-called special schools for persons with special needs where an adequate education can hardly be achieved.⁵⁵ Now education programmes propose models like “the second chance” in Romania, so that adult Roma get a second chance to achieve graduation. In our Roma-Quarter in Romania we looked for people wishing to take part in this programme, and obtained permission, but the project failed because the headmaster of the school allegedly did not have a classroom available for the Roma.

This is the reason for my *ceterum censeo*: for every Euro that is invested in a Roma-project, another Euro or better two must be invested to fight Anti-gypsyism. Pure pleas to humanism, even schooling against xenophobia and racism will be insufficient. Many publications of intercultural pedagogies and my own experiences prove that the best way to overcome the fear of diversity and difference is primarily successful through contact or encounter, meeting someone in person.

Being a catholic theologian also let me look for some inspiration from the Bible. In many ways Roma are similar to the lepers of biblical times. They have to stay away from the villages, looking for shelter under motorway-bridges, besides garbage dumps, in places which good bourgeois never enter. In some regions there is a concrete wall between the Roma-quarters and the quarters of the dominant society, in most regions there is a wall made of invisible glass. In biblical times leprosy was more than a medical diagnosis, it was a social category. In the

⁵⁴ Huub Van Baar, “Socio-Economic Mobility and Neo-Liberal Governmentality in Post-Socialist Europe: Activation and the Dehumanisation of the Roma”, in *Journal of Ethnic and Migration Studies*, Vol. 38, Nr. 8 (Sept. 2012), p. 1289-1304.

⁵⁵ ERRC Opposes Ethnic Boarding Schools in Slovakia
<http://www.errc.org/cikk.php?cikk=3580> viewed on 20.08.2012.

pericope of the healing of the leper (Mark 1,40-45 par) Jesus overcomes this gap by touching him and thus healing him. Touch, the most intimate form of contact, is a healing from exclusion.



Illumination from Codex Echternach (about 1040)

Many initiatives of members of the majority for Roma started with such an intense contact: one of the oldest Roma-NGOs in Austria was founded by a journalist who worked on a report about Romanian Roma⁵⁶, the beggars lobby struggling today to lift the ban on begging in Austria, was founded by an Austrian film-maker who accompanied a Romanian Roma beggar to her home to know her environment there.⁵⁷

So we should do the contrary of the common practice, no scaring, no evicting, no deporting, but creating institutionalized fields of encounter, of welcome, of admittance, where strangeness can be overcome and familiarity can evolve. Sometimes I dream that churches could perform this task, although the Anti-gypsyism of the society is widely reproduced in religious communities.⁵⁸

There are already some examples of best practice, not too many, but there are some groups and NGOs doing this work. In the city of Graz a catholic priest was shocked when he discovered Slovakian beggars had to spend the night in public toilets in winter time. He built a shelter, became their advocate, founded an enterprise of noodle-production in their home village and has a big influence on public discourse.⁵⁹ A Sinti-NGO in Upper-Austria takes over the role of a mediator when there are tensions with incoming Roma and they have succeeded in building an adequate campsite for travelling Roma.⁶⁰ In Munich a Roma-NGO supplies special social services for Roma and is financed by the city-council.⁶¹ For a long time I have demanded contact points for Roma in every county where people with intercultural knowledge and language skills, maybe with a Roma background, are employed by the community to provide information to all sides.

⁵⁶ <http://www.romano-centro.org> viewed on 20.08.2012.

⁵⁷ <http://www.bettelobby.at/> viewed on 20.08.2012. ⁵⁸ cf. G. Haupt, *Antiziganismus und Religion*, p. 139 ff. ⁵⁹ <http://www.vinzi.at> viewed on 20.08.2012.

⁵⁸ cf. G. Haupt, *Antiziganismus und Religion*, p. 139 ff.

⁵⁹ <http://www.vinzi.at> viewed on 20.08.2012.

⁶⁰ <http://www.sinti-roma.at/> viewed on 20.08.2012.

⁶¹ <http://madhouse-munich.com/> viewed on 20.08.2012.

I do not think that mass-immigration of Roma to Western Europe is a real danger. The flooding of the labour-markets in Western Europe by East-European workers after the end of restrictions on 1st May 2011 did not happen as sceptics had predicted. Nor did such horror-scenarios come true at the time when the poorest accession candidates Portugal, Spain and Greece joined the EU. I think that the danger of ruin to the fundamental pillars of the European Constitution, free mobility and choice of workplace, is much bigger.

A friendly welcome of Roma in Western states could lead to a change of mind in their countries of origin. Romania would not need to feel embarrassed any longer about its Roma population and the chance to do more for the equality of the Roma minority within Romania could rise.

Not all problems would be solved by such a new attitude, but new and creative possibilities could appear:

In a process of dialogue the majority could find a more balanced concept of manifold identities of Roma, where Roma can take part in decision-making. Roma could be recognized with more facets of their identity, for instance as mothers who want to feed their children and prepare them for a better future; Roma could be appreciated with their talents in language-skills and arts and so on. Roma would have the chance to understand their ethnicity as only one trait of their hybrid identity and not to be reduced permanently to negative prejudices. A permanent discriminating rating of Roma-ethnicity by the dominant society can lead to a Re-ethnification, that Bukow⁶² and others found in their research about Turkish youngsters in Germany. The children of these Turkish immigrants who were not allowed to achieve integration into the German society, defiantly reaffirmed their old Turkish ethnicity, reinforced it to a now positively connoted *differentia specifica* to the surrounding society. There is a rather big danger in overemphasizing the ethnicity in comparison with other traits of identity and personality. We could see this occur harmfully in the Balkan wars. Therefore I am rather sceptical – in contrast to my friend Tomas Acton – that ethnically pure religious communities such as some Roma-Pentecostal communities are really a good path to a better future, because they do not overcome the source of the problem, the exclusion and the gap to the majority, but underline and reinforce it ideologically.

In a democratic process of dialogue and encounter the self-representation of Roma could surely be improved, be it through NGOs, though political parties or through personalities. Without any doubt it is pleasing to have an increasing number of Roma-NGOs. A political self-organization of Roma, which was shattered and de facto inefficient for many years, is indispensable in a democratic society to support one's interests on national as well as on European levels. But one has to be careful because the definition of Roma as a transnational minority or the so-called Europeanization of the Roma-question is used by some national politicians. They argue in front of their voters that national changes are unnecessary because Roma are not members of the respective nationality but a supranational entity for which the EU has to take the responsibility. This danger is pointed out by Peter Vermeersch in a recently published article.⁶³

Finally a structured dialogic conflict management could minimize the importance of political concepts of Roma as enemies, which obviously never withstand a comparison with reality.

Roma have been in Europe for over 600 years. They have survived discrimination, slavery and the systematic annihilation during the Nazi-regime in the so-called Porrajmos. If we as members of the dominant society take over our duties and try to recompense even financially

⁶² Wolf-Dieter Bukow, Robert Llaryora, *Mitbürger aus der Fremde. Soziogenese ethnischer Minderheiten*, Opladen 1988; Wolf-Dieter Bukow, *Feindbild: Minderheit. Ethnisierung und ihre Ziele*, Opladen 1996.

⁶³ Peter Vermeersch, "Reframing the Roma: EU Initiatives and the Politics of Reinterpretation", in *Journal of Ethnic and Migration Studies*, Vol. 38, Nr. 8 (Sept. 2012), p. 1195-1212.

some of the crimes we did on the Roma over centuries, if we devote ourselves to fight Anti-gypsyism, if we deny the temptation to use our position of power to fix up a Roma- identity though ethnic ascriptions, if we take over the risk of an encounter at eye level and experience the enrichment by doing so, I am sure that migration of Roma will be the least problem to solve.

Social Mediation – Working Towards Inclusion from Amidst Exclusion

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Abstract

The aim of this paper is to analyze to what extent social mediation can be regarded as a productive means of solving disputes between migrant communities bearing in mind the often structural roots of these conflicts. The analysis of social mediation and its relevance is further carried out in the explicit light of the concepts of inclusion and exclusion. What this paper is intended to show is that it is in the housing neighborhoods that the primary experience of inclusion can take place. No political right is enough if the people are deprived of their right to live in peace in their local communities. Being accepted as a full worthy agent in the local level can give migrants a sense of belonging and empower them also on other levels of the society. Also, as social mediation involves a direct encounter of the two parties the underlying differences can be taken into account yet making way for a shared understanding of the past conflict and of how to prevent them in the future.

Keywords: social mediation, restorative justice, migrants, conflict resolution, inclusion, exclusion, neighbourhoods.

The Practice of Exclusion

Reasons for migration are multiple.¹ In many cases they have to do with various ways of excluding the other. But as theologian Miroslav Volf claims “the practice of exclusion is not just something that the evil and barbaric others do out there; exclusion is also what we, the good and civilized people, do right here where we are”.² We ignore and undervalue those around us daily. This becomes even more clear if the other has e.g. a different ethnic origin from ours. The problems related to exclusion follow migrants³ even in their new settlements. The practice of exclusion causes some wide-ranging consequences and this is why it needs to be tackled even in the midst of our own societies.

Exclusion takes form in a multitude of ways and it is important to understand them in order to be able to find some solutions to the existing challenges. Miroslav Volf describes exclusion firstly as cutting of the bonds that connect, taking oneself out of the pattern of interdependence and placing oneself in a sovereign position of independence.⁴ This way of understanding exclusion is the more common sense way and it indeed describes the reality that migrants face in their new settlements, often not able to participate due to language barriers or many discriminatory practices.

Surprisingly, exclusion can also entail erasure of separation. According to Miroslav Volf exclusion can secondly mean not recognizing the other as someone who in his or her otherness belongs to the pattern of interdependence. The other then emerges as an inferior being who must either be assimilated by being made like the self or be subjugated to the self.⁵ This way, too, to exclude migrants is clearly present in their everyday lives. It is not uncommon that the inclusion of migrants is understood as trying to make them like the national citizens of a country, obliged to renounce their typical habits. To accentuate the point Volf is making by describing exclusion also as an erasure of separation I refer particularly to Seyla Benhabib who argues for respecting the other just as the other. Not accepting the other as he or she is means to make him or her deny some characteristics very distinct to him or her.⁶ Not respecting others as they are therefore presents a way to exclude them.

It is important to understand these two ways of understanding exclusion, it is not just about pushing the other away, it is also about trying to force the other to be like oneself. Both ways of exclusion are equally problematic and both ways of exclusion can be found in the reality of migrants in our European societies. At the same time it is important to understand the challenge that the existing plurality in terms of worldviews, languages, cultures and ethnic origins puts forward. There are plenty of possibilities for the practice of exclusion in Europe today and the practice of exclusion extends to many different levels of society.

¹ The majority of cases of migration have to do with poverty, famine and persecution on the basis of race, religion, ethnicity, language, gender and sexual orientation, as well as ethnocide, genocide and civil wars. Seyla Benhabib, *The Rights of Others. Aliens, Residents and Citizens*, Cambridge University Press 2004, p. 137.

² Miroslav Volf, “A Theology of Embrace for a World of Exclusion”, in: David Tombs, Joseph Liechty (ed.), *Explorations in Reconciliation. New Directions in Theology*, Ashgate 2006, p. 24.

³ I want to underline that the term *migrant* usually refers to the movement of people from one place to another, both across national borders and within a national territory. Therefore the term covers many kinds of people in a variety of situations, those who move voluntarily and those moving involuntarily. In this paper a migrant refers to both these categories, though bearing in mind that the kinds of problems and situations I describe here usually do not apply for certain groups of voluntary migrants, such as personnel of multinational companies or organizations. See Kathleen Valtonen, *Social Work and Migration. Immigrant and Refugee Settlement and Integration*, Ashgate 2008, p. 4-6 for definitions of the term migrant.

⁴ M. Volf, “A Theology”, p. 67.

⁵ *Ibidem*, p. 67.

⁶ S. Benhabib, *The Rights of Others*, p. 168-169. See further K. Valtonen, *Social Work and Migration*, p. 6, who takes this point further and explicitly and critically discusses the process of integration of migrants.

Exclusion is not just something that touches individuals in their actions towards each other. Even actions of states and other political entities can be described in terms of exclusion. Sheila Benhabib talks of political membership when referring to principles and practices for incorporating aliens and strangers into existing polities. Political boundaries define some as members, others as aliens. The modern nation-state system has regulated membership in terms of the principal category of national citizenship.⁷ This question of national citizenship is most important when talking about migration. The newcomer often needs the rights and privileges that the national citizenship is connected with, like those of education, social security and healthcare. Being excluded from a political membership makes one excluded in a significant way from the whole system. This entails a whole lot of problems that must be dealt with not only by policymakers but also in the local level.

The Need to Include the Excluded

A high concentration of both ethnic minorities and of socially disadvantaged populations is typical for many deprived neighbourhoods in Europe. These neighbourhoods also present a breeding ground for conflicts of many sorts. Sophie Body-Gendrot states that it can be regarded somewhat a common wisdom that ethnically diverse societies tend to have higher levels of social and interpersonal violence than the more homogeneous ones.⁸ And according to recent studies the inhabitants of these neighbourhoods often feel insecure in their residential areas. Interestingly this feeling of insecurity and fear of violence does not always rest on empirical facts pointing to more violence than in the average but there is still a strong feeling of that being the case.⁹ Personal intuition therefore seems to mark one's attitudes towards the others. This is more so when the other is of different ethnic origin than what oneself is. In neighbourhoods inhabited by migrants this poses a problem. Anxieties towards the other spread unrest in the societies.

However, discriminatory practices, behaviours, attitudes and beliefs are part of elementary dynamics of human relationships and come to play even in a most everyday conduct, as maintained by Kathleen Valtonen. Moreover, she claims that our attitudes and beliefs about individuals and groups are formed by prejudice, stereotypes and ethnocentrism.¹⁰ Encountering the other can be problematic just because we bring to that encounter a whole set of expectations and assumptions. Noting this, the complexities of interaction in ethnic neighbourhoods become clearer. At the same time it hints to encounters between people to be also the solution of the issue.

To fully grasp the width of this problem I want to maintain a comprehensive understanding of the concept of violence. Large scale riots are not the only urgent problem in ethnic neighbourhoods, even though these, too, are not uncommon. What severely weakens the quality of life of the inhabitants in these neighbourhoods are the many kinds of troubles that are of so ordinary character that they do not interest the police or the media. These tensions do not show in the statistics on violence in the area. Yet they pave way for continuous conflicts.

Ethnic neighbourhoods foster a number of different cultural communities that often are very strange to the others. Cultural communities are built around their members' adherence to values, norms, and traditions that bear a prescriptive value for their identity. Failure to comply with them affects their understanding of membership and belonging, explains Seyla

⁷ S. Benhabib, *The Rights of Others*, p. 1.

⁸ K. Valtonen, *Social Work and Migration*, p. 82.

⁹ Jean-Louis Pan Ké Shon, "Perception of Insecurity in French Poor Neighbourhoods: Racial Proxy or Pure Discrimination Hypotheses?", in *Sage Journals: Urban Studies* 49 (3/2012), p. 506.

¹⁰ K. Valtonen, *Social Work and Migration*, p. 82.

Benhabib.¹¹ It is in the cultural identities that our most elementary convictions come to the fore. It is also in the cultural identities that the differences between individuals are at best identified. Yet it is these differences that need to be respected in order to not exclude the others.

Modern states presuppose a plurality of competing as well as coexisting worldviews. Societies that are composed of people of very different backgrounds need to make some substantial compromises so that they can accommodate the different expectations. This is not at all easy and depending on the level of the society there are differences in how these compromises are done. Principles of political integration are often more abstract and more generalizable than principles of cultural identity. Benhabib differentiates between thin and thick criteria when describing ventures to make unity out of a plurality. She claims that it is often easier to build on thin liberal-democratic institutional criteria rather than on thick cultural identities, thus leaving controversial issues concerning cultural, linguistic, religious and ethnic identities open and not addressed.¹² But these factors so constitutive to the personal identities of people do not go away simply by not mentioning them at the political level.

Like I pointed above, the practice of inclusion is by far about making the other like the self. Inclusion of migrants cannot mean that the migrants have to renounce their original culture and everything they believe in. Differences between people must be respected. There is a need to create unity in plurality. Enhancing multiculturalism must be seen as more of a norm than an exception. There is now more than ever an urgent need to rethink the idea of inclusion of only those alike and exclusion of the rest.¹³

The consequences of not giving the thick cultural criteria the amount of attention they deserve can be seen in the conflicts arising in the ethnic neighbourhoods, in the areas where the residents' cultural identities come profoundly to the fore. The practice of exclusion opens towards more and more chaos. Continuing chaotic living conditions are for many too much to bear and they seek out ethnic, nationalist or religious extreme movements that promise security in the face of what seems a world out of control.¹⁴

Any kind of violence is hardly ever a problem only in the interpersonal level. Any sort of violence is detrimental both to the victim and the offender, but questions related to violence are often of public relevance, even though the violence in itself is played in very private areas of life. Violence involving migrants, ethnic and racial groups even adds to the complexity.¹⁵

As it is difficult to point to any single cause for violence it can be stated that inter-racial violence is closely intertwined with crucial structural questions that must be dealt with by policy makers. Firstly, migrants become easy targets for xenophobic sentiments as they are often confined to segregated housing blocs in urban or rural areas, frequently cut off from the community around them.¹⁶ Secondly, as sustained by Juhani Iivari, who has conducted a study on migrants' sentences for offences in Finland, migrants' criminality seems to be a sum of failures in integration, long-term unemployment and lack of financial resources, racism and

¹¹ S. Benhabib, *The Rights of Others*, p. 120.

¹² *Ibidem*, p. 166.

¹³ I want to underline a paradox that often is neglected. It is that of the homogeneity of European societies. The modern nation-state system is built on the idea of inclusion. The nation states include people who are similar to each other in language, religion, race and ethnicity. However, the opposite of inclusion is always exclusion. The other has always been there. The incorporation of aliens and strangers, immigrants and newcomers, refugees and asylum seekers is a vital challenge but if you look at the European societies closer it is clear that they have always been there. See further S. Benhabib, *The Rights of Others*, p. 1.

¹⁴ Robert J. Schreiter, *The Ministry of Reconciliation. Spirituality & Strategies*, New York 2004, p. 11.

¹⁵ According to S. Body-Gendrot, "Urban Violence and Community Mobilizations", p. 83, inter-racial violence can be triggered by a need to act out in a context of frustration due to a perception that the residents' situation is unfair compared to that of the rest of the society or by a wish to answer to a provocation of hostile proximate groups.

¹⁶ Benhabib, *The Rights of Others*, p. 163.

marginalisation – all of which are largely structural problems. Therefore the answers to these problems cannot be only of stricter order and discipline, Iivari concludes.¹⁷

Measures to include must be taken on all levels of the society, even at the grassroots level. This is emphasized by Benhabib who claims that the subnational level should be equally advanced when reflecting on the ways to improve the lives of citizens and aliens. She underlines the significance of membership within bounded communities and defends the need for democratic attachment and action that is not directed only to the existing nation-state structures.¹⁸

The meaning of active measures at subnational level is highlighted when the importance of housing neighborhoods is recalled. As it is in the housing neighborhoods that much of the time is spent and where people should feel most comfortable and unpretending, it is there that also the cultural values and especially their differences come to play a significant role. A migrant who time after time meets dissent and resistance towards his or her worldview, custom and habits can develop feelings of indifference and nonchalance towards any effort of participation in the decision making affecting them.

Participation in decision making is essential for democracy. The democratic rule ideally 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.¹⁹ Democratic processes can dissolve tensions.

Inclusion in the democratic process is, however, not self-evident for the migrants, quite the opposite. They easily know and feel that they are unwelcome to join. The state's functions are time and again being questioned, which shows in the mobilizations in mixed neighborhoods. The growth of inequalities and the failure of redistributive policies suppresses peaceful cohabitation in our societies. When the rules of the democratic game seem biased in the housing, education, labor and civil rights arenas, resorting to direct action makes sense.²⁰

The lack of participation therefore is highly problematic and must be fought with measures that take into account the migrants special circumstances and the structural problems in which they are entangled. As I have shown migrants often meet many kinds of exclusionary practices that make their possibilities in participating in democratic activity difficult or unappealing. Instead of exclusion, inclusion should be fostered.

As an answer to the destructive practice of exclusion Miroslav Volf proposes the practice of embrace. This means never giving up on the other, sacrificing the self, and cultivating a willingness to rethink our thoughts and reshape our very identities in response to the other. Volf admits himself that in the harsh world of exclusion there are many who might object to the practice of embrace as something inefficient and positively harmful.²¹ Whereas embrace in the world of today can be seen as an unexpected answer to the challenge of exclusion there are also other developments going on that provide whole new answers to old questions.

¹⁷ Juhani Iivari, *Tuomittu maahanmuuttaja* (eng. *The Convicted Immigrant*), Helsinki: National Research and Development Centre for Welfare and Health, STAKES, Research Report 154, 2006, p. 139-140. Juhani Iivari has shown through empirical studies how the proportion of immigrants' sentences for offences, likewise the number of immigrants in prison is higher than that of Finns. These results are roughly consistent with research results obtained in other European countries. *Ibidem*, p. 9.

¹⁸ S. Benhabib, *The Rights of Others*, p. 3.

