

*THE RIGHTS OF OTHERS: ALIENS, RESIDENTS AND CITIZENS* BY SEYLA BENHABIB (CAMBRIDGE: CAMBRIDGE UNIVERSITY PRESS, 2004) 251 pages.<sup>1</sup>

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In *Rights*, Benhabib takes on a pressing challenge facing contemporary theories of deliberative democracy. How ought theories prefaced on open-ended normative deliberations respond to the boundaries of the communities in which such deliberations actually occur?

Generally, deliberative democratic theory holds that an institutional framework is legitimate when those affected by the institution could reasonably be persuaded to be bound by it.<sup>3</sup> As Benhabib puts it:

[e]very person, and every moral agent who has interests and whom my actions and the consequences of my actions can impact and affect in some manner or another, is potentially a moral-conversation partner with me: I have a moral obligation to *justify my actions with reasons* to this individual or to the representatives of this being.<sup>4</sup>

A serious challenge for such a theory, however, is that any inquiry into the norms through which communities articulate their boundaries leads to the dilemma that

a shared feature of all norms of membership, including but not only norms of citizenship, is that those who are affected by the consequences of these norms and, in the first place, by criteria of exclusion, *per definitionem*, cannot be party to their articulation.<sup>5</sup>

The issue that Benhabib seeks to address in this book is the paradox that membership criteria pose for theorists of deliberative

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<sup>3</sup> For a comprehensive introduction to discourse theory, see *e.g.* Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. by William Rehg (Cambridge: MIT Press, 1996).

<sup>4</sup> *Rights*, *supra* note 1 at 14.

<sup>5</sup> *Ibid.* at 15.

democracy. In this examination Benhabib resists being pushed towards either of two extremes. The first extreme holds that all criteria of exclusion are unjust because they affect those who are not party to their formulation. This leads to a radical "open borders" thesis<sup>6</sup> that is inadequate to the task of justifying any closure within which democratic politics can take place. The other extreme Benhabib wishes to distance herself from is the view of boundaries around communities as historically contingent, morally neutral facts that are pre-conditions for moral and political discourses; as such, these facts themselves cannot be subject to democratic deliberative discourses.<sup>7</sup>

Benhabib attempts to carve out a middle ground between these two positions. Benhabib says we can never entirely get around the paradox of membership: norms of membership will always affect those who have little say in their articulation. We can, however, require communities articulating such norms to engage in self-reflexive discussions that periodically reassess and modify exclusionary practices. The aim of such discussions, which Benhabib calls "democratic iterations," is to destabilize exclusions: "[W]e can render the distinctions between 'citizens' and 'aliens,' 'us' and 'them,' fluid and negotiable through democratic iterations."<sup>8</sup>

Benhabib's book represents a democratic iteration that aims to increase the fluidity of membership criteria. This iteration focuses on legal controls over migration and citizenship in affluent western states, particularly in the contemporary European context. Drawing on the philosophy of Kant<sup>9</sup> as interpreted by Arendt,<sup>10</sup> Benhabib argues that membership criteria sit at a troubling intersection between human rights norms and popular sovereignty claims. Benhabib suggests that where most contemporary political philosophers who discuss membership issues err is in attempting to resolve the tensions that arise at such an intersection.<sup>11</sup> Instead of seeking resolution, Benhabib advocates

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<sup>6</sup> See e.g. Joseph H. Carens, "Aliens and Citizens: The Case for Open Borders" in Ronald Beiner, ed., *Theorizing Citizenship* (Albany, NY: State University of New York Press, 1995) 229.

<sup>7</sup> See e.g. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) (see especially at 41ff); Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983) (see especially at 39ff).

<sup>8</sup> *Rights*, *supra* note 1 at 21.

<sup>9</sup> *Ibid.*, c. 1.

<sup>10</sup> *Ibid.*, c. 2.