¹⁹ *Ibidem*, p. 43.

²⁰ S. Body-Gendrot, M. Martiniello (ed.), *Minorities in European cities*, Introduction, p. 5.

²¹ M. Volf, "A Theology", p. 30.

Restoration Instead of Violence

Traditional judicial ways of solving conflicts are going through important transformations that can be expressed in connection with other societal evolvments. There is a sort of a vicious circle going on. In the past most disputes were regulated within families, schools or neighbourhoods. Now those places of regulation are going through a crisis. The judiciary and the police are called upon to resolve even minor disputes. Conflicts in the local level are escalated to the judicial conflict resolution. This burdens the judicial system. The crisis in the judicial conflict resolution system is manifested in overloaded courts, formality of the process, long delays, and high costs. This results in substantial challenges in judicial conflict resolution.²²

There is a need for innovative methods for conflict resolution, these include methods that pay attention to the management of conflicts that migrants are involved in. According to a recent study French inhabitants feel unsafe just because their neighbours are foreigners. Long-term measures in policy level should therefore seek to combat ethnic stereotypes rather than only to promote social integration. Attempts of forced social integration are not only bound to fail, but may even heighten the perception of insecurity if the mere living next to foreigners leads to a perception of insecurity.²³

The novel measures also should tackle problems originating of different migrant communities settling in the same areas. In addition to just resolving the actual matter, conflict resolution at its best alleviates ethnic prejudice instead of provoking it. Measures for tackling these problems even involve ways of solving conflicts without immediately resorting to violence. Therefore fruitful methods of solving conflicts must not only be able to solve the acute problem but must also take into account the complex dynamics of conflict and violence.

Since the 1970's a variety of restorative programs and approaches have emerged throughout the world. Restorative justice was originally an attempt to address some of the limitations of the criminal justice system in responding to wrongdoing. It began as an effort to deal with burglary and other property crimes but can now be available even for the most severe crimes. Restorative methods are also spreading beyond criminal justice system to schools and workplaces. Restorative approaches are used to resolve and transform conflicts even internationally in order to build and heal communities. Restorative justice is considered a sign of hope and the direction of the future.²⁴

As restorative justice involves a myriad of slightly differing practices, it is not easy to define what restorative justice is all about. According to one definition restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms and needs, and obligations, in order to heal and put things as right as possible.²⁵ Through restorative justice the parties can learn to live together as neighbours. Or, as Robert A. Duff expresses it, they can "recognize and accept each other as fellow citizens who can live within the polity, if not in friendship, at least in civic

²² Heidi Jokinen, *Medling vid brott. En begreppslig analys av en konfliktlösningssmetod i en senmodern tid* (eng. *Mediation in Criminal Cases. A Conceptual Analysis of a Conflict Resolution Method in Late Modernity*), Åbo 2011, p. 310; Jean-Pierre Bonafe-Schmitt, "Mediation: from Dispute Resolution to Social Integration", in: S. Body-Gendrot, M. Martiniello, *Minorities in European cities*, p. 217; Howard Zehr, *The Little Book of Restorative Justice*, Intercourse 2000, p. 3-5.

²³ J.-L. Shon, "Perception of Insecurity", p. 507.

²⁴ H. Zehr, *The Little Book*, p. 3-4. See Jari Salonen, Juhani Iivari, *Evaluation of the "Let's Talk – Social Mediation for refugee Communities in Europe" Project*, Helsinki: IOM International Organisation for Migration, Helsinki, Report 78/2004, p. 9; Crista Pelikan, Tomas Trenczek, "Victim offender mediation and restorative justice: the European landscape", in: Dennis Sullivan, Larry Tifft (ed.), *Handbook of Restorative Justice*, London 2008, p. 84 for different restorative practices.

²⁵ H. Zehr, *The Little Book*, p. 37. See further H. Jokinen, *Medling vid brott*, p. 318 on the challenges on defining restorative justice.

peace.”²⁶ I want to therefore insist on restorative justice being a fruitful way to include in the world of exclusion.

Restorative justice implies an encounter between the key stakeholders of the conflict, the alleged victim and the offender at minimum. Sometimes even other members of the community are involved. The two parties enter into a dialogue with each other to deal with the urgent questions emanating from the conflict. The encounter allows an opportunity for the two parties to explore facts, feelings and resolutions. They are encouraged to tell their stories, to ask questions, to express their feelings, and to work towards a mutually accepted outcome. During the meeting the two parties can explain to each other why the particular action and its consequences pose a problem.²⁷ It is the personal restorative encounter between the two parties that is of unique significance. This encounter provides an opportunity for the wrongdoing to be articulated by victims. The offenders then again can acknowledge the wrongdoing, thus taking up the responsibility of his or her actions. In conflicts where there is no clear offender both parties can acknowledge their part in the origins of the conflict. Restorative justice empowers the two parties in a conflict. Both might also understand that instead of looking at the past wrongdoings it is better to look to the future and find a mutually acceptable way of living together.²⁸

Restorative justice makes it possible for the two parties to take a personal stand in the case and to discuss exactly those issues that they feel relevant in the case. In the judicial conflict resolution this is not always the case as the process is strictly regulated and directed by the legal professionals. This personal participation is fruitful with regard to the two parties internalizing the conflict and its resolution. This personal participation can in my opinion be further understood as a way of democratic participation as it enables those whose lives are at stake to express their opinion and contribute to shaping the immediate living conditions. Restorative justice can give the two parties a sense of being able to influence in a peaceful manner their situation.

In addition to the two parties the restorative meeting is attended by one or two mediators. Unlike arbitrators the mediators have a facilitative role and they do not impose or even propose any settlement of the conflict. It is entirely up to the two parties to solve their conflict. The mediators oversee and guide the process, balancing the meeting for the parties involved. The mediator is trained to the task but is usually no professional in conflict resolution. This way the mediator possesses no expert knowledge that could put him or her in a superior position with regard to the two parties. Even the mediator's role emphasizes the meeting's unofficial and informal nature.²⁹

Another way of enhancing the possibilities of the two parties in being empowered by the restorative justice is that mediation is always completely voluntary. The parties are never made to come to mediation, but they personally choose to. The two parties can firstly decide whether they want to start mediation in the first place and then they have the right to end the meeting any time they so wish. This, too, can be very empowering for the two parties. They are included in the conflict resolution.

Social Mediation as a Working Method with Migrant Communities

As an unambiguous definition of restorative justice alone is difficult to draw there is neither one single and clear cut definition of social mediation. Arranged in 2000, the *European Seminar on Social Mediation and New Ways of Conflict Resolution* defined in its final declaration social

²⁶ Robert A. Duff, *Punishment, Communication, and Community*, Oxford University Press 2001, p. 96.

²⁷ *Ibidem*, p. 92; H. Zehr, *The Little Book*, p. 44-45.

²⁸ R. Duff, *Punishment, Communication*, p. 92; H. Zehr, *The Little Book*, p. 44-45.

²⁹ H. Jokinen, *Medling vid brott*, p. 56.

mediation as a “process for creating and repairing social bonds, leading to peaceful resolution of the conflicts in daily life in which an impartial and independent party seeks, by organizing exchanges between persons and institutions, to help them to improve a relationship or to resolve a conflict opposing them”.³⁰

The origins of social mediation can be traced to France, where social mediators and social mediation practices are nowadays countless. In his editorial to a collection of proceedings of the *European Seminar on Social Mediation*, Claude Bartolone, then French Minister for Urban Affairs, stated that the idea of social mediation was born as a response to some very concrete problems of everyday life. These problems are in part directly connected to an urban lifestyle especially in deprived areas, where tensions are aggravated by unemployment and economic difficulties. According to the minister many social mediation practices are related to the integration of migrants of foreign origin.³¹

Indeed, a typical feature of social mediation is often its relatedness with disputes involving migrants. This is the case with Finland, where social mediation was started by a project in the mid 2000's. In order to facilitate the integration of refugees and to strengthen the environment for reduced racism, discrimination and social tension, the International Organization for Migration (IOM) and the Regional Office for the Baltic and Nordic States organized together with the Mediation Office in the city of Vantaa from Finland and the North-East Consortium for Asylum Support Services from the UK a project called *Let's Talk – Social Mediation for Refugee Communities in Europe*. The idea was to develop social mediation practices for settling both criminal cases and disputes in situations where the parties come from refugee communities or where the conflicts occur between refugees and the local communities.³²

The Finnish model of social mediation put emphasis on the parties of the conflict. In many cases social mediation most importantly emphasizes the kinds of conflict dealt with. An essential feature of social mediation is that conflicts can be ordinary things, not just crimes with statutory punishments. Jean-Pierre Bonafe-Schmitt in his article *Mediation: From Dispute Resolution to Social Integration* (2000) divides the matters dealt with in social mediation into three different entities: the majority of these troubles are noise nuisances such as noisy washing machines or lawnmowers; relational problems such as loud conversations and grating animals; and conflicts related to ownership, like car parking. Typical is that the disputes are of an everyday kind. Yet they cause a great deal of conflict in the neighborhood, they are easily subject to repetition and create a feeling of insecurity.³³ It is extremely important to deal with the matters. Social mediation offers a method to do that.

Working with disputes that are complex conflicts – since it is usually not clearly defined who is the offender, if there even is one – the aim of social mediation is not only to settle compensation but also to support the opposing parties to understand the conflict, its origins

³⁰ Délégation interministérielle à la ville, Social mediation. New Ways of Conflict Resolution in Everyday life. Proceedings of the Seminar organized by the Interministerial Delegation for Urban Affairs under the French Presidency of the European Union – Oisin Programme. Paris-Créteil, 21-22-23 September 2000, Saint-Denis La Plaine 2000, p. 126.

³¹ *Ibidem*, p. 5-6.

³² J. Salonen, J. Iivari, *Evaluation of the “Let's Talk...”*, p. 3. The activities of the *Let's Talk* project can be divided into three categories: education, information dissemination and networking activities. Considering the very short mandate, 14 months starting from December 2002, the project started activities in a field where there were no previous experiences to learn from. Owing to its short timeline, the project was to be regarded as a start for something new rather than a completed enterprise; *ibidem*, p. 3. The practice of social mediation has continued in Finland with the so called Kotilo-project that is still running. See the homepage of the project: http://lato.poutapilvi.fi/p4_pakolaisapu/en/finnish_refugee_council/frc_in_finland/ kotilo-project viewed on 14.8.2012.

³³ J.-P. Bonafe-Schmitt, “Mediation”, p. 227; R. Duff, *Punishment, Communication*, p. 92.

and consequences. Social mediation can be thereby a tool for preventing community conflicts and promoting good relations on a very personal level.³⁴

The final declaration of the *European Seminar* states that social mediation guides the transformation of urban life around three main objectives: fostering communication to society; developing and creating social bonds meant to contribute to a better integration of certain populations; and contributing to the control and prevention of conflicts and violence. Further social mediation is regarded as a specific activity, which should not be confused with other public activities, such as education, social work or personal and material security, but social mediation should be developed on a co-operative and complementary basis along with these activities.³⁵

Social mediation therefore can have multiple advantages. These have to do with not only the integration of the migrants and what that entails to the whole community, but social mediation also enables more personal and individual developments. Social mediation puts strong emphasis on mediation being either preventive in creating social bonds or reparative in repairing them. The prevention of conflicts is highly important in contexts with migrants. Along reparation of crimes and disputes already occurred, the Finnish *Let's talk* project aimed specifically at prevention by decreasing crimes and disputes in which refugees are involved, and to building capacities and empowering the refugee communities' networks and the actors working with them.³⁶

Social mediation: working towards inclusion

Like I stated above some of the judgments we make of each other are unfounded in that they are based on some xenophobic sentiments and lack a correlation to reality. This is more so as the roots of the conflict might rest, as Benhabib claims, on unexamined prejudices, ancient battles, historical injustices and sheer administrative dominion.³⁷ Through social mediation it is possible to create spaces for personal encounter in order to work with these judgments and expectations.

Cecelia Clegg depicts the encounter in mediation as a potentially life- changing dialogue where the two parties are at their most vulnerable.³⁸ Using the term *life-changing* here can seem sentimental but it is actually not. Many of the reasons leading to a clash between people are based on some very basic assumptions about the other. These assumptions, half-truths and even myths can be largely exaggerated, faulty and even directly racist. Yet they represent the life-view of the opinion holders. For them these assumptions are most real and serious. This is why such conflicts are so problematic.

Truth becomes a central concept in social mediation. Moreover it becomes very central to understand the different dimensions of truth. The understanding of truth being many different things is especially true when it comes to social mediation, where issues of factual truth might reveal very little about who is wrong or right. In the kind of disputes that social mediation deals with it is in fact often very difficult to find a factual truth about the wrong and right done in the situation that evoked the conflict.

Apart from the factual truth there is a need to understand how true is actually something existential that corresponds to the human experience.³⁹ In mediation it is not the factual truth

³⁴ J. Salonen, J. Iivari, *Evaluation of the "Let's Talk..."*, p. 13.

³⁵ Délégation interministérielle à la ville, *Social mediation*, p. 129-131

³⁶ J. Salonen, J. Iivari, *Evaluation of the "Let's Talk..."*, p. 15.

³⁷ S. Benhabib, *The Rights of Others*, p. 178.

³⁸ Cecelia Clegg, "Embracing a Threatening Other: Identity and Reconciliation in Northern Ireland", in: Sebastian C.H. Kim et al (ed.), *Peace and Reconciliation. In Search of Shared Identity*, Aldershot 2008, p. 88

³⁹ R. Schreiter, *The Ministry of Reconciliation*, p. 118.

that is of importance but the relational one, the one that gives way for the lived experience of the participants. This kind of truth is not justified by reasoning it through but by the shared moral responsibility that meeting another person constitutes.⁴⁰ Creating spaces, like that of mediation, for a direct encounter might help the parties involved to shed new light on these situations and to find a common ground to deal with the matters.

In social mediation the role of the surrounding community is enhanced. The inhabitants in a certain neighbourhood might not share a sense of common neighbourhood identity, but in the residential area the two parties need to live together, next to each other, even in the future. According to recent studies an experienced insecurity in a neighbourhood is a clear incentive for moving out, if the resident only can.⁴¹ As this is not always possible, it is important that the conflicting parties find a certain kind of solution to their conflict. Therefore it is important to understand what to expect of mediation. The two do not have to become friends, it is enough that they learn to live in peace.⁴²

The proper solutions of conflicts are portrayed by looking at their depth and sources. For Marc Gopin one of the fundamental errors of modern civilization is the tendency to ignore the importance of cultural particularity for the individual and for the community. Concretely, he says, we cannot enter as peacemakers into a culture with pre-programmed, homogenized sets of values and principles, unless those principles are accompanied by an embrace of the unique identities of groups and individuals.⁴³ In order to answer to the challenges posed by the existing diversity, you need to pay closer attention to these differences and not try to overrule them with some generic common rules. Societies therefore need means to take these differences seriously. This is exactly what happens through restorative justice. Social mediation gives way for diversity as each conflict resolution can be defined according to the two parties of that particular conflict.

The possibilities of social mediation with migrant communities are highlighted when giving attention to the diversity that exists in certain neighbourhoods. Through a restorative encounter these differences can be maintained yet finding a common ground in solving the particular conflict. Gopin highlights further the meaning of negotiating, of the nature of the boundaries and of the steady work on the guidelines of crossing those boundaries as the key to the creation of deep and meaningful human identity. For him this means embracing the other in all his particularity.⁴⁴ This is especially true with regard to migrants, who in a profound manner do not share the linguistic, ethnic, religious or cultural background of their new settlement. Making them renounce all that would be a violent thing to do. The crucial question is how to accommodate these different ways of life to each other.

⁴⁰ In this respect I differ from Benhabib, who also suggests a meeting between the different stakeholders in an issue. According to Benhabib the political membership is ideally enhanced through the means of discourse theory that initially was formed by Jürgen Habermas and further developed by herself. The basic premise of discourse ethics is that only those norms and normative institutional arrangements are valid which can be agreed to by all concerned under special argumentation situations. The discourse ethics demand that all those whose interests are affected by a policy and their consequences have a say in their articulation as equals in a practical discourse. S. Benhabib, *The Rights of Others*, p. 13. It is reason that rules in the discourses. Benhabib utterly insists on a moral universalism that is apt for reconciling between institutional and normative necessities of democracy on the one hand and of the political membership of aliens and citizens alike on the other. This basic subsumption I do not share with her but rather want to further a moral contextualism, that in my opinion best describes what mediation and restorative methods are all about, as I aim to show in this paper.

⁴¹ J.-L. Shon, "Perception of Insecurity", p. 511.

⁴² R. Schreiter, *The Ministry of Reconciliation*, p. 65.

⁴³ Marc Gopin, "The Heart of Stranger", in: David Tombs, Joseph Liechty (ed.), *Explorations in Reconciliation. New Directions in Theology*, Aldershot 2006, p. 16.

⁴⁴ *Ibidem*, p. 20.

Apart from the encounter making possible new ways of interpreting situations and other people, these encounters, where the word is given to both parties and where they are also made to listen to the other, entail a specially rewarding personal participation in conflict resolution. This participation empowers both parties in a world of exclusion in an important manner. They get to know that they are stakeholders in bringing about the change in the society.⁴⁵ In social mediation the parties can be active participants whose full agency is enhanced by the mediator's minimal role.

The impact of mediation can therefore be described as a grass-roots initiative of empowerment of people. Different formal and informal modes of action and interaction constitute fertile ground for grass-roots engagement, making civil society an arena of inclusive participation. Even the types of civil society activity that are not formalized can be very significant for integration in the long term. The activity in civil society has potential not only for making sense of diversity, but for legitimizing it as a way of living.⁴⁶ With this in mind the official authorities could develop and boost different grass-roots initiatives, like that of social mediation, with active measures.

Benhabib states a paradox that “we can never eliminate”: those who are excluded will not be among those who decide upon the rules of exclusion and inclusion.⁴⁷ But with mediation just anybody can be granted a full agency to have at least a bit of control in shaping rules and customs applicable in one's immediate contours. According to Benhabib, the treatment of aliens, foreigners and others in our midst is a crucial test case for the moral conscience as well as political reflexivity of liberal democracies.⁴⁸

As mediation enables for the two parties a possibility to define the resolution of conflict completely according to their wishes, no general public can be sure in advance of what the actual outcome is going to be. Benhabib who calls for citizens active participation admits that such processes might be messy and unpredictable and may yield less than ideal results, but she is still convinced that they are after all more desirable than the coercive enforcing of certain principles, which always is questionable from a democratic perspective.⁴⁹ Social mediation can therefore strengthen the two parties' experience of a democratic decision making, having through mediation the experience of being taken seriously, as a rightful actor. Mediation can enhance their abilities and willingness to participate in other levels of the society, too. There is in theory no issue that could not be dealt with through social mediation. Yet in some cases the conflicts might be rooted in problems with a long history. Such problems represent a complex web of issues that can be extremely challenging to tackle. Like antipathy between certain nations. These might challenge the success of social mediation.⁵⁰ However, I want to emphasize that such an approach misses the possibilities of mediation on the very singular and personal level. The idea of mediation is to facilitate an experience for them to get a new kind of perspective on the other, no matter what the original setting might be.

Conclusion: Working Towards Peaceful Communities

The mixing of habits and customs has increased as the number of mi- grants has increased rapidly across Europe. A challenge emanating from this is the coexistence of inhabitants of different origins in the same housing areas. These neighborhoods can be fraught with conflict. In this paper I have argued that social mediation can serve as a fruitful means to solve conflicts between migrant communities.

⁴⁵ C. Clegg, “Embracing a Threatening”, p. 89.

⁴⁶ K. Valtonen, *Social Work and Migration*, p. 48-49.

⁴⁷ S. Benhabib, *The Rights of Others*, p. 177.

⁴⁸ *Ibidem*, p. 178.

⁴⁹ *Ibidem*, p. 113.

⁵⁰ J. Salonen, J. Iivari, *Evaluation of the “Let's Talk...”*, p. 31.

The developments in the past decades have challenged the idea of an uncontested collective narrative of common sympathies. This is well exemplified in the neighborhoods inhabited by migrant communities. Multitudes of beliefs and values live side by side. Universal claims on definite practices are therefore inapt and more contextual approaches are needed as moral issues do not lend themselves to be scrutinized out of the context in question. As social mediation involves a direct encounter of the two parties, the underlying differences can be taken into account yet making way for a shared understanding of the past conflict and of how to prevent them in the future. Social mediation could be a valuable method in working towards inclusion of migrants.

Social mediation can also serve on a more structural level. I have suggested that it is in the housing neighborhoods that the primary experience of inclusion can take place and that it is through some very concrete integrative actions that migrants are empowered also on a wider perspective. Being accepted as a full worthy agent in the local level can give migrants a sense of belonging and empower them also on other levels of the society. This potential emphasizes social mediation's relevance for integration of migrants. Social mediation hints at an emergence of a new mode of social regulation. I have argued the urgency of these new modes in working with the migrant communities. Social mediation shows only one kind of new thinking of the possibilities of participation of migrant communities in the running of their lives on a very basic level. These promising practices on the grass-roots level can, however, act as an example of giving way to similar practices even on other levels of the society.

Children as Moral Subjects in Ethics of Migration

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Abstract

In 2011 almost 50% of the displaced persons around the world were children but still there is a lack of migration research about children's experiences, roles and perspectives (Special issue in *Journal of Ethnic and Migration Studies* Volume 37 Issue 8 2011). The aim of this paper is first and foremost to demonstrate how the leading theories and debates in the debate about ethics of migration lack a discussion of children as moral beings in their own right and that the debate is characterized by an adult discourse and traditional rooted assumptions about children. Secondly, the paper argues that the ethics of migration should acknowledge children as moral beings with agency, interests, rights and experiences in their own right. If children's rights are acknowledged as morally relevant and if ethical theory should play a relevant role in the future debate of migration and policymaking then it is crucial to take a critical view on the construction of children as moral beings. Thirdly, the paper examines what the implications of future research in ethics of migration can be, if children are acknowledged as moral subjects in their own right.

In migration research children are traditionally represented as "passive, needy and different" (Ibid p. 1159). When children are in focus it is often in a fragmented fashion, with a perspective on children as future adults and as passive members of the family. However we can see an increased interest in challenging the traditional rooted assumptions about children in the latest years in the field of migration research as well as in some fields of philosophy. We have not yet seen a similar development in the ethics of migration. This paper analyses some of the leading contributions in the debate about ethics of migration represented by particularly Joseph Carens and David Miller that represents arguments for and against open and restricted borders. The analysis demonstrates how children to a great extent is invisible and that their roles, interests and experiences to a great extent have been left out of the debate. When children are mentioned it is in a fragmented fashion, in an adult-centric discourse, portraying children as reduced to family members and as vulnerable with a special need of protection and care. The paper suggests that more expanded conceptions of children will lead to new and important ethical questions. It concludes that many theoretical questions remain unanswered about the moral status of children in the ethical debate about migration and that the case of children point at gaps and weaknesses in some of the dominating theories about borders. A way to fill these gaps is to a greater extent take into account existing empirical research on children in migration and a growing philosophical research interest in children as moral subjects. The recognition of children as moral beings in their own right is put forward as one way of making ethical theory more applicable and relevant to policymaking and research of migration in the future.

Keywords: Ethics of migration, Moral status of children, Children rights, Joseph Carens, David Miller, Children as moral subjects

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Introduction

In 2011 Approximately 42 million persons around the world were forcibly displaced according UNHCR, of which almost 50 % were children¹. Even though children constitute a significant part of the forcible displaced this paper demonstrates that little, if any, systematic philosophical or ethical analysis has been done with focus on children's moral status within the debate about ethics of migration² which has been taking place in international scientific journals the last 20 years. The analysis make evident that in the debate children are to a great extent invisible and when children are portrayed it is made within a discourse of children as particular vulnerable, in a special need of protection and as a subordinated part of the family. Recent migration research and philosophical research in other fields, do however question "conventional" views of children and highlight a more differentiated and contextualized conceptualizations of children where they are as well acknowledged with capacities, agency and as active participants in the migration process. The question is then; in what way will a rethinking of conceptions about children also have consequences for the moral status of children in ethical theories and arguments about migration?

The aim of this paper is to discuss the moral status of children within the debate about ethics of migration. In line with what Joseph Carens calls a Contextual Approach to Political Theory³, I will discuss how children as a category and as moral subjects do point at existing theoretical gaps in need of further ethical inquiry. The following research questions have been guiding my work; a) in what way have children been portrayed and conceptualized as moral beings within the debate?; b) how can recent research of migration and philosophy contribute to new conceptualizations and rethinking of children as moral subjects in the debate?; c) if taking children as distinct moral subjects in their own right as the focus of inquiry what ethical questions can be raised and what weaknesses can be identified in the theoretical perspectives that has been influential in the debate?

In the first part, the Introduction, I outline the aim, questions and the motivation of the paper. I present previous research on how conceptions of children and childhood have been payed an increased interest in philosophy and migration research and how this research motivate a further investigation of the moral status of children in the ethical debate about migration. In the second part I demonstrate how the debate about ethics of migration so far has conceptualized children in a narrow and traditional way by analyzing some of the influential contributions made by Joseph Carens, David Miller and some associated debaters. In the third part I discuss how empirical migration research and philosophical research presents important arguments to rethink conceptions of children in the debate and how this leads to new theoretical questions and does point at existing gaps in ethical theory about migration. In the paper I present some examples about what type of theoretical questions that will be important to keep on investigate. In the conclusion I state that a critical examination of the moral status of children regarding rights, interests and definitions of childhood have not yet been developed in the ethics

¹ Forcibly displaced people is according UNHCR estimated to 42.5 million 2011. On average, 47 per cent of all persons of concern were children under the age of 18, including 13 per cent. Among Refugees 46% were children and among asylum-seekers 34%. (<http://www.unhcr.org/4fd6f87f9.html> p. 34)

² The debate about ethics of migration have been given different names such as "ethics of immigration" or "The Open borders debate of Immigration" In this paper I refer to the debate as it is described by Baader 2005, Seglow 2005, Wilcox 2010 and the specific material used in this study consist of in total 32 articles published in international scientific journals with a particular focus on the writings of Joseph Carens and David Miller. See more about method and selection principles in chapter next section and note 6 and 7.

³ *A Contextual Approach to Political Theory* (Carens 2004). This paper is driven by the assumption that a plausible ethical theory also need to have a component of contextualization to the problem it aims at having something to say about. One way of doing this is to use a child perspective in a *search for cases* that are especially challenging to the theorist's own theoretical position and to use the category of children as a point of departure to *gain a critical perspective on theory and point at existing gaps*.

of migration and thus call for further research in this topic. However, before getting to the analysis of the debate and future questions of research I will in the following give a brief background to how conceptions about children and childhood has been discussed within childhood research the last years.

Conceptions of children and childhood in previous research

Conceptions about children and childhood in society have been discussed the last 30 years out of various disciplinary perspectives such as sociology, history, psychology, anthropology and philosophy (E.g. James, Jenks and Prout 1998, Archard and Mcleod 2002, Kehily 2008, Wyness 2012). A common feature of this research is to put focus on children as subjects in their own right where conceptions of children and childhood is studied in different social contexts and historical processes. A broad range of empirical research has been carried out studying children's experiences and the active construction of their own social lives. Other empirical studies have been focusing on children and childhood through policy and at a societal macro level. During this emergence of childhood research one can also note that several different theoretical perspectives have been influential about how we can understand the lives of children, i.e. social constructionism, structural and post-structural approaches, new materialism etc.(Wyness 2012).

In modern philosophy there has been a growing interest of a critical discussion about the moral and political status of children in relation to philosophical theories and traditions (E.g. Archard and Mcleod 2002, Brennan and Noggle 2007, Walls 2010). In the anthology, *The Moral and Political Status of Children*, Archard and Macleod(2002) have gathered thirteen distinguished moral and political philosophers giving different contributions on children's rights, parental rights and duties, the family and justice and civic education. Archard and Macleod recognizes that an increased interest in the moral and political status of children has been propelled by at the one hand scholars identifying gaps in recent theory but at the other hand by a more general societal, legal and political development. They point for example at a changing character of families in western nations, an increased awareness about the problems faced by children in terms of poverty, abuse and a global agenda that recognizes children as right-holders following the Convention on the Rights of the Child. Archard and Macleod identify two different and dominating ideas of children in the tradition of moral and political philosophy. The *first* is that children are the property of their parents or an extension of the parent which can be found in the thoughts of Aristotle or by more modern philosophers as the libertarians Jan Narveson or Robert Nozick (Archard and Macleod 2002 p. 1). The *second* idea is that children are incomplete adults and not yet possessors of the powers and capacities that adults do have and that characterize human beings. Children are seen as unfinished humans and as "becomings" rather than "beings" in themselves, a view find by e.g. Aristotle, Locke, Hobbes or Grotius (Ibid p. 3).

In some of the most influential modern political theories of justice and rights, put forward by e.g. John Rawls, Ronald Dworkin, Robert Nozick or Michael Walzer, children have been treated only in the margin or as exceptions. A fundamental assumption of the dominant liberal theories is that the moral agents, covenants or right-bearers, are to be regarded as autonomous, rational and independent individuals. Since the traditional view on children portray them as lacking rational capacities, depending on others and as not fully human, children has not been taking into consideration as moral actors or subjects (Ibid p. 3 ff). Another traditional assumption in modern philosophy is that the interests of the child is consistent with the family or parents and that the parents (or corresponding guardians) are the ones who legitimately should and can convey the interest of the child.

In recent migration research increasing interest has been paid to the roles and experiences of children in migration.⁴ This due to a lack of data about children and the domination of traditionally rooted assumptions about children, childhood and family (White et. al 2011). Children are traditionally represented as “passive, needy and different”(p. 1159) where the perspectives of children have been overshadowed by an adult discourse on for example decision-making and experience during the migration process(see Spicer 2008 in White et al p. 1160). Recent migration research taking a child perspective does instead emphasize a more differentiated and contextualized understanding of children in migration. Complementary to the traditional assumptions, children are also regarded as active participants, autonomous and individuals with capacities in the migration process.

To conclude, conceptions about children and childhood in society have been paid increased interest the last 30 years in different disciplines and areas of research. The focus on children as subjects in their own right is however a rather new phenomena in philosophy as well as in migration research that previously have been dominated by adult discourses and portraying children as “passive, needy and different”. The emerging interest of children in philosophy and migration research have emphasized a more differentiated and contextualized conception of children as also having agency, being autonomous and playing a more active role in relation to the family and the state. By rethinking conceptions about children and put children as moral subjects in their own right it opens up possibilities to begin asking questions about what consequences this will have for the moral status of children in the ethical debate about migration. In the following will move on to analyze some of the most influential contributions to the ethical debate about migration to illustrate how the debate still is considering children’s moral status in a rather traditional and limited way. My point of departure is in previous childhood research, as referred above, and my interest is to problematize conceptions of children and childhood in the existing debate.

Children in the debate about ethics of migration

The ethical debate about migration have the last years been paying attention mainly to questions about border controls of nation states and individual rights to membership and admissions (E.g. Baader 2005, Seglow 2005, Wilcox 2010, Wellman and Cole 2011). In her research overview Shelley Wilcox states that philosophers historically have been arguing for the moral right of liberal states to control immigration although there might be some specific exceptions from this right (Wilcox 2009). One of the famous defenders for this traditional position is Michael Walzer. In his seminal work “Spheres of justice” (1984) he argues for a kind of communitarianism where members have a right to form political communities. As members of a political community they also need to have the possibility by themselves to make a decision about who is to become a member and who is not, in accordance with their understanding of the ”nature of the political community”(Wilcox 2009 p. 814). Citizens must be able to regulate immigration in order to protect their freedom of association, welfare and culture. An analogy can here be done between the nation-state and other types of communities such as clubs, associations and families and the possibility to include or exclude the one you want to. David Miller is another recent proponent for the right of nations to control their borders and restrict immigration (Miller e.g 1988, 1993, 1997, 2008). He emphasizes nationality and that individuals have a basic right to control their culture and to form it in accordance with their own wishes. Miller means that one could possibly argue for a *basic right* to free movement across borders if this is the only alternative to avoid famine and persecution. There could also

⁴ This interest is particular evident in the special issues from the *Journal of Ethnic and Migration studies*, *Transnational Migration and the Study of Children* (2012), and *Transnational Migration and Childhood*(2011) and in the special issue in *Childhood: Childhood and migration: mobilities, homes and belongings* (2010)

be a *bare interest* by individuals to immigrate to other states but this can never be seen as a basic right that overrules the right of citizens to control their cultural and political interests within the national state.

The conventional assumption has however been challenged the last years by liberals in two lines of arguments according Wilcox. From one direction the restrictive approach to open borders in liberal democracies have been criticized to be inconsistent with basic liberal egalitarian ideals of freedom, equal opportunity and moral equality. Joseph Carens is one of the most famous defenders of this position and have been advocating different liberal arguments for open borders and mean that a liberal acknowledgment of freedom as a basic human right also need to imply a freedom to move across national borders (E.g. Carens 1987, 1996, 2004). Liberals maintain individual rights of freedom to fulfill their preferences and desires as long as they do not intrude on others legitimate claims. In the same way as freedom of movement within the borders of the national state is considered a basic human right, the freedom of movement across borders ought to be considered in the same way. By the right of freedom of movement across borders follows also a *prima facie*⁵ obligation of national state to hold with open borders. From another direction the restrictive position on open borders have been criticized by a global justice perspective (E.g. Carens 1987 or Risse 2008) where rich liberal democracies are considered to have moral obligation to admit immigrants as a response to global injustices such as poverty and violations of human rights. These arguments stems out of the idea about the equal value and equal opportunity of all human beings. Rights and social positions ought then to be distributed out of abilities and talents and not out of morally arbitrary criteria's such as national citizenship, ethnic affiliation, gender or similar. National citizenship is considered arbitrary since one does not choose your place of birth more than one choose for example sex and should therefore not be a basis to distribute rights or social positions. If national states aim to avoid this kind of discrimination than they also ought to provide with open borders.

With point of departure in the research reviews of Bader 2005, Seglow 2005 and Wilcox 2010 I have recognized Joseph Carens and David Miller as two important and active contributors to the debate and as representing arguments for and against open respectively restricted borders. I have identified their contributions in some distinguished international scientific journals⁶ of politics, ethics, and philosophy and then moved on to recognize other contributions in these journals which can be seen as associated with the contributions of Carens and Miller⁷. A reason for concentrating on articles published in international journals is that the analyzed contributions could be, to some extent considered as a reflection of the ethical scientific debate in the sense that editors and peer-reviewers have been a part of the process in another way than the case with monographs and anthologies. A future and more in depth examination of the moral status of children in ethics of migration would likely to also bring in monographs and anthologies as valuable sources. The general question used in the analysis of the debate is; in what way have children been portrayed and conceptualized as moral beings?

Children as invisible and vulnerable in the debate

In this section the focus will be on how children have been conceptualized so far in the ethical debate about migration. I will demonstrate how children to a great extent have been left

⁵ A *Prima facie* ("at first sight" lat.) duty can be understood as a duty one has an obligation to follow as far as no other duty overrules it.

⁶ The Journal used in the study: *Ethics, The Review of Politics, Ethical theory and Moral practice*, *Ethics and international Affairs*, *Ethics and Global Politics*, *Journal of Applied Philosophy*

⁷ With associated articles I specifically refer to articles that somehow was posed as responses to Carens and Millers contributions or contributions that Carens and Miller was responding to. A complete list of the contributions that have been analyzed is presented under references/appendix.

out of the debate and when children are mentioned they are portrayed as vulnerable, dependent, as citizens in becoming and in special need of protection.

A first thing that appears when reading the articles out of a child perspective is the fact that in many cases children are not mentioned at all (E.g. Andersson 2008, Carens 1999, Laegard 2007, Meilaender 1999, Gibney 1996). In this sense the invisibility of children is rather striking. Children are in some of the articles however mentioned but when they are mentioned it is mainly in the passing and without further examination of children as category or as distinct subjects of interest. In these cases children are only mentioned a few times in the text or in a footnote (e.g. Miller 1998, 2004 p. 259, 2008 p. 196, 2011 p. 168-170, Boswell 2008, Carens 1996, Weiner 1996). In some other cases children are mentioned in the passing as examples but without paying interest to their moral status (e.g. Holtug 2011, Miller 2011, Weiner 1996). One illustration of this is the debate between Nils Holtug and David Miller in the *Journal of Ethics and Global Politics* where they discuss children as an example to why we intuitively would pay more moral significance to a child of our own family, community or nation in comparison to an anonymous child outside our own family, community or nation. This discussion does not say anything specific or explicit about children's moral status, more than using children as an example for the specific moral significance of people living in closer relation to ourselves. This type of example could at first sight seem to be harmless but put in a broader context it is also symptomatic for a conception of children as something that we all seem to agree upon be of special value. If Miller and Holtug by contrast had used a related adult as an example it would likely not had made the same strong appeal for a moral significance.

In a few cases children as a category is brought up as a topic of specific concern (Carens 2008 and Hovdal 2008). Joseph Carens (2008) devotes a section to children's rights in his article *The Right of Irregular Migrants*:

Within the general category of "irregular migrants," children constitute a group with special claims. For one thing, they are a particularly vulnerable subcategory of human beings, one standing in need of special protection, as is reflected, for example, in the existence of a special international covenant on the Rights of the Child. For another, they are not responsible for their unauthorized presence within the state, since it is their parents who have brought them in. (Carens 2008, *Ethics and International Affairs*, 22, 2, p. 168)

In the quotation of Carens, children are explicitly described as particular vulnerable and in need of special protection. There are no further moral arguments or explanations presented about why we are supposed to agree with his assumption more than that it is stated in the International Convention on the Rights of the Child. The CRC ought however not be seen as the outcome of an ethical theory but instead as a political document resulting from negotiations and compromises between states (Holtug 2011). The CRC can be seen as a development from the moral language of the Universal declaration of Human Rights which is somehow pointed at adult men and women. Human rights theorists seem though to have neglect the case about children and in what way the rights stated in the CRC theoretically can be applied to children (Wall 2010). Another example of portraying children as vulnerable in a more implicit way is when Miller (2011) and Holtug (2011) discuss the previous mentioned example about children in need of help. Even though the discussion do not contain any explicit statement about that children ought to be looked upon as particular vulnerable the fact that they discuss children in terms of special moral significance and in need of help becomes one among other indications of a strong discourse about children's vulnerability.

Moan Marit Hovdals response to Joseph Carens in the same journal is another of few examples where children are discussed as a specific object of interest.

The normative purpose of children's right to free public education, however, does not readily support the claim that migrant children in an irregular situation have a moral right to free public education. Carens emphasizes that the legal right of children to free public education

carries the value that society places on the well-being of children. The right to a free public education is meant, among other things, *to contribute to this good in the present*, and also *to enable children to function later in life*. One may reasonably claim that it follows from this that irregular children, too, have a moral claim to free public education. However, *the right of children to education is also meant to prepare them as citizens of the state of which they are members*. This creates a problem, because irregular migrants are not meant to remain in the state's territory. In principle, therefore, one cannot reason that it follows from the right's normative purpose that the children of irregular migrants have a moral right to a free public education, which Carens also recognizes. (Hovdal 2008, p. 208)

Hovdal question Carens argumentation of irregular migrant children having a moral right of free public education. She argues that the right to free education should be restricted in the case of irregular immigrant children since they are not meant to stay in the state's territory and therefore will not fulfill the normative purpose of education, namely to become good citizens. It is in this case interesting to see that children are discussed in relation to education, a perspective that fits well into a traditional philosophical view on children's moral status based on how they will contribute to the society as future citizens. According Hovdal the value of children's education lies not in a right to education as a basic universal human right, independently citizenship, but instead the value of education is related to children as becoming citizens. In this way she does not emphasize children to have some kind of special need and claim to rights as Carens does. Instead children's moral status is intimately connected to their contribution to the society and their citizenship.

Another conception of children that is evident in the quotation from Carens (2008 p. 168) is that children are regarded as a subordinated part of the family in terms of interests, decision-making and responsibilities. Carens states for instance that irregular migrant children are not "responsible for their unauthorized presence within the state" (2008 p. 168). This indicates that children not are seen as being a part of the decision-making within the family and that the parents are morally responsible for the children and seem to be regarded to also make plausible judgments about the best interest of the child. Even though none of the other contributions, in the same way as Carens, explicitly discusses children's subordination in the family, children is commonly discussed in close relation to concepts about family (Miller 1988, Miller 2011, Holtug 2011) which can be seen as another example of a discourse where children to a great extent is discussed as family members.

To sum up, children have been rather invisible in ethics of migration and when they are mentioned they are portrayed as vulnerable, in need of special protection, as citizens in becoming and whose interests are subordinated to their parents. These kind of traditional perspectives on children and childhood in the ethical debate are not unique but instead something that also to a large extent have been characterizing migration research in general during the last decades (White et al 2010, 2011, Gardner et al. 2012.)⁸ as well as classical and modern philosophy (Archard and Macleod 2002 p.1 ff) One might argue that the invisibility and marginalization of children in the debate depend on the fact that the discussion of ethical principles and theories do not leave much space for taking all specific categories, minorities or marginalized groups such as children into account. It is however important to remember that the group of children not is only a small minority but constituting a significant part of people in migration and if ethical theories cannot discuss relevant arguments about children then these weaknesses need to be pointed at and the relevance of the theories need to be questioned.⁹

⁸ Read more about different accounts on children's perspectives and criticism of adult-centric discourse in migration research as referred in earlier note; *Journal of Ethnic and Migration studies*, Transnational Migration and the Study of Children (2012), and Transnational Migration and Childhood(2011) and in the special issue in *Childhood: Childhood and migration: mobilities, homes and belongings*(2010)

⁹ This argument is in line with Joseph Carens Contextual Approach to Political Theory (2004) described briefly in footnote 3. The argument do not imply any normative claim whether children as moral beings ought to be

Rethinking children as moral subjects in ethics of migration

I have so far identified childhood research that in different ways have started to question traditional conceptions about children. I have also demonstrated how the ethical debate about migration conceptualizes children in a rather narrow and traditional way. If we now approach the question about children as moral subjects in line with a more complex and expanded conceptualization of children, what will then happen with the ethical debate about migration and borders? In this part I will demonstrate how recent migration and philosophy research offer strong arguments to a more expanded conceptualization of children and also acknowledge children as entitled with agency, autonomy and capacities. When putting children as moral subject in their own right I argue that it leads to new theoretical questions and a need for rethinking children's moral status in ethical theory. This is done in a similar way as recent philosophical research have begun to challenge conventional conceptions of children in ethical theory and how this relates to the moral status of children regarding rights, interests, and justice in relation to family and the state (E.g. Archard And Macleod 2002, Archard 2003, Brennan and Noggle 2007, Wall 2010).