<sup>11</sup> *Ibid.*, c. 3.

drawing on the rich pluralism found in sites of contemporary controversies over membership to encourage democratic discourses that can serve to problematize—but not simply erase—existing naturalized exclusions. These struggles, according to Benhabib, hint at an alternative to cosmopolitan calls for open borders on the one hand and an entrenchment of communitarian closed democratic communities on the other. This alternative is to be found not in either the end or the entrenchment of citizenship, but in its disaggregation and complexification.<sup>12</sup> Picking up on a theme developed elsewhere,<sup>13</sup> Benhabib provocatively proclaims that in contemporary pluralist societies the combination of increased international mobility and the disaggregation of citizenship has irreversibly led to a scenario whereby “‘the other’ is not elsewhere.”<sup>14</sup>

From an examination of sites of struggle that flow from the presence among “us” of “others,” Benhabib concludes that while it remains the case that theories of deliberative democracy require closure around democratic communities, such closure must be subject to ongoing critique in pluralist societies. As such, Benhabib advocates not “*open* but rather *porous* borders.”<sup>15</sup> In addition, Benhabib argues that although democratic communities may justly regulate their membership and admissions policies, such regulation must, at a minimum, accord with a right to first admittance for asylum seekers. Furthermore, there should be limits on discrimination that would permanently bar certain people who are long-term resident aliens from citizenship, or would deny membership on the basis of ascriptive features of their identity such as religion, race, ethnicity, and gender.

Benhabib acknowledges that these conclusions will “for some ... go too far in the direction of rootless cosmopolitanism; for others they will not go far enough.”<sup>16</sup> However, what I found curious about this book was that in spite of repeated insistence that we forge a middle

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<sup>12</sup> *Ibid.*, c. 4 & 5. Examples of such sites are the noisy debate in France surrounding laïcité and the hijab, and the discussions in Europe surrounding the right to non-citizen residents to vote in local elections.

<sup>13</sup> Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton: Princeton University Press, 2002).

<sup>14</sup> *Rights*, *supra* note 1 at 87.

<sup>15</sup> *Ibid.* at 221.

<sup>16</sup> *Ibid.*

ground between human rights norms on the one hand, and the ability of democratic communities to establish their own boundaries on the other hand, I felt that the author managed to go further than I was prepared to follow—remarkably, in both directions simultaneously.

With respect to human rights norms, it is unclear whether Benhabib appreciates just how radical the argument about the right of first asylum actually is. In one of the more troubling passages in the book, Benhabib states:

[S]ignificant developments in international law point in the direction of the *decriminalization* of migratory movements, whether these be caused by the search for refuge or asylum, or by immigration proper.<sup>17</sup>

Unfortunately, Benhabib fails to substantiate this assertion with any citation to the relevant developments mentioned. This is particularly troubling because as those working in migration law in western states over the past decades would attest, the trend seems to be entirely shifting in the other direction.<sup>18</sup>

All western states have adopted strategies to control movement across their borders by criminalizing unwanted migration, the most concerted of these efforts being directed precisely against asylum seekers. The most common strategy is to establish visa requirements, whereby any country which is perceived to be likely to generate flows of refugee claimants is added to a list of countries whose citizens must request a visa while abroad in order to successfully seek admission at the border. Of course, any visa applicant who is suspected of potentially making a refugee claim on arrival is denied a visa. The state then imposes penalties on any transportation company which provides passage to individuals without the relevant visas, imposes criminal sanctions on those who assist asylum seekers in circumventing the combined visa requirement/carrier sanctions program, and establishes complex enforcement and surveillance mechanisms to give effect to such programs, mechanisms which often include the use of military force. The result is that most asylum seekers in western states arrive at their destination through criminal misrepresentation in visa applications with

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<sup>17</sup> *Ibid.* at 68.