Empirical challenges to conventional conceptions about children in the debate

One traditional assumption about children in need of rethinking is the conception of children as vulnerable and in special need of protection (E.g. found in Carens 2008 p. 168, Miller 2011 p. 168) Children's vulnerability and special need of protection is demonstrated in the debate in various ways but mainly it is evident in the children's right discourse where the assumption seems to be that it is the "adult world" that has the responsibility and competence to secure the basic needs of children, that in turn do not seem to have that competence (Carens 2008 p. 168). In contrast Nick Mai's (2011) research on migrant male minors and young adults selling sex in the European Union draws on in-depth ethnographic research and puts forward children's embodied forms of resistance to restrictions of their mobility and demonstrates agency as opposing to a conventional view on the sex-selling child as a victim. Lotta Haikkola (2011) explores children's active roles and agency in carving out their own transnational ties and thus challenging a perspective on them as vulnerable. In a qualitative interview study Aoife O'Higgins (2012) demonstrates how young refugees in UK deliberately conform to expectations from social workers about vulnerability as a way to benefit from greater support and that the social workers may fail to consider young refugees abilities. The experiences of children make evident that vulnerability and agency is fluid and dynamic in need for contextualization and that we cannot not only see children as vulnerable and passive in need of help but also as active agents that make resistance to the system in different ways. Oude (2008) and Raghallaigh, M. and R. Gilligan (2010) have been doing research on unaccompanied minors and discuss these young persons as being both vulnerable in need of protection as well as competent agents in the migration process

Another assumption about children is the one that regard children as subordinated to their parents decision-making. Carens exemplifies this by stating that "For another, they are not responsible for their unauthorized presence within the state, since it is their parents who have brought them in (Carens 2008, p. 168). But an acknowledgment of children's agency and autonomy do put this assumption at odds. Contrary to Carens perspective Haikkola (2011), Huthins (2011) and Ni Laoire (2011) all in different ways state that children in practice can play an active role in family migration and to a great extent do contribute to the decision making in the family. Hutchins focuses for example on the dynamics of relationships between parents

seen as different or similar to adults. It points only to the fact that a discussion about the moral status of children to a great extent is left out of the debate.

and children in family migration from the UK to Australia, to illustrate how children's best interests influence the degree of children's involvement in migration decision-making.

Children as moral subjects and ethical implications

One can argue that how children are to be conceptualized to some extent is a matter of empirical findings about e.g. the moral development of children or how children's abilities and capacities can be understood in situated and contextualized practices. On the other hand there might also be philosophical reasons behind how we think that children ought to be conceptualized in order to put forward a normative argument or ethical theory. As the empirical research demonstrates there are good reasons to expand our conceptions about children to not only see children as particularly vulnerable and in special need but also as having agency, autonomy and capacities. If we re-conceptualize children and take them seriously as moral subject in their own right how can we then rethink the moral status of the child in ethics of migration? My argument is that a rethinking of the moral status of children can in a number of ways have interesting and crucial implications for the ethical discussions about borders and migration. I will here only mention a few examples regarding children's rights, interests and the definition of children and childhood.

A first way of rethinking the moral status of children is to take serious the theoretical discussion about children's rights with point of departure in a more complex conception of children. What kind of rights can be entitled to children and on what moral grounds? A critical perspective of the rights of the child has been a topic of concern for several philosophers the last years. James Griffin does for example pose the question whether children at all have rights (2002, 2008)? Out of this perspective the vulnerability and incapacities of children might point at urgent moral claims from children but at the same time disqualify them as right-bearers. According the so called choice-theory of rights, the rights are grounded in the relation between personhood and rights where autonomy and agency are fundamental criteria's for also being a bearer of rights, which then might exclude children or infants.(Griffin 2002, 2008, Brennan 2002) According what can be called the interest-theory of rights, the primary focus is the protection of rights based on fundamental interest, and not depending on the capacities or autonomy of children (Brighouse 2002, Brennan 2002) Since children can be claimed to have fundamental interests of protection one can for instance argue that children should be entitled to different welfare rights secured by the state such food, housing, health and education. The interests to welfare rights can however not be guided by the choices of the child, but instead by their parents or corresponding guardian that have capacities to make autonomous and rational choices about what is in the interest of the child. Samantha Brennan (2002) suggests that the two theoretical traditions of interest and choice-based theories are possible to combine. She defends a gradualist model and emphasize that the grounds for attributing children rights need to change in accordance with the autonomy that children develop.

Having in mind the conception of children as vulnerable and in special need it seems that an interest-theory of rights is the account that for example Carens and Miller, is close to, even though it is not spelled out explicitly. The emphasis is on children's right to protection, education, welfare and so on. But if acknowledging children's agency and autonomy it is possible to construct plausible arguments for children also to have more expanded rights based on their choices as children are developing their capacities. What consequences would this kind of acknowledgment of children's choices have for how rights are formulated in ethical theory and in migration policy?

A second way of rethinking the moral status of children regards the question about children's interests in relation to the family and the state in the migration process? Several assumptions are made in the debate regarding children's interests but little is said about the moral grounds. For example, in what way do children's interest coincide with those of the

family? If not, what right do children have to fulfill interests in opposition to the family? Archard and Macleod argues that interest claims of children, and the entitlements to resources and opportunities cannot simply be subsumed under the claims of their parents or families (Archard and Macleod 2002). On a daily bases migration authorities and courts refer to the CRC principle about best interest of the child when making decisions about who is aloud and who is not allowed to get into the national state. The meaning and application of the best interest of the child can then be absolutely decisive for a decision about admission and a way of controlling the borders of the national state. How can we then understand the content of the best interest of the child, who has the ability to make a judgment of that interpretation, what weight should a principle about the best interest of a child have in relation to other admission criteria and a national interest of controlling borders, and what rights do children have to get their voices heard in these matters?

Finally, an ethical theory that have the ambition to say something about, justice, rights and interests of children in migration also need to pose the question of what a child is and who is to be regarded as a child. So far the ethical debate about borders seems to have neglected the question about the limits of childhood even though it will have major implications for how we look upon for example duties, rights, interests, justice in relation to the subjects we discuss. The definition of childhood seem mostly to conform with the UN age criteria for defining who is to be regarded as a child and who is not. There is however plausible arguments presented about the moral irrelevance of using age as a primary criteria for deciding children's entitlement to rights, justice and interests (Archard and Macleod 2002, Archard 2003, O Brennan 2002). Even though age might be a politically and by law doable criteria to use, an ethical theory has to demonstrate why and in what way a certain age should be the determinant for the moral status of children. As suggested above other aspects of childhood and children such as vulnerability, dependence, agency, autonomy, capacities, interests and so on seem to be necessary to also take into account as crucial departures to discuss the moral status of children.

There is a broad range of urgent political and moral issues in migration policy regarding children's experiences, rights and interests where the dominating theories and arguments of liberal egalitarianism, liberal nationalism and communitarianism do not seem to offer enough theoretical tools sensible to the moral status of children. For example; How do we consider the rights and interests of the increasing number of unaccompanied minors from Afghanistan or Somalia coming to Europe? Many of them are adolescents and should we regard them as vulnerable children in need of special protection or/and as individuals with agency and capacities, and how does our conceptualization of unaccompanied minors play along with the rights and interests entitled to them? In cases of family-reunifications, how should the best interest of the child be regarded, and what weight can be given to the child's best interest in decisions of migration courts around the world? What interests can be entitled to children and who has the authority and possibility to give voice to the children's perspectives?

Conclusions

To conclude, many theoretical questions remain unanswered about the moral status of children in the ethics of migration. If ethical theory is to play a relevant role in research and policy about migration, there is a need of further development of theoretical concepts, theories and arguments in order to see children as moral beings in their own right. In this paper I have demonstrated gaps and weaknesses in existing ethical theory about migration but the questions I have raised are also to be seen as starting points in need of further examination. One way to develop ethical theory and point at the existing gaps is to a greater extent consider empirical research on migration to find cases regarding children in migration that calls for ethical deliberation and that challenge the present "adult-centric" discourse in ethics of migration. Empirical research and new conceptualization of children could be seen as one way of

responding to a present gap between ideal political theory and the politics, policy and practice of migration today that several philosophers have been paying increased attention to (Bader 2005, Benhabib 2004, Carens 1996).

A second way to develop ethical theory about migration is to bring in the already growing philosophical discussion about children's moral status, such as demonstrated in this paper. A third way to challenge ethical theory would be to broaden the questions in focus of the debate to also involve issues regarding children, topics such as children and admissions, decision-making within families, how policy and law acts on children's best interests, rights and interests of unaccompanied minors and so on.

One of the crucial points in this paper has been to argue that how we think about and conceptualize children will also inevitably have consequences for the moral status of children within ethical theory and in contexts of migration. When taking into account more expanded conceptions of children as also having agency, being autonomous and as active participants in migration it poses new theoretical questions and a need for rethinking children's moral status. One promising theoretical account to develop concepts about children's rights and interests in a migration context could be Samantha Brennan's "gradualist model", since it seems sensible to a conceptualization of children as both vulnerable and as having agency. A strong right discourse on children's moral status in ethics of migration might however have other constraints and a broad approach to different ethical accounts should be of interest in a future agenda for developing theoretical tools sensitive to experiences, rights and interests of children. A fundamental task will be to try and challenge the dominating arguments in the debate for and against open and closed borders in light of children and childhood. Do children, in the same way as adults, have a basic right to freedom of movement and on what grounds? In what way do children have a right of self-determination and being part of a national culture and politics? What other arguments and ethical issues regarding migration could possibly be emphasized with point of departure in childhood? My conclusion is that a development of theoretical concepts about children as moral subjects in their own right as well as empirical and policy oriented research on children in migration would be crucial steps towards an ethics of migration that also apply to children.

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Appendix I

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Ethics in-between – Ethics in a heterotopian world

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Abstract

The growing number of homeless and stateless persons challenges ethics because territorialized concepts of law, status or nationality no longer meet the needs of these people. This paper analyzes Foucault's concept of heterotopia as a tool for a better understanding of this situation, for a reasoned ethical answer and first steps into another spatiality. Heterotopia is also understood as alternative to frameworks like human rights or territorialized concepts and implies some philosophical and even theological problems. Exploring Paul Tillich's concept of time and space it can be shown that there are connections between theological topology and Foucault's topography. Therefore heterotopian heuristics are considered a complementary method for analysis of ethical problems.

Keywords: heterotopia, migration, refugee, city, denizenship, rights, responsibility, boat people, time, space, Tillich, fulfilment

To be means to have space.
Not to have space is not to be.¹

¹ Paul Tillich, *Systematic Theology*, vol. 1, Chicago 1951 (ed.1973).

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http://www.ep.liu.se/ecp_home/index.en.aspx?issue=97.

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We can be: in a place, in a relationship, in power, in motion... Our being-there (Dasein) has many aspects. My interest in the topographic signature of life was triggered by the 2011 *Societas Ethica Sibiu* conference on migration and poverty. Soon I was convinced that the question “where we are” is not a purely ontological one. It implies political questions as well as a comprehensive analytic challenge. Everybody has to find his or her own place in the world, everybody has to know the art of navigation² which until now has depended on positions and known whereabouts: the place we were, the space we had or we will have. It is important where we live or where we belong, this is the topographic signature of our lives.

There are different ways to reflect on this question:

- 1) It can be considered a political question because place / space is connected with membership, status and rights. A politically negotiated status is usually constituted on territories / places / spaces.
- 2) It is also a scholarly and philosophical question of how we position
- 3) ourselves in the world. It then turns into a fundamental question of universality or particularity. Are we looking for universal space or for moments of being at home in a specific place?
- 4) For theologians this question widens into a question of finitude or infinity, of Man's place and God's infinity, of time and eternity.

This paper reflects on the impacts of “having no place”. Refugees, migrant workers, boat people are often called displaced persons because their life without territory, place and status is dangerous and their need is a challenge to ethics.

Humanities have not reflected on topographical questions³ because they focused on universal concepts. Christianity was busy with conquering the world for the new faith and, without being interested in particular places. This paper uses Foucault's concept of “heterotopia”⁴ to explore ethical implications of topography and it attempts a reasoned “practise of space” which is both heuristic and emphasizes the practical needs of displaced persons.

Finally I will examine if these results have a theological dimension and can contribute to a theological understanding of space. I consider Tillich's *Systematic Theology* as exemplary not only because it reflects on time and space, but because the author is aware of the fundamental philosophical issues which accompany the reflection on space. He considers universality or particularity, deliberately avoids a choice and instead builds his system on a theory of correlation of God's and man's story⁵. Furthermore he mentions the impact time has on our perception of space. I propose to use Tillich's concept as a procedural and analytical tool and not as a final solution for these paradoxes. I consider it as encouraging further research

² Michel de Certeau: *Kunst des Handelns* (in English: *Practise of everyday life*), Berlin 1988, p. 9 in his introduction (only in the German edition, translated by Wolfgang Leyk): “This essay is dedicated to ordinary man... to the many who are on the way...”.

³ Markus Schröer, *Räume, Orte, Grenzen - Auf dem Weg zu einer Soziologie des Raums*, Frankfurt 2006, 17- 46, esp. p. 29; Oliver O'Donovan, “Loss of space”, in: O. O'Donovan, Johanna Lockwood O'Donovan, *Bonds of Imperfection - Christian Politics, Past and Present*, Cambridge 2004, p. 296-320. The neglect of place is owed to border crossing dynamics of human reflection and the quest for universal answers. Another reason is that topography is considered a material question while philosophy is reflexion and imagination. Sociology revives the question of place by observations on relations or territorial liquidity of 2nd modernity which is “going global”.

⁴ I refer to the essay: Michel Foucault, “Of other spaces - Heterotopias”, (1967), available online <http://www.colorado.edu/envd/courses/envd4114-001/Fall09/Theory/Foucault-Other%20Spaces.pdf>, viewed November 11th, 2012, also available in: M. Foucault, Jay Miskowiec, *Diacritics*, vol. 16, No. 1. (Spring, 1986), p. 22-27; M. Schröer, *Räume*, p. 19.

⁵ P. Tillich, *Systematic Theology*, vol.1, “The method of correlation”, p. 59-65.

on theological resources which can turn topography into a topology which lets us understand the spaces we have or have not.

Place, Space or Territory?

Heuristics of space and place

Spatiality affects thinking. It has effects on life. It can create either a feeling of security or insecurity, a feeling of “being at home” or being lost, a perception of owning space or of living in the proximity of others (beside- each-other-ness)⁶. Reflections about place / space mostly aim at “localisation” no matter how this enterprise is evaluated⁷. “A place is thus an instantaneous configuration of positions. It implies an indication of stability.”⁸ In Foucault’s Geography “place / site” is “defined by relations of proximity between points and elements”⁹. But this description of stability is no longer sufficient since the fixed focus on places and “landmarks” widened because the world as a whole came into view. Place is creative because in it “language unfurls, slips on itself, determines its choices, draws its figures and translations”¹⁰. Now “place / site” is tied to everyday practises, knowledge, relations and it seems appropriate to leave behind the benefits of particularity and localization and to reach out for a complex description.

The term “space” meets this comprehensive challenge by cross-ref- erencing positioning in geographically or sociologically defined “places”. “Space” provides a “setting” for communication and for the story of God’s people, especially in the Old Testament.¹¹ Contrarily “Space is an abstract notion,.... you can exist ,in space’ But not in , this space’”¹². Thinking about space instigates reflections on knowledge, power, science, discursive formations etc.¹³ Place / site on the other hand facilitates particular and local observation because it limits the field of view.¹⁴

The difference between space and place is like a twofold heuristic structure. Space is like a container and like a “subject” owning places as if they were objects¹⁵. But as a kind of “res extensa” place / site is used by subjects.¹⁶ Places are defined by borders, but as spaces they offer boundless possibilities for motion.¹⁷ This twofold nature of space was already mentioned by Merleau-Ponty who refers to an anthropological “spatial” dimension of geometrical space / place¹⁸. Certeau has proposed a helpful definition for this phenomenon: Places are defined by

⁶ Idem, *Systematic Theology*, vol.1, p. 194-195.

⁷ O. O’Donovan has a theological interest in “localisation and place” and considers it a necessary setting for identity and communication, O. O’Donovan, “Loss of space”, p. 303, while Foucault for example judges the history of localisations as obsolete. But it is necessary to look closely: O’Donovan’s statement might even be considered foucaultian in so far as he mentions the interdependence of place, knowledge and relation.

⁸ M. Certeau, *Practise of everyday Life*, Berkeley 1984, quotation p. 117.

⁹ M. Foucault, “Of other spaces”, p. 22.

¹⁰ M. Foucault, “The Language of Space”, in: Jeremy W. Crampton, Stuart Elden, *Space, Knowledge and Power - Foucault and Geography*, Burlington 2007, p. 163-169.

¹¹ O. O’Donovan, “Loss of space”, p. 307-310.

¹² *Ibidem*, p. 303.

¹³ M. Foucault, “Questions on Geography”, in: J. W. Crampton, St. Elden, *Space*, p. 173-184.

¹⁴ Foucault chooses the hospital as a space for observation and discipline. M. Foucault, “The Incorporation of the Hospital into Modern theology”, in: J. W. Crampton, St. Elden, *Space*, p.141-152.

¹⁵ According to Foucault “space” meant emplacement. Since emplacements lost their meaning space has become a heuristic factor and is not longer dependant on the notion of places.

¹⁶ M. Schröder, *Räume*, p. 20-30.

¹⁷ *Ibidem*, p. 286.

¹⁸ M. Certeau, *Practise*, p. 117. The geometrical space would of course be what formerly was called place and it would be determined by geometrical assumptions (modern geometry) or by what we perceive and can measure (Euclidian).

laws and very often by something lifeless... Spaces are created by actions.¹⁹ This understanding may widen territorialized concepts because it includes communities, frameworks or even surrounding landscape.²⁰ Spatiality can open particularity towards universality²¹ and may lead beyond concepts which are built on the fact that people own space and are members of territories.

Does this paradigmatic shift mean that it will be possible to find “living space” beyond territory? Will this spatiality have room for the growing number of “homeless” or displaced people whose rights were destroyed when they were deterritorialized?

“Having no place” and the loss of territory: empirics

The phenomenon of having no place has challenged politics since WW II, the best proof for that being the foundation of UNHCR in 1950. I am referring to recent research by Wolfgang Scheppe which was presented in the migropolis exhibition in Venice²². This project of representative political science followed the traces of illegal immigrants, handbag sellers, tourists in Venice but also boat people on the Adriatic Sea whose situation is particularly dramatic. The war-like defence of Fortress Europe, the gated community²³, by Frontex Border police annually causes several thousand deaths. According to Scheppe Venice and its surrounding waters are a fractal mirror of global problems. As a “generic city” Venice is a “container” of several “invisible cities” (Calvino)²⁴. The idea of several cities contained in the space of one can be traced back to Plato’s competing urban models of the kings and the philosophers city. Scheppe discloses these distinct cities by charting and illustrating specific kinds of mobility for different groups of the cities inhabitants:

- a) Subsistence based forced mobility: the mobility of sellers of faked Gucci handbags, illegals, migrant workers, refugees.
- b) Tourist and leisure induced voluntary mobility and, as a variation,²⁵ the mobility of “jet- set” businessmen or economic migrants like salespeople.

It must be remarked critically that the academic discourse focuses on voluntary mobility. Sociological or philosophical reflections neglect that often mobility is forced and caused by necessity for subsistence, war or ecological problems. Representative of mobility are to a lesser extent airports or generic shopping malls, but much more refugee camps or bad housing. Latter examples might exceed scholarly experience²⁶ but should be taken more seriously into account for a realistic description of today’s mobility.

¹⁹ M. Certeau, *Practise*, p. 118.

²⁰ O. O’Donovan, “Loss of space”, p. 303-307.

²¹ *Ibidem*, p. 306.

²² 2009 in Venice in Fondazione Bevilacqua La Masa / Piazza San Marco.

²³ Wolfgang Scheppe, “Militarization of Borders” in: *Migropolis – Venice of a Global Situation*, Venice 2009, vol. 1, 2, p. 438-464; p. 460.

²⁴ Italo Calvino, *Invisible Cities*, London 1972/1997. Calvino’s book has become a manifesto for architects and urban planners. It is written as a conversation between Kublai Khan and Marco Polo. Polo is reporting about cities he has seen, especially about their “inner life”, their tensions, strength and weaknesses. In the course of the narration the reader becomes aware of many “possible cities” which can be contained in the place of a city. Polo is introducing the Khan to a multidimensional view about urban life, its various functions, dynamics and complex formation. The reader is also becoming aware that the background of the narration about several cities is in fact one generic city: “Venice”. On generic cities also: W. Scheppe, *Migropolis*, vol.1, Prolegomena, p.104-119.

²⁵ O. O’Donovan, “Loss of space”, p. 296.

²⁶ O. O’Donovan’s typical example for motion is the businessman and jet-setter, “Loss of space”, p. 296.

The Loss-paradigm

Having no space

The Second World War's refugee problem promoted reflections on loss of territory. In 1943 Arendt wrote her essay "We refugees"²⁷. Being herself stateless in France, Arendt had worked with Jewish refugees before she emigrated to the USA. In her essay she describes how refugees' lives mirror the loss of order and human rights which were once provided by national states²⁸. Now political existence bears the signature of loss of "place" (that is home and rights). A new paradigm forces displaced people to live in "abstract nakedness" and to face the world as bare humans which are almost asking to be victimized.²⁹ In this context Arendt coined the term of "the fabrication of corpses" which has made an unlucky career from Heidegger³⁰ up to Agamben. People lose place and autonomy. Their living space now is with a dramatic description by Agamben the "camp" (*das Lager*) which is home to Baumann's "human waste", the global precariat and the "outcasts" of modernity. These concepts imply continuous transition of thresholds which usually secure and structure life. Displaced people live in a continuous emergency state. Many of them die suffocating in containers or cramped luggage compartments. They drown in Adriatic Sea waters, freeze to death walking "green borders" or die of thirst in the Mexican desert close to the U.S. They are always on the run because they have no papers no matter if they are sellers of faked Gucci handbags and Rolex watches, Sinti and Roma in Eastern Europe or an ethnic minority elsewhere.

A pragmatic approach for dealing with the loss paradigm is the construction of beyond-territory-memberships like the EU concept of *denizenship*³¹. It has become part of the EU identity politics and serves the growing number of resident non-civilians by enabling a citizenship which is not necessarily connected to full civil rights. It is considered as a step

²⁷ Hannah Arendt, "We refugees", in: Marc Robinson (ed.), *Altogether Elsewhere: Writers on Exile*, Boston-London 1996, p. 110-119. Arendt writes about her experience as a refugee, about attempts to avoid the word "refugee" so that no dependence on government agencies would be implied. She tells how Jewish refugees and immigrants tried to invent fictional "former lives and success stories" because simply as humans they seemed to be worth nothing.

²⁸ H. Arendt, *Elemente und Ursprünge totaler Herrschaft – Antisemitismus, Imperialismus, totale Herrschaft*, München 1986/2011, p. 559- 607; Giorgio Agamben, "We Refugees", in: W. Scheppe, *Migropolis*, vol.1, 120-125, also published as: "Beyond Human rights" in: G. Agamben, *Means without ends, Notes on Politics*, London 2000. A complex reflection about the end of the nation state also offered by theologian Joan Lockwood O'Donovan, "Nation, State, and Civil Society in the Western Biblical Tradition", in: O. O'Donovan, J. Lockwood O'Donovan, *Bonds*, p. 276-295. Lockwood ties nationality to a biblically founded concept and shows that nationality is not strange to Christian faith (p. 284-291). She explicitly refers to Arendt's work on loss of nations and remarks that Christian globalism has served the demise of the national state. On the other hand Christian confined by biblical tradition which knows a lot about topography. It is nevertheless a misjudgement to think that Christian and political "common goods" can exist besides each other or even be turned into a hybrid "democratic creed" (p. 294). Lockwood emphasizes that the Bible understands political power as vicarious. This means that rulers are accountable not only to God, but also to their people.

²⁹ H. Arendt, *Elemente*, p. 613-625, "Vor der abstrakten Nacktheit des Menschseins hat die Welt keinerlei Ehrfurcht empfunden.", p. 619.

³⁰ Heidegger quotes Arendt in his 1949 speech "Das Gestell". "... Ackerbau ist jetzt motorisierte Ernährungsindustrie, im Wesen das Selbe wie die Fabrikation von Leichen in Gaskammern und Vernichtungslagern, das Selbe wie die Blockade und Aushungern von Ländern, das Selbe wie die Fabrikation von Wasserstoffbomben."

³¹ Important information can be gained from these two papers: Atıkan Ece Özlem, The Treatment of Third Country Nationals in the European Union Sussex European Institute, in (SEI) Working Paper, No. 85, <<https://www.sussex.ac.uk/webteam/gateway/file.php?name=sei-working-paper-no-85.pdf>>, viewed November 10th 2012; Neil Walker, Denizenship and the Deterritorialization in the EU in EUI Working paper Law, No. 2008/08 <http://cadmus.eui.eu/bitstream/handle/1814/8082/LAW-2008-08.pdf?sequence=1>, viewed November 10th 2012.

towards equality for EU and non-EU citizens. But this supra- or trans-national concept has a crucial weakness because it requires papers which are only obtainable if you are “territorialized” and have the status as “negotiated individual”. It is a territorialized concept and implies membership as well as it depends on conditions of entry such as passports and immigration papers or green cards. Therefore it does not meet the needs of displaced persons.

If refugees, migrants and other displaced persons are no longer integrated in order structures of a nation or a federation, their situation requires a dynamic concept which discharges territorialized mechanics of inclusion and exclusion and is able to “unhinge the old trinity of state / nation / territory”³². This is why I turn to heterotopian heuristics.

Heterotopia and methodology

“Today the site has been substituted for extension which itself had replaced emplacement”.³³ Foucault’s Heterotopia turns from scientific geography to observation of extensions, relations, dynamics of knowledge and networks.³⁴ Topography or geography is about governance, distribution, inclusion and exclusion of people. Spaces are locations where power is executed and language is created, where discursive formations come into being and so on... Foucault’s geography is connected to his specific topics and it is no surprise that he reflects a lot about spatiality³⁵.

Foucault’s essay “Of other Spaces” and his essay on flight³⁶ emphasize a spatiality we could call empiric or bodily in so far as it makes us aware that we are limited, vulnerable beings and subjected to power even if it seems that we “own space”. But most important Foucault reflects how we are sometimes thrown “out of place into other places” which have their own order and time³⁷. Not surprisingly Foucault’s Heterotopia shows a hermeneutical double structure: other spaces can positively be found in hospitals, graveyards or ships.³⁸ And there are spaces which are extremely heterotopian up to the extent of being unreal spaces (outopias / Utopias) In the 15th/16th century geography abandoned scientific methods and gave way to fantastic non-scientific constructions of places which nevertheless remain connected to real society by analogy or correlation.³⁹ These spaces are totally excluded, because they are even exempt to existing heterotopias but they affect reality because they mark reflective thresholds and make aware of inclusion and exclusion dynamics which are constantly switching sides. I am emphasizing Foucault’s 5th principle of Heterotopias: it “... always presuppose a system of opening and closing that both isolates them and makes them penetrable.”⁴⁰ This heterotopian phenomenon is helpful in capturing essential dynamics of real, existing heterotopias. It is important to understand that utopias have a spatial quality.⁴¹

Scheppe’s research discloses a specific heterotopian phenomenology. Once migrants survive their journey to Venice, they build their own invisible city and society in otherwise deserted parks. They do haircuts and other business in streets and places and establish a heterotopian economy.⁴² These heterotopias owe their existence to a system of inclusion

³² G. Agamben, “We Refugees”, p.123.

³³ M. Foucault, “Of other spaces”, p. 22.

³⁴ *Ibidem*, p. 22.

³⁵ St. Elden, J. W. Crampton, “Space, Knowledge and power: Foucault and Geography”, in: J.W. Crampton, St. Elden, *Space*, p. 1-16.

³⁶ M. Foucault, “The Force of Flight”, in: St. Elden, J. W. Crampton, *Space*, p. 169-172.

³⁷ M. Foucault, “Of other spaces”, p. 24.

³⁸ *Ibidem*, p. 24-26.

³⁹ M. Foucault, “Of other spaces”, p. 24.

⁴⁰ *Ibidem*, p. 25.

⁴¹ Nigel Thrift, “Overcome by space: Reworking Foucault”, in: St. Elden, J. W. Crampton, *Space*, p. 53-58, especially p. 55, about Foucault choosing spatial non-categories for describing spatial qualities.

⁴² W. Scheppe, *Migropolis I, II*, see the articles: “Heterotopia Street”, p. 1106-1125; “Heterotopia Society”,

and exclusion. They are “other (heterotopian) spaces” – to other (real) spaces – and by this reciprocity they maintain a function for society, the driving force being interventions by power or knowledge. With heterotopia Foucault steps out of sites into a multidimensional “multiversal”⁴³ understanding of space including power and extensions. He goes beyond the subject-driven understanding of an additional “anthropological” dimension of space by Merleau-Ponty or Certeau because he takes into account the creative power of contexts and surrounding dispositive. These might be floating or liquid like the traveller’s seat in a train, ship or plane. This can be understood as a position which cannot be mapped, because it is contained in the infinity of sea or air or the anonymity of a shopping mall⁴⁴. By this understanding place and space are totally deterritorialized and Foucault’s topology has left previously known topographic science. In this polytopical world displaced people can become a place on their own, their own reserve (living space) of imagination or their heterotopical reality which is branded by the struggle for subsistence and survival.⁴⁵ As proof Scheppe presents many exemplary biographic narratives of refugees and migrants.

Heterotopia: living space beyond subjectivity

Heterotopia leads beyond subjectivity, cartography and topography. If there still is an acting subject to be found, it is “given room” for action. The science of surveying and mapping makes voyages from one space to another possible, like “walking” through space and grasping possibilities.⁴⁶ Latour’s essay on navigation⁴⁷ explores how to navigate in a polytopian world, how to find directions of future movements, how to understand space as a referent to possibilities and as a help for understanding networks.⁴⁸ This is done by becoming aware of differences and exclusions which are guiding own movements.

Foucault’s concept is most convincing if applied to current challenges of a hetero- or poly-topical world. New topography does not relieve us from responsibility and from the need for ethics even if it seems that we are living as passive subjects in a situation of “unknowingness”⁴⁹, even if it looks as if we are now “owned” by the spaces we once owned.

The Ethos of Spatial Practise

Two basic elements are conditional attitudes for this spatial practise:

- 1) Endurance of cognitive dissonance: “... Ethics require us to risk ourselves precisely at the moment of unknowingness, when what forms us diverges from what lies before us...”⁵⁰. Ethics are not about bridging cognitive gaps by rules or – in our case – territorialized concepts. Ethics are about courage to endure heterotopias in spite of their complexity because the situation is serious. Migrant’s lives always bear a signature of fundamental negativity. They are deterritorialized, they possess

p. 1126-1145; “Heterotopia Economy”, p. 1146-1153.

⁴³ Bruno Latour: *Entering a risky territory: space in the age of digital navigation*, p. 581-599, available at: <http://www.bruno-latour.fr/sites/default/files/117-MAP-DIGITAL-GB.pdf>, especially p.595, viewed November 10th, 2012.

⁴⁴ Zygmunt Baumann, *Liquid Modernity*, Cambridge 2000, p. 99.

⁴⁵ M. Foucault, “Of other spaces”, closing statement p. 26, using the image of a ship; also M. Certeau, *Practise*, p. 111-114 on Railway navigation and incarceration.

⁴⁶ M. Certeau, *Practise*, about “Spatial Practises”, p. 91-130, esp. p. 105.

⁴⁷ B. Latour, *Entering a risky territory*.

⁴⁸ *Ibidem*, p. 590. It would be interesting to correlate more deeply Latour’s reflections on human and physical geography, mimetic and navigational mapping to Foucault’s geography.

⁴⁹ N. Thrift, “Overcome by space”, in his closing remarks, p. 56-58 using a term by Judith Butler.

⁵⁰ J. Butler quoted in N. Thrift, “Overcome by space”, p. 58.

neither papers nor status and they have no stakes in the current discourses.⁵¹ In light of these practical needs endurance is just a first step.

- 2) Reflective agility: heterotopia denies mimetic maps and topographical order. These are replaced⁵² by flexible spatial experience, continuous confrontation and surprises. The feeling of having arrived and “being at home” makes place to the necessity of departures. These paradoxes mutually depend on each other and stimulate each other. We feel like we own a space and yet notice our heterotopian existence as being “beside-each-other”⁵³. Baumann’s liquid space concept explains this as due to forced subsistence which makes people continuously meet strangers and fight for their livelihood. Certeau describes this “liquid life” as resembling the glance through an airplane window. The new spatial practice triggers continuous reflection encounters with speculative possibilities.⁵⁴

Questions:

What can this reflective approach achieve? Does it not mean that people get “lost in space”? Does a liquid and trans-territorial concept not dissolve the few values and certainties which modernity has left to us? Does it not deny the universal idea of basic human rights which seems necessary to negotiate humane existence or the movement of people? Would it not be more efficient to forget about new spatiality, to pragmatically widen the number of beneficiary and to provide new membership concepts? Should the guest (even if uninvited) not have the chance to turn into a fellow citizen?⁵⁵ Would it not be better to bridge with good will and humanity the gap left by dissolving territoriality?

The problem is that this return to universality might erode ethical reflection on particular situations because it installs a ready-made methodological grid for surveying problems. In his plea for particularity O’Donovan has rightfully hinted at the danger of ideology filling structures left behind by the loss of nation state. A fitting example would be the “war against terrorism” which also was called a “war against evil”.⁵⁶

Spatial Practise – A Political Approach⁵⁷

EU’s denizenship pragmatically tries to tackle the difference between trans-territorial universality and territorial particularity with the help of a supranational framework. Another approach tries to connect heterotopias to existing reality. Displaced people in the Swiss town of Basel can leave their space out of society and find space in government bureaus giving assistance to people “sans papiers”⁵⁸. A more playful approach is the foundation of heterotopian cyber-communities⁵⁹. The practise of asylum or sanctuary might also be considered heterotopian. Such attempts at spatial practise enable navigation through a polytopian and multidimensional world by better comprehension of our life’s map. Now it is possible to re-frame “places” and re-gain particularities as “space for action”, the latter proposal

⁵¹ W. Scheppe, *Migropolis*, “The Person, Legitimacy and Mobility”, p. 126-173.

⁵² Z. Baumann, *Liquid Modernity*, on time and space in liquid modernity, p. 91-129, esp. p.104-109.

⁵³ P. Tillich, *Systematic Theology*, vol.1, p. 194-195.

⁵⁴ M. Certeau, *Practise*, p. 212-214.

⁵⁵ This is the title of an Interview with Seyla Benhabib in http://en.qantara.de/wcsite.php?wc_c=9613 viewed November 5th 2012.

⁵⁶ O. O’Donovan, “Loss of space”, p. 320.

⁵⁷ M. Certeau, *Practise*, headline of the 3rd part, p. 91.

⁵⁸ “Stimme der Sans-papier”, Basel - Die Zeitung der Anlaufstelle für Sans-papiers und der Union der Arbeiterinnen ohne geregelten Aufenthalt, (15th of March 2010).

⁵⁹ Fred Truniger, Sabine Wolf, “Heterotopien”, in:
<http://wiki.arch.ethz.ch/twiki/pub/Control/DiplWahlws0506/14_zuri.pdf> viewed November 5th 2012.

meeting O'Donovan's want for particularity. A political spatial practise pays attention to people no matter where and who they are and leads beyond passive membership towards action.

Membership actually is a passive category because to belong naturally to a nation or an ethnicity, to a given framework is not due to active choice. The Kantian/Arendt idea of "membership in a community" however exceeds territorialized contexts by a moment of activity which makes aware of other people and instigates to judge.⁶⁰ Again a twofold heuristic structure is detectable: active membership makes us aware of given context but it might also turn us against law and the contexts we are born in and we belong to.⁶¹ Active membership as sense of community facilitates a delegatised responsibility⁶² which acknowledges the space it belongs to by deliberately transgressing it. This should have happened in the case of Eichmann and in fact took place when Jewish resistance fighters entered the war not having a national affiliation⁶³.

Such action replaces natural given and passive memberships by active choices and enables us to live and act in hetero- or polytopian worlds⁶⁴. The merit of heterotopian topography is awareness and the fact that it is able to do both: discern structures and orders and then move and navigate from "one place to another"⁶⁵.

Theological outlook: from topography to topology

"Go therefore and make disciples of all nations,..." Mt 28,19

"And Jesus said to him, «Foxes have holes, and birds of the air have nests, but the Son of Man has nowhere to lay his head. »" Mt 8,20

Bible:

The heterotopian map is not strange to belief⁶⁶ and topographic heuristics are at the core of theology with the Old Testament being "full of the sense of place"⁶⁷. Concerning Israel or the Temple it actually seems that universal God went territorial and particular. Furthermore biblical topography constantly reaches out for "other spaces" like paradise, a thorn bush where Jahwe reveals himself, altars like Beth-el and of course the Temple. These stories bear the signatures of authors knowing what it means to be displaced. The New Testament is not different: Christ is born among shepherds on a heterotopian field – outside of town. Christ himself is a truly heterotopian "temple" which is not built from stone. Golgotha is the heterotopian place of trial where a death sentence becomes the fountain of mercy and life. The grave becomes the origin of life. These spaces are not only locations, they are like interfaces of Man's and God's history, parts of a cascade of spaces, platforms for faith⁶⁸ and referents.

⁶⁰ H. Arendt, *Lectures on Kant's Political Philosophy*, Chicago 1989, especially the 12 session, p. 68-72, especially p. 71.

⁶¹ *Ibidem*, p. 47.

⁶² Annabel Herzog, "Hannah Arendt's Concept of Responsibility", in *Studies in Social and Political Thought* 10 Sussex (2004), <<http://www.sussex.ac.uk/cspt/documents/10-3.pdf>>, p. 39, viewed October 25th, 2012.

⁶³ *Ibidem*, p. 49. Jewish resistance fighters in WWII did not primarily belong to a certain nation but considered themselves Jewish – thus changing and transcending the meaning of membership and legality in nations.

⁶⁴ M. Certeau, *Practise*, p. 237.

⁶⁵ *Ibidem*. This happens not only by acting but also by reflective action like creating narrations, p. 220.

⁶⁶ Understanding Christian life as pilgrimage: Hans G. Ulrich, "Wie Geschöpfe leben – Konturen evangelischer Ethik", in: *Ethics in Theological Discourse*, Münster 2005, p. 44-50. About a parochial existence with traces of heterotopia: G. Agamben, *Kirche und Reich*, Berlin 2012; P. Tillich, *Systematic Theology*, vol. 1, p. 195 on Pilgrimage, *ibidem*, vol. 2, p. 69.

⁶⁷ O. O'Donovan, "Loss of space", p. 307, J. Lockwood O'Donovan, *Nation*, p. 284, about the importance of Israel as "role model" for politics.

⁶⁸ I refer to B. Latour, *Entering risky territory*, p. 581-589.

They are understandable not as isolated sites but as a part within the “extension” of God’s story with man. In this understanding biblical topography is not mimetic cartography but made for navigational use which turns topography into topology. And the Bible is an important travel story for humanity.⁶⁹

Time and space. tillich

Tillich shows that theology always has been concerned with time and space and understood faith as “pilgrimage” (*Peregrinatio*). The Church tried to conquer the world and understood these efforts as a third fulfilling stage of history leading to God’s Kingdom.⁷⁰ Time (history⁷¹) and space are mutually dependent and there is an interesting interdependence of fulfilment and Heterochronias which are “other times in other spaces”, time accumulated or fleeing.⁷² This idea is not at all strange to biblical testimony: “But do not overlook this one fact, beloved, that with the Lord one day is as a thousand years, and a thousand years as one day.” (2. Peter 3,8). This kind of biblical heterochronia is used by Tillich in order to deconstruct theological historiography. Tillich further uses the term utopian⁷³ to deconstruct any notions that history can fulfil itself. It is utopian to think that somewhere in this world and in history could be a place of arrival because time and space are not available to man. It is God’s heterochronic time which encourages hope. Heterotopia / Heterochronia are challenging a distinction between what is important or not in faith (3. Mose 10,10 / 2. Sam 14,17 / 1. Cor 12,10 / Hebr. 5,14)

Heterotopia enables a deeper understanding of space: “Spaces are qualitative, lying within the frame of physical space but incapable of being measured by it.”⁷⁴ The specific quality of Tillich’s spatiality is that it opens for the experience that our subjectivity is confined by other people and powers which are controlling us. We are finite to the extent of non-being. “But, to be spatial also means to be subject to nonbeing.”⁷⁵ The security of having space always is accompanied by accepting insecurity and confinement. Such a confinement does not lead into emptiness but is a threshold we have to cross to realize the disposition of God’s “oikonomia” which creates “sanctuaries” as generic “other places”. “We are in a holy place when we are in the most secular place...”⁷⁶ This heterotopia frees us from the confinement of flesh; it does not aim at universality. But it is open for future exploration and for the advent of God’s kingdom so that hopes and dreams will not “dry up”.⁷⁷

Conclusion

Heterotopian heuristics enable deterritorialized thinking and are charged with awareness that space is not at our disposal. They encourage us to go to “other spaces” where “other people”

⁶⁹ “Narration created humanity” – Pierre Janet quoted by M. Certeau, *Practise*, in his chapter on “spatial stories” p. 115-130.

⁷⁰ P. Tillich, *Systematic Theology*, vol. 3, Chicago 1963, p. 344-350.