<sup>18</sup> See generally Marc L. Miller, "The 2002 Randolph W. Throver Symposium – Immigration Law: Assessing New Immigration Enforcement Strategies and the Criminalization of Migration: Introduction" (2002) 51 *Emory L.J.* 963.

or without the assistance of a criminal human smuggling network that procures false documents and that can also provide irregular transportation.<sup>19</sup>

Of course, there is nothing wrong with asserting that these common contemporary practices with respect to the criminalization of asylum seeking cannot be justified within a theory of deliberative democracy. To the contrary, I feel that we should discard any theory that does not object to such underhanded strategies used to avoid incurring obligations under the *Convention Relating to the Status of Refugees*.<sup>20</sup> However, it is important to acknowledge that actual respect for the right of first asylum that Benhabib advocates would impose substantial burdens on western states—burdens that states, by criminalizing asylum seeking, have indicated that they are simply unwilling to accept. In such a context Benhabib must offer alternatives in how to proceed. How ought the theory of deliberative democracy respond to this reality of long-standing and intractable injustice? What are the sites and strategies that can best challenge such injustice? Failing to ask these questions, and worse, failing to acknowledge the scope of the problem being confronted, risks leaving the theory largely irrelevant to those asylum seekers with whom Benhabib claims to be concerned.

While Benhabib's under-appreciation of the scope of the challenge faced by those concerned with justice in this area is problematic, I found the converse problem in the analysis to be more disturbing: In a bid to forge a middle ground between human rights norms and the need for communities to carve out delimited spaces in which to conduct their democratic politics, Benhabib carefully sets up the questions which will be the subject of critical discussions about

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<sup>19</sup> For a discussion of interdiction, interception, and visa program/carrier sanction techniques in Canada, see Andrew Brouwer & Judith Kumin, "Interception and Asylum: When Migration Control and Human Rights Collide" (2003) 21:4 *Refugee* 6; Marina Jiménez "Tighter Security Cited in Refugee-Claims Decline" *The Globe and Mail* (12 August 2004) A8. For a discussion of similar programs around the world, see Bryan Paul Christian, "Visa Policy, Inspection and Exit Controls: Transatlantic Perspectives on Migration Management" (1999) 14 *Geo. Immig. L.J.* 215; Joan Fitzpatrick, "Revitalizing the 1951 Refugee Convention" (1996) 9 *Harv. Hum. Rts. J.* 229 (see especially at 237); Jessica Howard, "To Deter and Deny: Australia and the Interdiction of Asylum Seekers" (2003) 21:4 *Refugee* 35; Nils Coleman, "Non-Refoulement Revised: Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law" (2003) 5 *Eur. J. Migr. & L.* 23; Areti Sianni, "Interception Practices in Europe and their Implications" (2003) 21:4 *Refugee* 25; and UN HCR, 2000, 18th Mtg., UN Doc. EC/50/SC/CRP.17.

<sup>20</sup> 28 July 1951, 189 U.N.T.S. 137.

membership so as to minimize the degree to which these two types of discourses conflict. In so doing, Benhabib presents the human rights norms as far less critical of the boundaries of democratic communities than they otherwise might be.

Benhabib argues that certain types of exclusion from citizenship, including those based on race, religion, and ethnicity, are impermissible according to any theory of deliberative democracy. Such exclusions impinge upon the communicative freedom of those who are excluded. To quote Benhabib at length:

[C]learly, reasons that barred you from membership because of the *kind* of being that you were, your ascriptive and non-elective attributes such as your race, gender, religion, ethnicity, language community, or sexuality, would not be permissible, because I would then be reducing your capacity to exercise communicative freedom to those characteristics which were given to you by chance or accident and which you did not choose. ... However, criteria that stipulate that you must show certain qualifications, skills, and resources to become a member are permissible because they do not deny your communicative freedom.<sup>21</sup>

Thus, Benhabib sees nothing wrong, in principle, with the practice of selecting immigrants through “point-system” programs, such as the one currently in place in Canada.<sup>22</sup> Now, let us set aside for the moment that “qualifications, skills, and resources” could quite easily be recast as socio-economic class (and its attendant complex intersections with gender, race, and able-bodiedness), a status that is for the vast majority of the world more ascriptive than the liberal presumptions embedded in the above passage would have it. We should leave this objection aside because of a deeper problem in Benhabib’s analysis: namely, the outcome of the democratic iterations seems to hinge on the kind of question being deliberated.