⁷¹ Dealing with a foucaultian concept like heterotopia the term “history” seems not very appropriate. Nevertheless Tillich’s understanding of history is close to Foucault’s because he is well aware of the limitation of historiography explaining or fulfilling itself. P. Tillich, *Systematic Theology*, vol. 3, p. 318.

⁷² M. Foucault, “Of other spaces”, p. 25.

⁷³ Tillich considers as utopian: fulfilment of history in itself. P. Tillich, *Systematic Theology*, vol. 1, p. 88, p. 268, judging changes in history as changes in Man’s fate. P. Tillich, *Systematic Theology*, vol. 2, p. 30, p. 74, utopian is the neglect of the correlation between the world and God’s history. Utopian is the notion of a place of arrival. P. Tillich, *Systematic Theology*, vol. 3, p. 354 where time fulfils...

⁷⁴ *Ibidem*, p. 318.

⁷⁵ *Idem*, *Systematic Theology*, vol. 1, p. 194-195: ... or vanishing or being swept away like Foucault’s “face in the sand”. Spatiality always includes the danger of non-being.

⁷⁶ *Ibidem*, p. 278, God is used as a “critical dispositive...” *Idem*, *Systematic Theology*, vol. 2, p. 68-69.

⁷⁷ M. Foucault, “Of other spaces”, p. 25.

live and to check out possibilities of their inclusion. Heterotopia applied leads towards attempts at regaining out-of-society spaces without levelling complexity and contingency of space. This method is about awareness, empathy and resistance. It focuses on personal and situational responsibility more than on theoretical frameworks. It will not support the idea that there are borders which should or can be defended. Thresholds are challenges for reflection, action and communication.

Heterotopian heuristics instigate reasoned spatial practise, awareness of contexts and spatial peculiarities which consequently further cautiousness and readiness for explorations. In politics such a practise will rarely be found with governmentality. But there are possible connections which should be encouraged. In the end heterotopia should not only provide interesting heuristics but enable society to become aware of spaces besides itself and of those who are excluded. B. Latour concludes: "A whole set of new features, such as anticipation, participation, reflexivity, and feedbacks, might now be included in the navigational definition of maps. We are aware that this new way of looking at risk geography might have interesting political consequences as well."⁷⁸

Teaching ethics I am sometimes tired of the dilemma between particularity and universality, descriptive or normative ethics, utilitarianism and deontology. Heterotopia makes aware of in-between, out-of-space positions and is offering a third complementary way for ethical reflection.

⁷⁸ B. Latour, *Entering a risky territory*, p. 596.

No Migration in a Realistic Utopia? Rawls's The Law of Peoples and the Topic of Migration

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Abstract

The current debate on migration and ethics is to a high extent informed by Rawlsian thinking. The ideas Rawls himself has put forward on this topic, however, are rarely discussed. One reason for that is Rawls's explicit exclusion of all questions related to migratory movements in his work *The Law of Peoples*. In this paper I argue that it is still valuable to examine this work on the foreign relations of liberal democracies more closely, especially if one is concerned with the moral and ethical challenges migration brings about: I will show that Rawls brings forward substantial arguments on these matters. The paper is divided into three sections. After a first introductory part I will discuss Rawls's ideas on migration in more detail. In the concluding part of my paper, I will summarize my findings and present some more general considerations on the implications my discussion of *The Law of Peoples* might have.

Keywords: Rawls, *The Law of Peoples*, migration

1. Introduction

The current debate on migration and ethics is to a high extent informed by Rawlsian thinking: Not only Rawlsian cosmopolitans refer to John Rawls's ideas, but also other authors who are not advocates of his basic assumptions comment his writings in their work. Though Rawlsian ideas seem to have a huge impact on our thinking about migration and ethics, the ideas Rawls himself has put forward on this topic are rarely discussed.

One reason for that might stem from Rawls's own treatment of this topic: In his book *The Law of Peoples* he extends his contractualist theory of domestic justice to the international realm. His main question here is, what principles should govern the foreign policy of a liberal democracy. Since migration seems to be a basic feature of our world one would expect that a work on the international relations of liberal democracies is also the place to talk about, for instance, immigration policies and the duties liberal democracies have towards refugees. But on the contrary, in the introduction to *The Law of Peoples* Rawls explicitly excludes the discussion of these matters: "There are numerous causes of immigration. I mention several and suggest that they would disappear in the Society of liberal and decent Peoples. [...] The problem of immigration is not, then, simply left aside, but is eliminated as a serious problem in a realistic utopia" (Rawls 1999: 8f.). Rawls acknowledges that there are, in fact, various causes of immigration, but he holds the position that the causes that make migratory movements a "serious problem" will not come about in the Society of Peoples – his vision of a "realistic utopia".

In the light of Rawls's exclusion of migration from his discussions in *The Law of Peoples*, one might ask, why should we talk at all about this work, if one is concerned with the moral challenges migration brings about. In this paper, I will argue that it is still valuable to examine *The Law of Peoples* more closely, especially if one is concerned with the ethical questions related to migration. At least three reasons speak in favor of my point:

Firstly, Rawls's explicit exclusion of migration from his discussion presupposes an assumption about the main causes of migration, which is of interest in its own right and needs further discussion. For Rawls the main causes of migration are the persecution of religious and ethnic minorities, political oppression, famines, and population pressure (Rawls 1999: 9). In his opinion all these causes are linked to the injustice of domestic political institutions. A further inquiry of this assumption seems to be of interest not only for Rawls exegesis, but also in its own right.

Secondly, in spite of the fact that Rawls wants to leave the topic of migration aside, he still brings forward substantial arguments concerning this topic. In my eyes, Rawls makes three main points: a) Migration is mainly caused by domestic injustice. b) Every "people"¹ should have a qualified right to the limitation of immigration (Rawls 1999: 39). c) Every liberal and decent people shall allow for a right to emigration (ibid. 74).

Finally, the ideas Rawls puts forward depend on widespread assumptions on migration. Assumptions that are needed to be addressed in any further discussion of migration and ethics.

The paper is divided into three sections. After this first introductory part I will discuss Rawls's ideas on migration in more detail: first of all, his assumption that migration would not be a serious problem in the Society of Peoples; then, his argument for the right to limit immigration and, finally, his ideas on a right to emigration. In the concluding part of my paper, I will summarize my findings and put forward some more general considerations on the implications my discussion of *The Law of Peoples* might have.

¹ Through out this paper I will stick to Rawls's notion of „peoples“. I want to note, however, that it is rather ideosyncratic and was subject to substantial criticism. See for instance: Beitz (2000: 678 ff.), Buchanan (2000: 716), Pettit (2006), Nussbaum (2007: 246).

2. Migration and *The Law of Peoples*

Despite the alleged lack of discussion concerning migration in Rawls's piece *The Law of Peoples*, we find remarks and footnotes spread over all the chapters of the book that, put together, give us a picture of Rawls's view on the matter. Without getting too deep into "Rawls exegesis", I would like to suggest that one might summarize Rawls's position on migration as follows: Firstly, according to Rawls the main causes of migration would disappear in his Society of Peoples. Secondly, a people has a right to limit immigration. Thirdly and finally, individuals should have a right to leave their home country - under certain specified conditions. In what follows I want to discuss these points in further detail.

2.1. *No Migration in the Society of Peoples*

Let us start with Rawls's first thesis. According to Rawls, the main causes of migration would disappear in the Society of Peoples that he envisions – an international society that is governed by certain principles regarding international conduct: the freedom and independence of all peoples, observance of treaties, equality of peoples, a duty of non-intervention, a right to self-defense, respect of human rights, compliance with certain restrictions in the conduct of war, and a duty of assistance (Rawls 1999: 37). Furthermore, this society consists of liberal and what he calls "decent" peoples, peoples that are not governed by a liberal conception of justice but, nevertheless, act non-aggressively, honor human rights and fulfill the rule of law.

For Rawls the main causes of migration are the persecution of religious and ethnic minorities, political oppression, famines, and population pressure (Rawls 1999: 9). In his opinion all of these causes are linked to the justice, respectively, injustice of the domestic political institutions. In other words, in a world of justly governed societies migratory movements would not be a serious problem. Migration is then, according to Rawls, basically a question of domestic political justice. Rawls legitimates his exclusion of the topic of migration with this assumption. But is Rawls's proceeding, here, convincing? A detailed answer to this question would need to show that, firstly, Rawls is right in claiming that the mentioned causes of migration would not come about within the members of his Society of Peoples. Secondly, that migration would not be "a serious problem" any longer, if only these causes disappeared. And thirdly, that if only migration is no longer a problem *within* the Society of Peoples, it is no longer a problem *for* the Society of Peoples.

2.1.1. *Oppression*

The first main causes of migration that Rawls mentions are the oppression of ethnic and religious minorities, and political oppression. According to Rawls's terminology, peoples are only to be called "liberal", if their basic structure prevents any form of oppression - be it for ethnic, religious or political reasons. So, by definition there does not occur any form of oppression within liberal peoples.

Rawls also assumes that what he calls "decent societies" would not act any different. It is unclear, though, what his conviction is based on. For being "decent" a society needs to respect human rights – again by definition. Presumably Rawls thinks that is enough to prevent oppression in this type of society. The problem is that Rawls's conception of human rights is rather minimalistic. It contains only the right to life, freedom from slavery and serfdom, liberty of conscience, the right to property, the right to formal equality and security of ethnic groups from mass murder and genocide (Rawls 1999: 65, 79). So, members of ethnic, or religious minorities and political dissenters are to be protected against violations of these human rights by liberal and decent governments. Therefore, Rawls can rightfully say that some forms of oppression, (quite severe forms of oppression) would not occur in a decent society, though presumably not all forms.

Let me elaborate this point a bit further: Concerning decent peoples Rawls restrains the requirements for freedom of conscience. He writes that in decent societies prevails a situation that he rerefers to “as permitting ‘liberty of conscience, though not equal liberty’” (Rawls 1999: 65). Regarding freedom of conscience decent peoples might treat individuals differently. Rawls gives an example that illuminates the impact of this statement quite well: “for instance one religion may legally predominate in the state government, while other religions, though tolerated, may be denied the right to hold certain positions” (Rawls 1999: 65). Members of other religious groups might be excluded from certain political positions. They also might not have the right to build temples, or to give religious education. Just to name some examples. All these things might be systematically prohibited in a decent society. These cases are not covered by Rawls’s list of human rights - especially not when the right to freedom of conscience is as limited.

The case is pretty similar concerning ethnic minorities. In Rawls’s decent peoples they are protected against mass murder and genocide, but they may lack traditional minority rights, as the right to found associations and clubs to uphold their language and culture. These rights are not guaranteed by Rawls’s list of human rights. The protection against political oppression also seems to be not as robust as one might want it to be. Rawls’s list of human rights forbids only some means of political oppression, not all. There might exist severe limitations of the freedom of press; political dissenters might be not allowed to found political associations and parties. Rawls’s human rights do not warrant against the systematic use of these classical means of political oppression.

The systematic usage of these means and the systematic denial of certain rights to religious and ethnic minorities, and/or political dissenters (that we’ve talked about) does not necessarily, but might amount to what we call oppression. To sum up: Oppression as a cause of migration would not necessarily disappear in Rawls’s Society of Peoples.

2.1.2. Famines and Population Pressure

Famines and population pressure are the two further causes of migration Rawls mentions. Here again, it seems unclear why Rawls assumes that they would disappear in his Society of Peoples. In his discussion of the causes and the preventability of famines, Rawls draws on findings of Amartya Sen, especially on his work *Poverty and Famines* (Sen 1981). In Sen’s opinion, many famines were caused by political mismanagement. They were a problem of distribution of resources, not of supply. Rawls interprets Sen’s results in the following way: “A government’s allowing people to starve when it is preventable reflects a lack of concern for human rights” (Rawls 1999: 109), and liberal and decent peoples would not allow this to happen.

I do not want to contest Rawls’s interpretation of Sen, here, though it had been subject to some criticism (see for instance: Nussbaum 2007: 438). What I want to emphasize, anyway, is: If Sen is right, then some famines are preventable - the ones that are caused by the political structures in question -, others are not. We might think of scenarios in which even in a Society of Peoples, as Rawls envisions it, famines would occur.

The same seems to be true regarding population pressure. Rawls holds the opinion that this possible cause of migration might be eliminated by strengthening the rights of women in a society (Rawls 1999: 9). However, even if the birth rate and therefore population growth rates might be reduced, this does not necessarily lead to a reduction of population pressure. A relatively low birth rate might still be not sustainable for a given economic system.

In a nutshell: Rawls does not succeed in showing that the causes of migration that he mentions would disappear in his Society of Peoples. And even if they would, one question remains: Even if migration were no longer a problem *within* the Society of Peoples, is it no longer a problem *for* the Society of Peoples? What about migratory movements from outside

the Society of Peoples; from those societies which Rawls calls “outlaw states”, “burdened societies” and “societies that are governed by a benevolent absolutism”, which are, though not part of his ideal theory, still part of the possible world he talks about in *The Law of Peoples*.

2.2. *The right to limit immigration*

Rawls’s second thesis on migration is: A people should have a qualified right to limit immigration. This thesis is found in a footnote to his discussion of the role of national borders (Rawls 1999: 39). His argument for the establishment of borders is that an asset tends to deteriorate, if nobody is given responsibility to maintain it. Similarly, a people is given responsibility for a defined territory. A particular border line might be historically arbitrary, but the existence of borders is necessary for maintaining the land and natural resources of a given territory. This is the background of Rawls’s first argument for a people’s right to limit immigration.

According to Rawls, a people bears responsibility for the condition of its territory “and they cannot make up for their irresponsibility in caring for their land and its natural resources by conquest in war or by migrating into other people’s territory without their consent” (Rawls 1999: 39). The point Rawls is trying to make here is probably, that a people has a right to limit immigration because other peoples do not have a universal right to leave their territory. The basis for this point is, presumably, again the empirical premise we have already discussed earlier: The condition of a country, especially its economic situation, is, according to Rawls, attributable to political mismanagement and structural problems.

Again, I do not want to discuss whether there are good reasons to hold this empirical assumption or not, but I want to point out that even if this assumption is true, it is at least questionable why the political mismanagement - that is to say *a collective fault* - should lead to the denial of *individual demands*. It seems to be possible to argue this way, if we were only talking about democracies here. One might say that in a democratic political structure persons bear responsibility for the outcome of these structures *qua* participation, respectively non-participation, in the democratic process. They might be regarded as the co-authors of the laws and political decisions made in these structures. However, the less democratic the basic structure of a given society is, the less clear it becomes in what way the population of this society bears responsibility for the outcome of the political system. It appears to be difficult to make sense of this kind of collective responsibility regarding political structures - like decent societies - that only allow for political participation in a very limited sense. It seems to be rather awkward, then, to deny possible individual demands for leaving one’s home country on the premise that a people is responsible for the kind of situation its country is in, when one’s opportunity to actually take on any responsibility for one’s country is rather limited. Unfortunately, Rawls does not give us any argument here.

He does give us, however, a second argument for a people’s right to limit immigration. He says: “Another reason for limiting immigration is to protect a people’s political culture and its constitutional principles” (Rawls 1999: 39). As far as I can see, his point is based on two assumptions: Firstly, that the political culture and the constitutional principles of a people are something of value; something worthy of protection. Secondly, that immigration might threaten this value.

It is, however, unclear in what way they are threatened. It seems to be obvious that a state might reach its limits confronted with large-scale migratory movements. One might of course argue for a limitation of immigration along the lines of Otfried Höffe. He argues that even the resources of a very wealthy state might be overburdened by a certain amount of immigrants and he gives a quite impressive example for his point: “Imagine if the [...] 15 million refugees the world witnessed at the turn of the twenty-first century, had all wanted to immigrate into a prosperous but small state as Liechtenstein” (Höffe 2007: 254). In such a case one could say,

that a political culture is threatened, because the functioning of a whole political system would be uncertain. However, this is not the direction Rawls's argument actually takes. He is in fact quoting Michael Walzer's *Spheres of Justice* (1983) in this footnote on a peoples right to limit immigration. On the one hand, one might think that this puts his argument closer to a communitarian approach to these matters. On the other hand Rawls quotes a passage in *Spheres of Justice* where Walzer is referring to Sidgwick in saying "to tear down the walls of the state is not, [...] to create a world without walls, but rather to create a thousand petty fortresses", which makes it less clear where Rawls is actually heading, because this does not seem to be a genuine communitarian point. Unfortunately Rawls does not tell us more about his reasoning concerning these matters, here.

2.3. *The Right of Emigration*

Let us now take a look on Rawls's third thesis on migration: the right of emigration. Rawls argues that in view of the possible inequality of religious freedom in what he calls decent societies these societies must allow for the right of emigration (Rawls 1999: 74). He adds in a footnote that liberal peoples would also need to allow for this right and he clarifies there as well that the right of emigration does not imply a corresponding right to immigrate somewhere else (ibd.).

From a liberal perspective, it seems to be unproblematic that a person should be allowed to leave her home country to live somewhere else. Rawls's presentation of this point, however, gives rise to some questions. He himself mentions a possible objection: "It may be objected that the right of emigration lacks the point without the right to be accepted somewhere as an immigrant" (Rawls 1999: 74). Rawls responds to this possible objection in saying that "many rights are without point in this sense: to give a few examples, the right to marry, to invite people into one's house, or even to make a promise. It takes two to make good on these rights" (ibd.). This point has been widely discussed in the literature on *The Law of Peoples*. Kok-Chor Tan argues for instance: "A right to emigrate from a country without a corresponding right to immigrate a country is a facile right" (Tan 1998: 293). In Tan's opinion it is impossible to "leave one's country unless adopted by another country" (ibd.).

In my eyes at least two questions would need to be addressed in further research on the right for emigration: Firstly, is Tan's objection convincing? Is it really impossible to make use of a right for emigration only if it implies a corresponding right for immigration? Or, does Tan jump too quickly to this conclusion and in doing so obscures the important distinction of simply *going somewhere else* and *adopting the citizenship* of another country? Secondly, the usage of the notion *having a right to something* seems to be rather opaque in this discussion on the right for emigration: It is in fact questionable whether the examples that Rawls gives for other rights that allegedly "take two" are at all analogous to the right to emigration and whether the right to make a promise and the right to emigration are rights in the same sense.

3. Conclusions

In the following last part of my talk I will not only summarize the findings of this examination of *The Law of Peoples* from a migration perspective, but I also want to show what implications these findings might have for the further research on the question which challenges the topic of migration poses for political philosophy.

Rawls does not discuss the topic of migration in detail, but we have seen that he still brings forward substantial theses on this phenomenon in *The Law of Peoples*. In his view, migration would not be a serious problem in a Society of Peoples. Rawls further argues that a people has a qualified right to limit immigration and that a person has a right to exit, a right to emigration.

We have seen that his first thesis begs the question: Even if there were only liberal and decent peoples in the world, there would still be migratory movements - and the ethical challenges they pose would remain. A philosophical work on international relations should cover the pressing topic of migration. It also became clear that Rawls's second and third thesis, though they incorporate widespread opinions on migration, are not that easy to underpin argumentatively. There are indeed significant problems in Rawls's own argumentation for a people's right to the limitation of immigration and a person's right to emigrate.

But what does it tell us, if a theory of domestic political justice gets enormous problems to deal with a particular phenomenon when it is extended to the international realm, as it is the case with Rawls's theory with the phenomenon of international migration? One answer would be, that the extension is carried out imperfectly. From this standpoint, Rawls simply did not extend his own theory of domestic justice correctly to the international sphere. This is probably the stance that "Rawlsian Cosmopolitans" would take, as Charles Beitz (2000). Another answer would be, that a theory of domestic political justice is just not extendable, since the domestic and the international sphere are structurally too different. Therefore, we need new concepts to cover the obligations we have internationally, or globally. That is the way Thomas Nagel (2005) argues, for instance. A further answer would be that the problems of the extension show us that the domestic theory is actually flawed. This is the thesis of Martha Nussbaum (2007).

It would be interesting to investigate these options in further research. What became clear, anyway, is that migration is not only a topic of immense importance in its own right but also for political philosophy in general, because it can help us to get clear on certain central notions and questions that go beyond what we refer to as "Applied Ethics".

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Participatory Parity vs. Segregated Citizenship

Comparing the Theories of Will Kymlicka and Nancy Fraser on the Rights of Immigrants and National Minorities

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Abstract

This article analyzes Will Kymlicka's theory of justifying special rights for members of national minorities in contrast to immigrants or refugees and compares Kymlicka's account with the principle of participatory parity, as it is established by Nancy Fraser. It is argued that, comparing to Kymlicka, Fraser provides a better starting point for ethical considerations of minority rights in general. Even though the principle of participatory parity lacks detailed instruction of its political implementation, it is primarily inclusive and does not deprive immigrants or refugees of basic rights.

Keywords: minority rights, human rights, immigration, refugees, citizenship, inclusion.

Introduction

Ethical investigations of immigration occur within a wide scope of responsibilities.¹ The moral and legal dimensions of a right to migrate, the right to enter into another state, the legal and illegal dimension of immigration, the corresponding duties of hospitality and first-admission policies the host states may have to fulfil, and, of course, the almost unbearable living conditions many immigrants have to cope with during the process of migration are only some issues in current debates. All these moral and judicial aspects are further complicated by various causes, motives and aims that different categories of migrants have for leaving their home country, which also influence the moral justification of their right of residence.

There is, however, another point for discussion which does not touch the concrete process of migration, but does involve the legal coexistence of immigrants, refugees, regular citizens and other members of minority groups *after* immigration has taken place. In this context, the tension² between universal rights, which are conferred to every human being, and their contextual realization in individual nation states with their own particular ethno-political communities, cultures and citizenry, has led to the emergence of different legal categories concerning the membership in a political community. Various legal titles, for example full citizenship, the citizenship of the European Union, denizenship, permanent residence, special minority rights or the suspension of deportation for asylum seekers mark different categories of political membership, which deal with the tension between the universality of human rights claims and the particularity of citizenship and political interaction.

In my paper, I will concentrate on this tension by analyzing two different approaches to the legal status of national minorities, immigrants and refugees. On the one hand, I will discuss Will Kymlicka's theory of self-government rights for national minorities. For Kymlicka, the main challenge contemporary nation states are confronted with is their dealing with the rights of certain minority cultures, for example of refugees, immigrants and national minorities. In his view, a just treatment of these groups is best achieved by giving self-government-rights as a special case of citizenship rights to national minorities, whereas the interests of the other groups can be met by implementing so-called polyethnic rights. There are, however, some problems concerning his appreciation of cultural membership, which, I think, raise several questions and lead to an unjustified preference of national minorities in contrast to immigrants or refugees. I will therefore contrast Kymlicka's approach with some considerations of Seyla Benhabib and Nancy Fraser and I will refer to Fraser's so-called status model and the principle of "*participating as a peer* in social life"³. Their approach, I think, responds to some challenges of migration concerning the inclusion and exclusion of certain segments of the population. Migration flows lead to the re-composition of demographic groups, and this is why immigration ethics must provide possibilities of changing the *demos*, i.e. the group of those persons who gain political membership in a nation state. In this regard, Fraser's and Benhabib's account is, even if in a broad sense, better qualified than Kymlicka's approach. As the question of recognition is an important aspect of both positions, I will also make some short remarks concerning the different concepts of recognition which are implied in these theories.

My paper is divided into three parts. First, I will concentrate on Kymlicka's account (I); second, I will discuss Nancy Fraser's principle of participating as a peer, and I will support her theory by some aspects of Benhabib's debate about the rights of immigrants

¹ See for an overview Veit Bader, "The Ethics of Immigration", in *Constellation* 12 (3/2005), p. 331 f.

² The tension between universal human rights and their particular embodiment in single nation states is clearly elaborated by Seyla Benhabib in *The Rights of others. Aliens, Residents and Citizens*, Cambridge 2004, p. 2, p. 44, p. 175.

³ Nancy Fraser, "Recognition without ethics", in *Theory, Culture, Society* 18 /2001, p. 24.

and refugees (II). In the third (and very short) section, I will present my own considerations. There are several aspects I will not deal with, as the relation between individual rights and group rights or the liberal and communitarian impacts of Kymlicka's approach. All these are very important and comprehensive problems, which, however, cannot be discussed appropriately within the limited scope of this article.

Political Self-government and Societal Cultures. A Short Outline of Kymlicka's Approach

Three Forms of Group-specific Rights

Will Kymlicka's philosophical interests focus on questions concerning multiculturalism, historical formation of multicultural states, their political problems and claims for recognition that certain minority groups raise against the state they live in. His aim is to establish terminological concepts which could meet the requirements of contemporary politics of multiculturalism and the corresponding legal discourse.⁴ For Kymlicka cultural diversity, which causes the challenges of multiculturalism that modern societies are confronted with, has been incurred within a long period of formation. In particular, Kymlicka discusses two ways of emergence of cultural diversity in modern societies. On the one hand, cultural diversity "arises from the incorporation of (...) previously self-governing, territorially concentrated cultures into a larger state"⁵. Kymlicka refers to these cultures as 'national minorities.' A national minority wishes to sustain itself as a kind of distinct society besides the majority culture and therefore demands certain forms of self-government. On the other hand, cultural diversity "arises from individual and familial immigration"⁶. In contrast to national minorities, immigrants wish to be integrated into the larger society and to be recognized in their ethnic identity. These so called 'ethnic groups' of immigrants tend to modify the institutions of the larger society, which should not only represent the values and opinions of the majority, but also those of the members of ethnic groups.⁷

Contemporary democratic states have developed several instruments to integrate national minorities and ethnic groups. One of these instruments is expressed by the civil and political rights of individuals (for example freedom of association, of religion, of speech and mobility a.s.o.).⁸ These rights enable the maintenance of "the various groups and associations which constitute civil society"⁹ and which guarantee the sustainment of different organizations that individuals belong to. However, according to Kymlicka, there are some challenges of cultural difference that can only be accommodated by establishing certain group-specific rights which

⁴ A very clear introduction into Kymlicka's philosophy is given by Susanne Schmetkamp in *Respekt und Anerkennung*, Paderborn 2012, p. 197-216.

⁵ Will Kymlicka, *Multicultural citizenship. A liberal Theory of Minority Rights*, Oxford 1995, p. 10.

⁶ *Ibidem*.

⁷ There are, of course, many other categories of group-membership, for example the group of disabled persons or of homosexuals, but Kymlicka does not discuss them in particular. As I will point out further, Kymlicka adheres the adjudication of minority rights to the formation of a societal culture a minority has to build up if it wants to be in a position to get special rights. This concept of a societal culture is indeed very ambitious: for Kymlicka, the term "a culture" [is] synonymus with 'a nation' or 'a people' – that is, an intergenerational community, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language and history." W. Kymlicka, *Multicultural Citizenship*, p. 18. Therefore, certain minority groups and minority cultures are excluded from further investigations: they do not meet the criteria mentioned above, and should be understood as "new social movements", *ibidem*, p. 19, but not as minority cultures.

⁸ W. Kymlicka, *Multicultural Citizenship*, p. 26. Conspicuously, and this will be pointed out further, there are no rights of political participation within this list.

⁹ *Ibidem*.

exist beyond the regular scope of citizenship-rights. In particular, Kymlicka distinguishes between three forms of group specific rights: self-government rights¹⁰, polyethnic rights¹¹ and special representation rights¹².

Self-government rights justify their bearers' claims for political autonomy and territorial jurisdiction of national minorities. They are to achieve political self-determination for the members of national minorities living in a specific area on the territory of a nation state. Polyethnic rights ensure the expression of difference from the mainstream society. They enable members of ethnic groups to practice their cultural and religious customs, and, in some cases, they also permit the deviation from special legal rules, for example rules concerning dress-codes in public institutions. Special representation rights respond to the concern that the general political institutions may fail to represent the diversity of the population. As some sections of the population may be underrepresented, they sustain special rights which guarantee their attendance in political processes and acclamations. As he often regards special representation rights as a corollary of self-government rights, Kymlicka does not discuss them in detail. These rights can overlap in the sense that a special group claims for more than only polyethnic rights or self-government rights.

Societal Cultures

The distinction between national minorities and ethnic groups has several consequences for the justification of group-specific rights. According to Kymlicka, the justification of group-specific minority rights is especially justified if they are applied to a so-called societal culture. A societal culture is perceived of as a

“culture which provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres. These cultures tend to be territorially concentrated, and based on a shared language.”¹³

A societal culture provides its members with personal identity and self-determination, it enables them to achieve their aims in life. It is essential that the traditions and values of a societal culture are also represented in practices and institutions covering the whole field of human activities: a societal culture therefore incorporates the public and private life of individuals. This comprehensive notion of societal cultures also explains why Kymlicka regards his theory of minority rights as based on fundamental liberal principles.

According to Kymlicka, the

“freedom which liberals demand for individuals is (...) the freedom to move around within one's societal culture, to distance oneself from particular cultural roles, to choose which features of the culture are most worth developing, and which are without value.”¹⁴

A societal culture therefore provides conditions for the liberal value of freedom and for exercising one's own freedom. This is why the liberalization of a nation and a strong sense of cultural identity are no contradictory aspects.¹⁵ It is important to see that in Kymlicka's account it is not the ethnic groups, but only the national minorities that are able to form a societal culture.¹⁶ As Kymlicka points out, societal cultures are always associated with national

¹⁰ *Ibidem*, p. 27.

¹¹ *Ibidem*, p. 30.

¹² *Ibidem*, p. 31.

¹³ *Ibidem*, p. 76.

¹⁴ *Ibidem*, p. 90 f.

¹⁵ Kymlicka's examination of liberal theories of minority rights in contrast to communitarian approaches is indeed very detailed, but I cannot discuss it more thoroughly due to the limited scope of the text at hand.

¹⁶ *Ibidem*, p. 94.

groups or national minorities: national minorities are situated in local territories, they maintain their own language, customs and practices and provide their members with a sense of identity and cultural self, which should be protected. Ethnic groups, in contrast, do not build a community that is as deeply bound to cultural customs, tradition and identities: their aim is to get integrated into and to enrich the society and not only to be different from the majority.

For Kymlicka, the best way to protect societal cultures is to implement self-government rights as a special case of citizenship-rights for national minorities,¹⁷ which guarantee full political self-determination within a nation state. This protection of societal cultures has to be seen as a sign of recognition and respect a nation state expresses towards the societal culture of a national minority.¹⁸ As societal cultures contain the basic source of identity, self-respect and social embodiment of their members, they have to be appreciated by the institutional order of a state and its population. Instead of responding to “national differences with benign neglect,”¹⁹ a state pays tribute to those populations which have been discriminated against within the process of nation-building.

However, self-government rights as one (and maybe the strongest) example for group-specific rights are only justified for national minorities. Immigrants, who form ethnic groups, possess some attributes of societal cultures (for example their own language), but lack others (for example their own territory). As they aim at being integrated into the larger society and are yet interested in keeping central traditions and customs of their cultures, ethnic groups should be protected by polyethnic rights, but not by self-government rights. Polyethnic rights enable immigrants to perform their traditions and, at the same time, oblige the majority to bring about a reasonable integration of immigrants.

Societal Cultures and Exclusion: The Case of Immigrants and Refugees

This distinction between national minorities and immigrants and between self-government rights and polyethnic rights poses several questions. In this regard, much could be said about the legitimacy of group rights in general or within Kymlicka’s discussion about liberal and communitarian concepts of group rights, but my intention is to focus here on another point. Kymlicka’s explanation of national minorities and self-government rights is elaborated and clearly illustrated by many examples of indigenous peoples in North and South America and of different ways local politics deal with their needs. Nevertheless, while marking central differences between minority groups, Kymlicka to some extent fails to consider essential claims, needs and conditions of other minorities, for example those of immigrants and refugees. According to Kymlicka, in many cases, immigrants are not able to perform societal cultures: “I believe that national minorities have societal cultures, and immigrant groups do not.”²⁰ As immigrant groups are too mixed and as they aim to be integrated into the major society or to engage in the political and economic institutions of the nation state they immigrated in, they do not have the ability to exercise self-government rights. In contrast to national minorities, immigrants decided to uproot themselves, they “voluntarily relinquish some of the rights that go along with their original national membership.”²¹ Indeed, for Kymlicka, “immigration is one way of waiving one’s right”²². At a first glance, it seems as if this does not really matter at all, because immigrants are still bearers of polyethnic rights. But at a second glance it is obvious that in Kymlicka’s account immigrants are disadvantaged if compared to national minorities. As liberal states have to protect people’s cultural membership and societal culture, immigration

¹⁷ *Ibidem*, p. 101.

¹⁸ *Ibidem*, p. 129.

¹⁹ *Ibidem*, p. 127.

²⁰ *Ibidem*, p. 101.

²¹ *Ibidem*, p. 96.

²² *Ibidem*.

must be limited²³ if a nation state accommodates too many immigrants and if a state pursues a politics of open borders to a large extent, the conditions to secure societal cultures become less advantageous. Moreover, it is not clear at all if Kymlicka wants to extend regular citizenship rights, including regular rights of political representation to immigrants or not. According to him, immigrants are seeking for national rights, and to a certain degree Kymlicka admits that immigrants as individuals, “without regard for their group membership,”²⁴ sustain full citizenship rights as every normal citizen in a state. This, however, does not apply with regard to their membership of a cultural group, which may affect societal cultures of national minorities in the country of immigration. Besides, the adjudication of citizenship-rights to immigrants is even more constrained by Kymlicka’s conceptional understanding of ‘immigration’ and ‘immigrants.’ As he points out in *Politics in the Vernacular*, immigrants are people “who arrive under an immigration policy which gives them the right to become citizens after a relatively short period of time – say, 3-5 years – subject only to minimal conditions”²⁵. This positive assessment is, in contrast, only related to immigrants, who enter a nation state with the consent of the state they migrate in. However, this consent does not have to be based on moral or altruistic consideration, but can also be the result of political calculations, for example, if well educated immigrants are needed for the labour market of a state. Kymlicka himself states that “illegal immigrants or guest-workers or other migrants”²⁶ are excluded from the possibility of becoming citizens. In general, citizenship should be limited “to the members of a particular group, rather than all persons who desire it”²⁷, and this limitation is also justified in the maintenance of societal cultures. The above-mentioned²⁸ individual rights, which are attributed to members of ethnic groups or national minorities as means of integration, cannot be extended to rights of political participation. Whereas members of national minorities are in a position to exercise political participation rights by means of their regular citizenship (for they are citizens of the nation state they belong to) and, beyond that, should be bearers of political self-determination rights as a special class of minority rights, it is not clear at all if immigrants and their descendants should even be bearers of general citizenship rights or not. Kymlicka does not present any ways of an adequate consideration of the needs and legal situation of immigrants.

This also applies to refugees fleeing from political persecution or severe poverty. In contrast to immigrants, refugees do not choose to give up their culture. But

“national rights of refugees are (...) rights against their own government. If that government is violating their national rights, there is no mechanism for deciding which other country should redress that injustice.”²⁹

Indeed, this may be a correct description of the legal situation of refugees, but Kymlicka does not undertake a moral discussion about how to cope with this injustice. He only states:

“The best that refugees can realistically expect is to be treated as immigrants, with the corresponding polyethnic rights, and hope to return to their homeland as quickly as possible. This means that long-term refugees suffer an injustice, since they did not voluntarily relinquish their national rights. But this injustice was committed by their home

²³ *Ibidem*, p. 125.

²⁴ *Ibidem*.

²⁵ W. Kymlicka, *Politics in the Vernacular. Nationalism, Multiculturalism, and Citizenship*, New York 2001, p. 153.

²⁶ *Ibidem*.

²⁷ W. Kymlicka, *Multicultural Citizenship*, p. 125.

²⁸ *Ibidem*, p. 4.

²⁹ *Ibidem*, p. 98.

government, and it is not clear that we can realistically ask host governments to redress it.”³⁰

This evaluation does not really arise from a moral blindness to the needs of immigrants and refugees, but results from the defence and justification of the rights of national minorities who have formed a societal culture. Kymlicka's aim is to strengthen the culture and legal position of indigenous peoples and natives, who, according to him, are discriminated against in modern nation states. This leads to the fact that Kymlicka sometimes overstates the meaning of culture and of societal cultures to the well-being of individuals. Individuals whose culture is degenerated have to be placed in a position to form societal cultures to gain more than polyethnic rights. Only in this case, Kymlicka becomes aware of the moral relevance for the situation of these groups. Legal interests of persons who do not belong to the majority culture, but who have neither performed a societal culture, are not recognized.³¹ Kymlicka does not mention any ways of improving the legal situation of immigrants or refugees, for example by extending civil or self-government rights. If it is possible for a person to improve her legal situation independently of her being or not-being in a societal culture remains open.

An approach which enables a different perspective on the problems mentioned by Kymlicka is presented by Nancy Fraser's principle of participatory parity. In contrast to Kymlicka, Fraser wants to dispense with group identities and considers the question of special rights for minority groups independently of their cultural status. In the second part I will briefly explain her account to take the discussion further by examining a framework for an inclusive perspective on the rights of national minorities, as well as of immigrants or refugees, which provides general prospects of changing the conditions for political participation and for rebuilding the *demos*.

The Concept of Participatory Parity

In contrast to Kymlicka, Fraser does not strictly distinguish between different kinds of minority groups. This is why her account is based on an equal consideration of the social and legal status of religious and sexual minorities, of disabled persons, of national minorities, immigrant groups or gender-related forms of discrimination. An advantage of this strategy is that equality between different groups proves to be an absolute term within her account. A disadvantage, however, must be seen in the vagueness regarding practical questions: as Fraser's approach is designed in a very broad and abstract way, she is not able to meet concrete practical issues, e.g. particular ways of changing the legal system of a nation state. Whereas Kymlicka's account contains many proposals of how to modify states' jurisdiction and is enriched by examples from American and Canadian history about different ways of integrating national minorities, Fraser does not regard questions like these. Nevertheless, by adding some further premises, her account provides a framework for a fair and balanced treatment of the legal needs of national minorities, immigrants and refugees.

Justice or Recognition?

Fraser distinguishes between two different approaches to minority rights. On the one hand, the question of minority rights can be regarded within a redistributive framework. In this context, an equal redistribution of basic material and non-material goods (e.g. basic economic goods, health care, equal basic rights, a.s.o.) can be understood as a remedy for suffered injustice and place the members of minority groups in a better starting position in life.³²

³⁰ *Ibidem*, p. 99.

³¹ This is also mentioned by S. Schmetkamp, *Respekt und Anerkennung*, p. 216.

³² N. Fraser, "Soziale Gerechtigkeit im Zeitalter der Identitätspolitik. Umverteilung, Anerkennung und Beteiligung", in: Nancy Fraser, Axel Honneth, *Umverteilung oder Anerkennung? Eine politisch-*

As these goods are redistributed to all the persons who suffered (or are still suffering) from injustice and unequal treatment, the redistributive account is universal and ignores cultural differences between minority groups. On the other hand, minority rights can be regarded from a more particularistic point of view.³³ In this case, a recognition-based account of minority rights aims at recognizing and appreciating the members of minority groups (ethnic, sexual, or others) in their alterity. This recognition is seen as a basic resource of the member's personal development and integrity as 'full' and equal human beings.³⁴ The position taken here is a particularistic one because recognition always means the recognition of a special culture, its "traits and identities" and "specific horizons of value."³⁵ Fraser criticizes recognition-based accounts of minority rights because a rigorous focusing on collective cultural identity may put moral pressure on individual members and promote separatism and segregation between social and cultural groups. Fraser therefore wants to combine both accounts by establishing the so-called model of status equality or the status model. Within the status model,

"what requires recognition is not group-specific identity but rather the status of group members as full partners in social interaction. Misrecognition, accordingly, does not mean the depreciation and deformation of group identity. Rather, it means *social subordination* in the sense of being prevented from *participating as a peer* in social life."³⁶

Recognition, especially institutional recognition of the individual's cultural background and identity, is indicated if individuals are seen as equal partners of political and social cooperation, if no one is prevented from participation by his or her group membership. This shows that the status model is not blind to culture-specific issues as a whole. It does not only regard cultural aspects as characteristics of a group or a community, but also as personal traits of the single members of the culture as *individuals*:

"It is unjust that some individuals and groups are denied the status of full partners in social interaction simply as a consequence of institutionalized patterns of cultural value in whose construction they have not equally participated and which disparage their distinctive characteristics or the distinctive characteristics assigned to them."³⁷

These distinctive characteristics and identities of individuals are recognized if these individuals are put in a social and legal position to perform their interests and needs and to articulate their characteristics within the process of political decision-making. As the principle of participatory parity "presupposes the equal worth of human beings"³⁸, it also requires a corresponding account of recognition. Recognition, therefore, is indicated if all "institutionalized patterns of cultural value express equal respect for all participants and ensure equal opportunity for achieving social self-esteem."³⁹ Even in Fraser's account, institutional questions of recognition play an important role, but in contrast to Kymlicka, Fraser's concept of recognition is more open: achieving personal and social self-esteem as a basic component of recognition is not only important for members of national minorities, but also for members of other minority groups and even for those (if there are any), who do not belong to any minorities at all. This so-called "*intersubjective condition* of participatory parity" leads to the

philosophische Kontroverse, Frankfurt a.M. 2003, p. 29f.

³³ Ibidem.

³⁴ Indeed, Kymlicka's concept of recognition is based on this approach.

³⁵ N. Fraser, "Recognition without ethics", p. 22.

³⁶ Ibidem, p. 24.

³⁷ Ibidem, p. 26.

³⁸ Ibidem, p. 30.

³⁹ Ibidem, p. 29.

preclusion of “institutionalized norms that systematically depreciate some categories of people and the qualities associated with them.”⁴⁰

The Inter- and Intragroup Level of Peer Participation

Moreover, in terms of cultural minorities, it is important to distinguish between an intergroup and an intragroup level of participatory parity.⁴¹ On the intergroup level, participatory parity regulates the relation between “*minorities vis-à-vis majorities*”⁴² and provides an equal participation in social interaction for the members of minorities as well as for the majority. On the intragroup level, in contrast, “participatory parity [...] serves to assess the *internal effects of minority practices* for which recognition is claimed – that is, the effects on the groups’ own members.”⁴³ Thus, Fraser takes up an issue that is also mentioned by Kymlicka: even Kymlicka excludes those societal cultures from being recognized, which put certain internal restrictions on their members, e.g. concerning traditional gender roles.⁴⁴ Although this problem is not pursued in his account, it plays a central role in Fraser’s approach. The principle of participatory parity, therefore, is not only important to regulate the relation between different groups of the population, but also has certain impacts on the structure of a single group itself. If certain members of a group are denied participatory parity within this group, they are not recognized in their individuality and, compared to other group-members, they take up a socially subordinated status.