If, for example, instead of having a conversation about the justifiable bases on which new potential members may be screened for admittance to my community, we were to inquire into why I have a claim

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<sup>21</sup> *Rights*, *supra* note 1 at 138-39.

<sup>22</sup> *Immigration and Refugee Protection Regulations*, S.O.R./2002-227, ss. 73-85. The point system screens out the vast majority of those who might be interested in migrating to Canada, as in order to obtain the minimum pass mark a potential skilled immigrant must generally demonstrate fluency in English and/or French, a minimum of a Master’s degree level of education, and several years of work experience in a limited number of highly skilled professions. For an excellent review of the point system, see Catherine Dauvergne, “Evaluating Canada’s New *Immigration and Refugee Protection Act* in Its Global Context” (2003) 41 *Alta L. Rev.* 725.

to membership while you do not (*i.e.* what makes it my community and not yours? what gives me the authority to make the determination about exclusion and not you?), the discussion would proceed along rather different lines. Such democratic deliberations would quickly have to confront the reality that the vast majority of citizens of common law states (including Australia, Canada, Britain, and the United States) have a claim to citizenship on the basis of place of birth, based on the principle of *jus soli*.<sup>23</sup> In such a context, if the status which puts me in a position to determine whether or not you, who do not enjoy similar status, can continue to be justly excluded is itself distributed on the basis of an ascriptive social or biographical feature, then does not such a starting place for our conversation already violate “the communicative freedom of human beings qua human beings”?<sup>24</sup>

Let us take a parallel example. Suppose a state were to establish a two-track citizenship system. In such a system all people belonging to one race would receive automatic citizenship. Those of another race are able to apply for citizenship on the basis of clearly articulated qualifications and skills that will assure those who already enjoy citizenship that the inclusion of these particular persons belonging to the other race will work to their advantage. If all we discuss in our democratic iterations is whether or not the particular criteria that apply to the second track to citizenship can be justified, then some liberal theories may well conclude that such a system is acceptable. If, however, we discuss the existence of the two-track system to begin with, then the practice would be viewed as highly problematic.

Of course, there may be important differences between race and place of birth. It is important to acknowledge, however, that the starting point for our conversations about the rights of others in Benhabib’s analysis is, at least for countries such as Canada, a community in which membership is accorded for the most part on the basis of place of birth. Any democratic discourse theory that is troubled by distributions of life chances according to ascriptive social characteristics must confront and

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<sup>23</sup> For an extended discussion of some of the more troubling features of the principle of *jus soli* as it plays out in the contemporary world, see A. Shachar, *Citizenship as Inherited Wealth: The New World of Bounded Communities* (Cambridge, MA: Harvard University Press) [forthcoming 2006].

<sup>24</sup> *Rights*, *supra* note 1 at 139.

defend such a starting point when it queries the ways that democracies treat those they construct as “outsiders.”

In summary, then, I find Benhabib’s book to be an interesting and effective “conversation starter” for democratic iterations on membership. Benhabib’s basic insight that it is unhelpful to talk about citizenship in a way that seeks to resolve the tension between the global human rights norms on the one hand, and attempts by communities to carve out spaces in which to engage in democratic politics on the other, is admirable. The insistence that, contrary to most prominent liberal and communitarian theorists, the bounds of the community cannot be placed outside discourses on justice, is refreshing. Most importantly, Benhabib passionately and persuasively demonstrates that we no longer live in a world where the interaction between states and non-citizens can be imagined as a one-way unilateral projection of power:

[W]e need to move toward a vision of reflexive acts of constitution-making which are cognizant of the fact that political entities act in an environment crowded with other political actors, and that acts of self constitution are not unilateral gestures.<sup>25</sup>

In our future multilateral conversations on this topic, however, it seems to me that in assessing the way we treat others, it is essential to remember that “we” do not just encounter “others”—“we” and “others” construct one another as such. And the way “we” go about that construction should not be placed outside the bounds of “our” democratic iterations either.

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<sup>25</sup> *Rights*, *supra* note 1 at 175-76.