Conclusion and Outlook

Despite the common consideration of intra-group subordination in both theories, I would like to mention some differences between Fraser’s and Kymlicka’s approach and I will argue, that Fraser provides a more adequate framework for a normative analysis of minority rights. Even though her account lacks detailed information about political implementations of participatory parity, it enables comprehensive discussions about citizenship and political membership. This can be seen, first, in the inclusiveness of her account. The concept of participating as a peer within the social and political system of a nation state does not bind the option of adjudicating special rights for minorities on the formation of a societal culture. Instead of separating distinct categories of group members, whose legal status may be different, Fraser holds that “all potentially affected by political decisions should have the chance to participate on terms of parity in the informal processes of opinion formation to which the decision-takers should be accountable.”⁴⁵ In this manner, questions concerning citizenship, different ways of political participation a.s.o. are initialized: regardless of their political citizenship, individuals should have the right to participate as peers in political life. However, as the access to political participation is mediated within legal categories, the so-called “all-affected principle”⁴⁶ ultimately has to provide legal categories and individual rights which guarantee the participation of every person in political life. This is why Fraser cannot avoid questions concerning the legal status of group members, and it is astonishing, that, in this context,⁴⁷ she does not enforce a further discussion about the various ways citizenship and

⁴⁰ *Ibidem*. Italics in original.

⁴¹ *Ibidem*, p. 34.

⁴² *Ibidem*, p. 34.

⁴³ *Ibidem*.

⁴⁴ W. Kymlicka, *Multicultural Citizenship*, p. 36.

⁴⁵ N. Fraser, “Transnationalizing the Public Sphere. On the Legitimacy and Efficacy of Public Opinion in a Post-Westphalian World”, in: N. Fraser, *Scales of Justice. Reimagining Political Space in a Globalized World*, New York 2009, p. 95.

⁴⁶ *Ibidem*.

⁴⁷ Nevertheless, there are further domains, for example concerning citizenship, gender equality or sexual

political membership in a state can be rearranged. In contrast to Kymlicka, who justifies special rights for members of national minorities besides their regular citizenship, Fraser cannot limit to undertaking a similar particularization of citizenship, but has to develop criteria, which could re-define the *demos* of a nation. Whereas there have been improvements concerning the rights of permanent residents,⁴⁸ there are still many deficiencies for other groups, especially for refugees and asylum seekers⁴⁹. In fact, Fraser considers the social interaction between these groups, but omits discussing their concrete legal status. However, as the redistributive scenario of participatory parity “must reach beyond the distribution of rights and goods to examine institutionalized patterns of cultural value,”⁵⁰ it may have to exceed juridical issues, but it also includes questions of rights. Therefore, before dealing with institutionalized discrimination of social groups, participatory parity must be reconsidered as a question of rights and legal participation.

This aspect can be supported by some further remarks. If the status model is interpreted in a more context-sensitive way, it can be assessed that the principle of participatory parity is quite open to special treatments: for example, it does not prevent members of minority groups from granting political self-representation rights or similar legal claims. If certain members of minority groups are not adequately considered in political life, they are also prevented from participating as peers, and the modus of political decision-making has to be changed. This change of political decision-making can be promoted by adjudicating special rights. On the one hand, for example self-representation-rights may be an important condition for members of minority groups to act as peers in social life, and in this case they have to be warranted. On the other hand, self-representation-rights or other rights for minorities can be the result of political decision-making, of a political process, which is based on the all-affected-principle. So if participating as a peer requires special goods – special representation rights for minorities – these goods mark an improvement of political decision-making and of participatory parity. They have to be granted not only to the members of national minorities, who have build up a societal culture, but, potentially, also to individuals belonging to other minority groups with a less distinctive cultural identity.⁵¹ Nevertheless, in Fraser’s account, adjudicating special rights must not lead to a separation of the population and to particularistic scenarios. This is why justifying special rights is only legitimate within the limits of constituting the *demos* and of achieving participatory parity between the members of different groups. From this point of view, special rights are only legitimate if they support the process of participating as peers. If they exclude rightholders from equal participation, they are not

subordination, especially in view of Same-Sex-Marriage, which are widely discussed by Fraser. See N. Fraser, “Recognition without Ethics?”, p. 33 f; N. Fraser, “After the family wage. A Postindustrial Thought Experiment”, in: N. Fraser, *Justice Interruptus. Critical Reflections on the Postsocialist Condition*, New York 1997, p. 50.

⁴⁸ A very complex account of political membership can be seen in citizenship of the European Union, which provides extensive political and social rights for citizens of EU-States living in another member state than their original European home country. For more information concerning the Citizenship of the European Union see Antje Wiener, “Europäische Bürger-schaftspraxis”, in: Jürgen Mackert, Hans-Peter Müller (eds.), *Moderne (Staats)Bürgerschaft. Nationale Staatsbürgerschaft und die Debatten der Citizenship Studies*, Wiesbaden 2007, p. 261-284. Beyond that, the legal situation of permanent residents has improved in some ways. There are concepts of dual citizenship, possibilities to gain full citizenship, or, if permanent residents retain the citizenship of their home country, improvements concerning basic liberty rights. See for an overview S. Benhabib, *The rights of others*, p. 160 ff.

⁴⁹ They are, for example, excluded from employment opportunities, co-determination of their legal resident or freedom of association. S. Benhabib, *The rights of others*, p. 162 f.

⁵⁰ N. Fraser: “Recognition without ethics”, p. 28.

⁵¹ This is why political representation rights may not only be justified for national minorities (for example the Danish minority in Schleswig Holstein, one of the German federal states), but also for immigrants or their descendants (for example fellow citizen from Turkey or other large immigrant groups).

justified. Therefore, a strong federalism, which may be the result of an intense exercise of political self-government-rights, does not mark an adequate mode of political constitutionalism.

And, beyond that, as Fraser is concentrated on a just interaction of individuals and groups, which is sensitive for both individual needs and cultural differences, a prescribed preference of selected groups is unjustified. For this reason, Fraser's account also shows a better way of responding to the tension between the universalistic and particularistic aspects of immigration ethics. Whereas Fraser considers the universal dimension of human rights and tries to find, although in a broad sense, possibilities for their political implementation, Kymlicka to some extent disregards the universal connotation of those rights, which are up to every human being and not only to members of certain national minorities. Due to all these aspects, I would ultimately like to argue for Fraser's concept of participating as a peer in social life: the status model offers a well-balanced consideration of the political status of members from different social, cultural, religious and sexual groups. It does not only ensure a just political treatment of minorities, but also enables ways of communication and of a discursive organization of social and political life, which is sensitive for different needs and claims. And finally, the status model shows a more distinguished and modern concept of state and nationhood: it does not refer to the so-called *ius sanguinis*, which adheres political membership to cultural and political ancestry, but includes all those who are affected by certain decisions, in the process of social and political decision-making.

Migration as Ethical Challenge – Migrational Background as Disadvantage for the Choice of a German Kindergarten? (A Case Study)

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Abstract

Children with migrational background attend German kindergartens in a high percentage. How to react to different forms of segregation? The paper analyzes what kind of advantages and problems, also in the field of language, these melting-pots have. Especially Christians should face the fears and problems in this special period of childhood. Ethically, the issue is discussed in the field of individual ethics and institutional ethics.

Keywords: migrational background, childhood, kindergarten, individual ethics, institutional ethics

Introduction

“To which kindergarten have you sent your children? Oh, isn’t this the one where so many children of migrant families are going to?” With these or similar questions one is likely to be confronted with when choosing a kindergarten for your children in Germany and, I think, in other countries in the European Union. For me, as German moral theologian, working in Regensburg (Bavaria), this was the case when choosing a suitable place in kindergarten for my own children. It is also one of the first situations when one is directly confronted with the issue of migration and migrational backgrounds outside the family context. Surely, such a case study is depending on your residential area.

But what criteria should be applied in this decision-making process? Is the nearby kindergarten in the district better than the one with the pedagogy of Montessori? A rather unconvincing criterion in the context of theological ethics seems to be if the decision depends on how many play dates might come from migrant families, when looking for a suitable kindergarten. Why this is a rather inadequate criterion will be explained in this contribution.

1. Situation: Age of Migration

In the Age of Migration (Polak 2011, 151) 84 % of the children of migrant families in Germany attend a kindergarten (Migrationsbericht 2010) which applies, on average, to children who are between 3 and 6 years old. After having completed their 4th year of life, 90 % of the children with a migrational background attend a German kindergarten. The quotas for children from migrant families have become relatively high. The average percentage of these children in Bavarian kindergartens is 18.3, for example (Kuger / Kluczniok 2008, 163).

Most of them participate in a full-time childcare. The reasons for this are not yet scientifically evaluated. One might think of the parental intention to strengthen the knowledge of the foreign language or of financial reasons. In Germany, there is a political agenda to expand childcare so that, in general, the attendance in kindergartens and day nursery is probably increasing for children with and without migrational background (Schmidt 2012, 26).

What is meant by migrational background? See § 6 Art. 2 of the „Migrationshintergrund-Erhebungsverordnung“ (29.9.2010): for the situation in Germany applies if (1) the person does not have the German citizenship or (2) the place of birth lies outside today’s borders of the Federal Republic of Germany and the immigration of this person was after 1949 or (3) the place of birth of one of the parents lies outside today’s borders of the Federal Republic of Germany and the immigration of this person was after 1949. The reasons for migration are diverse: Work, being a refugee, new partnership etc. (Becka 2011, 9).

There are three factors, which influence the attendance of kindergarten for children with a migrational background: the local segregation (1) that means the concentration of migrant families to certain regions and districts, the social segregation (2) that means the concentration in the lower educational- and socioeconomic classes and the ethnical segregation (3) that means the social and local concentration of migrant families from the same ethnical group (Schmidt 2012, 216). The question remains how these factors influence the decision-making process as to which kindergarten should be chosen. It is a fact that the segregation differs from urban to rural areas. That means, with the criteria ‘migrational background’ one is most likely to be confronted with when living in a city and in a district with a high percentage of migrant families.

2. Kindergarten – a special period of time

In the time of attending kindergarten, the development of one’s personal identity, the experience of ‘othering’ (Bünker 2011, 148) and developing a collective sense of community is very important for both: the foreign and the indigenous children. Already children are

challenged to find orientation and their position in a culturally and religiously pluralized world. Intercultural and interreligious education is part of the processes of development that should already start in early stages of childhood in the face of the challenges of a pluralistic world – according to the latest empirical study concerning religious and interreligious learning between 3 and 6 years (Schweitzer / Biesinger / Edelbrock 2008, 9).

Especially for families with a migrational background, cultural-religious roots are very important characteristics of identity, often, they are even stronger than for families of the native culture and country. Religion with its special claims strengthens the connection to the cultural heritage as well (Harz 2009, 124). That is the reason why families with migrational backgrounds hold up their background also in the sphere of kindergarten.

On the part of the kindergartens public administration and management, the question as to which approach the kindergarten has towards migration, arises: compensatory, intercultural or critical concerning structure and politics. The compensatory one is linked with the forthcoming success in school and sees integration as assimilation. The intercultural approach to migration looks for acceptance, cultural self-understanding and cultural and/or intercultural competence and integration is seen as inclusion. The last one searches for the acquisition of critical reflection concerning societal structures, in order to find and ask for mechanisms of discrimination. Integration is considered as incorporation by this approach (to migration) (Schmidt 2012, 216). All three want to realize equal opportunities but in different ways. The compensatory approach negates L1-Acquisition (L1 being the mother tongue) for example, the intercultural does not.

The political and pedagogical focus shifts towards kindergarten, in order to give children with migrational background the best opportunities for the education and integration in Germany. But in general, the time spent in kindergarten is a rather neglected scientific area but it can be considered as an important instrument for the transition from family to school (Bouras 2006, 224).

New empiric studies found out that if more than half of the children speak a foreign mother tongue the conditions for learning German are bad. In Germany, 13.3% of the kindergartens are in this problematic situation. A high percentage of children with migrational background correlate negatively with the language competence of all children (Becker 2006, 462). It also affects the quality of these institutions in general (Kuger / Kluczionik, 173).

This problem is faced politically by reducing the size of a kindergarten group, for example. A model that uses a different approach is applied in the United States. It works with the so called “bussing”, which means to distribute the relevant children equally via bus. Another approach works with the family and supports family centers, where mothers with migrational background are seen as partners in the process of their child(ren)’s integration. This instrument accepts the concept of family in its importance as the place of socialization and education (Schmidt 2012, 234).

But what about the parents of the indigenous children?

3. A question of individual ethics: Indigenous play dates only?

In Germany, the parents decide which kindergarten the child attends and how long (half-time, full-time). In most cases, they are forced to take the children to the nearest primary school. However, some parents choose a private school. These are about 9.0 % of pupils (Statistisches Bundesamt 2009, 6).

In Germany, the period of kindergarten is the one where the neighborhood can meet. Performance differentiation only starts with entering school life. That is why the issue of migration is very challenging in kindergarten, especially in this period of early childhood when leaving family life on an hourly basis – for the first time, in most cases. That means that the time of kindergarten can be a melting-pot for all children in a district.

But how to react as parents to the high percentage of children with migrational background in the nearby kindergarten? Is migration a disadvantage or more likely an advantage? What can one say from an ethical point of view?

One can think of solidarity in the ethical context, for example: solidarity with the children with migrational background, who can learn from the indigenous play date, surely under the condition of having the intention to learn. And naturally the other way round: the indigenous child also has the possibility to learn. I will exemplify this later on with regard to language. Therefore, all children are in a win-win-situation.

But there is a limit of solidarity, for example when the children with migrational background dominate the kindergarten. But how many percent of children with migrational background can be handled in a satisfying manner? Or is this view a new way of discrimination? New scientific studies have given the information that over 50 % are too much. But is this not the view of a compensatory approach to migration? Is an intercultural approach not obliged to have a more view – that means to be open for all children regardless their migrational status or other criteria's like having the ability to speak in the territorial language). The social principle of solidarity has its limits.

But one can think of questions of equal opportunities, especially justice of distribution. Adapting the theory of justice, as written down by John Rawls, for this special situation of deciding about places in kindergarten the veil of ignorance (*Schleier des Nicht-Wissens*) is an interesting instrument. Which portion of children with migrational background can be dispersed among kindergartens to get a well-mixed group? 50 % per cents seem a critical limit which should be considered.

But why should we as Christian consider this challenging situation?

4. Theological Background: Migration as common experience

Migration is a central issue of the human condition in the Bible. Look at Abraham and Sarah, Isaac and Rebekah; Jacob and Rachel; Joseph, his brothers; and their descendants (Campese 2012, 4). One can think of the migration from slavery in Egypt. This Judeo-Christian experience of migration and liberation provides the basis for the preamble of the Decalogue: "I am The Lord your God who brought you out of the land of Egypt, out of the house of slavery". (Ex 20,2) This indicative formula makes migration and liberation to one of God's most important action towards Israel (Fremdling 1997, 100). The exodus is not a past, but permanent appeal to migrate (Manemann 2011, 70). The protection of the foreigner and even the love for him and the principle of hospitality are central issues in the theology of the Old Testament.

"The New Testament portrays Jesus as the leader of a new Israel, who just after his birth had to flee persecution as a refugee to Egypt along with Mary and Joseph." (Hollenbach 2011, 808) Jesus leads his disciples in a new kind of migration and, in a symbolic interpretation, as Exodus into freedom and redemption on the basis of his death and resurrection. The instruction "Erga migrantes Caritas Christi" reminds us, furthermore, on Mary, the Mother of Jesus, who gave birth to her Son away from home (Lk 2,1-7) and was compelled to flee to Egypt (Mt 2,13-14) (Erga Migrantes 2004, 15). When one has a look at Gal 3, 28 it can mean that there are borders because of gender, nation, people, class, but these borders are relative in the community with Jesus Christ.

Being far away from home and, therefore, being foreign is a common experience for Christians as for other religions "Jews, Christians, and Muslims are all descendants of the Patriarch Abraham, whose experience of God's call led him to migrate from the home of his kinsfolk to the land of Canaan." (Hollenbach 2011, 808)

Furthermore, it is important to recognize the historical impact of migration of early Christianity and displacements of the patristic period. Particularly evident in 1 Peter, themes of

being foreign, exile and pilgrimage are presented and also into the experience of early Christianity (Rowlandes 2011, 858).

In our days, the Second Vatican Council speaks in *Gaudium et spes* 27 explicitly about being the neighbor to migrants. The theological ethicist David Hollenbach holds the conviction that all human beings are brothers and sisters in the human family and no longer considers nationality or ethnicity. All people are created in human dignity. This so called “Christian Cosmopolitanism” should let us forget borders and national limits and their political significance but should not let us forget the positive role of borders to strengthen an identity. This Christian cosmopolitanism helps to identify all people as one community.

That is why differences, as migrational background, should play no further role, also in the searching of a place in kindergarten and also in the distribution of places for children.

5. A question of institutional ethics: Only catholic ones are allowed?

Until now especially the perspective of the parents has been considered. In Germany, there are communal kindergartens, confession-bound kindergartens and kindergartens with special pedagogical concepts. When there are too many applications, the administration of the kindergarten makes criterias for the distribution of kindergarten places.

Should it be a child of catholic parents or a child of a non-confessional bound family? Only baptized children are welcome? Should it live nearby or should it come from further away? In the last year of kindergarten, all of the so-called pre-school children, who want to go to the kindergarten, have to be admitted. The Sinus-Survey of Migrants says that 33 % of people with migration background are Catholic (Sinus-Sociovision 2008, 133).

Remembering the migration experience from the Holy Bible, the ‘migrational background’ should be a criterion in this decision-making process and also high-ranked to fulfill the biblical and theological mission. That affects the self-image of the ‘institution kindergarten’ to fulfill explicitly biblical experience and mission.

Concerning the discussed approaches to migration (compensatory, intercultural, and critical), a Catholic kindergarten, on the one hand, should apply the intercultural concept to be open to the intercultural exchange. On the other hand, the critical one should be considered, too, concerning the ranking of the criterion “migrational background”. Is the kindergarten in an area where the field of migration is no issue or in a district where segregation can be recognized? If there are different groups in kindergarten: how can the children with migrational background be distributed: no ethnically homogenous group, for example.

These are very detailed problems but the question of language is one question which should be considered explicitly.

6. Language problems

Often there is the parental fear that the indigenous language is not practiced enough in a kindergarten with a high migrational percentage. Language as an instrument of cultural expression and key to integration and equal opportunities is very important.

In the research of pedagogy for little children, it is shown that those children who are confronted with other languages acquire a trans-lingual-competence. The reason is that multilingual children learn the arbitrariness of semiotic signs early on. They recognize earlier than monolingual children that the connections of form and meaning of words are up for discussion. To think multilingually is a starting point for arising challenges (Lengyel 2011, 101).

In general, attending kindergarten is of importance for the cognitive development, the development of social competence and for the language development, the most important issue. For the children with migrational background, acquiring a language in a – sometimes – new

country is a special way of learning. Three factors are relevant here: the motivation to learn the language, the general opportunity to get in contact with the language and the individual competence to learn a language (Becker 2006, 450).

Multilinguality is the condition for their acting (Lengyel 2011, 97) and thinking. That is why it is not enough only to give courses in language but to look at fostering language acquisition, so that deeper connections with language, acting and thinking can be understood.

Surveys show that children who get in contact with the German language in the age of 3 or 4 can learn the most important morpho-syntactic qualities of German sentences within half a year (Thoma / Tracy 2006, 74). There is no scientific knowledge yet as to when the bilingual L1-Acquisition (mother tongue) and when the successive L2-Acquisition starts (first foreign language). The later success in school not only depends on the attendance of kindergarten but also on factors as the cultural level of the families (Khan-Svik 2008, 141). Analyses have shown that preschool attendance affects school readiness both directly and indirectly (via cognitive and linguistic skills) (Biedinger 2010, 43).

Conclusion

This example from everyday life is an example for connecting individual ethics and institutional ethics. And the problems of segregation (local, social, and ethnical) can be faced by guidelines for the institution and by reflecting individual premises. Concerning institutional ethics, the institution kindergarten (together with people in charge of questions of pedagogy) should reflect how to react to the children with migrational background (giving opportunities, dividing one ethnical group etc.) and the politics should have strategies in mind how to protect children in advance and how to face manifested segregation, especially in special districts. The questions of individual ethics ask the parents of the indigenous children to show solidarity and to foster justice in this special period and place of childhood: the kindergarten where all children from the neighborhood should meet (Biesinger / Edelbrock / Schweitzer 2011). The trust in the institution kindergarten has risen on the side of the migrant families. They are asked to show certain openness to the foreign culture. The German bishops suggest in this situation to create places in kindergarten which are free of charge and to let participate organizations of migrants (Integration 2004, 30).

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